

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9098, 9099, 9100, 9101; Ruling Date: January 19, 2010; Ruling #2010-2371; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2010-2371
January 19, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Numbers 9098, 9099, 9100, and 9101. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision.

FACTS

The grievant, who was employed by the Department of Corrections ("agency"), initiated a grievance on September 15, 2008 challenging a September 11, 2008 counseling letter she received for failure to obtain prior approval for an absence from work on September 8, 2008, the resulting leave without pay, her placement on leave restriction, and alleged violations of the Family and Medical Leave Act ("FMLA") and due process.¹ Subsequently, the grievant received a Group I Written Notice for failing to report to work as instructed, and two Group II Written Notices for again allegedly failing to report to work.² The grievant timely grieved these three disciplinary actions, which were qualified for hearing by the agency head.³

On April 8, 2009, the EDR Director issued Ruling Nos. 2009-2242 and 2009-2268, which qualified for hearing all issues grieved in the September 15th grievance except the grievant's placement on leave restriction and consolidated the grievant's four grievances for hearing. A hearing was held in this matter on June 15, 2009. In a hearing decision dated June 22, 2009, the hearing officer upheld the three Written Notices but reversed the grievant's leave without pay status on September 8, 2008 and November 13, 2008. The grievant subsequently requested administrative review of the hearing officer's decision by this Department and the Department of Human Resource Management.

¹ EDR Ruling Nos. 2009-2242, 2009-2268.

² Hearing Decision in Case Nos. 9098, 9099, 9100, 9101, dated June 22, 2009 ("Hearing Decision") at 1.

³ *Id.*

DISCUSSION

The grievant's request to this Department for administrative review challenges the hearing officer's decision on essentially three grounds: (1) the leave restriction imposed on the grievant, which required prior approval of leave and was the basis of the three Written Notices challenging in this hearing, is contrary to state policy; (2) the leave restriction, as applied to the grievant, violated applicable law (the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)); and (3) the application of the leave restriction was in retaliation for the grievant's alleged request for a reasonable accommodation and her use of FMLA leave. These arguments are addressed below.

Violation of State Policy

The hearing officer's interpretation of agency policy is not an issue for this Department to address. Rather, the Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.⁴ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state or agency policy. In this case, it appears that the grievant has requested administrative review by DHRM with respect to the alleged policy violations.

Violation of Law

Under the grievance procedure, the EDR Director may address, through the administrative review process, challenges that the hearing officer's actions and decision do not comply with the grievance procedure.⁵ Claims that the hearing officer's decision is not in accordance with law must be raised with the circuit court in the jurisdiction in which the grievance arose.⁶ Consequently, to the extent the grievant wishes to challenge the leave restriction, as applied, as contrary to the ADA or the FMLA, she must do so by seeking review of the hearing officer's decision by the appropriate circuit court.⁷

Retaliation

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."⁸ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

⁴ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

⁵ *Grievance Procedure Manual* §§ 6.4, 7.2(a).

⁶ Va. Code §2.2-3006(B).

⁷ In regard to the grievant's legal claims, we note that to the extent she asserts that her November 12, 2008 absence to care for her brother was protected under the FMLA, a brother is not generally a qualifying family member. See The Family and Medical Leave Act of 1993, as amended, Public Law 103-3, at §102.

⁸ Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁹

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹¹ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹² Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹³ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, the grievant challenges the hearing officer’s finding that the disciplinary actions were not taken against her by the agency as a result of her protected activity (requesting a reasonable accommodation and taking leave under the FMLA). The grievant’s challenge, however, simply contests the weight and credibility that the hearing officer accorded to the testimony of those witnesses at the hearing, the inferences he drew from witness testimony and party exhibits, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer’s authority, where, as here, there was sufficient evidence in the record to support the hearing officer’s determination. In particular, we note the lack of evidence establishing a causal link between any protected activity and the agency’s imposition and enforcement of the leave restriction. Contrary to the grievant’s assertions, the mere fact that these events occurred does not prove, in itself, a causal connection. Further, while the grievant apparently presented evidence that the agency did not have an official “leave restriction” policy, she did not demonstrate that she was singled out by the agency in its application of this apparent practice. Accordingly, this Department has no reason to disturb the hearing decision regarding the hearing officer’s findings with respect to retaliation.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM the hearing officer has issued a

⁹ *Grievance Procedure Manual* § 6.4.

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

revised decision.¹⁴ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Claudia T. Farr
Director

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).