

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9114;
Ruling Date: September 18, 2009; Ruling #2010--2375; Agency: Norfolk
State University; Outcome: Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Norfolk State University
Ruling Number 2010-2375
September 18, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9114. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On April 9, 2009, the grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without approved authorization.¹ The grievant challenged the disciplinary action by initiating a grievance on April 15, 2009.² The grievance proceeded to hearing on July 1, 2009 and in a hearing decision dated July 2, 2009, the hearing officer upheld the Written Notice.³ The grievant subsequently sought reconsideration of the hearing decision which the hearing officer denied on July 28, 2009.⁴ The grievant now seeks an administrative review decision from this Department.

DISCUSSION

The grievant's request for administrative review to this Department challenges the hearing officer's decision on essentially four grounds: (1) the hearing officer "allowed false, unlawful, and irrelevant information by the agency, to be admitted into evidence"; (2) the hearing officer "did not adequately review the evidence presented by the grievant"; (3) the "Procedural History provided by the hearing officer was misleading and omitted important sequential pieces of evidence"; and (4) the agency failed to comply with the Grievance Procedure. These arguments will be addressed below.

¹ Decision of Hearing Officer, Case No. 9114, issued July 2, 2009 ("Hearing Decision") at 1. During the second management resolution step, the agency reduced the disciplinary action to a Group III Written Notice with a 30-workday suspension. *Id.*

² *Id.*

³ *Id.* at 1 and 6.

⁴ Reconsideration Decision of the Hearing Officer, Case No. 9114-R, issued July 28, 2009.

Findings of Fact/Consideration of Evidence

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.”⁵ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ 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’s first two challenges to the hearing officer’s decision, in effect, simply contest the weight and credibility that the hearing officer accorded to the testimony of those witnesses at the hearing, the resulting inferences that he drew, 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. Moreover, this Department concludes that there was sufficient evidence in the record to support the hearing officer’s determination that the grievant engaged in the alleged misconduct. In particular, we note that the evidence is apparently undisputed that the grievant was absent from work without having received approval from her supervisor.¹¹ Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case.

Alleged Noncompliance by the Agency

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

⁶ *Grievance Procedure Manual* § 6.4.

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Agency Exhibit 1, at 10.

The grievant's remaining objections appear to be to the agency's alleged failure to comply with the grievance procedure during the management resolution steps and the omission of this alleged non-compliance in the "Procedural History" portion of the decision.¹² In particular, the grievant alleges that "there was not a Third Resolution Step of the grievant and the agency," the agency failed to timely respond to her grievance, the agency did not allow the grievant to have witnesses present during the second-step meeting, and the agency unilaterally reduced the disciplinary action without timely notifying the grievant.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹³ That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct alleged noncompliance, the grievant may request a ruling from this Department.¹⁴

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.¹⁵ Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.¹⁶ Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, the grievant claims that several alleged procedural violations occurred during the management resolution steps. Although the grievant was aware of a possible procedural error at each step, she advanced to the hearing, without raising the issue of noncompliance to the Director of this Department until after she had received the hearing officer's decision. As such, the grievant waived her right to challenge the agency's alleged noncompliance during the resolution steps.

¹² The grievant does not identify what "important sequential pieces of evidence" were omitted by the hearing officer in the "Procedural History" portion of the hearing decision; however, a review of the grievant's request for review, in its entirety, suggests that the grievant believes the agency's alleged noncompliance should have been addressed in that section of the decision.

¹³ See *Grievance Procedure Manual* § 6.

¹⁴ See *Grievance Procedure Manual* § 6.3.

¹⁵ *Id.*

¹⁶ *Id.*

It should be further noted that even if the grievant's assertions were indeed correct, she was nevertheless afforded a full and fair opportunity to present her case to a neutral hearing officer, present evidence in support of her case, and to cross-examine witnesses testifying against her. Accordingly, despite any potential non-compliance prior to the hearing, the grievant received adequate due process through the grievance hearing.

Finally, with respect to the hearing officer's failure to discuss the agency's alleged noncompliance in the "Procedural History" portion of the decision, as these allegations of noncompliance were not properly before the hearing officer, his failure to discuss them cannot be considered error.

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 revised decision.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹

Claudia T. Farr
Director

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).