

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9159/9160; Ruling Date: December 16, 2009; Ruling #2010-2442; Agency: Department of Veterans Services; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Veteran Services
Ruling Number 2010-2442
December 16, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Numbers 9159 and 9160. For the reasons set forth below, this decision is remanded for further consideration and/or clarification.

FACTS

The salient facts as set forth in the hearing decision are as follows:

On April 29, 2009, Grievant was issued a Group II Written Notice with a ten-day suspension for unsatisfactory performance and failure to follow instructions and/or policy. On May 14, 2009, Grievant was issued a Group II Written Notice with removal for unsatisfactory performance and failure to follow instructions and/or policy.

The Department of Veterans Services employed Grievant as a Purchasing Specialist at one of its Facilities. The purpose of her position was:

This position will be responsible for procuring equipment, supplies, and services needed for the on-going purchasing needs of the center.

Grievant's measures of core responsibilities included:

Researches and purchases goods and services in accordance with requested need and within the state's regulations, policies, and procedures. Provides the goods and services that meet the requestor's specifications and timeframes. Assists requestor's with their descriptions/requests of goods and services, provide them with purchasing options and

solutions, and give them the necessary resources to make informed purchasing decisions.

Maintains orderly and accurate records to keep track of purchases, to ensure goods and services are provided as requested, and to respond to inquiries.

Uses assigned credit card to make all purchases possible within established guidelines.

Provides appropriate documentation to support al [sic] purchases especially those which are exceptions.

On January 22, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance stating, in part:

Even after a Notice of Improvement dated 11/10/08, a Written Notice dated 12/2/08, and another Notice of Improvement dated 1/6/09, [Grievant] has still not performed some of her EWP duties effectively, to include providing goods and services within the requestors' timelines and assisting requestors with their purchasing options and solutions. ***

5) Accounts payable documentation. The [credit card] from last month still does not have [employee's name] signature on it. The deadlines for [credit card] are clearly published and were also one of the things in her written warning. She can not say that the administrative assistant has not gotten it back to her. It is [Grievant's] responsibility alone to get [employee's name] to sign it in a timely manner. [Employee's name] planned absences are noted in advance. We have al told her numerous times since September both verbally and in writing to verbally ask [employee's name] for what she needs and it is still a recurring problem even after a written warning. I expect all [credit card] deadlines to be met with 100% compliance. There are also some Pos that are outstanding that accounts payable must have in order to meet prompt pay deadlines, which is a regular occurrence. Once the blanket Pos run out it is [Grievant's] responsibility to generate a new one upon request. ***

Clearly she is not working [on] pending files that were set up for her based on the above. We discussed her maintaining the pending files to include filing pending items and following up on their status. Nothing should be in the pending files for more than the time it takes for an

order to arrive. If there is a PR and the items were ordered timely, then she should have a PO and be getting a receiving document timely. If not, it is [Grievant's] responsibility to follow up with the vendor and the ordering employee to correct the problem in a timely manner. If the pending files were being worked on, the above problems would not have occurred. Not only that, but we are at a significant risk as a facility if pending items are not consistently being followed up on. ***

[Grievant] will take ownership of ensuring goods and services arrive in a timely manner to meet the needs of our residents, while still complying with purchasing law, to include communicating with all affected parties.

She will take the initiative to educate department managers on their options and the purchasing law.

She will respond to all inquiries within 24 hours, and sooner where the inquiry impacts resident care.

She will perform all duties in her EWP effectively and efficiently. If a significant improvement in these areas does not occur within 30 days, there will be a second Written Notice.

In the first part of March 2009, the Environmental Services Director asked Grievant to purchase bibs for residents at the Facility. On April 27, 2009, the Environmental Services Director noticed that bibs that she has requested Grievant to purchase had been requested in mid-March but had not yet arrived. The Agency opened the eVA computer system and observed that the bibs were not ordered by Grievant until April 24, 2009. Bibs are items that the Facility routinely requires replacement.

Grievant was obligated to show that all purchases made on her credit card were supported by invoices or other appropriate documentation. Grievant was to submit a credit card log reconciliation showing the items purchased along with the supporting records. One due date for submitting the reconciliation log was April 24, 2009. She submitted the log on April 30, 2009. It was incomplete and missing invoices for a least four purchases. For the seven monthly reconciliations beginning in October 2008, four of the seven were submitted late and all had missing documentation.

A review of the contents of Grievant's desk on April 27, 2009 showed several hundred pages of order filings that had not been organized into

pending files. Several of the purchase order forms were dated from weeks to months earlier. By failing to place these documents in an appropriate pending order filing system, Grievant could not track easily the status of the orders.

Grievant was given a unique logon identification and password to access the Agency's computer system and the internet. The Agency reviewed Grievant's computer activity from March 31, 2009 through April 29, 2009. The majority of her internet usage was of a personal nature. As of April 28, 2009, there was over 1500 temporary internet files. Very few of those files were work related.¹

Based on the foregoing findings of fact, the hearing officer upheld both the April 29th Written Notice with suspension and the May 14th Written Notice with removal.² The grievant sought reconsideration of the hearing decision, which the hearing officer denied on November 2, 2009.³ The grievant now seeks administrative review from this Department.

DISCUSSION

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.”⁴ 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.⁵

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges a number of the hearing officer's findings and conclusions. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ 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

¹ Decision of Hearing Officer, Case No. 9159/9160, issued September 9, 2009 (“Hearing Decision”) at 2-6 (footnotes omitted).

² *Id.* at 8.

³ Decision of the Hearing Officer, Case No. 9159/9160-R, issued November 2, 2009 (“Reconsideration Decision”) at 1.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ *Grievance Procedure Manual* § 6.4.

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

the disciplinary action.⁸ 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.⁹ 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.

The grievant's challenges to the hearing officer's findings of facts and conclusions appear to simply contest the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority. 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.

This Department concludes that there was sufficient evidence in the record to support the hearing officer's determination that the April 29, 2009 Group II Written Notice with ten-day suspension for Unsatisfactory Performance and Failure to Follow Instructions and/or Policy was warranted. In particular, the April 29th Written Notice was issued as a result of the grievant's failure to order supplies upon request, maintain pending files, and timely submit credit card reconciliations, logs and supporting documentation. There is record evidence demonstrating that the grievant had been instructed on numerous occasions prior to the issuance of the April 29th Written Notice of her obligations with regard to ordering supplies, maintaining pending files and submitting credit card logs.¹⁰ As such, the hearing officer's conclusion that the grievant failed to follow her supervisor's instructions with regard to these areas of responsibility cannot be disturbed by this Department. Additionally, the hearing officer found, and the record supports, that the grievant was asked in March 2009 to place an order for bibs but the order was not actually placed until the end of April 2009.¹¹ Finally, witness testimony supports the hearing officer's finding that "[f]or the seven monthly reconciliations beginning in October 2008, four of the seven were submitted late¹² and all had missing

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ Agency Exhibits 2, 4 and 5 (prior Notices of Improvement Needed/Substandard Performance issued to the grievant as a result of her performance deficiencies).

¹¹ Agency Exhibit 10 (witness statement of Ms. B) and Hearing Recording at 54:36 - 54:52.

¹² The grievant claims that she was "able to prove" at hearing that only the October 2008 reconciliation log was late and that the hearing officer erred when he found that the due date for the April reconciliation log was April 24th. According to the record evidence, it appears that the grievant was given until April 26th to complete the April log. *See* Agency Exhibit 9. However, the record evidence also reflects that the log was not actually received until sometime after April 26th. *Id.* As such, regardless of the accepted actual due date for the April log, it appears that the log was untimely and the hearing officer's finding that the due date was April 24th is harmless error. Similarly, the grievant correctly points out in her request for administrative review that the hearing officer incorrectly found that the "[the April 24th] due date is established under the Virginia Department of Accounts [DOA] procedures." However, the hearing officer's finding in this

documentation.”¹³ In light of the above record evidence, this Department cannot, and will not, disturb the hearing officer’s findings and conclusions with regard to the April 29th Written Notice.

Likewise, this Department concludes that there was sufficient evidence in the record to support the hearing officer’s determination that the May 14, 2009 Group II Written Notice with termination for Unsatisfactory Performance and Failure to Follow Instructions and/or Policy was warranted. In particular, the May 14th Written Notice was issued as a result of the grievant’s “excessive” use of the computer for personal reasons which in turn, affected her ability to perform her job duties. Again, witness testimony and agency exhibits in this case support the hearing officer’s conclusion that the grievant’s personal use of the internet was neither incidental nor occasional and as such, in violation of state policy.¹⁴

Accordingly, this Department cannot, and will not, disturb the hearing officer’s findings and conclusions with regard to the May 14th Written Notice with termination.

Mitigation Analysis

The grievant also raises an issue with the hearing officer’s findings regarding her supervisor’s alleged acquiescence to the grievant accessing personal internet sites during work hours. In particular, as part of his mitigation analysis, the hearing officer states the following:

The Supervisor testified that she did not object to Grievant listening to music from her computer. The Supervisor did not realize that “bandwidth issues” could arise from listening to music. It appears that Grievant regularly accessed YouTube videos. It is not clear that the Supervisor knew Grievant was playing YouTube videos and listening to the music from those videos as opposed to simply listening to an internet radio station without video content. No evidence was presented showing that the Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos. To the extent the Supervisor was at fault, she was at fault for not informing Grievant that she was violating State policy and that Grievant should discontinue her behavior. These factors are not mitigating circumstances that would make the Agency’s punishment exceed the limits of reasonableness. In light of the standard

regard is also harmless error because even though DVS, not DOA, set the 24th of the month as the due date for the reconciliation log (DOA set a due date of the 8th of the month it appears), the salient point is that the record evidence reflects that the grievant was untimely in submitting that log regardless of which agency established the date it was due.

¹³ Hearing Recording at 16:00 through 17:15 (witness testimony of Ms. M). *See also* Agency Exhibit 9 and Agency Exhibit 10 (witness statement of Ms. E).

¹⁴ Hearing Recording at 1:30:48 - 1:32:15 and Agency Exhibits 11 and 12.

set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.¹⁵

The grievant argues that the hearing officer's finding that "[n]o evidence was presented showing that [the] Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos" was in error because at hearing the Supervisor gave testimony to the contrary. During her testimony and upon cross-examination, the Supervisor admitted that she knew that the grievant utilized YouTube to listen to online music during work hours¹⁶ and that she did not correct such behavior because she did not view the grievant listening to online music as "detracting from productivity."¹⁷ Thus, it is unclear how the hearing officer reached his conclusion that "[n]o evidence was presented showing that the Supervisor authorized Grievant to watch YouTube videos or even listen to online music without videos."

Moreover, if the Supervisor were aware of the grievant's use of the computer to listen to music and did not object to such use, the question arises as to whether the grievant had adequate notice of the applicable rule as to internet usage. According to the *Rules for Conducting Grievance Hearings*, one example of a potentially mitigating circumstance is an employee's lack of notice of a rule, the agency's interpretation of a rule, and/or the possible consequences of failing to follow a rule.¹⁸ The hearing officer may also consider the particular circumstances present in a specific case in determining whether the discipline exceeds the bounds of reasonableness.¹⁹ Accordingly, this decision is remanded for further consideration and/or clarification consistent with this decision.²⁰

Policy Violation

The grievant also asserts that the hearing officer failed to properly apply policy. In particular, the grievant claims that the agency violated policy by failing to provide her

¹⁵ Hearing Decision at 8.

¹⁶ Hearing Recording at 1:12:58 – 1:13:04.

¹⁷ *Id.* at 39:55 – 41:02.

¹⁸ See *Rules for Conducting Grievance Hearings*, § VI (B)(1) where "Lack of Notice" is defined as:

The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

¹⁹ A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness. *Rules for Conducting Grievance Hearings*, § VI(B). Moreover, this Department will find that a hearing officer failed to comply with the grievance procedure with respect to mitigation of disciplinary action only where the hearing officer's action constituted an abuse of discretion.

²⁰ By remanding this decision, we do not express any opinion as to whether the discipline should have been mitigated or should be now. (The hearing officer is not precluded from doing so if he finds mitigation appropriate under the *Rules*.)

with an opportunity to respond to the charges against her prior to the issuance of the April 29th Written Notice.²¹ Moreover, during the hearing, the agency admitted that it did not provide the grievant with a period of at least 24 hours to respond to the charges against her prior to its issuance of the April 29th Group II Written Notice.²²

This Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. 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.²³ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. Accordingly, if the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, she must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Since the initial request for review to this Department was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is ordered to reconsider and/or clarify his decision in accordance with this ruling. 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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶

Claudia T. Farr
Director

²¹ To the extent the grievant is claiming that her due process rights were violated as a result of the agency's actions, the grievant is free to raise this legal issue with the circuit court in the jurisdiction where the grievance arose once the hearing decision becomes final.

²² Hearing Recording at 2:40.

²³ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

²⁴ *Grievance Procedure Manual* § 7.2(d).

²⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).