

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9216;
Ruling Date: January 10, 2010; Ruling #2010-2473; Agency: Department of
Alcoholic Beverage Control; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Alcoholic Beverage Control
Ruling Number 2010-2473
January 27, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9216. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

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

The Department of Alcoholic Beverage Control employs Grievant as a Special Agent in Charge at one of its Facilities. She has been employed by the Agency for over twenty years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency operates the LINX system which contains detailed information about individuals including their criminal history. Grievant attended LINX system training on February 28, 2008. She was instructed during the training that the system could be used only for business related requests and not for personal use. Grievant signed a user agreement stating in part that she

Acknowledge that I have read, understand and agree to comply with the HR LINX User Rules. I also understand that the HR LINX system and the equipment are subject of monitoring to ensure proper functioning and to protect against improper or other authorized use, access or dissemination of information. Unauthorized requests, use, dissemination or receipt of LINX information could result in civil or criminal proceedings being brought against the agencies and/or individuals involved. Violations of these

rules may also subject of the user to possible disciplinary action and HR LINX excess termination.

Grievant's Daughter married Mr. G. Grievant had not met Mr. G. Mr. G had been charged with sexual battery. Mr. G had not been involved in any licensee or criminal matters involving the Agency.

Grievant was having difficulty accessing the LINX database. On August 7, 2008, Grievant went to Special Agent C and asked if she would provide assistance. Grievant gave Special Agent C several names to check in the database. One of those names was the name of Grievant's Daughter. Special Agent C knew the Daughter's name. Grievant said "put [Daughter's] name in there." Grievant also told Special Agent C "put [in] her husband's name, whoever he is." Special Agent C entered the names into the database and retrieved information regarding the Daughter and Mr. G. Grievant was stunned regarding the information she learned from the inquiry.

Grievant called the Daughter from her work telephone. Grievant told the Daughter, "do you know what you have gotten into?" If you can, get out of the marriage now. We're willing to help you and do anything we can for you." The Daughter asked "how do you know?" Grievant said, "I don't know what you're involved in. But I don't like it. This man must be involved with something." Grievant also said "this man has a criminal record. He probably has a record as long as I don't know what. This man probably has a record 2 miles long. Get out of it." Grievant also told the Daughter, "whoever you're married to, you and him need to get it to the precinct. Go to the precinct and run both of [your] criminal records. And after you run your criminal records, go to [the] Retail Merchants and run your credit reports. Then you find out what kind of man you're ... married to."

Mr. G spoke with Special Agent B on August 11, 2008 regarding his concerns about Grievant. Mr. G alleged that Grievant had accessed his criminal history and informed his wife of his background. Mr. G sent Special Agent B a letter reiterating his concerns with Grievant's behavior.

One or two days after August 26, 2008, Grievant received a letter sent by certified mail from her Daughter and Mr. G. The Daughter and Mr. G stated they did not wish to receive any further contact from Grievant. The letter upset and surprised Grievant. Grievant believed sending the letter was not consistent with her Daughter's normal behavior. Grievant believed Mr. G was unduly influencing the Daughter. Grievant and her Husband went to the police office in the jurisdiction revealed by the return address on the certified letter. They inquired regarding the

Daughter's location and expressed concern about Mr. G's criminal background. They were told that the daughter was no longer in that jurisdiction and that Mr. G had charges pending against him for rape and attempted rape.¹

Based on the foregoing findings of fact, the hearing officer upheld the disciplinary action stating:

In the Agency's judgment, Grievant's behavior rises to the level of a Group III offense. The Agency's judgment in this case is supported by the evidence. Grievant used the Agency's computer database to obtain sensitive information about two people, the Daughter and Mr. G, who were not seeking services from or otherwise involved in the Agency's business operations. Grievant then used the information she obtained from the Agency's computer database to warn her Daughter about Mr. G's character and background. Grievant held a position of trust. She had received training during which he was instructed not to access the Agency's computer database for personal reasons. She signed an agreement acknowledging that improper use of the system could result in disciplinary action. The Agency's judgment is consistent with the DHRM Policy 1.60 which defines Group III offenses to include, "any misuse or unauthorized use of state records".²

The grievant now seeks as 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."³ 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.⁴

Findings of Fact/Conclusions

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁵ and to determine the grievance based "on the material issues and grounds in

¹ Decision of Hearing Officer, Case No. 9216, issued November 17, 2009 ("Hearing Decision") at 2-4 (footnotes omitted).

² Hearing Decision at 4.

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

⁴ *Grievance Procedure Manual* § 6.4.

⁵ Va. Code § 2.2-3005.1(C).

the record for those findings.”⁶ 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.⁷ 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.⁸ 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 many of the hearing officer’s findings of facts and conclusions⁹ including the hearing officer’s conclusion that she wrongly used the agency’s computer database to obtain sensitive information about her daughter and Mr. G. The grievant’s challenges contest the weight and credibility that the hearing officer accorded to the testimony of a witness 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 within the hearing officer’s authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.¹⁰ So 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 grievant inappropriately used the agency’s computer database to obtain information for other than legitimate law enforcement purposes. In particular, in Agency Exhibit 4, a transcript of the grievant’s testimony during the agency investigation of this matter, and during the hearing, the grievant admitted that she, in concert with Special Agent C, used the internal database

⁶ *Grievance Procedure Manual* § 5.9.

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

⁹ Many of the grievant’s challenges to the hearing officer’s findings of fact and conclusions are immaterial to the conclusion that the grievant engaged in the behavior described in the Group III Written Notice. For instance, the grievant challenges the hearing officer’s finding that Special Agent B spoke to Mr. G on August 11, 2008 concerning the grievant when, according to the grievant, there was no proof that it was actually Mr. G. speaking to Special Agent B. The hearing officer’s finding regarding to whom Special Agent B was speaking appears immaterial to the hearing officer’s finding that the grievant used the agency’s internal database for improper purposes. Other apparent incorrect findings of fact and conclusions, such as that the grievant is a Special Agent in Charge, when she in fact is only a Special Agent, and that no prior disciplinary action against the grievant was introduced, when information was presented that she had previously been terminated from the agency, are harmless error as these findings appear to have no bearing on the hearing officer’s conclusion that the grievant wrongly used the agency’s internal database system.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

system to obtain information regarding her daughter and her daughter's husband.¹¹ While the grievant may disagree with the hearing officer's findings and conclusions and contend that Special Agent C entered the names in the LINX system, not the grievant, and did so only to learn how to use the system, the hearing officer's conclusions cannot be disturbed by this Department on administrative review when, as is the case here, the hearing officer's finding that the grievant admitted to using the database to obtain information on another individual for reasons unrelated to her job is supported by the record evidence. Likewise, any conclusions with regard to the grievant's intent in utilizing the LINX system is a credibility determination reserved exclusively for the hearing officer and cannot be disturbed by this Department on administrative review.

Mitigation

The grievant also appears to be arguing that the hearing officer erred by not considering evidence of inconsistent discipline.¹² Inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.¹³ However, as with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.¹⁴ In this case, although the grievant alleged inconsistent discipline in her grievance,¹⁵ a review of the hearing record indicates that she did not present this argument to the hearing officer at hearing. Accordingly, the hearing officer cannot be found to have erred in failing to consider this allegedly inconsistent discipline.¹⁶

Further, this Department will review a hearing officer's mitigation determinations only for an abuse of discretion.¹⁷ Therefore, EDR will reverse only upon clear evidence

¹¹ During questioning by the agency, the grievant stated that upon being able to access the LINX system she stated the following to Special Agent C: "I said put [grievant's daughter's] name in there. And then I said put her husband's name, whoever he is. So, right after that, I was stunned on the information that I had learned from it." Agency Exhibit 4, p. 65. *See also* Hearing Recording at 2:25:20 – 2:27:29.

¹² In her request for administrative review, the grievant states: "[t]he disciplinary action should have applied to Special Agent C who received a counseling letter for not advising them that Grievant violated the policy and used the computer database for personal reasons." (emphasis in original).

¹³ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹⁴ *See e.g.*, EDR Ruling 2009-2157, 2009-2174; EDR Ruling #2010-2366 and EDR Ruling #2010-2368. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

¹⁵ In an attachment to her Form A, the grievant states: "Co-employee received lesser disciplinary actions."

¹⁶ The hearing decision states the standard by which a hearing officer may mitigate disciplinary action and in light of this standard, the hearing officer finds no existing mitigating circumstances to reduce the disciplinary action in this case. Hearing Decision at 5-6. The hearing decision however does not specifically mention anything regarding the grievant's claim contained on her Form A that she was disciplined more harshly than Special Agent C. However, as stated above, the hearing officer did not err in omitting this claim from his decision due to the grievant's failure to put on any evidence at hearing regarding the alleged inconsistent discipline.

¹⁷ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith ...

that the hearing officer failed to follow the “exceeds the limits of reasonableness” standard or that the determination was otherwise unreasonable. Based upon a review of the record, there is nothing to indicate that the hearing officer’s mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, this Department will not disturb the hearing officer’s decision.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer’s decision. 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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

Claudia T. Farr
Director

but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts.” *Id.*

¹⁸ *Grievance Procedure Manual* § 7.2(d).

¹⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).