

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9248; Ruling
Date: March 30, 2010; Ruling #2010-2525; Agency: Department of Social Services;
Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Social Services
Ruling Number 2010-2525
March 30, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case No. 9248. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The facts, as set forth in the January 19, 2010 hearing decision in Case No. 9248, are as follows:¹

PROCEDURAL HISTORY

On September 25, 2009 Grievant was issued a Group III Written Notice with termination. The Written Notice provided, "Termination due to your misuse and unauthorized use of state records and disclosure of confidential information; disclosure of confidential information and failure to comply with written policy." The Written Notice indicated Offense Codes/Categories of:

13...Failure to follow instructions and/or policy,
51...Unauthorized use of State property or records, and
52...Computer/Internet misuse.

Following the failure to resolve the matter at the second resolution step, Grievant requested qualification of her grievance on November 18, 2009 and on November 30, 2009 the matter was qualified for a hearing by Agency Head. The undersigned was appointed Hearing Officer effective December 16, 2009 and hearing was held on January 11, 2010 with Grievant in attendance.

¹ Decision of the Hearing Officer in Case No. 9248 issued January 19, 2010 ("Hearing Decision") at 1. Footnotes from the hearing decision have been omitted.

FINDINGS OF FACT

Grievant was employed by Agency as a Fiscal Technician, (roll title: Administrative and Office Specialist, III). Her duties with Agency include processing payments received from certain individuals on their child support obligations. Her duties also involve use [sic] an Agency computer and access to Agency information systems and resources.

Agency has in place written policies prohibiting the disclosure of confidential information and accessing confidential information not related directly to the responsibilities of the administration child support enforcement laws.

Grievant was aware that agency policy prohibited her from making any unauthorized access to confidential information and that she was prohibited from disclosing confidential information. On 11/2/07 Grievant signed the "Virginia Department of Social Services, Information Security Policy, Standards and Acceptable Use Awareness Acknowledgement Form". On 11/24/08 Grievant signed a document indicating she had received a copy of, read, and understood the "Conflict of Interest Guidelines for DCSE Employees" and the requirement of maintaining confidentiality of records.

The Automated System for Enforcement of Child Support ("APECS") provides a notice and warning page to employees each day that it is accessed by an employee. This notice and warning page includes the following:

"THE APECS SYSTEM CONTAINS PRIVILEGED CUSTOMER INFORMATION AS WELL AS GOVERNMENT INFORMATION THAT IS RESTRICTED TO AUTHORIZED USERS ONLY."

"... UNAUTHORIZED PRINTING OR RELEASE OF DATA IS A VIOLATION OF DCSE POLICY AND PROCEDURES...."

"... MAINTAINING CONFIDENTIALITY OF RECORDS AND OBEYING THE CONFLICT OF INTEREST (COI) AVOIDANCE REQUIREMENTS IS AN IMPORTANT PART OF EACH DCSE EMPLOYEE'S RESPONSIBILITY. ANY VIOLATION OF THE COI GUIDELINES IS GROUNDS FOR DISCIPLINARY ACTION. SHOULD FACTS AND CIRCUMSTANCES WARRANT IT, DISCIPLINARY ACTION FOR A FIRST TIME VIOLATION MAY RESULT IN TERMINATION OF EMPLOYMENT AND POSSIBLE CRIMINAL PROSECUTION."

Grievant has access to SPIDeR, (System Partnering in a Demographic Repository) a web-based system which facilitates communication between several

applications including the Division of Motor Vehicles and Virginia Employment Commission. Agency utilized "SPIDeR" for locate purposes for people who do not have addresses in the Automated System for Enforcement of Child Support ("APECS").

On or about July 14, 2009, Grievant retrieved payments placed in the Agency's drop box. She was tasked with recording incoming payments and preparing them for deposit. Grievant observed the name of a particular payor on a money order and expressed to a co-worker that she had a past boyfriend by the same name.

The relevant information needed to properly identify the payment retrieved was provided by the individual's money order which indicated on its face the payor's name and social security number. This information matched information in the Automated System for Enforcement of Child Support ("APECS"). However, Grievant initiated a search through SPIDeR to access DMV records of the individual whose name was the same as a past boyfriend. She showed his DMV photograph to another employee and commented that it was not the same person as her past boyfriend.

On July 24, 2009 another individual made a check payment on his child support case at Agency's office. Grievant was not assigned by Agency to work on the case of this individual. The individual who made the check payment on 7/24/09 had never met or talked to Grievant at the Agency office or away from the Agency office.

Shortly after the individual's visit to the Agency office Grievant accessed the individual's DMV records through SPIDeR. She showed the individual's DMV photograph to a fellow employee. Grievant initiated a search on Myspace and Facebook as to the individual whose DMV records she had accessed. On subsequent dates she transmitted, using Myspace, communications to him. On Myspace Grievant disclosed the individual's affiliation with "DCSE" indicating she saw him in the lobby at her work place and specifically indicating "DCSE" in the e-mail.

The Individual expressed concern over the contacts by Grievant and he made a police report concerning harassment to law enforcement officials. Individual's wife was upset that somebody from Agency contacted her husband knowing him to be married and having a family.

Grievant has one active Group I offense issued 4/23/09 (Offense Dates 3/2/09 - 4/3/09) issued for, "continued unsatisfactory job performance including

failure to follow daily deposit procedures, undistributed report, customer service inquiries and follow up on fiscal adjustments timely.²

Based on the previous findings, the hearing officer reached the following holdings in his Hearing Decision:

Incident number 1.

On or about July 14, 2009, Grievant retrieved payments received in the Agency's office's drop box. Grievant was tasked with recording and preparing such payments for deposit.

In this incident, Grievant observed the name of a payor on a money order she retrieved from the Agency's drop box to be the same name as a past boyfriend. Grievant told a co-worker that she had a past boyfriend by the same name and thought maybe he had a case here. Testimony described Grievant as being upset at the thought the past boyfriend may have a child and was paying child support. To see if the name on the money order was her past boyfriend Grievant pulled confidential information up on SPIDeR accessing the DMV records of the payor.

When a payment is recorded for deposit, the payment information provided by the payor is verified to the Automated System for Enforcement of Child Support ("APECS"). Agency witnesses testified that there was no business need for Grievant to access payor's information on DMV records. The information needed to post the payment was on the money order itself. The money order listed payor's name and social security number and this matched information in APECS.

Agency utilized "SPIDeR" for locate purposes for people who do not have addresses in APECS. Grievant was looking to determine if the money order payor was her past boyfriend and not to determine a payor's address. This was not part of the Agency's locate process and there was no business need to utilize "SPIDeR".

For personal reasons, Grievant initiated a search through "SPIDeR" to access DMV records of the payor and called a fellow employee to view the payor's DMV photograph she accessed on her computer. Grievant made the comment that the payor was not the same person as her past boyfriend. Additionally, Grievant sent an Agency employee an e-mail stating her being happy that it was not him.

Incident number 2.

² *Id.* at 2-3

On July 24, 2009 a non-custodial parent made a check payment in Agency office on his child support case. After the payment Grievant was observed accessing DMV information on this individual through "SPIDeR". Grievant showed this individual's picture to an Agency employee and commented as to him having dreamy eyes and that she was in love with him.

After accessing the confidential information through "SPIDeR" and using the confidential case information accessed, Grievant started a search on "Myspace" and "Facebook" for this individual. Grievant located the individual and initiated social networking contacts with him. Contact was made by Grievant with this individual in July and August of 2009. In one of the contacts Grievant indicated that she had seen the individual in the lobby at her work at "DCSE".

Agency expressed concern that information as to an individual having a case with Agency is confidential and should not have been divulged or posted on a social networking website. The individual expressed concern over the contacts by Grievant. He indicated to Agency that he reported matters to law enforcement. Agency was contacted by law enforcement to discuss the police report filed. Additionally, the individual's spouse was described by him as being upset that somebody from agency contacted him knowing him to be married and having a family.

Agency's fiscal unit consists of two team members and each is assigned a caseload. The caseload split is determined by the first letter of the non-custodial parent's last name. The individual's name did not fall into Grievant's case load. She does not contest that she called up confidential information and showed the individual's picture to a co-worker. She does not contest contacting the individual via Myspace and Facebook. Grievant contends that the individual had questions and that is what brought her into his case even though it was not assigned to her.

Grievant called over co-worker to her worksite and showed the co-worker a picture of the individual on the SPIDeR website through the DMV. Grievant told the co-worker his eyes were dreamy, told the co-worker the individual's name, and that she was going to find him in Facebook or Myspace to see if she could get more information on him. After accessing confidential information Grievant initiated a name search on Myspace and Facebook.

Grievant transmitted social networking e-mails to the individual. In these e-mails on Myspace, Grievant disclosed she saw the individual in the Agency lobby at her work place and specifically indicated "DCSE".³

³ *Id.* at 7-8

Based on the forgoing the hearing officer upheld the discipline and termination of the grievant's explaining that:

Agency expressed concern over the seriousness of matters in this case. Agency investigated matters and determined, as a result of their investigation, that there was a breach of confidentiality and that Grievant's actions constituted a misuse/unauthorized use of state records which is listed in the Standards of Conduct, Attachment A: Policy 1.60 as an example of a Group III offense. Agency was concerned that Grievant utilized an Agency computer for non-business reasons, she accessed confidential information accessed using Agency's information system for non-business reasons, and that Grievant disclosed confidential information.

Computer access to confidential information was utilized by Grievant on the job for personal reasons. In one incident, Grievant checked out the name of a payor to see if it was a past boyfriend. In a second incident she called up confidential information to establish a personal contact with the individual. This individual brought his concerns to Agency that confidential information was disclosed by Grievant. He was concerned over disclosure of his relationship with DCSE and over contacts initiated by Grievant. Grievant did not know him before he came into the DCSE office, Grievant saw him in the DCSE lobby, and used confidential information to identify and contact him.⁴

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.”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

Findings of Fact

The grievant appears to challenge the hearing decision, in part, on the basis of the hearing officer’s findings. 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 the 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

⁴ *Id.* at 8.

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.

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. Thus, to the extent the grievant is challenging the hearing officer's findings of fact and his weighing of the evidence, such determinations are entirely within the hearing officer's authority.

In this case, there is record evidence that supports the hearing officer's findings that the grievant engaged in the misconduct listed on the Written Notice: failure to follow instructions and/or policy; unauthorized use of state property or records, and computer/internet misuse.¹¹ Accordingly, this Department must uphold the hearing officer's finding of fact with respect to this issue.¹²

Fair hearing/Bias

The grievant asserts that she was not given a fair hearing but does not state how the hearing was unfair. She offers no supporting evidence except her observation that the hearing officer "seemed to disagree with my issues," and, presumably, the fact that he ultimately ruled in favor of the agency.

In administrative appeals to the EDR Director asserting hearing officer bias, the standard of review is whether the hearing officer harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party alleging bias has the burden of proving the hearing officer's bias or prejudice.¹³ Here, the grievant has not met that burden. The mere fact that findings align more favorably with one party than another will rarely, if ever, constitute sufficient evidence of bias.¹⁴

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

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Agency Exhibits, Tabs 3 and 4; and testimony of the Fiscal Tech beginning at 16:50.

¹² The grievant also asserted in her request for Administrative Review that she has a health problem and "seriously feel[s] that they were looking for any excuse to get [her] out of that office." Mere speculation is not a sufficient basis upon which a hearing officer can base a finding of discrimination. The grievant pointed to no evidence in her Ruling Request to support her allegation of discrimination and a review of the hearing record by this Department did not reveal that the grievant presented evidence to support such a finding.

¹³ See, e.g., EDR Ruling No. 2010-2388.

¹⁴ *C.f.*, *Al-Ghani v. Commonwealth*, No. 0264-98-4, 1999 Va. App. LEXIS 275 at *12-13 (May 18, 1999) ("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")

To the extent that the grievant is asserting that the hearing officer conducted the hearing in an unfair manner, based on a review of the hearing record including a recording of the hearing, we find no evidence that would support this contention. The grievant points out in her request for appeal that she was not represented, but the hearing officer treated the grievant with full respect, explaining the process as it progressed, and giving the grievant every opportunity to present her case.

Perjury

The grievant asserts that the one of the witnesses committed perjury at her hearing. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.¹⁵ In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.¹⁶ Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The same principles described above generally apply to other forms of allegedly false evidence. Accordingly, we decline to disturb the decision on this basis.

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

¹⁵ See e.g., EDR Ruling #2006-1383.

¹⁶ See, e.g., Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

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).