

Issue: Administrative Review of Hearing Officer's Remand Decision in Case No. 8840;
Ruling Date: February 23, 2010; Ruling #2010-2528; Agency: Department of
Corrections; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2010-2528
February 23, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's Remand Decision in Case Number 8840.

FACTS

In this case, the grievant received two Group II Written Notices related to his storage of personal, non-work-related files on the agency's computer system.¹ The grievant was demoted and transferred as a result of these disciplinary actions.² The hearing officer, in a decision dated October 17, 2008, upheld the Written Notices.³ In EDR Ruling Nos. 2009-2157, 2009-2174, this Department remanded the case to the hearing officer to address various issues raised by the grievant on administrative review. The hearing officer issued a 51-page Remand Decision on January 18, 2010, which upheld the original decision.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

In requesting this administrative review, the grievant submitted two electronic documents containing more than 120 pages of arguments, plus additional incorporated attachments. The grievants' submissions reiterate many of the same arguments he raised in the first administrative

¹ Decision of Hearing Officer, Case No. 8840, Oct. 17, 2008 ("Hearing Decision"), at 8-9.

² *Id.* at 9-10.

³ *Id.* at 16.

⁴ Remand Decision of Hearing Officer, Case No. 8840, Jan. 18, 2010 ("Remand Decision"), at 49.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

review in this case. As such, many of these issues have already been addressed by this Department and require no further discussion. In addition, the grievant disputes the hearing officer's interpretations of state and agency policies. Such questions about the proper meaning of policy language are within the purview of the Department of Human Resource Management (DHRM),⁷ and not for this Department to address.⁸

This Department's prior remand of this case to the hearing officer was less about failings in the hearing officer's analysis, and more for the purpose of having the hearing officer clarify certain findings and address some of the grievant's arguments.⁹ In his Remand Decision, the hearing officer has addressed the grievant's claims in a comprehensive manner. The hearing officer has complied with this Department's remand in full. Certain of the grievant's claims at issue on remand are addressed specifically below.

Noncompliance

The grievant again lists numerous alleged violations of the grievance procedure by the agency and the hearing officer. These issues were addressed in EDR Ruling No. 2009-2157, 2009-2174 and bear no further comment. The only remaining issue for the remand involved Grievant's Exhibit 44 (GE 44) and whether there should have been any adverse inference drawn if noncompliance was found.¹⁰

In the Remand Decision, the hearing officer appropriately addressed the propriety of the agency providing only a listing of information.¹¹ The hearing officer also addressed the content of GE 44 and whether an adverse inference should be drawn against the agency for any alleged noncompliance in providing limited information on GE 44. The hearing officer found that the circumstances did not warrant an adverse inference.¹² Such determinations are within the hearing officer's discretion. Based on the hearing officer's analysis, this Department finds no abuse of that discretion.

Clarity of Hearing Decision

The grievant claims that the hearing officer has not clearly described the bases of his holdings in the Remand Decision. This Department's review finds a comprehensive decision that clearly expresses the hearing officer's findings. Although the grievant may disagree with

⁷ See Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

⁸ For example, the grievant's various arguments concerning the hearing officer's interpretations of the types of conduct that are prohibited by policy are questions for DHRM to address. In addition, the grievant's claims regarding the manner in which he was escorted out of the building and the handling of his personal files are questions of policy. For purposes of the grievance procedure, the hearing officer addressed these and other similar misapplication of policy questions sufficiently in the Remand Decision. Remand Decision at 18-34, 37-38. However, whether the hearing officer's determinations were consistent with policy are questions for DHRM, not this Department.

⁹ See EDR Ruling Nos. 2009-2157, 2009-2174.

¹⁰ See *id.*

¹¹ Remand Decision at 41-42.

¹² *Id.*

the hearing officer's rationales, it is not reasonable to suggest that the Remand Decision is not clear. To the extent the grievant argues that the clarity of the hearing decision is a violation of law, the grievant may raise such an issue with the circuit court on appeal, if he so chooses.¹³

Similarity Between Written Notices

On remand, the hearing officer has addressed the grievant's argument that the Written Notices have effectively disciplined him twice for the same conduct by describing the same behavior and being almost identically worded.¹⁴ The hearing officer addressed this issue and found that it was consistent with state policy to use the same factual basis to support multiple disciplinary actions.¹⁵ While such a finding in its broadest application might be problematic,¹⁶ the hearing officer's holding under the facts of this case is understandable.

There are different ways to view this issue in this case. On the one hand, the misconduct described on the two Written Notices appears to be identical.¹⁷ However, the behaviors described on the Written Notices also encompass a variety of actions and continuing instances of misconduct by the grievant over a course of years, as found by the hearing officer.¹⁸ Consequently, it is also understandable how the hearing officer could deduce that there are sufficient acts of misconduct to support two separate Written Notices in this case.

In any event, such matters involve the interpretation of policies and application of the facts to the applicable policies. This Department has no basis to disturb the hearing officer's determinations and interpretations. To the extent the grievant may argue additional due process concerns, he may raise such matters on appeal to the circuit court as a matter of law.

Retaliation Claim

The grievant argues that the hearing officer failed to address properly his retaliation claim. Unlike the original hearing decision, the Remand Decision addresses the elements of a retaliation claim and explains the hearing officer's determination that the grievant had not met his burden.¹⁹ Nothing the grievant has presented provides a basis for this Department to disturb the hearing officer's findings.

Seven Additional Files

¹³ See Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ Remand Decision at 42-43.

¹⁵ *Id.*

¹⁶ For instance, if an employee commits a single act of misconduct that could be described as unsatisfactory work performance (Group I offense generally), failure to follow a supervisor's instructions (Group II offense generally), and a failure to abide by written policy (Group II offense generally), it would not appear that an agency could issue three disciplinary actions (one Group I and two Group II's) for that one act of misconduct.

¹⁷ See discussion in EDR Ruling Nos. 2009-2157, 2009-2174.

¹⁸ Remand Decision at 43.

¹⁹ Remand Decision at 33-38.

The grievant has again raised the issue concerning the seven additional computer files. The hearing officer clarified in the Remand Decision that the testimony about these additional files was considered only as rebuttal evidence.²⁰ As such, there was no requirement that the agency identify those documents as potential exhibits beforehand.²¹ Further, as the hearing officer notes, these additional files were not considered in determining whether the grievant had engaged in the misconduct noted in the Written Notices.²² The Remand Decision has appropriately clarified the record and there is no basis to disturb the hearing officer's determinations.

Factual Conclusions

Many of the grievant's arguments challenge the hearing officer's factual conclusions and assessments of the evidence and witnesses' testimony. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²³ and to determine the grievance based "on the material issues and grounds in the record for those findings."²⁴ 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.²⁵ 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.²⁶ 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.

The grievant appears to contest the hearing officer's findings of 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 of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.²⁷ As discussed in EDR Ruling Nos. 2009-2157, 2009-2174, 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.

²⁰ *Id.* at 11.

²¹ *Cf.* Sup. Ct. Va. R. 1:18B (Uniform Pretrial Scheduling Order).

²² Remand Decision at 11.

²³ Va. Code § 2.2-3005.1(C).

²⁴ *Grievance Procedure Manual* § 5.9.

²⁵ *Rules for Conducting Grievance Hearings* § VI(B).

²⁶ *Grievance Procedure Manual* § 5.8.

²⁷ *Rules for Conducting Grievance Hearings* § VI(B).

Mitigation

The grievant also challenges the hearing officer's consideration of mitigating circumstances. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."²⁸ EDR's *Rules for Conducting Grievance Hearings* provides in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.²⁹

Therefore, for a hearing officer to mitigate a disciplinary action that he or she found to be consistent with the facts, policy, and law,³⁰ the rules require a finding that the agency's discipline nevertheless exceeded the limits of reasonableness upon consideration of the record evidence. This Department will review a hearing officer's mitigation determinations only for abuse of discretion.³¹ Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

In the Remand Decision, the hearing officer has described in great detail the mitigating and aggravating circumstances considered, as the hearing officer compiled them from a review of the record.³² There is no indication that the hearing officer's determinations or assessments of these factors was an abuse of discretion. Indeed, the hearing officer appears to have recognized that many issues, beyond those specifically listed in the *Rules for Conducting Grievance Hearings* could be considered mitigating circumstances. It appears that the hearing officer has properly applied the "exceeds the limits of reasonableness" standard. There is no basis to disturb the hearing decision.

²⁸ Va. Code § 2.2-3005(C)(6).

²⁹ *Rules for Conducting Grievance Hearings* § VI(B)(1) (alteration in original).

³⁰ The issue of mitigation is only reached if the hearing officer finds the agency has sustained its burden of showing that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy. *Rules for Conducting Grievance Hearings* § VI(B).

³¹ "'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 ... 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.*

³² Remand Decision at 44-50.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This Department's review of the Remand Decision and the grievant's submissions find no basis to remand the case for further review by the hearing officer. The hearing officer has thoroughly addressed the grievant's numerous arguments in the remand decision, while focusing on the material issues in this case.

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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵

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Director

³³ *Grievance Procedure Manual* § 7.2(d).

³⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³⁵ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).