

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9246; Ruling Date: April 12, 2010; Ruling #2010-2552, 2010-2567; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2010-2552, 2010-2567
April 12, 2010

The grievant has requested that this Department (“EDR”) administratively review the original hearing decision and reconsideration decision in Case Number 9246. For the reasons set forth below, we will not disturb the hearing decision.

FACTS

The pertinent facts of this case, as set forth in the hearing decision and reconsidered opinion in Case No. 9246, are as follows:

Grievant filed a timely an [sic] appeal from two Group III Written Notices issued on July 31, 2009, each of which provided for the disciplinary action in addition to issuing of the Written Notice of termination.

- A. On 7/31/09 Grievant was issued a Group III Written Notice, (Offense Dates: 7/28/09 & 7/30/09) for “Falsifying records (verbal and written) during an investigation” (Written Notice Offense Codes/Categories: 74).
- B. On 7/31/09 Grievant was issued a Group III Written Notice (Offense Dates: Winter/Spring 2008) for “Selling property under VDOT possession for personal financial gain” (Written Notice Offense Codes/Categories 99).

Following the failure to resolve the matters the agency head, on 10/13/09, qualified both Group III Written Notices with termination for hearing. The [hearing officer] was appointed hearing officer effective December 16, 2009 and a grievance hearing was held on both Group III Written Notices with termination on January 13, 2010.

Grievant is an employee of Agency. He began working for Agency in 1998 as an Inspector and in 2007 he became an Engineering Technician with Agency. His job Title is Engineer Technician III and his Role Title is Preliminary Engineer.

An agency employee made a statement that led to an investigation of whether property in the possession of Agency was sold by Grievant. This employee stated he and Grievant were riding through a site that had temporary road signs erected but no workers or construction equipment were present. As no work was being done the road signs were taken down and placed in their Agency vehicle. The employee indicated that at the Agency workplace Grievant took the signs out of the truck and Grievant sold the signs. These events were alleged to have occurred about a year prior to the initiation of the investigation.

Grievant signed two typewritten documents concerning matters related to the investigation. Meetings were held with Grievant to discuss the investigation. Agency prepared one typewritten statement to document Grievant's statements and certain events. This statement was signed and dated 7/28/09. Grievant signed indicating, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

A second typewritten statement was signed by Grievant at a meeting held on July 30, 2009. This statement was prepared by Agency documenting statements about the events and statements concerning auctions. This document was signed by Grievant on 7/30/09 and also indicated, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

Grievant signed two handwritten statements dated 7/31/09. In one of these statements Grievant indicated he did not call certain auction companies on the day he said he did in his 7/30/09 statement. His written statement further indicated "Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true."

In Grievant's subsequent handwritten signed statement dated 7/31/09 Grievant indicated he did not get stopped by police on the evening of April 16, 2009 as he had stated in the typewritten statement dated 7/28/09. In that signed statement Grievant had indicated he was pulled over on 4/16/09 by a police officer for speeding. He said he provided his license and registration and was given a verbal warning. Grievant then indicated that later, when he began to replace the items he pulled out of his glove box when he was searching for his registration, he discovered auction tickets and a receipt for the signs. Also in the typewritten statement of 7/30/09 Grievant had indicated he called Police Chief and was informed that because it was a simple verbal warning they would not have a record of the stop and there would be no record of his license or plate being checked or of his vehicle being stopped by one of their officers.

Grievant's second statement made on 7/31/09 stated, "I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records. Further, my call to ____ (*name provided in statement is redacted herein*) on April 17, 2009 while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend."¹

Based on the foregoing facts, the hearing officer reached the following conclusions in his hearing decision:

Engineering Technician ("Eng. Tech.") spoke to an Agency employee of an incident of work zone signs going missing from his Agency vehicle and Grievant, prior to the fact, discussing the signs were going to be sold and after the fact saying the signs were sold.

At issue are work zone signs described as orange fabric roll up work zone signs and their spring loaded sign stands. The signs were observed to be up and on display at a site where no work was going on.

Eng. Tech. indicated the signs were picked up, transported back to the Agency site, and Grievant took and sold the signs. Eng. Tech. further contended that:

Grievant and Eng. Tech. picked up the signs and brought them back to the district office in Eng. Tech.'s truck.

Grievant talked about the possibility of selling these signs while in route to the district office.

At his Agency office Eng. Tech. looked out his office window and saw Grievant removing something from the truck. The signs were in his truck and then were not there.

A few weeks later Grievant said to him the signs were gone and were sold.

Grievant indicated that the signs were folded and left at the work site. Grievant further contended that:

¹ Decision of the Hearing Officer in Case No. 9246 issued January 19, 2010 ("Hearing Decision") at 1-3. Footnotes from the Hearing Decision have been omitted.

He did not put the signs and stands from the road into his personal vehicle and sell them.

He did sell signs and stands to an individual but he purchased those signs and stands from an estate auction but could not recall where or when the auction took place.

Two receipts, one for the signs & stands were located from the auction where he contends the purchase occurred.

There is conflict between versions of events as related by Eng. Tech. and Grievant. It is not contested that Grievant sold signs. However, Grievant contends that the signs were purchased at auction. Grievant's Witnesses testified he had purchased signs from Grievant in June of 2007 and that Grievant had told him the signs were purchased at auction.

Eng. Tech. testified he did not see Grievant with the signs in his hand but did see him moving around his Eng. Tech's state truck. Eng. Tech. saw Grievant going between the two vehicles, his and Grievant's. It was twilight and getting dark when this occurred. He testified that the signs were there, and then were not there. Eng. Tech. did not know with 100% certainty who the signs were sold to but the day the signs were picked up a specific individual's name was mentioned by Grievant to him.

Agency's Report of Investigation concluded that:

1. Grievant and Eng. Tech. agreed they passed through a closed work zone and saw signs and stands left by a contractor.
2. Eng. Tech. reported that Grievant took the signs and stands and sold them.
3. Grievant stated that Eng. Tech. and Grievant folded eight signs and stands and left them on the shoulder of the road.
4. Grievant acknowledged selling eight signs and stands to an individual however he indicated he purchased the signs and stands at an auction.
5. Grievant could not recall when and where he purchased the signs and stands but he provided receipts for the signs & stands and for lumber purchased.
6. Validity of the receipts could not be verified.

The Agency presented evidence as to their taking into consideration prior instances of dealings with both Eng. Tech. and Grievant. Prior incidents were considered wherein Eng. Tech. and Grievant separately were involved in matters concerning problems and how each acted. Agency presented evidence concerning prior incidents where there were discrepancies between what was said by Grievant and what was said by others concerning matters on the job.

Agency management sought follow up review of the events after the investigation of the office of the Inspector General. Both Eng. Tech. and Grievant statements were further investigated. Follow up interviews were conducted and concern was expressed over the auction tickets and other problems that began to appear.

During the follow up investigations the issues of false statements & documents came up. Grievant's first admission as to making false statements (oral and written) addressed his contacting auction companies (referenced in his 7/30/09 written statement). Grievant indicated in the 7/31/09 statement addressing his false statements that "All other information provided me is completely accurate and correct." There were, however, at this time, Agency concerns over Grievant's statements about the law enforcement stop on the evening of April 16, 2009. Grievant had contended this stop led to discovery of the auction receipts in his glove compartment. In a subsequent written statement of Grievant on 7/31/09 he admitted to his falsifying statements as to his vehicle being stop by law enforcement.

Agency gave consideration to the credibility of the parties in determining matters and its course of action. Credibility is a consideration in this cause. Grievant does not contest that he sold signs to an individual however he contends the signs sold were signs that he purchased at an auction. Grievant produced two receipts and what appears to be an adding machine ribbon showing the addition of 55 and 25 x .05 totaling 84.

The auction receipt for "signs and stands" produced by Grievant appears to be a form receipt with lines. It shows no identification of seller, auctioneer, location of auction, date of auction, or any other identifiable information other than the number "185" on a line next to "Buyer's Name or Number". Also, the adding machine ribbon shows no identification of seller, auctioneer, location, date, or any other identifiable information. Agency investigation report was not able to verify the receipts. Grievant was not able to recollect the place of the auction, it's date, or who conducted the auction.

The Agency investigation report stated that the individual who purchased the signs and stands indicated Grievant told him that Grievant had purchased road signs and stands at a yard sale.

Grievant indicated in his signed statement of 7/28/09 that he received approximately \$400 for the signs he sold. Investigators interviewed the individual on 4/16/09 that had purchased signs from Grievant. The report stated the individual indicated he purchased signs and stands for around \$100 and he could not be sure about the exact price he paid.

Grievant signed written statements indicating that he falsified records, verbal and written, during the investigation. During the Agency's investigation meetings held with Grievant were summarized in writing, reviewed, and signed by Grievant. Two written statements dated 7/28/09 and 7/30/09 were presented in this case. Both written documents contained the statement, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

On 7/28/09, during the Agency Investigation, Grievant signed a typed statement which was prepared by Agency. Included within the written statement was the following:

{note: names were set forth in Grievant's signed statement but such names are redacted below}

"On April 16, 2009, _____ (*name redacted*) met with _____ (*Grievant's name redacted*) to question him about the events associated with her investigation. Later that evening while on his way to New River Community College, _____ (*Grievant's name redacted*) was pulled over by a Town of Dublin police officer for speeding. He provided his license and registration to the officer and was given a verbal warning. He cannot remember if the officer returned to his patrol car to run a check on his license plates and/or registration. He believes he did not return to his car to do this. After class, _____ (*Grievant's initials redacted herein*) began to replace the items he pulled out of his glove box when he was searching for his registration. As he was placing items back in the glove box, he discovered the auction tickets and receipt he paid for the signs in with the glove box items such as game hunting tickets and food receipts."

On 7/30/09, during the Agency Investigation of selling of property which was in possession of Agency, Grievant signed a second typed statement prepared by Agency. This document stated that Grievant contacted several auction companies named in the document to ask how they do advertising and indicated that Grievant spoke with a number of individuals and companies. The statement provided details within the statement as to one individual refusing to go back and look for receipts.

Grievant subsequently admitted in two separate written statements which Grievant signed and which were dated 7/31/09 that he falsified statements previously given to investigators. Grievant stated, "Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records...."

Grievant, in a hand written document which he signed dated 7/31/09 stated, "I did not call the auction companies of __, __, and __ (*names provided in written statement but redacted herein*) on the day I said I called them in my written statement of July 30, 2009. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true."

Grievant in a written and signed statement of 7/31/09 stated, "I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records Further, my call to _____ (*name provided in written statement but redacted herein*) on April 17, 2009, while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend."

The documents of 7/28/09 and 7/30/09 were signed as part of the Agency investigation into matters and constitute records which were falsified. As stated therein these documents were signed attesting and consenting that the information Grievant had provided was factual and accurate as written. These documents confirmed statements and events discussed by Grievant and Agency during the investigation.

Conclusions:

A. Falsifying records (verbal and written) during an investigation:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

The disciplinary action of issuing a Group III Written Notice with termination for "Falsifying records (verbal and written) during an investigation" was warranted and appropriate under the circumstances.

B. Selling property under VDOT possession for personal financial gain:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

The disciplinary action of issuing a Group III Written Notice with termination for "Selling property under VDOT possession for personal financial gain" was warranted and appropriate under the circumstances.²

The hearing officer thus upheld the termination of the grievant's employment finding no mitigating circumstances that would warrant a reduction in the discipline.³

The grievant timely requested that the hearing officer reconsider his hearing decision on the basis of a "major error of fact" of when the grievant took and sold the signs. On February 15, 2010, the hearing officer upheld his earlier 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

Timeliness of the February 20, 2010 Appeal

As an initial point, the agency asserts that the grievant's request for administrative review is untimely. The grievant apparently sent his request for administrative review only to the Department of Human Resource Management ("DHRM") Director on February 3, 2010. On February 20, 2010, the grievant informed the EDR Director that he intended for her to review the decision as well. The grievant seeks leave to have appeal accepted and reviewed by this Department.

² Hearing Decision at 4-9.

³ *Id.* at 9.

⁴ See Decision on Request to Reconsider or Reopen in the matter of Case 9246-R, issued February 15, 2010, ("Reconsideration Decision").

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

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

This Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period.⁷ The reason for this rule is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, EDR, or DHRM—can be somewhat perplexing for parties not familiar with the process. Thus, we will consider the grievant’s appeal to this agency timely and will consider the merit of his objection.

Definition of “Record”

The crux of the February 3, 2010 appeal is the grievant’s assertion that the documents the grievant signed (then later recanted, in part), were not “*any* official state records kept in the normal course of business.” The grievant asserts that DHRM Policy 1.60, *the Standards of Conduct (“SOC”)*, gives examples of what type of action are to be considered “falsifying records.” The grievant notes that under the *SOC*, records include, but are “not limited to vouchers, reports, insurance claims, time records, leave records or other official documents.”

We believe that this is primarily a DHRM policy issue and should be addressed by the DHRM Director.⁸ As a matter of compliance with the grievance procedure, however, we find no error with the hearing officer’s analysis or the conclusions in his decision.⁹ However, this Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. Rather, the DHRM Director (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. This issue has been raised with DHRM and only a determination by DHRM will establish whether the hearing officer erred in his interpretation of state policy.

Findings of Fact

The grievant has appealed the hearing officer’s reconsidered opinion. The grievant had asked the hearing officer to reconsider his decision on the basis that the original decision contained a major error of fact regarding when the alleged theft of the signs occurred.

⁷ EDR Ruling Nos. 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at *6-7 (January 15, 2008). (Court affirmed EDR’s determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.)

⁸ We note in Case No. 8955, the DHRM Director declined to rule upon the issue of whether under policy “falsification” of records requires an intent to deceive, holding that policy was “silent in that regard” and “represents an evidentiary issue.” Thus, to the extent that DHRM is not inclined to rule on whether the records at issue here constitute “records” under the *SOC*, we will address this issue from the perspective of compliance with the grievance process.

⁹ The hearing officer’s actions here can hardly be viewed as an abuse of discretion, clearly erroneous, or in any other way a violation of the grievance procedure. The examples listed in the *SOC* are not all inclusive. Furthermore, it is far from clear that the records in question are not official documents. Where policy is silent or ambiguous, a hearing officer often must interpret policy before he can apply it. His interpretation is subject to review by the DHRM Director. *See* Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2); *see also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹¹ 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.¹² 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.¹³ 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.

Here, the grievant has challenged the hearing officer’s findings regarding when the theft occurred. The hearing officer addressed this argument in his Reconsideration Decision. In upholding his earlier decision, the hearing officer noted that he is required to consider the totality of evidence admitted at hearing. While he did not expressly so state, the hearing record appears to contain sufficient record evidence to support the conclusion that the grievant stole the signs even if the date that the theft occurred is uncertain.¹⁴

New Evidence

The grievant has asked this Department to consider the decision in the grievant’s unemployment benefits case. This will not be considered for several reasons.

First, because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”¹⁵ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.¹⁶ The fact that a party discovered the evidence after the trial does not necessarily make it “newly discovered.” Rather, the party claiming evidence was “newly discovered” must show that:

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ *See, e.g.*, the grievant’s false statements, the grievant’s inability to state when and where he allegedly purchased the signs, the inconsistencies between the grievant’s and sign purchaser’s versions of the facts surrounding the sale of the signs, and the Eng. Tech’s testimony, generally.

¹⁵ *Cf. Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d on reh’g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining “newly discovered evidence” rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining “newly discovered evidence” standard in context of grievance procedure).

¹⁶ *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.¹⁷

Here, the evidence that the grievant seeks to have considered is not “newly discovered,” it is simply new. “Newly discovered evidence” as defined under case law does not include events that occurred after the trial or hearing.¹⁸ The evidence cited by the grievant was created after the hearing ended. The hearing occurred on January 13, 2010. The unemployment decision was issued on March 8, 2010. Thus, under the rules set forth above, this evidence would not be considered newly discovered evidence warranting a reopening of the hearing.

A second reason for not considering this new evidence is that, under Virginia law, determinations or decisions of the Virginia Employment Commission are not admissible in grievance hearings.¹⁹

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²

Claudia T. Farr
Director

¹⁷ *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

¹⁸ See Lowe v. Mercedes Benz of N. Am., Inc., Nos. 95-3038, 96-1501, 1996 U.S. App. LEXIS 31215 at *8 (4th Cir. Dec. 5, 1996)(“Events occurring after trial are not ‘newly discovered evidence’ within the meaning of 60(b)(2).”(unpublished opinion). citing to 11 C. Wright & A. Miller, Federal Practice and Procedure § 2859 (2d ed. 1995) (“Under both rules [59 and 60(b)(2)], the evidence must have been in existence at the time of the trial.”); Boyd v. Bulala, 672 F. Supp. 915, 922 (W.D. Va. 1987) (same), rev’d in part on other grounds, 877 F.2d 1191 (4th Cir. 1989).

¹⁹ See *Rules for Conducting Grievance Hearings* § IV (D) citing to Va. Code § 60.2-623.

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Virginia Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).