

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9424;
Ruling Date: December 28, 2010; Ruling No. 2011-2826; Agency:
Department of Education; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Education
Ruling Number 2011-2826
December 28, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9424. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The salient facts as set forth in Case Number 9424 are as follows:

The Department of Education employed Grievant as an Accountant until his removal effective June 29, 2010. He had been employed by the Agency since 1998. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 30, 1998, Grievant submitted a State Application for Employment for the position of Fiscal Technician Senior with the Agency. Grievant wrote in the information necessary to complete the application. This information included his name and address, education, experience, miscellaneous items, and certification. In the upper left corner on the first page of the application, there appeared space on the preprinted form for the applicant to write the "Position number". Grievant wrote the position number of the Fiscal Technician Senior position. There also appeared a space for the applicant to write "Number of attachments". Grievant left the space blank.

Under the miscellaneous items portion of the application, the following question is posed:

Have you ever been convicted of any violation(s) of law, including moving traffic violations or juvenile convictions committed after your fourteenth birthday? YES NO. If YES, please provide the following: Description of offense: _____ Statute or

ordinance (if known): _____ Date of Charge:
_____ Date of conviction:
_____ County, city and state of
conviction: _____

For additional convictions use plain paper -- include all information listed above.

Grievant wrote a check mark in the blank space next to the word "YES". He wrote "Trespassing" in the blank space following "Description of offense". He wrote "12 - 93" in the blank space following "Date of Charge". He wrote the name of a location in Virginia in the blank space following "County, city and state of conviction".

The Agency did not conduct a background check to verify the information provided by Grievant. The Agency's customary hiring practices did not include conducting background checks on applicants selected for employment.

On March 5, 2010, the Agency learned the Grievant had been arrested and charged with a misdemeanor. The Human Resource Coordinator met with Grievant. Grievant indicated that the matter was all a mistake and that the matter was scheduled for trial. The Agency began an investigation.

On May 18, 2010, the Agency retrieved Grievant's State application from his personnel file and noted that Grievant had written that he had been convicted of trespassing. On May 25, 2010, the charges against Grievant were withdrawn from prosecution. The Investigator spoke with law enforcement officers involved in the case and became concerned that there was "more to the story." The Investigator contacted the Agency's legal counsel and learned for the first time that Grievant had prior convictions.

On June 7, 2010, the Human Resource Analyst and the Investigator met with Grievant to inform him that he had falsified his April 1998 applicant [sic] for employment. Grievant was provided a copy of his application. Grievant agreed to and signed an authorization form enabling the Agency to receive his criminal history background from the Virginia State Police.

The Virginia Criminal Record provided by the Virginia State Police showed that Grievant was found guilty on March 6, 1987 of a misdemeanor for solicitation, found guilty on March 27, 1991 for a misdemeanor solicitation for a lewd act, and found guilty on October 6,

1993 of a misdemeanor for solicitation. Grievant's Virginia Criminal Record did not show a conviction for trespassing.¹

Based on the foregoing findings of fact, the hearing officer upheld the Group III Written Notice with removal.²

The grievant subsequently requested that the hearing officer reconsider the hearing decision based on newly discovered evidence. In a decision dated November 29, 2010, the hearing officer denied the grievant's request for reconsideration.³ More specifically, in his Reconsideration Decision, the hearing officer concluded:

Grievant seeks to reopen the hearing to present testimony of witnesses Grievant contends were knowledgeable regarding the instructions he received in circumstances of his application for employment. Grievant has not identified these witnesses by name. He has not offered any reason why these witnesses could not have testified during the original hearing. The evidence offered by Grievant is not new evidence.⁴

The grievant also requested an administrative review by the Director of the Department of Human Resource Management (DHRM). In a letter dated November 23, 2010, the DHRM declined to administratively review the hearing decision because the grievant's request failed to identify a policy violation. The grievant now seeks an 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.”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

New Evidence

In his request for administrative review, the grievant seeks to have the hearing reopened in order to present additional witness testimony. More specifically, the grievant seeks to introduce testimony to contradict the agency's contention that there were no

¹ Decision of Hearing Officer, Case No. 9424, issued October 20, 2010 (“Hearing Decision”) at 2-3.

² *Id.* at 5.

³ See Decision of Hearing Officer, Case No. 9424-R, issued November 29, 2010 (“Reconsideration Decision”) at 1.

⁴ *Id.*

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

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

attachments to his original application packet. In addition, the grievant asserts that he has “had recent contact with a member of the original three person panel who conducted [his] initial interview” and that this person will be able to “confirm that there was a private second interview between [the grievant] and the hiring supervisor” as well as attest to the fact that his “application had been put in a personal file prior to [his] interview.”

A reopening of the hearing to present additional information requires that the evidence to be presented be “newly discovered.”⁷ 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.⁸ However, the fact that a party discovered the evidence after the trial does not necessarily make it “newly discovered.” Rather, the party must show that

- (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.⁹

Here, the grievant has provided no information to support a contention that the evidence referenced in his request for administrative review should be considered newly discovered evidence under this standard. Specifically, the grievant was presumably aware, or should have been aware, prior to hearing that the witnesses at issue had potentially relevant information but simply did not call these individuals as witnesses at hearing. Moreover, a review of the hearing recording in this case revealed that the grievant presented at hearing some of the information he now seeks to introduce as “newly discovered” evidence.¹⁰ Consequently, there is no basis to re-open or remand the hearing for consideration of this evidence.

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

⁷ See *Rules for Conducting Grievance Hearings*, § VII (A)(1).

⁸ See *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

⁹ *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

¹⁰ More specifically, during his opening statement the grievant states that there are documents now missing from his application, including a letter dealing with his criminal history, his medical history and information regarding a two-year gap in time on his application. Hearing Recording at 2:57 through 4:05. Moreover, as to the remaining evidence that the grievant would have proffered, it appears to relate to his having purportedly given the agency notice of his prior offenses. Such evidence would have presumably gone to the heart of his defense: that is, he had made the agency aware of these convictions. Therefore, this evidence could have, and should have, been presented to the hearing officer at the grievance hearing.

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requests for administrative review have been decided.¹¹ Because all timely requests for administrative review have been decided, the hearing decision is now a final decision. Within 30 calendar days of the date of this ruling, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹³

Claudia T. Farr
Director

¹¹ *Grievance Procedure Manual* § 7.2(d).

¹² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).