Issue: Administrative Review of Hearing Officer's Decision in Case No. 9650; Ruling Date: December 7, 2011; Ruling No. 2012-3112; Agency: Department of Rehabilitative Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Rehabilitative Services
Ruling Number 2012-3112
December 7, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9650. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision this matter.

FACTS

The facts of this case are set forth in detail in the 23-page decision in Case Number 9650.[1] In sum, the grievant was accused by the Department of Rehabilitative Services ("the agency") with three separate offenses:

(1) Failing to inform his supervisor or requesting approval of employment outside of the agency (firearms training);
(2) Not reporting to work or submitting leave slips for missed time; and
(3) Falsifying state records by requesting reimbursement for mileage that was not incurred.[2]

The hearing officer upheld all of the charges against the grievant and the termination of his employment. The grievant has challenged the hearing decision specifically challenging each of the sustained charges.

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

[1] Decision of Hearing Officer, Case No. 9650, issued September 6, 2011 ("Hearing Decision") at 1.
[2] *Id.* at 1.
[3] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

Outside Employment Without Prior Approval

The grievant was charged with engaging in outside employment—firearms training—without prior approval. On this issue, the grievant challenges the hearing officer's conclusion that there was "no merit in Grievant's contention that he did not violate the outside employment policy because the class was taught not to make money but as a community service."[5] The grievant argues that his work with his firearms training enterprise ("APT") was not employment but rather was nonprofit community service and that under state policy, nonprofit community service is not employment. Therefore, the grievant argues, no agency approval was necessary. However, the hearing officer rejected the grievant's assertion that his involvement with APT was community service. To that point, the next sentence to follow the above quoted passage was: "Grievant has acknowledged his work with APT was outside employment." These sentences read together lead to the conclusion that the hearing officer is not, as the grievant argues, holding that community service work is employment requiring an outside employment agreement. Instead, it would seem evident that the hearing officer finds the grievant's work to be employment in the traditional sense—that is, work done for compensation or with the hope of potential compensation or profit.

There is record evidence to support the finding that the grievant acknowledged that his work with APT was employment. First, the grievant had completed an outside employment form for his work with two named enterprises: APJ (which the grievant states "never got off the ground") and APT, his firearms training business.[6] Although the grievant's assertions on whether he submitted such a form to management evolved over time, the completion alone of the outside employment form lends support to his apparent recognition that his work with APT was employment.[7] Furthermore, while the grievant testified that his two businesses were distinct in that one—APT—was a non-profit for which he charged for his classes only to cover his expenses, he also testified that "I'm not doing very well businesswise, I'm in the red with it." In fact, he twice referred to the business being in the "red."[8] The mere fact that a business is not profitable does not mean that it is not employment, or more to the point, a community service. In addition, the grievant, in the form, made no attempt distinguish the two enterprises in terms of one being a for-profit organization versus one being a non-profit. In light of all the above, this Department concludes that there is sufficient record evidence to support the hearing officer's determination that the grievant had engaged in outside employment.[9]

---

[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Hearing Decision at 12-13, n. 11.
[6] In fact, the grievant testified at hearing that APT was a business, albeit a non-profit. Hearing testimony beginning at Page 4, Side A.
[7] The hearing officer cites in her reconsideration decision to the form as evidence that the APT was employment.
[8] Hearing testimony beginning at Tape 4, Side A.
[9] The hearing officer found the grievant's testimony unreliable in several respects. Hearing officers are charged with making determinations of credibility. Although the grievant claimed that APT was merely a community service offering, the hearing officer apparently disbelieved him. This Department has no authority to substitute its judgment for that of hearing officer regarding the credibility of the grievant.

Failing to Report to Work or Submit Leave Slips for Missed Work

The grievant was disciplined for not working on several occasions without submitting leave slips for the missed time. The grievant advances several arguments to counter the hearing officer's finding that he missed time from work and did not submit leave forms to cover that time. These arguments primarily focus on the apparent lack of telework approvals (as well as documents relating to a 1995/1996 grievance) in the grievant's personnel file. As explained below, the absence of these documents from the hearing record is not dispositive and does not warrant a re-opening of the hearing.

The hearing decision found the evidence showed that on several days during March 2011, grievant had failed to report to work as scheduled at the agency. The decision noted that the grievant attempted to defend his absences by making numerous assertions such as that he teleworked. The grievant asserts that in 2007, management approved him for telework and that the approval was continuous and therefore remained effective in March 2011. He alleges that management's position was that a counselor could work from any place so long as he/she got the job done. Grievant also claims office staff always knew his whereabouts.

The hearing decision considered each of the claims beginning with the assertion that he had approval to telework in March 2011. The hearing decision observed that the evidence showed that the grievant had sought approval to telework on or about February 11, 2011 ("2011 telework request"), but that the request had been denied by management due to Grievant's poor productivity and Attention Deficit Disorder symptoms. As to the grievant's claim that the agency had previously approved him to telework in 2007 and that the approval had not been terminated as of March 2011, the hearing officer also found that claim to be unsubstantiated and that any prior approval had been revoked. This finding was based in part on the grievant's April 24, 2011 response to management's due process notices regarding alleged misconduct, in which he stated, in pertinent part, the following regarding his 2011 telework request:

> A few weeks ago, I turned in a request for telework. However, I never heard back from anyone, so I assumed that I would be able to telework on a very part-time basis and as a reasonable accommodation when my medical condition flares up, or to catch up. If I'm not approved I will put in a request as an ADA accommodation.

The hearing officer found that the grievant's April 24, 2011 response shows he was aware by February 11, 2011, if not before, that he was not then a worker approved for telework under any prior telework agreement. In addition, the hearing officer observed that:

> Grievant's supervisor before his firing was SG. The evidence shows she became Grievant's supervisor in January 2011. When she asked Grievant for his work schedule, he informed her it was from 7:30 a.m. to 4:15 p.m. By his own admission, Grievant never informed SG that he had been approved to telework. The Grievant testified that he assumed SG knew he teleworked. The Hearing Officer finds this testimony self serving and not credible. Thus, the Hearing

> Officer finds Grievant's claim that his approval to telework in 2007 continued in March 2011, was not substantiated.

Based on the forgoing, this Department notes that the grievant knew or should have known of the lack of approval forms in his personnel file well prior to hearing and thus any associated objections could have and should have been raised at the grievance hearing. More importantly, the lack of the prior approvals in the grievant's personnel file is essentially irrelevant, as explained by the hearing officer. The grievant's submission of the February 11, 2011 ("2011 telework request") served as evidence that, at minimum, the grievant had questions as to whether he had permission to telework. The grievant essentially assumed the risk of allegedly teleworking without having the 2011 telework request approved. Based on the rationale adopted by the hearing officer, this Department has no basis to disturb the hearing decision here.[10]

Falsification of Records

The grievant argues that the falsification of records charge boils down to a single instance of mistake. The hearing decision finds that the "Agency has shown by a preponderance of the evidence that Grievant falsified a record when he submitted the April 4, 2011 voucher claiming mileage for March 21, 2011, when he had not traveled on state business on that day." The grievant asserts that he incurred mileage on March 9, 2011 but mistakenly reported it as having been incurred on March 21, 2011. The hearing officer found the grievant's explanation "not acceptable" and him "untrustworthy."

This Department cannot second guess the hearing officer's determinations regarding credibility. The grievant testified that he mistakenly put down the 21st as the date when travel expenses were incurred. This position is consistent with at least one earlier representation regarding his travel voucher. For instance, in [Hearing Officer Exhibit 5, page 10] a June 7, 2011 response to the third step respondent, the grievant asserts that he made a clerical error. But at hearing, when the agency pressed the grievant on cross-examination about his contention that when he "noticed that [he] missed 3-9-11 . . . [he] stuck it on 3-21-11," the grievant was unable to satisfactorily explain why he reported mileage on the 21st instead of the 9th.[11] Thus, this Department cannot conclude that the hearing officer's conclusions regarding the grievant's truthfulness are unsupported by the record as a whole. Such determinations are reserved for the hearing officer alone and this Department has no basis or authority to substitute its judgment for that of the hearing officer or to otherwise intervene when there is record evidence (or an absence of evidence) to support such findings. Accordingly, this Department will not disturb the hearing decision.[12]

---

[10] It should be noted that the hearing officer found that the grievant could not substantiate with documentation that he had worked at home. Thus, even if the grievant had a valid telework agreement—which the hearing officer did not so find—the grievant failed to show that he teleworked.

[11] Hearing Tape 4, Side B. "I can-I'm not sure."

[12] The grievant submitted additional information to this Department on October 2, 2011. This information and related objections and arguments have been carefully considered by this Department and do not alter the result. This

CONCLUSION AND APPEAL RIGHTS

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.[13] 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.[14] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[15]

_____
Claudia T. Farr
Director

---

information, which was received more than 15 days beyond the hearing decision date, could only be considered as supplemental arguments to the three timely arguments addressed above.

[13] *Grievance Procedure Manual* § 7.2(d).

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

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