

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9732, 9733, 9734; Ruling Date: April 4, 2012; Ruling No. 2012-3234, 2012-3311; 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 Department of Transportation
Ruling Numbers 2012-3234, 2012-3311
April 4, 2012

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9732/9733/9734. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9732/9733/9734 are as follows:¹

The Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its Facilities. Grievant began working for the Agency in March 2008. The purpose of his position was, "performance of maintenance to VDOT roads and Right of Ways, by providing manual labor, safe and effective equipment operations and good customer service."

In April 2008, Grievant attended Basic Equipment Operators Training. As part of this training he was informed "Do not exit the operator's cab and leave the equipment running. Turn off the equipment and take the keys with you before you get out of the cab – even for a quick conversation with the work crew." He was also informed, "Do not leave running equipment unattended" and "Practice 'key control'; take the keys with you when you leave the operator's cab."

On August 17, 2010, the Supervisor instructed Grievant to "flat drag" a specific location with a Motor Grader. A Motor Grader has a "belly blade" underneath it to spread gravel, dirt, etc. as the Motor Grader moves forward. Grievant drove the Motor Grader in the direction of the job site but deviated a short distance to stop at a local convenience store. Grievant stopped on the side of the road. Grievant exited the Motor Grader but left the equipment's motor

¹ Decision of Hearing Officer, Case No. 9732/9733/9734 ("Hearing Decision"), issued January 10, 2012, at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

running and the keys inside and the door unlocked. Grievant entered the convenience store. While Grievant was inside the local convenience store, he was not able to see the Motor Grader.

On November 5, 2010, the Supervisor instructed Grievant to power wash one piece of equipment and hook up another piece of equipment. The amount of time necessary to complete that task should have been approximately one hour. Employees usually start their assignments at 7:30 a.m. The Supervisor left Grievant's location before Grievant began his work. The Supervisor returned approximately three hours later and observed that Grievant had not completed his assignment and was making a telephone call on his personal cell phone and smoking a cigarette. The Supervisor was surprised that Grievant had not completed his assignment and approached Grievant to determine why Grievant had not completed his assignment. The Supervisor asked Grievant to hang up the telephone and asked Grievant why he had not completed his assignment. Grievant continued his conversation and ignored the Supervisor. The Supervisor again asked why Grievant had not completed his assignment. Grievant ended his phone call. Grievant said that he had just finished washing the bush hog. The Supervisor then asked why Grievant had not installed the broom/sweeper. Grievant raised his voice and told the Supervisor that he had just finished washing the bush hog. The Supervisor attempted to explain to Grievant that he should have accomplished more than just washing the equipment. Grievant stepped towards the Supervisor and yelled "Buddy, I told you I just got done washing the bush hog." Grievant had moved close enough to the Supervisor for the Supervisor to believe the Grievant had invaded the Supervisor's "personal space". Grievant was holding a lit cigarette in his finger and pointing his finger within four to six inches of the Supervisor's face. Grievant repeated his gesture two or three times. The Supervisor took a step back and told Grievant not to call him buddy but to call him by his first name. Grievant again stepped forward and pointed his finger with a lit cigarette in the Supervisor's face and said "Buddy, I just called you buddy again."

On April 20, 2011, Grievant was instructed by the Transportation Operator III to take a dump truck with an attached roller to help repair a part of a road that had been washed out by a flood. Grievant was instructed to wait by a silo near the work site. Grievant drove past the silo and had to turn around to reach the worksite. Grievant made a sharp U-turn which caused the dump truck and roller to jackknife. Part of the roller attachment pressed against the rear driver's side of the truck bed causing the bottom corner of the truck bed to be pushed inward approximately one half-inch. Grievant drove the dump truck and roller to the work site. He helped unhook the roller and then performed his work duties. When the project was finished, another employee helped reattach the roller to the rear of the dump truck and noticed damage to the truck bed. Grievant was asked if he knew how the damage occurred. Grievant responded that he was unaware of the damage.

* * * * *

On September 7, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a one day suspension for violation of safety rules and failure to comply with policy. On November 17, 2010, Grievant was issued a Group III Written Notice of disciplinary action for workplace violence. On June 2, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for violating a safety rule and failure to comply with policy.²

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On August 31, 2011, the EDR Director issued Ruling No. 2012-3062, 2012-3063, 2012-3064 consolidating the three grievances for a single hearing. On December 6, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 5, 2012, a hearing was held at the Agency's office.³

In a January 10, 2012 hearing decision, the hearing officer rescinded the September 7, 2010 Group II Written Notice of disciplinary action with a one day suspension for violation of safety rules and failure to comply with policy.⁴ The hearing officer upheld the Group III Written Notice of disciplinary action for workplace violence.⁵ The hearing officer reduced the June 2, 2011 Group II Written Notice of disciplinary action with removal for violating a safety rule and failure to comply with policy to a Group I Written Notice.⁶ The hearing officer denied the grievant's request for reconsideration on March 9, 2012.⁷ The grievant now seeks 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."⁸ 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.⁹

² Hearing Decision at 1.

³ *Id.*

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.*

⁷ See Decision of Hearing Officer, Case No. 9732/9733/9733-R ("Reconsideration Decision") issued March 9, 2012 at 2.

⁸ Va. Code § 2.2-1001(2), (3), and (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Ability to Conduct a Fair Hearing

The grievant alleges that the *Grievance Procedure Manual (Manual)* did not state the grievant could testify at hearing. Specifically, the grievant contends that he had no idea he was allowed to testify, but if the hearing officer had taken some time during the hearing to explain procedure, the grievant would have testified at hearing.

This Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.¹⁰ The *Manual* expressly states that parties may represent themselves and may make opening and closing statements.¹¹ The *Rules for Conducting Grievance Hearings (Rules)* state that “[e]ach party may be present during the entire hearing and may testify.”¹² Moreover, in the initial hearing officer appointment memorandum that is sent from this Department’s Hearings Program Director to the parties of a grievance hearing, it specifically states that “[t]he grievant can testify as a witness at the hearing.”¹³ Therefore, a grievant’s lack of knowledge about the grievance procedure is not grounds for a rehearing. Furthermore, the general conduct of the hearing is within the sound discretion of the hearing officer.¹⁴ Thus, noncompliance with the grievance procedure and *Rules* on such grounds will only be found if the hearing officer has abused that discretion.

Based on this Department’s review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. The hearing officer repeatedly asked the grievant how many witnesses he intended to call,¹⁵ and although the grievant called four witnesses,¹⁶ he did not testify himself. Furthermore, when the hearing officer specially asked if the grievant wanted to call any additional witness, the grievant’s advocate responded that she did not.¹⁷ Therefore, it does not appear that the grievant was materially prejudiced. Moreover, in his Reconsideration Decision, the hearing officer stated that “hearing officers must remain neutral during grievance hearings,” and therefore, he stated it was inappropriate for him to advise parties how to present their case.¹⁸ We agree. Accordingly,

¹⁰ See, e.g., EDR Ruling No. 2009-2252; EDR Ruling No. 2009-2079; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

¹¹ *Grievance Procedure Manual* § 5.8.

¹² *Rules for Conducting Grievance Hearings* § IV(A) (emphasis added).

¹³ Memorandum to the Parties to the Grievance from EDR’s Hearings Program Director dated November 18, 2011.

¹⁴ E.g., EDR Ruling No. 2009-2091.

¹⁵ See Hearing Record Part II at 1:13:47 (question by the hearing officer to grievant’s advocate, asking how many witnesses the grievant intended to call) and at 2:15:44 through 2:17:50 (The hearing officer asked the grievant’s advocate who the next witnesses were. The grievant’s advocate responded with the name of the grievant’s fourth witness. The hearing officer asked, “Who else?” and the grievant’s advocate responded with a list of five additional witness names. The hearing officer asked, “Is there anybody else you want to testify who is not on that list?” and the grievant’s advocate answered, “Well [sixth named witness].” The hearing officer asked again, “So there are no other persons you would put on the list besides those?” The grievant’s advocate responded, “No sir.”)

¹⁶ See Hearing Record Part II at 1:15:30 (testimony begins of Mr. M), 1:44:52 (testimony begins of Mr. S), 2:01:50 (testimony begins of Mr. MC), and at 2:19:37 (testimony begins of Mr. JC).

¹⁷ See Hearing Record Part II at 2:15:44 through 2:17:50 (The hearing officer asked, “So there are no other persons you would put on the list besides those?” and the grievant’s advocate answered, “No sir.”)

¹⁸ Reconsideration Decision at 2.

this Department finds no abuse of discretion by the hearing officer when he failed to advise the grievant of his right to testify during the hearing.

Evidence Considered by the Hearing Officer

The grievant alleges that the hearing officer did not consider the grievant's exhibits when he rendered his final hearing decision. Furthermore, the grievant asserts that the testimony of one of the agency witnesses conflicted with the May 25, 2011 police accident report. Specifically, the grievant alleges that the May 25, 2011 police accident report states the driver was unknown, but the agency's witness testified that the grievant was the driver of the dump truck when the damage occurred to that vehicle.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁹ and to determine the grievance based "on the material issues and grounds in the record for those findings."²⁰ Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.²¹ Accordingly, the technical rules of evidence do not apply.²² By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.²³ 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.

One of the issues in this case is whether the grievant was the driver of the agency dump truck when the damage occurred to the vehicle, and if so, whether he violated agency safety rules and policy by doing so. As such, the hearing officer had the duty to receive all probative evidence regarding this issue. Based upon this Department's review of the hearing exhibits, this Department notes that the May 25, 2011 police accident report states that it was *initially* unknown who the operator of the dump truck was when the damage occurred to the agency vehicle, however, the report also includes an attached state vehicle crash report which indicates the grievant was the state vehicle driver at the time of the incident.²⁴ 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. In his reconsideration decision, the hearing officer stated that he "considered all of the exhibits presented during the hearing."²⁵ Moreover, the hearing officer stated that he "weighed the evidence and made findings of fact based on the most believable evidence."²⁶ Therefore,

¹⁹ Va. Code § 2.2-3005.1(C).

²⁰ *Grievance Procedure Manual* § 5.9.

²¹ *Rules for Conducting Grievance Hearings*, § IV(D).

²² *Id.*

²³ Va. Code § 2.2-3005(C)(5).

²⁴ Agency Exhibit Tab 21, pages 1-3.

²⁵ Reconsideration at 2.

²⁶ *Id.*

because 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.

Grievant's March 23, 2012 Request for Administrative Review

In a March 23, 2012 email, the grievant requested this Department administrative review five additional issues, specifically alleging: 1) the agency's human resources office failed to follow Section 2.4 of the *Manual* when it assigned the second step respondent for the grievant's November 17, 2010 Group III Written Notice, which the grievant alleges denied him "his full grievance rights;" 2) the hearing officer should not have been able to uphold the grievant's termination when the grievant's November 17, 2010 Group III Written Notice was mitigated down to a 30 day suspension; 3) the hearing officer allegedly did not review grievant's Tab 5, Tab 11, or Tab 15 exhibits; 4) the grievant allegedly was not informed of the issues that were qualified for hearing; and 5) the grievant's three grievances should not have been consolidated into one hearing because of the complex nature of the cases.

The *Manual* provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."²⁷ This Department has allowed parties to raise beyond the 15 day timeframe only those issues that could not have been raised previously.²⁸ Here, all five additional issues raised by the grievant could have been raised within the 15 day period following the original hearing. The hearing officer issued his original decision on January 10, 2012.²⁹ The grievant first raised these particular five issues on March 23, 2012, which was 73 calendar days after the issuance of the hearing decision. Therefore, the request for this Department's administrative review for these five additional issues is untimely.

Grievant's March 23, 2012 Request for "Re-Reconsideration" of the Hearing Officer's Decision

In a March 23, 2012 email, the grievant requested the hearing officer to "re-reconsider" his January 10, 2012 hearing decision because two of the agency witnesses allegedly gave false testimony, accusations, and documentation at hearing.

This Department cannot identify any provision of the *Manual* or the *Rules* that requires the hearing officer to "re-reconsider" his January 10, 2012 hearing decision. However, once an original hearing decision becomes final, either party may seek review by the circuit court within thirty days of a final decision on the grounds that the determination is contradictory to law.³⁰ Therefore, this Department need not address this issue.

²⁷ *Grievance Procedure Manual* § 7.2(a).

²⁸ See EDR Ruling no. 2007-1563, 2007-1637, 2007-1691, note 26.

²⁹ Hearing Decision at 1.

³⁰ *Grievance Procedure Manual* § 7.3(a).

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.³¹ 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.³² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³³

Claudia T. Farr
Director

³¹ *Grievance Procedure Manual* § 7.2(d).

³² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).