

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9807; Ruling Date: July 13, 2012; Ruling No. 2012-3368; Agency: Department for the Blind and Vision Impaired; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Department for the Blind and Vision Impaired
Ruling Number 2012-3368
July 13, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9807. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9807 are as follows:¹

On December 15, 2011, shortly after 8:00 a.m., the Grievant's immediate supervisor came to the workplace and found several hole punches on a workstation surface, the chair at the workstation and the floor. In her testimony, this supervisor stated that she talked to the Grievant about the mess at approximately 8:20 a.m. This supervisor testified that she asked the Grievant to clean the mess shortly after 9:00 a.m. She further testified that she asked the Grievant to clean the mess shortly after 10:00 a.m. In her oral testimony before the Hearing Officer, this witness testified that she asked the Grievant a third time to clean the mess shortly after 12:00 p.m.

In a memorandum dated December 15, 2011, which was produced at 12:32 p.m., on that date, this supervisor indicated that she and the Grievant had a "conversation about the mess," during the morning of December 15, 2011. In the memorandum of December 15, 2011, this supervisor stated in part as follows:

Around 10:00 a.m., I again asked [Grievant] to please get the pieces of paper up.

This same supervisor produced a second memorandum on December 15, 2011, and it was created at 3:05 p.m. In this memorandum, the Grievant's supervisor states that she requested the Grievant to clean the mess at 8:20 a.m., again at 10:00 a.m., and again before lunch.

¹ Decision of Hearing Officer, Case No. 9807 ("Hearing Decision"), May 24, 2012 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

The Grievant denied that this supervisor requested her to clean the mess at any time other than the request made after 12:00 p.m., and the Grievant stated that she was on her lunch break at that time. The Grievant testified that she told her supervisor that she was at lunch and that she would deal with the mess after her lunch break.

While there was some discrepancy in the times that the supervisor gave in her oral testimony and the contemporaneous memorandum that she created, both her oral testimony and the memorandum indicate that she requested the Grievant to clean the mess three (3) separate times. The supervisor testified that the Grievant refused to do so after all three (3) requests and the Grievant testified that she was only requested once and that was during her lunch period.

Based on the veracity and likely truthfulness or lack thereof of the various witnesses, the Hearing Officer finds that the Agency has borne its burden of proof to establish that the Grievant was requested on three (3) separate occasions to pick up the paper punch holes. Inasmuch as the Grievant refused to do so, that does rise to the level of insubordination and failure to follow the direct instructions of a supervisor.

The Grievant introduced testimony and documentary evidence as to various medical conditions that she had that may have prevented her from picking up the hole punches. She focused on the fact that there were chemicals in a supply closet, where she may have found a broom. The Grievant offered no evidence as to why the hole punches could not have been picked up without the aid of a broom.

* * * * *

The Grievant was issued a Group II Written Notice on January 6, 2012, for:

The supervisor directed the employee to pick up paper droppings from the hole punch machine that spilled onto a chair and onto the floor on three separate occasions prior to the employee's lunch period. The employee did not comply with the request as instructed.

Pursuant to the Group II Written Notice, the Grievant received no disciplinary action other than the issuance of the Written Notice. On January 31, 2012, the Grievant timely filed a grievance to challenge the Agency's actions. On April 24, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 21, 2012, a hearing was held at the Agency's location.²

² *Id.* at 1.

In the May 24, 2012 hearing decision, the hearing officer upheld the Group II Written Notice of disciplinary action.³ The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, EDR 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.”⁴ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁵

Hearing Officer’s Consideration of the Evidence

The grievant’s request for administrative review challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ 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.⁸ 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.⁹ 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant contests the evidence presented by the agency that she was asked to clean up the pieces of paper from the floor on three separate occasions. She contends that the memoranda produced by her supervisor documenting these occurrences were not reasonably believable or credible. The grievant alleges discrepancies exist as to the times of day that her supervisor recorded as those when grievant was requested to clean up the mess in question and thus the agency did not bear its burden of proof to show that the disciplinary action was warranted.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer’s findings that the grievant was asked by her supervisor to clean up the paper punch holes on three separate occasions and that grievant failed to comply.

³ *Id.* at 4.

⁴ Va. Code § 2.2-1202.1(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

The hearing officer noted that “[w]hile there was some discrepancy in the times that the supervisor gave in her oral testimony and the contemporaneous memorandum that she created, both her oral testimony and the memorandum indicate that she requested the Grievant to clean the mess three (3) separate times.”¹⁰ The grievant’s supervisor testified that, after speaking initially with the grievant regarding the mess at about 8:20 a.m., she subsequently instructed the grievant three times to clean up the area.¹¹ In contrast, the grievant testified that she was only asked one time to clean up the pieces of paper, which was over her lunch break, shortly after 12:00 p.m.¹²

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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 hearing decision, the hearing officer found the testimony of the grievant’s supervisor credible and held that the agency “has borne its burden of proof to establish that the Grievant was requested on three (3) separate occasions to pick up the paper punch holes.”¹³ Therefore, 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. Accordingly, we decline to disturb the decision on this basis.

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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Christopher M. Grab
Senior Consultant
Office of Employment Dispute Resolution

¹⁰ Hearing Decision at 3.

¹¹ See Hearing Record at 8:33 through 9:35 (testimony of grievant’s supervisor).

¹² See Hearing Record at 1:15:13 through 1:15:45 (testimony of grievant).

¹³ Hearing Decision at 3.

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).