

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9786; Ruling Date: September 18, 2012; Ruling No. 2013-3425; Agency: Virginia Department of Transportation; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Transportation
Ruling Number 2013-3425
September 18, 2012

The agency has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's Reconsideration Decision in Case Number 9786.

FACTS

The procedural and substantive facts of this case are set forth in EDR's first administrative review (EDR Ruling Number 2012-3363) in this case and are incorporated herein by reference. On August 16, 2012, the hearing officer issued a Reconsideration Decision,¹ and respectfully declined to change his original hearing decision.² The agency now appeals the hearing officer's reconsideration decision.

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."³ 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.⁴

Failure to Follow EDR's Instruction

The agency challenges whether the hearing officer's reconsideration decision fails to follow EDR's instruction in EDR Ruling Number 2012-3363 because it "remains silent about whether the Grievant falsified a state document and/or made a false statement to management." Moreover, the agency alleges that the hearing officer's reconsideration decision inaccurately concludes "the grievance is about a matter of definition and motive" instead of addressing whether "the Group III that was issued for unsatisfactory performance and falsifying records."

¹ Reconsideration Decision, Case No. 9786, August 16, 2012 ("Reconsideration Decision").

² *Id.*

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

In EDR Ruling Number 2012-3363, EDR held that it was the hearing officer's duty in this case to determine whether the grievant falsified a state document and provided false information to management. In his reconsideration decision, the hearing officer clarified that he based his original decision that the grievant did not falsify information to the agency solely upon the fact that the agency's evidence was circumstantial and it was contradicted by the grievant's direct testimony and by the grievant's mother's affidavit.⁵ He further clarified that when the grievant was "asked if she had any (undefined) personal relationship with the other employee, she said no, because of the implication of impropriety."⁶ Moreover, the hearing officer explained in his reconsideration decision that he found the grievant's demeanor and testimony truthful and credible.⁷ Hence, the hearing officer concluded the grievant did not falsify documents and/or falsify statements to agency management.⁸

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁹ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁰ 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.

Although we agree that the hearing officer's reconsideration decision is once again deficient in its lack of factual findings and analysis on the material issues of this case, we disagree that the reconsideration decision is silent about the material issue of this case – whether the grievant provided false information to agency management – or is "riddled with inaccurate statements" that the agency alleges the hearing officer used to support his decision. Albeit a bare minimum, the hearing officer's reconsideration decision contains some findings of fact and analysis regarding whether the grievant provided false information to agency management. We note, however, that given the limited clarification and analysis in the hearing officer's reconsideration decision, a reader would still have a difficult time understanding what evidence was presented by either party or what evidence the hearing officer relied upon to reach his final conclusion.¹¹ Even so, EDR cannot disturb the hearing officer's conclusion that the grievant did not falsify information to management. The hearing officer's finding is supported by the record evidence, and EDR cannot substitute its judgment for that of the hearing officer with respect to that finding.

⁵ Reconsideration Decision at 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ We note that EDR will address the proper format of a hearing decision and a reconsideration decision with this hearing officer independently and confidentially upon the conclusion of this grievance.

Witness Issues

The agency alleges that the hearing officer erred by basing his reconsideration decision upon the grievant's direct testimony because it was allegedly contradictory throughout the hearing record. Specifically, the agency asserts that the grievant's testimony became contradictory when she stated that after the other employee asked her out and the meeting did not go well, she testified that she still wanted to remain friends with that employee even though that employee did not.¹² When the grievant testified that "I was basically worried that he was the only person that'd asked me out after, you know – I was basically second guessing my decision to be just friends," the agency challenges how the hearing officer could subsequently find the grievant's testimony as credible.¹³ Moreover, the agency alleges the hearing officer should not have considered the affidavit of the grievant's mother because she was not available for cross-examination by the agency.

Upon EDR's review of the hearing transcript, we find that there is evidence in the hearing record to support the hearing officer's finding that the grievant was truthful to the agency. Specifically, the hearing transcript reflects the grievant's testimony that she did not have a romantic relationship with the other employee, nor did she feel that she had a relationship that would pose a conflict of interest in an investigation.¹⁴ When agency management questioned the grievant about her relationship with the other employee and implied impropriety had occurred, the grievant characterized her relationship with that employee to agency management as "friendly but mostly professional."¹⁵ When the grievant's attorney questioned the grievant whether a romantic relationship had formed, the grievant stated "No, not at all. It was only after that meeting took place that I realized he intended it for something that I didn't have the same intention."¹⁶ As such, the grievant maintains that she was honest with the agency when she wrote in her March 29, 2012 email to agency management, "I did not have any relationship or pursue any relationship with [the named employee] *as alleged.*"¹⁷ (emphasis added) When questioned what she meant by "as alleged," the grievant stated she was referring to the impropriety allegations in Mr. C's grievance.¹⁸

As stated above, 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. Therefore, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR has no basis to disturb the hearing officer's decision for this reason.

¹² See Hearing Transcript, page 93, lines 1 through 4.

¹³ See Hearing Transcript, page 106, lines 9 through 14.

¹⁴ See Hearing Transcript, page 78, lines 1 through 7.

¹⁵ See Hearing Transcript, page 77, line 25.

¹⁶ See Hearing Transcript, page 93, lines 11 through 13.

¹⁷ See Hearing Transcript, page 96, lines 6 through 17.

¹⁸ See Hearing Transcript, page 96, lines 15 through 17.

Finally, with regard to the grievant's mother's affidavit, the agency did not request the hearing officer to issue a witness order for the grievant's mother to appear at hearing, which arguably weakens the agency's argument.¹⁹ Further, neither the *Grievance Procedure Manual* nor the *Rules for Conducting Grievance Hearings* preclude consideration of affidavits. Although a hearing officer will likely give such documents not subject to cross-examination less weight than live testimony, they are still properly admissible at hearing. Therefore, EDR cannot conclude that the hearing officer abused his discretion with regard to considering this affidavit.

CONCLUSION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.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



Christopher M. Grab
Senior Consultant
Office of Employment Dispute Resolution

¹⁹ The agency raised its objection to the admission of the affidavit at the commencement of the hearing, which the hearing officer took under advisement.

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

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

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