

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9888; Ruling
Date: October 22, 2012; Ruling No. 2013-3443; Agency: Department of Juvenile
Justice; Outcome: Remanded to AHO.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3443
October 22, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9888. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration.

FACTS

In his September 7, 2012 decision in Case Number 9888,¹ the hearing officer made the following findings of fact:

The Grievant was employed by the Agency as a probation officer. The Grievant transferred from [another locality] to [the locality]. The Grievant was assigned a case and appeared in court for a hearing. The Judge in the case issued an order from the bench which was then memorialized in a written order. The written order from the court was received by the Grievant. The Grievant wrote additional language on the Agency's copy of the order. This language imposed a condition of probation that if the defendant did not test negative for marijuana within seven days the defendant was to be brought back before the court. This is what the Grievant recalled the judge ordering even though it was not on the written order.

The modified order was place [sic] in the Agency file for the case. The defendant did not test negative within seven days and the Grievant went to her supervisor and requested a detention order for the defendant. The Grievant requested the detention order be issued immediately because the defendant was present in the courthouse having just taken a drug screen. This was not the usual procedure for issuing a detention request. However, the supervisor authorized the detention request because the Grievant said it was the court's order and there was a pending larceny charge also.

¹ Decision of Hearing Officer, Case No. 9888, September 7, 2012 ("Hearing Decision").

The Grievant took the detention request to the clerk of the court and requested the case be placed on the docket for that day. The clerk was reluctant to add the case to the docket as it was against policy to add cases at the last minute to the court's docket. The matter was raised with the judge who declined to make any changes to the written order and directed that the matter be brought in the regular course. The defendant was subsequently detained in a hearing the next day. The case was then later dismissed and the defendant released at the request of the Commonwealth Attorney when it was found the detention request was authorized by the Grievant's supervisor based, in part, upon the language the grievant added to the order. The pending larceny charge was not in the [local] jurisdiction and appeared to be a "diversion" case in the charging jurisdiction; a basis, which the supervisor would not have used to authorize a detention request. The defendant's underlying charge alone did not warrant detention and thus the Agency faced the possibility of an illegal detention and the according liability to the family and loss of integrity with the public.

The Grievant's supervisor reviewed the matter and pulled the Agency file copy of the order and compared it to the original order in the court's file. The addition was noticed and the supervisor questioned the Grievant about the difference in the order. The Grievant was specifically asked if the court clerk added the language to the order to which the Grievant gave an affirmative response. The Grievant subsequently stated that she had not been paying attention when first questioned about the order and had, in fact, made the changes to reflect what she thought the judge had said. The Grievant said it was standard procedure to add the oral orders of the court to written orders in [another locality]. The Grievant's supervisor reported the matter to her supervisor for review. The Grievant's second line supervisor approved the Agency's action in this matter.

The Agency personnel did not believe the Grievant had been honest with them during this incident and felt her work could no longer be trusted. The Grievant's second line supervisor offered the grievant the opportunity to try and transfer back to [the other locality]. A transfer never materialized. The Group III Written notice was issued for falsifying state documents and the employment of the Grievant terminated.²

Based on these facts, the hearing officer held the following:

The Grievant modified the Agency's copy of the court order. The Grievant never got approval for the alteration she made to the order and ultimately the change was not endorsed by the court overseeing the matter. The Grievant's action created a record within the Agency which was not accurate and may have been relied upon by Agency personnel. The Grievant's action had a material effect on the Agency as a probation violation case was processed and

² *Id.* at 1– 2 (footnotes omitted).

dismissed as a result of the Grievant's action, and further, the integrity of the Agency may have been put in question as these actions directly impacted the public.

The Grievant argues that her actions were not so egregious as to warrant termination because she was allowed to continue performing her duties and offered the opportunity to try and transfer back to [another locality]. The Grievant's argument is not persuasive. It is clear the Agency supervisors held no malice towards the Grievant and were not opposed to her leaving the [local] office to return to [the other locality] if the Grievant could arrange it. It is equally clear the Agency had already decided it could not trust the Grievant and she would be separated from the [local] office. When the transfer could not be arranged the Grievant was terminated from employment. Any delay in taking the disciplinary action by the Agency was intended for the benefit of the Grievant and was not unreasonable under the circumstances. Giving the Grievant an opportunity to try to transfer does not demonstrate that the Agency imposed a harsher sanction than was warranted.

The Grievant created a false record in the Agency and was not completely honest about what had occurred. This was a serious breach [sic] of the Grievant's duty which severely impacted the operations of the Agency and warranted termination under the Standards of Conduct.³

The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, the Office of Employment Dispute Resolution (EDR) through the Department of Human Resource Management 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

In her request for administrative review, the grievant challenges the hearing officer's findings of fact and assessments of witness testimony and evidence specifically as to the question of whether the grievant falsified a state document. For example, the grievant argues that she did not falsify a document because when she wrote her notes on the court order she was memorializing what she believed was spoken verbally by the judge in the courtroom. She essentially argues that the words she wrote were not untrue when she wrote them and she did not

³ *Id.* at 3.

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

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

have the requisite intent to falsify a document.⁶ The grievant points to a document from the Assistant Commonwealth Attorney that she suggests corroborates her claims as to what the judge said in court and other matters.⁷ She argues that the hearing officer did not consider this exhibit as it was not discussed in the hearing decision.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁸ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁹ 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.¹⁰ 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.¹¹ 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.

Based upon our review of the record, we find that the grievant has raised a valid point. It is not clear from a review of the hearing decision how the hearing officer concluded that the grievant falsified a document with the requisite intent at the time she wrote her notes on the court order. At a minimum, there appears to be at least some issues of disputed fact between evidence presented by the agency and that of the grievant with arguable support of the exhibit from the Assistant Commonwealth Attorney.¹² The *Rules for Conducting Grievance Hearings* require that where a case is decided on disputed facts, “the hearing officer must identify and explain his/her reasoning in resolving the dispute(s).”¹³ As there does not appear to be a discussion of this exhibit in the hearing decision, it is not clear that it was reviewed and/or considered by the hearing officer. Therefore, because there is no identification or explanation of the issues of

⁶ For years, hearing officers have typically required a showing of intent to establish that an employee has falsified a document. *See, e.g.*, EDR Ruling No. 2012-3176 (and discussion of hearing decision therein); EDR Ruling No. 2009-2325 (same). We note in Case No. 8955, the DHRM Director declined to rule upon the issue of whether under policy “falsification” of records requires an intent to deceive, holding that policy was “silent in that regard” and “represents an evidentiary issue.”

⁷ *See* Agency Ex. J.

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² For example, the hearing officer states that the notes written by the grievant on the court order were “ultimately ... not endorsed by the court.” Hearing Decision at 3. However, the letter from the Assistant Commonwealth Attorney could be viewed as supporting some of the claimed untrue statements of the grievant, including what was orally spoken in court by the judge and that, later, the judge indicated he would not endorse the amendment because “he didn’t mean what he said.” Leaving aside the issue of when the grievant knew that the court would not “endorse” the alleged statements of the judge in court in relation to when she wrote the notes, which could also be relevant, a review of this evidence purports to create at least a disputed issue of fact.

¹³ *Rules for Conducting Grievance Hearings* § V(C).

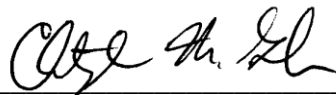
disputed facts (if they exist) and/or a lack of clarity as to the basis for the finding of falsification with the requisite intent, the case must be remanded to the hearing officer for further consideration.

ADDITIONAL ISSUE, CONCLUSION, AND APPEAL RIGHTS

As stated above, this case is remanded to the hearing officer for further consideration and explanation of the findings of fact and determinations as to whether the grievant falsified a document. This ruling in no way finds that the grievant's conduct in this case was completely appropriate. However, EDR and the hearing officer must confine our reviews to the actual charges of misconduct on the Written Notice at issue in this grievance (presumably falsification). This raises a further issue.

In reviewing the hearing decision, the hearing officer recounts that the grievant received a Group III Written Notice for falsifying a state document.¹⁴ However, in EDR's review of the hearing record, the Written Notice could not be located and, as such, was presumably not entered into the record as an exhibit. Although a copy of the purported Written Notice at issue in this case was supplied to the hearing officer with the appointment packet, inclusion of a document with the appointment packet does not make it a hearing exhibit unless entered into the record at hearing. On remand, the hearing officer should address whether the apparent lack of the final Written Notice in the hearing record has any material impact on this case.¹⁵

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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸



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¹⁴ Hearing Decision at 2.

¹⁵ Certainly the Written Notice is critical in all disciplinary cases to determine the actual charged misconduct. However, there may be cases in which the charges are not in question, while in others the parties may be unclear as to the final version of the Written Notice at issue, for example.

¹⁶ *Grievance Procedure Manual* § 7.2(d).

¹⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁸ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).