

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9888; Ruling Date: November 29, 2012; Ruling No. 2013-3475; 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 2013-3475
November 29, 2012

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

The hearing officer's findings in his September 7, 2012 decision in Case Number 9888,¹ as recounted in EDR's first administrative review in this case (EDR Ruling Number 2013-3443), are hereby incorporated by referenced. In EDR Ruling Number 2013-3443, the hearing officer was directed to provide further consideration and explanation of the findings of fact and determinations as to whether the grievant falsified a document. The primary issues for consideration noted in the EDR Ruling were 1) the hearing officer's consideration of a letter from the Assistant Commonwealth's Attorney and any resulting disputed issues of fact, and 2) the basis for the determination that the grievant had falsified a state document with the requisite intent. The grievant asserts in her renewed request for administrative review that the hearing officer did not adhere to the remand directives of EDR.

In the hearing officer's remand decision, there is no discussion of any determination as to whether the grievant falsified a state document with the requisite intent. Rather, the hearing officer appears to address that the grievant altered a copy of the court order without approval or authority.² However, the grievant was not disciplined for altering a court order without approval or authority. She was disciplined for falsifying a state document.³ While the hearing officer notes that the grievant's notes resulted in an "inaccurate" document in the agency's files, EDR has reviewed nothing in the remand decision that clearly explains how the grievant falsified the document with the requisite intent.

Even assuming that there is evidence in the record to support the hearing officer's factual finding that the grievant's notes on the court order were "inaccurate," there has still been no determination of whether such "inaccurate" notes were falsified with the requisite intent. For instance, consider an employee who makes a mistake in entering information into an agency record thus creating an "inaccurate" document in the agency's files. Has that employee falsified

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

² Remand Decision, Case No. 9888, Oct. 23, 2012, at 2.

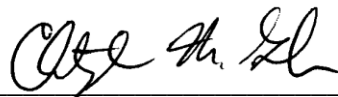
³ *Id.* at 1.

the record by making a simple mistake without a requisite intent? Similarly, an employee who places information on an agency record that he/she believes to be true, but turns out to be incorrect has also created an “inaccurate” document in the agency’s files. Where is the evidence that such an employee had the intent to falsify that document? It may very well be that the grievant engaged in misconduct by altering the document without approval or not following appropriate protocol to do so. However, the agency did not discipline the grievant for those acts, but for falsifying the record, which has not been adequately addressed in the hearing decision.

The above analysis leads us to the next issue, which is the hearing officer’s determination that the Assistant Commonwealth’s Attorney letter was irrelevant. Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue.⁴ While a hearing officer’s evidentiary determinations are due appropriate deference, here, the hearing officer has abused that discretion. The letter includes statements that purport to support the grievant’s testimony of what the judge said in court and, as a result, what the grievant decided to write down as notes on a copy of the court order. Whether the notes the grievant wrote were believed to be true or false is a material issue in this case. The rationale of why the grievant wrote these notes is a material issue in this case because it goes to the grievant’s state of mind, i.e., what intent did the grievant have to falsify the document? The ultimate weight and factual determinations are still within the hearing officer’s discretion and, as long as they are supported by the record, EDR cannot disturb them. However, we are unable to find that a failure to consider this document is harmless error.

In short, the hearing officer has not properly considered EDR’s directives on remand. As such, the case is remanded, again, to the hearing officer for further clarification and consideration of the issues discussed above. The hearing officer must address whether the grievant falsified a state document with the requisite intent and, in so doing, explain any findings of disputed fact, including consideration of the Assistant Commonwealth Attorney’s letter.

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.⁵ 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.⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁷



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⁴ See *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) (“We have recently defined as relevant ‘every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.’” (citations omitted)); *Morris v. Commonwealth*, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) (“Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue.” (citations omitted)).

⁵ *Grievance Procedure Manual* § 7.2(d).

⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁷ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).