

Issue: Administrative Review of Case #8232/grievant requested review of hearing decision;
Ruling Date: March 20, 2006; Ruling #2006-1269; Agency: Department of Rehabilitative
Services; Outcome: hearing decision in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Rehabilitative Services
Ruling Number 2006-1269
March 20, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8232. For the reasons set forth below, we will not disturb the hearing officer's decision in this case.¹

FACTS

The underlying facts of this case, as set forth in the hearing decision are as follows:

The Department of Rehabilitative Services (Hereinafter referred to as agency) employed grievant for three years as a program administrative specialist.

In February 2004, the agency implemented a competency-based program to advance disability analysts from trainee status to journey status to senior analyst. The program requires that trainees, including those with previous departmental experience, must successfully demonstrate mastery of specified competencies within 24 months of completing centralized training. Failure to master competencies within the 24-month period requires the supervisor to develop a work plan to assist the employee in successfully meeting performance expectations and outlining consequences (including discipline) should performance not improve. Grievant was hired in October 2002 and completed centralized training in January 2003. Therefore, pursuant to the program, grievant should have demonstrated mastery of the competencies not later than January 2005.

During the first quarter of performance year 2005 (October - December 2004), grievant's performance had been deteriorating. She had difficulty in managing her caseload, failed to achieve the SPAR accuracy goal, and failed to process claims within the acceptable range of processing times. Grievant asked to transfer to a different office and was allowed to do so on January 3, 2005.

¹ While this ruling does not expressly address every point raised in the request for administrative review, each has been carefully considered.

Before grievant transferred to the new office, she had acquired experience in many types of cases including initial, reconsideration, child, and continuing disability cases. Nonetheless, because the new office had minor variances in procedure, grievant's supervisor gave her several months to settle in before measuring competency levels even though grievant had passed the 24-month deadline. As grievant's backlog of cases gradually increased, her supervisor regularly (approximately every other week) reminded grievant that she had to address her steadily increasing backlog of work. New initial and reconsideration cases are assigned to analysts by a computer program so that everyone receives a random selection of cases. Competency levels are measured during a three-month period and the employee knows beforehand when the period will begin and end.

In May 2005, grievant's supervisor asked her if she was ready to begin the competency measuring period; grievant agreed that she was. The competency period was designated as the months of June through August 2005. During that period, grievant failed to achieve one of the five required competency levels. The supervisor observed that grievant had failed to take timely actions on cases, in some cases took no action for weeks at a time, and was unable to maintain her total caseload at a manageable level. As a result, the supervisor gave grievant a Notice of Improvement Needed/Substandard Performance and a three-month work plan designed to help her achieve a successful competency evaluation.

As a result of grievant's failure to achieve journey status, and because her [sic] she had not maintained her caseload at a manageable level during the year, grievant's annual performance evaluation was Below Contributor overall. After grievant pointed out numerical errors in the evaluation, the rating of one core responsibility was changed but the overall rating remained the same. Subsequently, the Human Resources office directed the supervisor to again revise the evaluation and change the overall rating to Contributor. Human Resources determined that the work plan given to grievant in early October prevented the supervisor from giving a rating lower than Contributor.

Through the instant grievance, the grievant challenged the agency's actions, essentially claiming that the agency had unfairly applied or misapplied policy by denying her journey status or in the preparation of her journey plan. In his January 20, 2006 hearing decision, the hearing officer found that the grievant had not borne the burden of proof to show either unfair application or misapplication of policy. The hearing officer concluded that the grievant attempted to shift responsibility for her problems to her supervisors.

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.”² 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.³

The Hearing Officer’s Findings and Conclusions:

The grievant challenges a number of the hearing officer’s findings and conclusions. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁵ 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.

In this case, grievant’s objections are primarily challenges to the hearing officer’s findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision.⁶ As stated above, such determinations are entirely within the hearing officer’s authority.

Bias:

The grievant asserts that the hearing officer was biased against her. The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an “orderly, fair and equitable fashion”⁷ and to “maintain order, decorum and civility.”⁸

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

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

⁴ Va. Code § 2.2-3005.1(C)(ii).

⁵ *Grievance Procedure Manual* § 5.9.

⁶ For example the grievant asserts that the hearing officer: (1) “did not grasp this process,” [Request for Administrative Review, pg. 2, paragraph 2]; (2) “failed to grasp that I was assigned 50 of another analyst [sic] cases upon arrival,” [Id. at paragraph 4]; “incredulously deduced that I was randomly assigned cases,” [Id. at pg. 3, paragraph 2]; “ignored the testimony of the agencies [sic] witness,” [Id. at pg. 3, paragraph 3]; “ignored or misapplied this same witness testimony,” [Id. at pg. 3, paragraph 4]; “picked statements from her when it suited the agency, but he ignored statements which definitively proved my points,” [Id. at pg. 3, paragraph 6]; “failed to grasp,” and “failed to comment on,” [Id. at pg. 4, paragraph 3].

⁷ See *Rules for Conducting Grievance Hearings*, § IV(C).

⁸ See *Rules for Conducting Grievance Hearings*, § IV(A).

Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process⁹ and avoid the appearance of bias.¹⁰ The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has “a direct, personal, substantial [or] pecuniary interest” in the outcome of a case.¹¹ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹²

In this case, the grievant has not identified or submitted any evidence to support her claim of unfairness or bias, nor has she claimed that the hearing officer had a “direct, personal, substantial or pecuniary interest” in the outcome of this grievance. Accordingly, we find no actionable bias on the part of the hearing officer.

Perjury:

The grievant asserts several witnesses committed perjury at the hearing. This Department consistently held that a request for a rehearing or reopening cannot be granted except in extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process. Virginia Court opinions are instructive as to the issues of perjury and the hearing process. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.¹³ Those courts reasoned that the original trial (or hearing) was the party’s opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. Under the rationale of those courts, the grievant’s claims of changed evidence or perjury, coming after the hearing decision has been issued, would not warrant reopening. Indeed, the grievant had the opportunity at her hearing to question agency witnesses about the alleged inconsistencies in their testimony, and to attempt to ferret out any perjury at that time. We conclude that there is no clear evidence of extreme circumstances or fraud such as to warrant a rehearing.

APPEAL RIGHTS AND OTHER INFORMATION

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

⁹ See *Rules for Conducting Grievance Hearings*, § III(D).

¹⁰ See *Rules for Conducting Grievance Hearings*, § II.

¹¹ *Welsh v. Commonwealth of Va.*, 14 Va. App. 300, 315 (1992), (brackets in original).

¹² See, e.g., Ruling Nos. 2006-1186, 2004-758, and 2003-113.

¹³ See, e.g., *Peet v. Peet*, 16 Va. App. 323 (1993); *Jones v. Willard*, 224 Va. 602 (1983); *McClung v. Folks*, 126 Va. 259 (1919).

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

arose.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁷

Claudia T. Farr
Director

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

¹⁶ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

¹⁷ Va. Code § 2.2-1001 (5).