

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10877; Ruling  
Date: January 6, 2017; Ruling No. 2017-4453; Agency: Department of Corrections;  
Outcome: AHO's decision affirmed.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2017-4453  
January 6, 2017

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 10877. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10877, as found by the hearing officer, are as follows:<sup>1</sup>

01. Facility is a correctional center operated by Agency. As such, only authorized persons and property are permitted to enter or exit Facility. Search of employees, visitors and offenders are conducted to assist in the detection of contraband.

02. Grievant was issued a Group III and a Group II Written Notice for matters occurring on 4/27/16 at Facility. The Group III Written Notice was issued for *Safety Rule Violation* concerning an incident occurring at or around Front Search and the Group II Written Notice was issued for failure to follow instructions and/or policy concerning an incident occurring at or around Sallyport.

03. Grievant was employed by Agency as a Unit Manager at Facility on 4/27/16. No evidence was admitted that Grievant has had any other active Written Notices prior to the two Written Notices issued 6/23/16. As a Unit Manager, Grievant was in charge of several housing units within Facility. She managed the total operation of these units with responsibility for supervision of staff assigned to these housing units. As a Unit Manager, she is non-security staff, however, she can supervise security staff.

04. Facility has an Administrative Duty Officer (“ADO”) assigned throughout the year. Duty as ADO is assigned, on a rotational basis, from a list of qualified individuals, which included Grievant. While Grievant was assigned to be ADO during a number of periods throughout the year, she was not the assigned ADO on 4/27/16.

---

<sup>1</sup> Decision of Hearing Officer, Case No. 10877 (“Hearing Decision”), November 28, 2016, at 3-5 (citations omitted).

05. Generally, all employees and visiting non-employees entering Facility are required to be searched in accordance with OP 445.1 and OP445.2. Facility Unit Head (i.e. Warden) has authority to determine who may enter Facility and authority to exempt individuals from search.

06. Control is maintained of persons and property entering and exiting Facility. At Facility's Front Entry Search a Security Officer is posted to provide for control of persons and property entering and exiting Facility at this location. The door granting access to Facility at Front Search Entry is controlled electronically by a button. Upon entering the building into the Front Entry Search area, individuals are required to be positively identified, to be searched, and are required to leave an identification card with Front Search before proceeding on.

07. On 4/27/16 C/O B was assigned, at times relevant to this proceeding, to Front Entry Search. Her post included the front entry search area and other areas and operations contiguous thereto. As a part of her duties she was to determine the purpose of persons wanting to enter Facility, conduct a search of entering persons, and obtain an ID card from each person entering. The ID card was kept at Front Entry Search and returned upon the person exiting.

08. Grievant, as Unit Manager, was in the chain of command at Facility. Grievant was C/O B's superior in the chain of command on 4/27/16.

09. On 4/27/16, Deputy arrived at Facility seeking to obtain custody of Inmate and transport the inmate to a Court proceeding. Deputy appeared at the front door of Facility and was buzzed into the Front Search area. Deputy had not cleared the metal detector while C/O B was talking with him to determine what he needed. At this point he had not been searched or provided an ID. Grievant came and began talking to Deputy at this point.

10. Grievant had observed C/O B tell Deputy he could not come in and she asked him what his reason was for entering Facility. On his saying her was there to pick up an Offender, she went to the Records Department to check on matters. On returning, Grievant observed Deputy had a weapon and Grievant told Deputy he needed to take his weapon and cell phone back to his car. Grievant pushed the button controlling front door to let him out. As Deputy was returning, Grievant had returned Technician's ID card to her and was buzzing her out the front door. Technician held the door open for Deputy to re-enter as she was exiting. Grievant then escorted Deputy into Records Department without Deputy having been searched and without Deputy having provided an ID card.

11. While Deputy was in the Records Department he was asked for identification. However, Deputy said he left his identification in his vehicle. Deputy then left the Records Department, exited the building, secured his identification card, and then re-entered the building. Once more Grievant escorted him to Records Department without Deputy having been searched and without his having to provide an ID card at Front Entry Search.

12. After matters in the Records Department, Deputy left through the Front Entry Search area and went to the area of Facility Tower and its Sallyport to wait for the count to clear so Inmate could be processed into his custody. Reconciliation of the count had been delayed which prevented Inmate from being moved. While Deputy was waiting, Grievant saw him in the area of Tower and apologized for the delay in being able to process out Inmate.

13. Grievant exited the compound via the Tower Sallyport and obtained the key to the Tower Sallyport barrier from C/O in Tower. Grievant asked the other deputy to step outside the vehicle and remain outside the compound with all the weapons. She removed the cable barrier and Tower C/O opened the gate letting her, the deputy and the vehicle into the Sallyport.

14. Tower C/O was disciplined for lowering key to Grievant as Grievant was not a security officer and keys to security barrier are not to be in possession of non-security staff. C/O B. was given verbal counseling for her actions.

15. After the Deputy's vehicle entered the Sallyport, Sgt. was notified and arrived to verify the paperwork needed for taking custody of Inmate. Sgt. determined the Gate Pass Report that Deputy had was not signed. Sgt. obtained permission of Shift Commander to sign off on the Gate Pass Report and then did so. Additionally, the Release of Custody form for Inmate which Watch Commander was supposed to sign was only signed after Deputy and his vehicle had entered the Sallyport.

16. Grievant returned the cable keys to the Tower Officer having to exited the Sallyport to do so.

On or about June 23, 2016, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy and a Group III Written Notice for a safety rule violation.<sup>2</sup> The Group III Written Notice was accompanied by a demotion to a position in a lower pay band with a 15% disciplinary pay reduction, effective June 25, 2016.<sup>3</sup> The grievant timely grieved the disciplinary actions<sup>4</sup> and a hearing was held on October 18, 2016.<sup>5</sup> In a decision dated November 28, 2016, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant failed to follow policy and violated a safety rule and upheld the issuance of both Written Notices.<sup>6</sup> The grievant now appeals the hearing decision to EDR.

---

<sup>2</sup> Agency Exhibits A, B.

<sup>3</sup> Agency Exhibit B.

<sup>4</sup> The grievant filed three grievances in total: two disputing the issuance of the Written Notices, and a separate grievance challenging "issues related to verbal counseling and the Written Notices." Agency Exhibit C; *see* Hearing Decision at 1. Although the hearing officer discussed the verbal counseling in the hearing decision, he did so in relation to the Written Notices, noting that "the matters addressed to [the] Grievant" when she was counseled "were properly referred to and/or characterized in the Group III Written Notice." *See* Hearing Decision at 13-14. Accordingly, the grievant's claims regarding the substance of the verbal counseling will not be addressed in this ruling, except as it relates to the disciplinary actions at issue.

<sup>5</sup> *See* Hearing Decision at 1.

<sup>6</sup> *Id.* at 5-17.

## 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.”<sup>7</sup> 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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>8</sup>

### *Admission of Video Recording*

In her request for administrative review, the grievant appears to assert that the agency did not properly disclose a copy of a video recording of the events that occurred in the Front Search area on April 27, 2016, and that “[t]he lack of the ability to view this video directly limited [her] advocate’s ability to properly prepare for the hearing . . . .” EDR’s review of the hearing record indicates that the hearing officer did not issue an order directing the agency to provide the grievant with a copy of the video recording.<sup>9</sup> EDR has reviewed nothing to suggest that the agency failed to disclose a copy of the recording with its other proposed exhibits prior to the hearing, as directed by the hearing officer, although it does appear that technical difficulties limited the grievant’s ability to view the recording in advance of the hearing. Having reviewed the evidence in the record and the parties’ submissions, however, EDR finds that remanding the case is not warranted here.

By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.<sup>10</sup> Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding,<sup>11</sup> and the technical rules of evidence do not apply.<sup>12</sup> When a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer’s prehearing orders, the hearing officer may continue the hearing to allow the opposing party time to respond. In this case, however, EDR has reviewed nothing to show that the grievant requested a continuance or otherwise brought the alleged issues with the recording to the hearing officer’s attention, either before the hearing or when the agency’s advocate played the recording at the hearing. Moreover, EDR finds no material prejudice in the admission of the recording into the hearing record.

It is clear from the agency’s list of proposed exhibits that the grievant was provided with documentary evidence in advance of the hearing that put her on notice the agency planned to argue that her actions in the Front Search area violated a safety rule. Screenshots of the video recording were admitted into evidence separately from the recording itself,<sup>13</sup> and the Written

---

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> The grievant appears to allege that she requested a copy of the recording during the management resolution steps and that the recording was not given to her. If that was the case, the grievant should have raised that issue using the party noncompliance process described in Section 6.3 of the *Grievance Procedure Manual*.

<sup>10</sup> Va. Code § 2.2-3005(C)(5).

<sup>11</sup> *Rules for Conducting Grievance Hearings* § IV(D).

<sup>12</sup> *Id.*

<sup>13</sup> Agency Exhibit K at 17-32.

Notice explicitly charged the grievant with violating a safety rule that compromised the security of the facility.<sup>14</sup> Furthermore, EDR's review of the hearing record indicates that the grievant had the opportunity to present her arguments regarding her actions in the Front Search area on April 27, 2016, call witnesses and question them about their knowledge of those issues, and cross-examine any witnesses called by the agency about those topics. At the hearing, for example, the agency played a copy of the recording for the hearing officer in the presence of the grievant and her advocate, while a witness testified about the events depicted in the recording.<sup>15</sup> The grievant's advocate cross-examined the witness about the content of the video<sup>16</sup> and presented evidence in support of the grievant's position that her actions in the Front Search area were not improper. Finally, it appears that hearing officer did not consider the video recording in reaching the decision because he did not cite to the recording in the hearing decision; he appears instead to have relied on the screenshots of the recording that were admitted into the hearing record without comment or objection from the grievant.<sup>17</sup>

Although EDR in no way condones the agency's failure to disclose the video recording of the Front Search area in a viewable format, if that indeed occurred, nothing in the hearing record suggests that the grievant's ability to prepare and present her case was unfairly prejudiced. Therefore, under the particular circumstances of this case, EDR cannot find that the hearing officer erred by either admitting the recording into evidence or by not continuing the hearing to allow the grievant additional time to respond such that remand is warranted here. Accordingly, EDR declines to disturb the decision on this basis.

#### *Hearing Officer's Findings of Fact*

The grievant further asserts in her request for administrative review that "[t]here are many evidential statements made as part of the findings by [the hearing officer] that are not aligned with the evidence presented." Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>18</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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

---

<sup>14</sup> Agency Exhibit B.

<sup>15</sup> See Hearing Recording at Track 1, 16:41-25:02 (testimony of Witness D1).

<sup>16</sup> *Id.* at Track 1, 38:13-49:22 (testimony of Witness D1).

<sup>17</sup> See Hearing Decision at 8-11; Agency Exhibit K at 17-32. The grievant also used the screenshots of the recording from Agency Exhibit K to support the arguments in her request for administrative review, which suggests that the errors she alleges in the decision may be discerned without reference to the recording itself.

<sup>18</sup> Va. Code § 2.2-3005.1(C).

<sup>19</sup> *Grievance Procedure Manual* § 5.9.

<sup>20</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>21</sup> *Grievance Procedure Manual* § 5.8.

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.

With respect to the Group III Written Notice, the hearing officer assessed the evidence and concluded that, while the “Grievant was not assigned duty at [the] Front Search Entrance,” she “made the decision step [sic] in and take certain actions,” “knew or should have known that Deputy was required to be searched and leave an ID before entering,” and “twice allowed Deputy past the Front Entry Search and into the Administration Building without being searched and without surrendering his ID as was required by policy and procedure.”<sup>22</sup> In relation to the Group II Written Notice, the hearing officer determined that the grievant “allowed Deputy to pull his patrol car into the Sallyport . . . without the Deputy’s vehicle being searched as was require [sic] by policy.”<sup>23</sup> In her request for administrative review, the grievant generally disputes the hearing officer’s conclusions and assessment of the evidence. In support of these claims, the grievant has included an extensive, line-by-line refutation of the hearing officer’s factual findings and conclusions.

Hearing officers must make “findings of fact as to the *material issues* in the case”<sup>24</sup> and determine the grievance based “*on the material issues* and grounds in the record for those findings.”<sup>25</sup> EDR has thoroughly reviewed the hearing record and the grievant’s request for administrative review and concludes that most of the alleged errors in the hearing officer’s assessment of the evidence were either not material or are simply factual findings on which the grievant disagrees with the hearing officer’s conclusions or impact of the findings. As a result, EDR cannot find that remanding the case to the hearing officer for reconsideration on the specific factual issues alleged by the grievant would have an effect on the ultimate outcome of this case. Furthermore, the hearing officer clearly assessed the evidence presented by the parties and found that the agency had met its burden of showing that the grievant had engaged in the conduct described in the Written Notice, that her behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. EDR’s review of the hearing record indicates that there is evidence to support those findings.<sup>26</sup>

With respect to the grievant’s contention that she did not have notice her actions in the Sallyport constituted misconduct and/or that other employees were not disciplined for engaging in comparable behavior, the hearing officer considered evidence that the grievant was similarly situated to other employees who may have “re-entered the compound without being searched based upon being under constant view.”<sup>27</sup> However, the hearing officer did not find the grievant’s argument persuasive.<sup>28</sup> EDR’s review of the hearing record indicates that there is evidence to support the hearing officer’s determination that the grievant did not establish that she was either unaware of the rule or disciplined more harshly than other employees who had

---

<sup>22</sup> Hearing Decision at 9-10.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> Va. Code § 2.2-3005.1(C) (emphasis added).

<sup>25</sup> *Grievance Procedure Manual* § 5.9 (emphasis added).

<sup>26</sup> *See, e.g.*, Hearing Recording at Track 1, 14:33-15:13, 25:30-26:08, 27:41-30:09, 30:58-33:24, 1:01:28-1:02:03 (testimony of Witness D1), 1:19:09-1:22:31, 1:28:09-1:28:31 (testimony of C/O B), 2:15:31-2:17:19 (testimony of Witness W), 3:44:06-3:45:03, 3:50:31-3:51:17, 4:01:45-4:02:38 (testimony of Witness B4), 5:06:11-5:08:44, 5:10:41-5:11:04, 5:18:26-5:19:23 (testimony of Witness D3); Agency Exhibits E, F, G, H, J, K.

<sup>27</sup> Hearing Decision at 13.

<sup>28</sup> *Id.*

engaged in similar behavior. Many witnesses testified about their understanding of the areas that were considered part of the secured perimeter of the facility and search practices at the facility at the time the incident occurred.<sup>29</sup> Much of evidence about this issue appears to have been unclear and/or inconsistent in establishing the specific circumstances under which employees had allegedly exited and re-entered the security perimeter of the facility without being searched, and whether those circumstances were similar to the conduct for which the grievant was disciplined.<sup>30</sup> There is, however, evidence in the record to support the hearing officer's conclusion that the "Grievant failed to follow instruction and policy as alleged"<sup>31</sup> because she should have been, and was not, searched when she entered the Sallyport.<sup>32</sup>

In summary, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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. Other individuals, had they been in the hearing officer's position, may not have reached the same conclusion as the hearing officer in this case. Indeed, there are many aspects of this case that are questionable, and a number of facts in the sequence of events that could be interpreted in different ways.<sup>33</sup> The question to be answered, however, is not whether another person would have made the same decision as the hearing officer in any particular case, but whether that decision is based on the evidence in the record. As discussed above, there is nothing in the hearing recording or the hearing decision to indicate that the hearing officer abused his discretion in assessing the relative persuasive weight of the evidence presented by the parties. Because the hearing officer's findings in this case 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.<sup>34</sup>

---

<sup>29</sup> *E.g.*, Hearing Recording at Track 1, 5:44:03-5:44:15 (testimony of Witness R2), 5:56:10-5:57:36 (testimony of Witness S), Track 2, 00:13-38, 2:46-4:01 (testimony of Witness J), 22:27-23:05 (testimony of Witness A), 34:26-34:45, 37:09-39:41, 42:43-44:20 (testimony of Witness M), 56:15-56:44 (testimony of Witness W2), Track 3, 5:19-6:12, 19:04-21:55 (testimony of Witness T); Agency Exhibit K at 13-16.

<sup>30</sup> *See id.*

<sup>31</sup> Hearing Decision at 13.

<sup>32</sup> *See supra* note 26.

<sup>33</sup> As an example, the hearing decision states that the grievant and the Deputy are shown "walking together from/through search area" at 11:23:56 a.m., while it appears from a screenshot of the video recording that C/O B was accompanying the Deputy at that time. Hearing Decision at 10; Agency Exhibit K at 30. This finding is what apparently led the hearing officer to conclude that the grievant allowed the Deputy to enter the facility "twice" without being searched. Hearing Decision at 10. In this second instance, the grievant appears to correctly point out that it was C/O B who allowed the Deputy access to the Administration Building without being searched and initially led him through the hall. However, the screenshot of video recording also shows that the grievant is standing in the foreground waiting for the Deputy to re-enter the building, and so the facts are open to reasonable interpretation as it cannot be said that the grievant was not involved at all at that time. Agency Exhibit K at 30. Further, even if the hearing officer made findings consistent with the grievant's arguments as to this one piece of the sequence of events, it does not eliminate the evidence regarding other instances of misconduct that were cited in the Written Notice.

<sup>34</sup> To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.



CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>35</sup> 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.<sup>36</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>37</sup>



---

Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>35</sup>*Grievance Procedure Manual* § 7.2(d).

<sup>36</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>37</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).