

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10003; Ruling
Date: February 20, 2013; Ruling No. 2013-3534; Agency: Department of
Corrections; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2013-3534
February 20, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10003. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10003 are as follows:¹

The Agency employed Grievant as a security sergeant, with approximately 17 years of service with the Agency. The Grievant admitted that he cursed an inmate that escalated to a physical altercation...

As for the Group III Written Notice, it states:

On 10/20/12 you engaged in acts of unprofessional conduct with Offender [R]. Per your admission, while opening the back door of the dormitory for recreation you and Offender [R] had a verbal confrontation involving vulgar language which led to a physical fight. Evidence shows you provoked the verbal confrontation. This action led to minor injuries and could have led to a major concern for the other staff responding to the 1033 and/or caused a serious breach of security.

The Grievant asserts that the inmate was the instigator of the altercation and that he (the Grievant) was merely defending himself.

A security captain testified that officers are not allowed to curse—such conduct is unacceptable. He also testified that the Grievant was an excellent supervisor.

¹ Decision of Hearing Officer, Case No. 10003 ("Hearing Decision"), January 28, 2013, at 3-4.

The chief of security testified that the Grievant admitted that he cursed the inmate prior to the altercation, and that security staff should always try to back away from any confrontation and call for assistance if needed. The chief of security testified that the policy is to avoid any physical confrontation as it presents a risk to staff, offenders, and potential liability for the Agency and the Commonwealth. The chief of security testified that the Grievant's EWP requires him to ensure a safe and secure confinement. The chief of security also testified that supervisory personnel, like the Grievant, receive enhanced training on conflict resolution. Investigation of this altercation was ultimately turned over to the Agency's outside investigator who concluded that the Grievant's charged offense was founded.

Testifying for the Grievant were two facility counselors and two corrections officers who were unanimous in their opinions that the Grievant was a good supervisor and asset to the institution. The Grievant's good work tenure is apparently conceded by the Agency through its own evidence and disciplinary mitigation.

The Grievant described himself as outspoken by nature, and he testified he does not condone cursing. However, the Grievant admitted, following a verbal exchange with the inmate, that he cursed the inmate by stating, "[F—k] that, I am not going to keep open doors [for] you." This statement was in the Grievant's handwritten account. The physical altercation started with the inmate striking the Grievant, at which point the two started wrestling around. There were minor injuries to both the Grievant and the inmate. The Grievant takes issue with aspects of the investigation, the extent of interviews, information obtained from inmates, and the lack of contact from the outside investigator. However, based on the unrefuted account from the Grievant, the Agency has met its burden of proving that the Grievant inappropriately cursed the inmate and the exchange led directly to an altercation, regardless of who struck first. Other facts that the Grievant disputes are irrelevant to the core basis for the discipline.

On October 26, 2012, Grievant was issued a Group III Written Notice of disciplinary action, with demotion, for unprofessional conduct. In the January 28, 2013 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written notice.² The grievant now seeks administrative review from EDR.

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

² Hearing Decision at 5.

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

The grievant’s request for administrative review essentially challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁵ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁶ 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.⁷ 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.⁸ 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.

In this instance, the grievant contests the evidence presented by the agency that his actions escalated the conflict with the offender in question. The grievant states that those witnesses testifying on the agency’s behalf did not actually see the events leading up to the conflict, and thus he essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted. Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer’s findings of unprofessional conduct, such as the grievant’s handwritten statement⁹ and the grievant’s own testimony that he did in fact say “F—k [you/that]” even though he denies directing this statement towards the offender who engaged in the subsequent physical confrontation.¹⁰

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. In his hearing decision, the hearing officer found that the grievant’s own testimony regarding the incident provided enough evidence to support the agency’s issuance of a Group III offense for unprofessional conduct.¹¹ The grievant

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

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

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

⁹ Agency Exhibit 2.

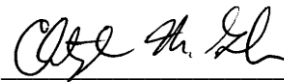
¹⁰ See Hearing Record at 01:48:13 through 01:48:20 (testimony of grievant).

¹¹ Hearing Decision at 4.

sets forth several challenges to facts that led to the physical confrontation; however, the hearing officer found that the agency “has met its burden of proving that the Grievant inappropriately cursed the inmate and the exchange led directly to an altercation, regardless of who struck first. Other facts that the Grievant disputes are irrelevant to the core basis for the discipline.”¹² Because 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. Accordingly, we decline to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

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.¹³ 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.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵



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¹² *Id.*

¹³ *Grievance Procedure Manual* § 7.2(d).

¹⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁵ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).