

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10071; Ruling
Date: June 18, 2013; Ruling No. 2013-3635; 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 2013-3635
June 18, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10071. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10071 are as follows:¹

The Department of Corrections employed Grievant as a Unit Manager at one of its Facilities. The purpose of her position was, “[s]erves as OIC over one or more housing Units, with the decision-making authority for all within-Unit aspects of prison operations.” No evidence of prior active disciplinary action was introduced during the hearing.

On January 19, 2013 at approximately 11 p.m., Grievant was in her office. The Inmate came into her office and they talked with the door closed. Officer S became concerned regarding the length of time the Inmate was in Grievant’s office with the door closed. He depressed the button to the intercom located in Grievant’s office so he could hear their conversation. Officer S heard the Inmate say to Grievant, “Show me your ti—ies.” Grievant and the Inmate began whispering. Grievant’s office had a narrow vertical window. Several officers were in or near the Control Room and could see the Inmate’s side but not his full body or any part of Grievant. The Inmate had his pants partially down and he was thrusting his hips back and forth. On several occasions, the Inmate “peeked” out of Grievant’s door to see if anyone else was nearby. After approximately 20 minutes, Grievant and the Inmate walked out of Grievant’s office. They were “joking and laughing.”

When the Inmate returned to his cell, Officer M activated the intercom to listen to the Inmate’s conversation with his cell mate. The Inmate told his cell mate that he “hit that”, “got her naked”, and “it was good.” Officer M interpreted

¹ Decision of Hearing Officer, Case No. 10071 (“Hearing Decision”), May 22, 2013, at 2-3 (some references to exhibits from the Hearing Decision have been omitted here).

the Inmate's comments to mean that the Inmate claimed he had sexual relations with Grievant.

From January 19, 2013 through January 23, 2013, Grievant met with the Inmate eleven times. This number was much greater than the number of time she met with other inmates.

On January 25, 2013, the Warden met with Grievant to inform her that she was being placed on paid pre-disciplinary leave. The Investigator and two other employees were also in the meeting with the Warden and Grievant. The Warden questioned Grievant regarding why she was in her office for a lengthy period of time with the door shut.

On February 15, 2013, Grievant sent the Assistant Warden a text message stating that the Inmate forced himself on her and that she did not say anything because she was too embarrassed and humiliated. The Assistant Warden sent Grievant a text asking if the Inmate physically assaulted her. Grievant replied "yes."

The agency issued the grievant two Group III Written Notices and terminated her from employment.² The hearing officer upheld the Group III Written Notice with removal for fraternization, but rescinded the Group III Written Notice for failure to report.³ 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 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

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 and the facts he chose to include in the decision. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁶ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁷ 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.⁸ Thus, in disciplinary actions the hearing officer

² *Id.* at 1.

³ *Id.* at 5.

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

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

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

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.⁹ 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 on a review of the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant "had an inappropriate relationship with the Inmate sufficient to establish fraternization," and that this relationship was consensual.¹⁰ In particular, witnesses testified that on January 19, 2013, the inmate had been in the grievant's office with the door closed; that the inmate's pants were partially down and he made thrusting movements; that the inmate made sexual comments to the grievant and reported sexual conduct to his cellmate; that afterwards the grievant and inmate walked out of the grievant's office joking and laughing; and that the grievant thereafter interacted frequently with the inmate in her office.¹¹ This testimony was sufficient for the hearing officer to find that the grievant engaged in inappropriate, consensual conduct with the inmate. 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.

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.¹² 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.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴



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⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ Hearing Decision at 4.

¹¹ *Id.* at 2-3.

¹² *Grievance Procedure Manual* § 7.2(d).

¹³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).