

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10712; Ruling
Date: January 29, 2016; Ruling No. 2016-4924; Agency: Department of
Corrections; 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 Corrections
Ruling Number 2016-4294
January 29, 2016

The Department of Corrections (“agency”) 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 10712. For the reasons set forth below, EDR remands the hearing decision to the hearing officer for further action consistent with this ruling.

FACTS

The grievant is employed by the agency as a Corrections Officer Senior.¹ On July 22, 2015, the grievant was issued a Group I Written Notice for unsatisfactory performance.² The grievant grieved the disciplinary action,³ and a hearing was held on January 6, 2016.⁴ On January 12, 2016, the hearing officer issued a decision rescinding the Group I Written Notice.⁵ The agency has now requested administrative review of the hearing officer’s decision.

The relevant facts in Case Number 10712, as found by the hearing officer, are as follows:⁶

The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. She has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

On June 10, 2015, Grievant was working as the master control officer beginning at 5:50 p.m. She was responsible for filling out a Daily Issue Log for Security Equipment/Weapons. The purpose of the Daily Issue Log was to record when employees removed and returned weapons from the armory. She also was responsible for filling out a Master Control log to record events occurring throughout the day relating to her post.

¹ Agency Exhibit 2 at 1.

² Agency Exhibit 1; see Decision of Hearing Officer, Case No. 10712 (“Hearing Decision”), January 12, 2016, at 1.

³ Agency Exhibit 2.

⁴ See Hearing Decision at 1.

⁵ Hearing Decision at 1, 4.

⁶ Hearing Decision at 2-3 (citations omitted).

On June 10, 2015 at 5:50 a.m., Officer W went to the master control post where Officer H was working. Officer W obtained an AR-15 from Officer H and took the weapon to Tower 3. Officer H completed the Daily Issue Log to show removal of the AR-15. At approximately, 12:35 p.m., Officer B assumed Officer W's post duties in Tower 3 thereby becoming responsible for the AR-15. Near the end of his shift, Officer B left Tower 3 and took the AR-15 to master control to return the weapon to the armory. Officer H was ending his shift in master control as Grievant assumed her post in master control. Either Grievant or Officer H received the weapon from Officer B. Neither Grievant, nor Officer H filled out the Daily Issue Log to show that the AR-15 had been returned. Grievant recorded on the Master Control log that "[Officer B] returns weapons and equipment from tower 3. Tower 3 closed."

On June 15, 2015, the Agency discovered that an AR-15 had a bullet in the chamber even though it has been turned into the master control officer. The Agency wanted to determine when the weapon was returned and which master control officer received the weapon. The Agency reviewed the Daily Log Sheets completed by master control officers and discovered that the Daily Log Sheet on June 10, 2015 had not been completed. Sometime after June 15, 2015, Officer H entered information into the Daily Log Sheet indicating that he had received the AR-15 on June 15, 2015.

In concluding that the agency had not met its burden of showing that the grievant had engaged in conduct warranting a Group I Written Notice for unsatisfactory performance, the hearing officer made the following conclusions of policy, quoted below in relevant part:

The Written Notice states, "In a meeting I held with you on this subject on July 8, 2015, you admitted that you did not check the serial number of subject weapon which you issued and received, and that your log book entries were incorrect." Grievant did not issue the AR-15 on June 10, 2015. Grievant wrote in the Master Control Log that Officer B returned equipment but did not claim that she received the equipment. Grievant's admission that she received the AR-15 was based on her review of documents and not a recollection of the events occurring almost a month earlier. She later recanted the admission and now asserts she did not complete the Daily Issue Log because she did not receive the weapon and that Officer H was the one who actually received the weapon before he left the Facility. Grievant's assertion is consistent with Officer H's behavior of later signing the Daily issue Log to indicate he received the weapon.

The agency now asserts that the hearing officer's findings, in particular with respect to whether the grievant received the weapon, are erroneous.

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”⁷ 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.⁸

The agency’s request for administrative review challenges the hearing officer’s finding that the grievant did not receive the weapon at issue.⁹ Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹¹ 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.¹² 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.¹³ 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 case, the hearing officer appears to have concluded that the grievant did not improperly fail to record appropriate information about the weapon on its return to Master Control, as asserted by the agency, because the grievant did not receive the weapon.¹⁴ The hearing officer found that another officer (“Officer H”), rather than the grievant, in fact received the weapon on its return.¹⁵

The agency asserts that this factual finding is in error. The agency notes that Officer H testified at hearing that the grievant, not he, received the weapon,¹⁶ and that the hearing officer failed to address Officer H’s testimony in the hearing decision. The agency also points to the grievant’s own apparent admission that she failed to inspect the weapon in question.¹⁷ Lastly, the agency argues that because the grievant did not testify at hearing, any statements she made relating to her actions could not properly be considered evidence at hearing.

While other evidence could be viewed as supporting the hearing officer’s findings of fact, given the character of the evidence cited by the agency, including in-person testimony under

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ See Hearing Decision at 3. Although EDR agrees with the hearing officer that the Written Notice could have been more clearly drafted, it appears the agency intended to charge the grievant with failing to check the serial number of a weapon on its return to Master Control and record the appropriate information. See Agency Exhibit 1; Hearing Recording at 1:03:36-1:04:51 (testimony of Warden).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ Hearing Decision at 3.

¹⁵ *Id.*

¹⁶ Hearing Recording at 2:18:42-2:18:53 (testimony of Officer X).

¹⁷ See Hearing Decision at 3; Agency Exhibit 1 at 2. The hearing officer notes that although the grievant admitted she received the weapon, she later recanted the admission. Hearing Decision at 3.

oath, further clarification by the hearing officer of his factual findings is needed. Although decisions regarding conflicting evidence and credibility are in the sole authority of the hearing officer, in a case where the hearing officer's findings appear to disregard or reject significant evidence, explanation of the hearing officer's reasoning may be necessary. Additional explanation by the hearing officer of his apparent rejection of the evidence cited by the agency—in particular, Officer H's testimony—is warranted here. In so doing, the hearing officer must also address his reliance on non-testimonial assertions by the grievant to establish facts and recant earlier contradictory admissions relied upon by the agency. For example, if the hearing officer has found that Officer H's testimony wholly or on particular pertinent points lacks credibility, a discussion of the relative weight afforded the conflicting evidence is necessary when the opposing evidence includes non-testimonial statements for which credibility cannot be readily assessed like in-person testimony. Accordingly, the hearing decision is remanded to the hearing officer for further clarification of his findings regarding the grievant's conduct with respect to the weapon in question.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, we remand the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).¹⁸ Any such requests must be **received by** the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.¹⁹

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



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¹⁸ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹⁹ See *Grievance Procedure Manual* § 7.2(a).

²⁰ *Id.* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).