

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10128; Ruling  
Date: September 17, 2013; Ruling No. 2014-3694; Agency: Department of  
Corrections; Outcome: No Relief – Agency Upheld.



**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 2014-3694  
September 17, 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 10128. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10128 are as follows:<sup>1</sup>

The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On December 13, 2012, Grievant was tired from standing for several hours and wanted to switch posts with Officer M. Officer M was working at the front entry search area of the Building but was scheduled to begin working on the roving patrol post. Grievant entered the building from the outside and approached Officer M. Grievant asked Officer M if she would do Grievant a favor by switching posts with Grievant. Grievant explained that her back was hurting and she really wanted Officer M to do a favor for Grievant by switching posts. Officer M said she thought they should adhere to the normal schedule rotation. Grievant became frustrated, said “whatever!” and walked down a hallway. Officer M continued to work the front entry search post. Grievant returned to Officer M’s location and said “F—k it!” Grievant was angry and her voice was raised when she spoke to Officer M. Officer M said, “You don’t have to curse me just because I can’t do you a favor.” Grievant said, “I’m not cursing you, just cursing.” Officer M said, “I understand you’re exhausted, we both are.” Grievant

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<sup>1</sup> Decision of Hearing Officer, Case No. 10128 (“Hearing Decision”), August 2, 2013, at 2-3. Some references to exhibits from the Hearing Decision have been omitted here.

said, “Just go, just go, just go.” Grievant assumed the front entry search post and Officer M went to the roving patrol post.

On January 16, 2013, the agency issued the grievant a Group I Written Notice of disciplinary action for using obscene language towards another corrections officer and disruptive behavior.<sup>2</sup> The grievant timely initiated a grievance challenging the disciplinary action, and a hearing was held on July 17, 2013.<sup>3</sup> On August 2, 2013, the hearing officer issued a decision upholding the disciplinary action.<sup>4</sup> The grievant has now requested an administrative review.

### 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>5</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 a party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup>

#### *Failure to Comply with the Grievance Procedure*

The grievant asserts that the first step-respondent failed to comply with the grievance procedure when he allegedly failed to “conduct any investigation, fact finding, nor did he formally interview any of the witnesses.” Claims challenging a party’s noncompliance with the grievance procedure must be raised through the noncompliance process set forth in Section 6.3 of the *Grievance Procedure Manual*. Failure to raise a noncompliance claim prior to proceeding to the next step of the grievance procedure generally results in waiver of that claim.<sup>7</sup> As the grievant did not raise her claims of noncompliance prior to advancing to the next step, these claims have been effectively waived.<sup>8</sup>

#### *Failure to Produce Camera Footage*

The grievant also asserts the agency failed to produce existing camera footage of the incident for which she was disciplined, and she asks that the footage now be produced and reviewed as part of this administrative review. With respect to the agency’s alleged failure to produce the footage prior to the hearing, we note that the grievant’s counsel did not raise this issue at hearing, and as such, the grievant may not now raise this objection on administrative review. We also note that although the grievant suggests that she first made the request to the

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<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 5.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4.

<sup>7</sup> See EDR Ruling No. 2004-593.

<sup>8</sup> We note that the duty imposed at the first step does not mandate an extensive investigation, a fact-finding meeting or a formal interview process. See *Grievance Procedure Manual* § 3.1.

agency during the grievance management resolution steps, she did not seek a compliance ruling through the process set forth in Section 6.3 of the *Grievance Procedure Manual* and thus has waived any claim of noncompliance during the steps.<sup>9</sup> Accordingly, we find no basis to remand the hearing decision on this basis.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.<sup>10</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>11</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>12</sup>



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<sup>9</sup> The agency denies that it ever received a request for the footage from the grievant. We note, however, that any existing footage was arguably within the scope of the Order for the production of documents issued by the Hearing Officer on July 2, 2013.

<sup>10</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>11</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>12</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).