

Issue: Compliance/Administrative Review of Hearing Decision #5740; Ruling date: July 9, 2003; Ruling #2003-122; Agency: Department of Corrections; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2003-122
July 9, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5740. The grievant claims the hearing officer exceeded the scope of his authority and abused his discretion and that the hearing should be reopened because (1) the qualified issue of retaliation was not addressed at hearing; and (2) the hearing officer failed to mitigate the disciplinary action. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure and that the hearing should not be reopened.

FACTS

The grievant is employed as a Corrections Officer with the Department of Corrections (DOC or the agency). On February 28, 2003, the grievant was issued a Group II Written Notice for failure to follow established policy.¹ On March 21, 2003, the grievant initiated a grievance challenging the Group II Written Notice. Specifically, the March 21st grievance alleges unfair application of policy, procedures, rules and regulations, and retaliation. The grievance proceeded to hearing on June 9, 2003. In a June 10, 2003 decision, the hearing officer upheld the Group II Written Notice.²

DISCUSSION

By statute, this Department 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."³ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

¹ The grievant called in sick to work on February 1, 2003 and upon her return to work, allegedly failed to provide proper documentation of her reason for failing to come to work on that day.

² See Decision of Hearing Officer, Case Number 5740 issued June 10, 2003, pages 3-4.

³ Va. Code § 2.2-1001(2), (3), and (5).

⁴ See *Grievance Procedure Manual* § 6.4(3), page 18.

Failure to Address Issue of Retaliation

The grievant claims that the issue of retaliation was not addressed or presented at her June 9th hearing because (1) her representative was unaware that he had to request orders for the appearance of witnesses relevant to her retaliation claim; and (2) she was advised that the issue of retaliation would be considered hearsay without proper witnesses.

Under the *Rules for Conducting Grievance Hearings* and the *Grievance Procedure Manual*, a hearing officer has the authority to issue orders for the appearance of witnesses at hearing if a party so requests.⁵ This Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure. A grievant's and/or her representative's lack of knowledge about the grievance procedure and its requirements does not warrant the reopening of a hearing. Additionally, it should be noted that a May 23, 2003 letter from the hearing officer advised both the grievant and her representative that the hearing officer could send orders compelling the attendance of witnesses at hearing upon request from either party.⁶

Further, hearing officers have the authority to hear and resolve issues that have been qualified for hearing.⁷ Additionally, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁸ Accordingly, the technical rules of evidence do not apply.⁹ While this Department cannot determine the reliability the hearing officer would have afforded evidence submitted relative to the grievant's retaliation claim without appropriate witness testimony, nothing in the grievance procedure specifically prohibited the grievant from presenting such evidence at hearing. As such, this Department concludes that the grievant's failure to present evidence relative to her retaliation claim due to possible misinformation regarding the admittance of such evidence does not warrant a reopening of the hearing.

Finally, it should be noted that the hearing officer has addressed the grievant's retaliation claim. While not specifically mentioned in the June 10, 2003 hearing decision, the hearing officer's June 23, 2003 reconsideration decision acknowledges the grievant's retaliation claim and failure to present evidence at hearing relating to her claim and

⁵ *Rules for Conducting Grievance Hearings*, page 4 and *Grievance Procedure Manual* § 5.7, page 14.

⁶ The May 23, 2003 letter from the hearing officer was addressed to the grievant's representative, and the grievant was copied on the document. In this letter, the hearing officer states, "If you would like for me to send out orders compelling the attendance of witnesses, please exchange your list of witnesses immediately (in other words, do not wait until June 3rd) and write on that list that you ask the hearing officer to compel the attendance of your witnesses." Attached to this letter was a Prehearing Order that stated, "The parties are responsible for having their respective witnesses appear at the hearing. **If a party wishes to have the Hearing Officer send orders to witnesses compelling their attendance at the hearing, the party should make this request in writing as soon as possible.**" (emphasis in original).

⁷ See *Rules for Conducting Grievance Hearings*, page 9 and *Grievance Procedure Manual* § 5.7, page 14.

⁸ *Rules for Conducting Grievance Hearings*, page 7.

⁹ *Id.*

concludes that the agency did not retaliate against the grievant.¹⁰ Therefore, the hearing officer has appropriately addressed the issue of retaliation based on the evidence in the record before him.¹¹

Failure to Consider Mitigating Circumstances

The grievant claims that the hearing officer erred by not finding mitigating circumstances which would have resulted in her Group II Written Notice being reduced. In support of this contention, the grievant claims that evidence submitted at the hearing revealed that she had previously been sick with the same illness that caused her to miss work resulting in the Group II Written Notice, she saw a specialist for her illness days later, and she has an exemplary work history.

Under the grievance procedure, “the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct.”¹² Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee’s length of service.¹³ The grievance procedure, however, does not require hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation. In any event, it appears from the hearing officer’s June 10, 2003 decision that mitigating circumstances were considered. For example, the hearing officer wrote that “[a]lthough Grievant has many years of successful service to the Commonwealth, that evidence is insufficient to mitigate the disciplinary action against Grievant.”¹⁴

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department concludes that the hearing officer neither abused his discretion nor exceeded his authority under the grievance procedure in conducting or deciding this case.

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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the

¹⁰ See Reconsideration Decision of Hearing Officer, Case Number 5740 issued June 23, 2003, page 1.

¹¹ Hearing officers are authorized to make “findings of fact as to the material issues in the case” and to determine the grievance based “on the material issues and grounds in the record for those findings.” See Va. Code § 2.2-3005(D)(ii) and *Grievance Procedure Manual* § 5.9, page 15, respectively.

¹² *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

¹³ *Id.*

¹⁴ Decision of Hearing Officer, Case Number 5740 issued June 10, 2003, page 3-4.

¹⁵ *Grievance Procedure Manual*, § 7.2(d), page 20.

¹⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

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final hearing decision is contradictory to law.¹⁷ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁸

Claudia T. Farr
Director

¹⁷ *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

¹⁸ Va. Code § 2.2-1001 (5).