

Issue: Compliance/Recruitment/Selection; Ruling date: March 13, 2002; Ruling #2001-193; 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 the Department of Corrections/ No. 2001-193
March 13, 2002

The grievant has challenged the hearing officers' decision in the above captioned grievance. The grievant claims that the hearing officer's conduct of the hearing and hearing decision do not comply with the grievance procedure.

FACTS

The agency employed the grievant as a Corrections Officer. On June 29, 2001, the grievant was issued a Group III Written Notice and terminated for "sleeping during working hours." On July 16, 2001, the grievant initiated a grievance challenging the Written Notice and termination, which advanced to a hearing held on September 18, 2001. On October 5, 2001, the hearing officer issued a decision upholding the Group III Written Notice and termination.

On October 14, 2001, this Department received the grievant's request that we administratively review the hearing officer's October 5 decision he concurrently requested reconsideration from the Department of Human Resource Management (DHRM) and the hearing officer. On December 10, 2001, DHRM responded that the grievant's request did not present a challenge that the hearing decision was inconsistent with state or agency policy; thus, they declined to conduct a review. The hearing officer granted the reconsideration request and issued a reconsideration decision on October 25, 2001, concluding that there was no basis to amend or reverse his original decision. We now respond to the grievant's request for administrative review.¹

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 in all matters related to procedural compliance with the grievance procedure."² 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.³

¹ See *Grievance Procedure Manual* § 7.2(c)(providing that a hearing officer's decision on reconsideration should be issued before the DHRM or EDR Directors issue their decisions).

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

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

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁵ Further, “[i]n 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. If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline.”⁶ Mitigating factors include, but are not limited to, “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity” and “an employee’s long service or otherwise satisfactory work performance.”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

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁹ Accordingly, the technical rules of evidence do not apply.¹⁰ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹¹ 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Procedural Error

The grievant alleges that several of his witnesses did not testify because the hearing officer and agency were late in processing the orders for the witnesses to appear. The hearing officer has stated that it was the grievant who was late in providing his witness list, and that he and the agency made every effort to notify the witnesses once they were identified. Moreover, it is undisputed that the hearing officer offered the grievant a continuance to allow all of his witnesses a chance to appear in person; alternatively, he offered to have the witnesses testify that day by telephone. The grievant declined either of these accommodations and stated his preference to simply proceed with the hearing, which the hearing officer did. There is nothing in these facts that shows an

⁴ Va. Code § 2.2-3005(D)(ii).

⁵ *Grievance Procedure Manual* § 5.9, page 15.

⁶ *Rules for Conducting Grievance Hearings*, page 7; DHRM Policy No. 1.60(IX)(B)(effective 9/16/93).

⁷ DHRM Policy No. 1.60 VII(C)(1).

⁸ *Grievance Procedure Manual* § 5.8(2), page 14.

⁹ *Rules for Conducting Grievance Hearings*, page 4.

¹⁰ *Id.*

¹¹ Va. Code § 2.2-3005(C)(5).

abuse of discretion by the hearing officer or any noncompliance with the grievance procedure.

Other Errors

The grievant also challenges the hearing officer's conclusions in his decision regarding the grievant's behavior, and the agency's handling of his disciplinary action. These challenges, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations were entirely within the hearing officer's authority. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, the hearing officer was charged with deciding whether the Group III Written Notice and termination for "sleeping during working hours" was warranted. The hearing officer found credible the testimony of three agency witnesses (a Captain, Major, and control room officer) who stated that they had observed via the institution's security television cameras that the grievant was sleeping at his post for a period of approximately 30 minutes. In addition, the hearing officer was given a "guided tour" of the institution's camera system, with both parties and an agency Electronic Technician present, and he observed the camera's capabilities (e.g., to pan, tilt, zoom and focus, etc., by remote control). The hearing officer concluded that, under the circumstances presented, the camera would allow the witnesses to clearly see that the grievant was sleeping, as they testified.

The grievant claims that the hearing decision improperly failed to consider the following: (1) the agency's witnesses were of questionable repute; (2) their testimony was inconsistent as to relevant times and events; (3) an Electronic Technician's statement supported that the television camera could not have shown the grievant was sleeping because he was not facing the camera; and (4) medical evidence showed that the grievant was suffering anxiety and stress due to harassment by his supervisors prior to the disciplinary action.

The hearing officer found that the agency's witnesses were credible based on their demeanor, and that their statements regarding time were approximations and, thus, sufficiently consistent. Also, the hearing officer has explained that the Electronic Technician was not called as a witness at the hearing, and that prior to their review of the camera system, the parties were instructed that the Technician's statements during the camera review would only become part of the record at the parties' request. Neither party made that request, and the hearing officer based his conclusions about the camera's capabilities on his own observations made during the tour. Finally, the hearing officer found that the grievant did not present sufficient evidence to show a connection between

any alleged harassment or stress and anxiety, and his being asleep during working hours. Based on all of the forgoing, the hearing officer upheld the disciplinary action.

In this case, the hearing decision was clearly based on the record evidence and the material issues of the case; thus, this Department finds no error.

CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer in this grievance neither abused his discretion in his conduct of the hearing nor exceeded his authority in 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.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 In noting the right of appeal to the circuit court, this Department expresses no opinion as to whether the final hearing decision conforms to law. This Department's rulings on matters of *procedural compliance* are final and nonappealable.¹⁵

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

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

¹⁴ *Id.*

¹⁵ Va. Code § 2.2-3003 (G).