

Issue: Compliance-Hearing Decision; Ruling Date: August 5, 2002; Ruling #2002-030;
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. 2002-030
August 5, 2002

The agency has challenged the hearing officer's decision in the above captioned grievance. The agency claims that the hearing officer's decision does not comply with the grievance procedure.

FACTS

On August 23, 2001 an Assistant Warden at the grievant's facility was making rounds and drove up to the 54-foot security tower where (unknown to the Assistant Warden) the grievant was posted. The Assistant Warden called out to whomever might be in the tower. When he heard no response, the Assistant Warden walked back out from underneath the tower and tried to see if an Officer was on duty, but could not see anyone. The Assistant Warden assumed the tower was unmanned and left the area. Subsequently, the Assistant Warden learned that the grievant had been on duty in the tower at the time he was trying to hail whomever was posted there. Based on the Assistant Warden's inability to get the grievant's attention in this incident, the grievant was issued a Group I Written Notice on August 31, 2001, for inadequate or unsatisfactory job performance for being inattentive while on post duty.

The grievant initiated a grievance challenging the Written Notice on September 25, 2001, and the grievance proceeded to a hearing, on January 4, 2002. On January 26, 2002, the hearing officer issued a decision rescinding the Group I Written Notice. On February 5, 2000, the agency requested that the hearing officer reconsider his earlier decision. On February 6, 2002, the hearing officer re-affirmed his prior decision.

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."¹ 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.²

¹ Va. Code § 2.2-1001(2), (3), and (5).

² 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”³ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁴ 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.

Alleged Errors

The agency asserts that the hearing decision contains a mistake of fact, specifically, that the grievant did not hear the Assistant Warden hailing her in this incident “because of the sound of generators and other noise coming from the main yard.” The agency stated in its reconsideration request that evidence from the facility’s logbooks shows that the generators were not operating at the specific time in question. In addition, the agency states that the hearing officer erred in concluding that the Assistant Warden could simply have radioed the grievant to gain her attention, because the radio in the Assistant Warden’s vehicle cannot communicate with the radios used by officers assigned to the security tower.

The hearing officer, however, found credible the testimony of the grievant that she could not see or hear the Assistant Warden during this incident because of ambient noise and limited visibility, and because she was likely sitting down facing the security perimeter at the time. In addition, the hearing officer toured the security tower and its environs and personally observed the layout, noise level and visibility from the tower. With regard to the radio, the hearing officer’s reconsideration decision explains that he meant that the Assistant Warden could have contacted the grievant by relaying a call through any post in the facility that had both kinds of radios. Finally, in his reconsideration response, the hearing officer concluded that the agency’s logbook evidence (which had not been presented at the hearing) was not newly discovered evidence and, even assuming it had been considered, would not have changed his overall assessment that the grievant had not been inattentive, but was simply physically unable to see or hear the Assistant Warden from her vantage point.

The agency’s 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.

³ Va. Code § 2.2-3005(D)(ii).

⁴ *Grievance Procedure Manual* § 5.9, page 15.

CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer in this grievance acted within his authority under the grievance procedure 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.⁵ 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.⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁷ 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.⁸

Claudia T. Farr
Director

⁵ *Grievance Procedure Manual*, § 7.2(d) page 20.

⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a) page 20.

⁷ *Id.*

⁸ Va. Code § 2.2-3003 (G).