

Summary: Compliance: Hearing Decision; Ruling Date: May 30, 2002; Ruling #2002-056; 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. 2002-056  
May 30, 2002

The grievant has challenged the hearing officer's 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 November 26, 2001, the grievant was issued a Group III Written Notice and terminated for jeopardizing an inmate's safety. The grievant initiated two grievances challenging the Written Notice and termination, the first on November 30, 2001 (alleging retaliation for his prior grievance activity), and the second on December 6, 2001 (alleging "discrimination" because other officers who committed "far worse" offenses were issued less severe discipline). The two grievances were consolidated by ruling of this Department on February 13, 2002, and proceeded to a hearing held on February 15, 2002. On February 26, 2002, the hearing officer issued a decision upholding the Group III Written Notice and termination. On March 6, 2002, this Department received the grievant's request that we administratively review the hearing officer's February 26 decision. This ruling responds to that request.

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."<sup>1</sup> 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.<sup>2</sup>

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>3</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>4</sup> Further, "[i]n cases involving discipline, the hearing

<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>2</sup> See *Grievance Procedure Manual* § 6.4(3), page 18.

<sup>3</sup> Va. Code § 2.2-3005(D)(ii).

<sup>4</sup> *Grievance Procedure Manual* § 5.9, page 15.

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.”<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup>

Further, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.<sup>8</sup> Accordingly, the technical rules of evidence do not apply.<sup>9</sup> By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>10</sup> 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 Noncompliance*

The grievant alleges that the hearing officer failed to issue a timely decision. Hearing officers are required to hold the hearing and issue a written decision within 30 calendar days of their appointment.<sup>11</sup> In this case, the hearing officer’s appointment letter is dated January 23, 2002. Assuming three days for delivery of the appointment letter, the hearing officer either received the letter on Saturday, January 26, 2002, or the next business day, Monday, January 28, 2002. As stated, the hearing was held on February 15, 2002, and the decision issued by mail on February 26, 2002. Even assuming the earlier appointment date of January 26, 2002, the hearing officer’s decision was issued only one day beyond the timeframe. The grievant has not shown that his case has in any way been prejudiced by the delay. The hearing officer’s one day delay is thus, at most, harmless error.

#### *Other Errors*

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<sup>5</sup> *Rules for Conducting Grievance Hearings*, page 11; DHRM Policy No. 1.60(IX)(B).

<sup>6</sup> DHRM Policy No. 1.60 VII(C)(1).

<sup>7</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

<sup>8</sup> *Rules for Conducting Grievance Hearings*, page 7.

<sup>9</sup> *Id.*

<sup>10</sup> Va. Code § 2.2-3005(C)(5).

<sup>11</sup> *Grievance Procedure Manual*, § 5.1.

The grievant also challenges the hearing officer's conclusions in his decision regarding the grievant's behavior, and the agency's handling of the 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 was warranted. The Written Notice stated that the grievant had "willfully and negligently put [an inmate's] safety and/or life in jeopardy" (i.e., by identifying the inmate as an informant). The hearing officer found that the underlying facts regarding the grievant's actions were undisputed—the grievant had labeled an inmate as an informant and attempted to conspire with another inmate to "take care of" the named informant by obtaining information that could be used to take punitive action against the informant. The grievant presented a witness at the hearing to challenge that these actions were not sufficiently serious to merit disciplinary action. Consistent with his authority, however, the hearing officer found greater credibility in the testimony of the warden, the deputy warden, and the institutional investigator, that these actions by the grievant had seriously undermined both the safety of the informant/inmate and the security of the institution.

The grievant further claims that the hearing officer failed to consider that the termination was in retaliation for an earlier grievance that the grievant had initiated challenging a shift change. The hearing officer failed to find any evidence of a connection between the grievant's prior protected activity of filing a grievance challenging a shift change and the disciplinary action for undermining inmate and institutional security. Likewise, in response to the grievant's allegation that the agency's actions were based on a discriminatory bias, the hearing officer found the discrimination claim unsupported by the evidence. This determinations by the hearing officer are clearly within his authority under grievance procedure.

Finally, the grievant asserts that the hearing decision did not give sufficient weight to evidence that five other officers had allegedly committed similarly serious offenses but were issued less severe discipline. The hearing officer examined the personnel files of the officers to review the incidents cited by the grievant. The hearing decision states that "...in each case the circumstances were different. Each led to a carefully considered disciplinary action, appropriately taken in each case. Not one of the cases involved any conspiracy or attempted conspiracy with an inmate to cause punitive or detrimental action against another inmate, coupled with direct violations of [agency] Procedures."<sup>12</sup> Based on his review, the hearing officer concluded that the grievant's termination was not disproportionate or inconsistent with agency disciplinary actions in

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<sup>12</sup> Hearing Decision, dated February 26, 2002.

other cases. This determination was well within the discretion of the hearing officer to make.

### 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.<sup>13</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>14</sup> In this case, the date of this ruling is the "final hearing decision" date, and thus any appeal to the circuit court should be filed by June 29, 2002. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup> 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.<sup>16</sup>

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Claudia T. Farr  
Director

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Jeffrey L. Payne  
Employment Relations Consultant

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<sup>13</sup> *Grievance Procedure Manual*, § 7.2(d) page 20.

<sup>14</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a) page 20.

<sup>15</sup> *Id.*

<sup>16</sup> Va. Code § 2.2-3003 (G).