

Issue: Compliance/Hearing officer decision; Ruling Date: October 8, 2002; Ruling #2002-154; 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. 2002-154  
October 8, 2002

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5467. The grievant essentially claims that the hearing officer exceeded the scope of his authority and abused his discretion by mischaracterizing witness testimony and erroneously identifying an individual in the decision.

FACTS

The grievant is employed as a correctional officer senior at the Department of Corrections (DOC). On March 8, 2002, the grievant timely initiated a grievance challenging a Group I Written Notice issued for unsatisfactory job performance. The grievance advanced to hearing and on July 23, 2002, the hearing officer upheld the Group I Notice. The grievant has challenged the hearing officer's decision based on alleged inaccuracies and mischaracterizations contained in the 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."<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 officer reviews the facts *de novo* to determine whether the cited actions constituted

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<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.

misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. 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>5</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.

In this case the grievant alleges that the hearing officer mischaracterized witness testimony. In his decision, the hearing officer found that the grievant had pulled another employee toward him by grabbing her coat lapels and then pushed her against a wall demanding to know why she had not been at home the previous day. While the grievant objects to the characterization that he pulled the employee towards him, the hearing officer's findings are based upon evidence in the hearing record.

The grievant also contends that hearing officer erroneously stated that the grievant met with an Assistant Warden prior to agreeing to complete an incident report. The grievant asserts that it was the Warden rather than an Assistant Warden with whom he spoke prior to agreeing to complete the report. However, even if the grievant were correct in his assertion that it was the Warden, not an Assistant Warden, the alleged error is not material to the critical issue to be resolved: whether the grievant's behavior and work performance was unsatisfactory. The hearing officer found, by a preponderance of the evidence in the hearing record, that the grievant's physical behavior was rougher than mere horseplay (the grievant's characterization of the incident), and that the grievant's behavior "constituted deliberate physical contact that is totally inappropriate in any workplace."

In sum, the grievant's challenges to the hearing officer's decision, 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 fact findings and inferences that he drew, the characterizations that he made, or the facts that he chose to include in his decision. This Department cannot conclude that the hearing officer's findings were without some basis in the record and, thus, the hearing officer's decision cannot be said to be out of compliance with the grievance procedure.

### APPEAL RIGHTS

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>6</sup> Within 30 calendar days of a final hearing

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<sup>5</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

<sup>6</sup> *Grievance Procedure Manual*, § 7.2(d), page 20.

decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>7</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>8</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>9</sup>

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Director

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<sup>7</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

<sup>8</sup> *Id.*

<sup>9</sup> Va. Code § 2.2-1001 (5).