

Issue: Compliance/Hearing Decision; Ruling Date: April 23, 2003; Ruling #2003-076;
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
No. 2003-076
April 23, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5618. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by not considering alleged mitigating circumstances. The grievant claims that the hearing officer should have considered the fact that the Warden based his decision to issue her a more severe punishment than an equally culpable co-worker on misleading information provided by the complicit co-worker. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

On September 24, 2002, the grievant was issued a Group II Written Notice of disciplinary action for "[u]nauthorized use or misuse of state property or records." She was accused of using the agency's letterhead for an improper purpose, a charge that was purportedly found warranted pursuant to an Internal Affairs investigation.

On October 21, 2002, the grievant timely filed a grievance to challenge the agency's action. The outcome of the Third Resolution Step was not satisfactory to the grievant and she requested a hearing. On January 8, 2003, the Department of Employment Dispute Resolution assigned this appeal to the hearing officer. On February 11, 2003, a hearing was held at the agency's regional office.

The hearing officer upheld the disciplinary action in a March 27th hearing decision, in which he concluded that "[a]lthough the Agency disciplined Officer B and Grievant differently when they should have received the same discipline, there are not mitigating circumstances justifying a reduction of the Grievant's discipline."¹ The hearing officer explained that "[t]he reason the Agency gave Officer B a Group I instead of a Group II was because Officer B effectively misled the Warden regarding Officer B's knowledge of events and his level of participation."²

¹ March 27, 2003 Hearing Decision, page 6.

² Id.

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 “In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR.”⁴ 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 hearing officer correct the noncompliance.⁵

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ Further, in 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. 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 Additionally, 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.⁹ “Should the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so without citing one of the specific offenses listed in the *Standards of Conduct*; however he must identify in general terms the misconduct that occurred.”¹⁰

Failure to Find Mitigating Circumstances

The grievant claims that the hearing officer erred by not finding mitigating circumstances which would result in her discipline being reduced. In support of this contention, the grievant claims that while she has been consistently candid about her involvement in the letterhead incident, she received a Group II Notice. In contrast, the grievant asserts that a co-worker who misled the Warden and provided untruthful testimony at hearing, received only a Group I Notice for his complicity in the incident. The grievant also asserts that her otherwise long history of satisfactory work warranted mitigation of her discipline.

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

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

⁵ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁶ Va. Code § 2.2-3005(D)(ii).

⁷ *Grievance Procedure Manual* § 5.9, page 15.

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

⁹ *Rules for Conducting Grievance Hearings*, page 11.

¹⁰ *Id.* at p. 12.

Under the grievance procedure, however, “the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct.”¹¹ 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.¹² 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.¹³

APPEAL RIGHTS

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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶ This Department’s rulings on matters of procedural compliance are final and nonappealable.¹⁷

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¹¹ *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

¹² *Id.*

¹³ Moreover, while the hearing officer does expressly discuss why he did not find mitigating circumstances, (he was not required to do so), one could reasonably conclude that he found the level of Officer B’s punishment inadequate instead of the grievant’s punishment excessive.

¹⁴ *Grievance Procedure Manual*, § 7.2(d), page 20.

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

¹⁶ *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

¹⁷ Va. Code § 2.2-1001 (5).