Issue: Compliance/administrative review of hearing officer decision; Ruling date: August 25, 2003; Ruling #2003-123; 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. 2003-123
August 25, 2003

The grievant has requested that this Department administratively review the hearing officer's conduct in Case Number 5734. The grievant contends that (1) the hearing officer improperly allowed into evidence the circumstances surrounding an inactive Group I Written Notice, (2) the agency added documents to the grievance record prior to hearing, and (3) his advocate could not properly question a witness who testified by speakerphone.

FACTS

The grievant has been employed with the Department of Corrections (DOC) for twenty years and was a Sergeant for five years until his demotion on February 13, 2003. As a Sergeant, the grievant supervised five correctional officers. Several officers at the grievant's facility reported that the grievant made inappropriate comments to one of his subordinates about his domestic problems.[1] Furthermore, the written reports state that the grievant commented on the same subordinate's work performance in the presence of inmates.[2] The grievant subsequently admitted to making inappropriate statements to a subordinate officer.

Following its investigation into the grievant's inappropriate comments, DOC issued a Group III Written Notice on February 13, 2003 for acts which seriously undermine the effectiveness of the agency's activities. In addition to the Written Notice, the grievant was suspended for five days, transferred, and demoted. The grievant filed a grievance on March 7, challenging the Written Notice and the resulting transfer and demotion.[3]

---

[1] The grievant is reported as having asked for the officer's girlfriend's phone number. In written statements, officers also claimed that the grievant inappropriately teased the officer about his girlfriend taking his furniture and stated that the girlfriend physically beat the officer.
[2] The grievant allegedly told the correctional officer that "[i]f you can't be an officer, get a job at Pizza Hut."
[3] *See* Grievance Form A, dated March 7, 2003.

The hearing took place on June 10, 2003 and the hearing officer issued his decision on June 12, 2003. In his decision, the hearing officer concluded that the grievant made inappropriate comments to a subordinate officer and upheld the Group III Written Notice.[4] The hearing officer issued a reconsideration decision on June 23, upholding the June 12 hearing decision.[5]

DISCUSSION

Inactive Written Notice

The grievant objects to the agency's reference at hearing to his Group I Written Notice, which was issued in 1994. He cites to the DOC Standards of Conduct, which states that inactive written notices "shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense."[6]

In this case, the hearing officer stated in his June 12 decision that "it is permissible for an agency to evaluate whether an employee has been previously counseled or disciplined for same or similar offenses as indicia of whether the employee is engaging in a repetitive pattern or similar behavior."[7] In upholding the disciplinary action, the hearing officer cited the seriousness of the offense and further noted that the grievant had engaged in "recurrent behavior over a period of time."[8] As it was written, the original hearing decision might be read to show that the hearing officer considered the prior inactive Group I, in reviewing level of discipline given to the grievant, which appears to be impermissible under the Standards of Conduct.

However, in the reconsideration decision dated June 23, the hearing officer clarified that he considered the inactive disciplinary action only for the *limited purpose* of demonstrating that the grievant was on notice as to what type of language was permitted in the workplace. He stated that "[e]ven though a disciplinary action is inactive, it constitutes permissible evidence if offered to demonstrate that the grievant has been previously warned about *similar* unacceptable behavior."[9] It appears that the hearing officer makes a distinction between (1) considering an inactive Written Notice to establish a pattern of misconduct warranting a more severe punishment and (2) considering it as evidence that the grievant was warned in advance that a particular act constitutes misconduct. The grievant appears to claim that according to the Standards of Conduct, it is impermissible for the agency (or for the hearing officer in reviewing the agency's action) to consider an inactive Written Notice for *any* purpose.

---

[4] Hearing Decision, Case No. 5734, pages 5 and 6, issued June 12, 2003.
[5] Reconsideration Decision, Case No. 5734, page 4, issued June 23, 2003.
[6] DOC Policy 5-10.19(D). Similarly, the Department of Human Resources (DHRM) Policy 1.60, Standards of Conduct, states that inactive disciplinary actions "shall not be considered in an employee's accumulation of Written Notices, or in determining the appropriate disciplinary action for a new offense." DHRM Policy 1.60(VII)(B)(2)(e).
[7] Hearing Decision, Case No. 5734, page 5, issued June 12, 2003.
[8] *Id.* at page 6.
[9] Reconsideration Decision, Case No. 5734, page 2, issued June 23, 2003, (emphasis in original).

The nature of the grievant's claim is largely based on the hearing officer's interpretation of DOC Policy No. 5-10.7 and DHRM Policy 1.60. Specifically, the grievant claims that the hearing officer violated the grievance procedure in the way he applied the Standards of Conduct guidelines regarding inactive disciplinary actions. Thus, the crux of the grievant's argument is a policy interpretation question, which is not appropriate for this Department to address. Rather, the Director of DHRM has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state policy.[10] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

Requests for administrative review must be made and *received* by the reviewer within 10 calendar days of the date of the hearing decision.[11] In this case, the grievant did not request a ruling from DHRM. However, the grievant timely requested administrative review from this Department. This Department has held in the past that timely claims made to the wrong party may proceed.[12] Therefore, if the grievant wishes to request DHRM to administratively review the hearing officer's application of the Standards of Conduct, he must do so within 10 calendar days from the date of this ruling. If DHRM finds that the hearing officer's interpretation of policy was incorrect, the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.[13] If DHRM finds that the hearing officer did not abuse his authority, then he is in compliance with the grievance procedure.

Added Documents to the Grievance Record

The grievant claims that the agency failed to comply with the grievance procedure when it added documents to the grievance record after the grievance was sent for qualification for a hearing. The grievance procedure requires that all claims of noncompliance be raised immediately.[14] Thus, if the grievant proceeds with the grievance after becoming aware of the agency's procedural violation, the grievant may waive the right to challenge the noncompliance at a later time.[15] Further, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

---

[10] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2), pages 18-19.
[11] *See* Grievance *Procedure Manual* § 7.2(a), page 18.
[12] *See* EDR Rulings 2000-008 (grievance initiated timely with the wrong party) and 2003-124, 2000-131 (request for administrative review sent to wrong agency).
[13] *Grievance Procedure Manual* § 7.2(a)(2), pages 18-19.
[14] *Grievance Procedure Manual* § 6.3, page 17.
[15] *Id*.

In this case, the grievant learned of the added documents prior to hearing, but waited until the day of hearing before raising the issue of noncompliance. Although the grievant asked DOC's Human Resources about the added documents, he did not follow the established procedure for addressing issues of noncompliance, as outlined in the Grievance Procedure Manual. The grievant did not (1) notify the agency head of noncompliance, (2) allow the agency 5 workdays to correct the noncompliance, or (3) request a compliance ruling from this Department. As such, the grievant waived his right to challenge the agency's addition of documents to the grievance record.[16] However, even if the grievant had not waived his right to challenge the agency's action, this Department concludes that the agency did not violate a substantial requirement of the grievance procedure. Parties may attach documents to the grievance record at any time prior to hearing.[17] Furthermore, as the hearing officer correctly noted in his June 23 reconsideration decision, the grievant was not prejudiced in any way at his hearing because the agency provided the grievant with a copy of its exhibits nearly a week prior to the hearing.

Use of Speakerphone

The grievant asserts that his representative was unable to fully question one of the agency's witnesses because he testified by conference call. Specifically, the grievant claims that the witness was difficult to hear and that the hearing officer could not make a decision regarding the witness's credibility without observing his testimony. When witnesses are unable to attend a grievance hearing, "testimony can be received via conference call."[18] Decisions regarding witness testimony are wholly within the hearing officer's discretion and this Department will not substitute its judgement for that of the hearing officer unless a party can demonstrate that the hearing officer abused his authority under the grievance procedure.[19]

Assuming, without deciding, that the grievant could establish that the hearing officer abused his discretion,[20] the grievant has not established that he has been prejudiced by the witness's testimony by speakerphone. In order to show prejudice, the grievant must provide *specific* examples of how he was prejudiced by the testimony of an agency witness via telephone. During this Department's investigation, the hearing officer acknowledged that the testimony was initially difficult to hear, but that after moving the telephone, all parties could understand the witness. Moreover, the hearing officer stated that the grievant's representative did not object after the telephone was moved and that

---

[16] *See Grievance Procedure Manual* § 6.3, page 17.
[17] Documents may also be added *during* the grievance hearing if they are relevant to the claims. *See Rules for Conducting Grievance Hearings*, page 7.
[18] *Rules for Conducting Grievance Hearings*, page 8.
[19] *Grievance Procedure Manual* §§ 5.5 and 6.4, pages 13 and 18.
[20] It is far from clear that the hearing officer has abused his discretion. The hearing officer reported that once the telephone was moved, the witness could be heard with little difficulty. It is not evident that his decision to allow the testimony to continue was unreasoning or arbitrary.

the grievant had unlimited time to question the witness. The grievant further claims that, had the witness been present, the hearing officer may have determined that the witness was not credible. While it is certainly easier to make credibility determinations in person, the grievant's concern is nevertheless based on speculation. This Department has held that "[s]peculation and conclusory allegations of prejudice are insufficient to establish abuse of discretion by the [hearing officer]."[21] Accordingly, this Department concludes that testimony via telephone did not appear to prejudice the grievant and will not disturb the decision of the hearing officer in this matter.

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.[22] In addition to the grievant's request for a ruling from this Department, the grievant requested reconsideration by the hearing officer. The hearing officer responded to the grievant on June 23, 2003. As noted above, the grievant has 10 calendar days from the date of this ruling to request administrative review of the hearing decision from DHRM. The hearing decision in this case will become a final hearing decision when either (1) the 10 calendar day period expires and the grievant does not request a ruling from DHRM or (2) DHRM issues its decision after a timely request from the grievant, and, if ordered by DHRM, the hearing officer issues a revised decision. 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable. [25]

_____
Claudia T. Farr
Director

_____
Leigh A. Brabrand
EDR Consultant

[21] EDR Ruling No. 2001-124 (quoting *U.S. v. Lorick*, 753 F.2d 1295, 1297 (4th Cir. 1985)).
[22] *Grievance Procedure Manual*, § 7.2(d), page 20.
[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.
[24] *Id.*
[25] Va. Code § 2.2-1001 (5).