Issue: Compliance/Administrative Review of Case #544; Ruling Date: May 11, 2004; Ruling #2004-640; 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
Ruling Number 2004-640
May 11, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 544. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure. Specifically, the grievant maintains that: (1) the hearing officer demonstrated bias in favor of the Department of Corrections (DOC or the agency); (2) the hearing officer failed to consider important evidence presented; (3) the hearing officer's decision defies the intent of the grievance procedure; and (4) DOC failed to prove what was charged on the Written Notice. For the reasons discussed below, this Department concludes that the hearing officer's decision and actions did not violate the grievance procedure.

FACTS

On November 19, 2003, the grievant received a Group III Written Notice with termination for violation of employee Standards of Conduct 5-10.17(B)(15), which states: "Gross negligence on the job that results in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee." In an attachment to the Group III Written Notice, the agency details the events that led to the grievant's discipline.

On November 26, 2003, the grievant timely initiated a grievance challenging the Group III Written Notice and termination. Subsequently, the grievance was qualified for hearing and a hearing was held on February 17, 2004. In his decision dated February 20, 2004, the hearing officer found the Group III Written Notice and termination warranted and appropriate because "[f]ailure to lock not one, but two inmates in separate recreation cages, no matter how busy the Agency Officers were, was gross negligence."[1] In a March 19, 2004 reconsideration decision, the hearing officer affirmed his original determination. Additionally, the Department of Human Resource Management (DHRM) affirmed the hearing officer's decision as consistent with policy.

[1] Decision of Hearing Officer, Case Number: 544, February 20, 2004.

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."[2] 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.[3]

Alleged Bias

In this case, the grievant claims that the hearing officer was biased in favor of the agency. Specifically, the grievant claims that the hearing officer held the grievant, who appeared *pro se*, to a strict rules of evidence standard, while affording the representative for the agency, who is "very experienced at trying grievances," more leniency with regard to such rules. In particular, the grievant claims that (1) during his cross-examination of an allegedly rude witness, the hearing officer "admonished" him for arguing with the witness, yet failed to address the witness' inappropriate refusal to cooperate; (2) the hearing officer failed to assist him in appropriately phrasing his questions; (3) the hearing officer was "sarcastic and condescending" to him; (4) the hearing officer improperly allowed the agency to ask leading questions; (5) the hearing officer improperly allowed an agency witness to make legal conclusions; and (6) the hearing officer improperly allowed agency witnesses to testify about and interpret reports and video tapes.

The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an "orderly, fair and equitable fashion"[4] and to "maintain order, decorum and civility."[5] Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process[6] and avoid the appearance of bias.[7] However, the Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[8] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[9]

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[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3), page 18.
[4] *See Rules for Conducting Grievance Hearings*, § IV(C), page 7.
[5] *See Rules for Conducting Grievance Hearings*, § IV(A), page 6.
[6] *See Rules for Conducting Grievance Hearings*, § III(D), page 4.
[7] *See Rules for Conducting Grievance Hearings*, § II, page 2.
[8] Welsh v. Commonwealth., 14 Va. App. 300, 315 (1992) (brackets in original).
[9] *See* e.g. Compliance Ruling of Director #2003-113 and #2001-146.

In this case, the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest in the outcome of the grievance. Therefore, we find no actionable bias on the part of the hearing officer. Moreover, while the hearing officer told the grievant not to argue with a witness, the hearing officer's directive was not inappropriate in tone or substance given (1) the circumstances upon which the directive was declared;[10] and (2) the hearing officer's duties to maintain "order, decorum and civility" and to conduct the hearing in an "orderly" fashion. The grievant maintains that he was merely trying to ask follow-up questions, not argue with the witness, and that the hearing officer should have done more to help him in phrasing his questions, given his *pro se* status. Specifically, the grievant asserts that if the hearing officer had been unbiased, he would have told the grievant to "make sure he was asking in the clear form of a question, so it could not be confused with making a statement" instead of telling him not to be argumentative. While a hearing officer should always be cognizant of a party's lack of knowledge of the technical rules of evidence and should under certain circumstances offer clarification or guidance on procedural issues, there is no mandatory duty for the hearing officer to instruct the grievant on how to question witnesses as the grievant has alleged. Moreover, after the hearing officer told the grievant not to argue with the witness, he further instructed the grievant that he may ask questions of the witness. Therefore, it appears that the hearing officer did offer some guidance to the grievant on how he should proceed in questioning the witness, and that, the grievant was not being told to stop the questioning of the witness.

Further, although the hearing officer may have allowed questioning that did not comply with the rules of evidence, those rules do not apply to grievance hearings,[11] and thus allowing such questioning would not be a violation of the *Rules for Conducting Grievance Hearings*. Indeed, the hearing officer is to "establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts."[12] More importantly, it appears as though the hearing officer granted both parties latitude regarding the rules of evidence, not just the agency as the grievant has alleged.

To summarize, in light of the above evidence and circumstances, this Department cannot conclude that the hearing officer demonstrated a direct, personal, substantial or pecuniary interest in the outcome of a case or acted with partiality toward either party. And while certainly the appearance of impartiality is to be avoided, there is insufficient evidence in this case that the hearing officer conducted the hearing inappropriately or abused or exceeded his authority under the grievance procedure.

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[10] Based upon a review of the hearing tapes, it appears that the hearing officer had to interrupt the grievant and the witness and thus it was necessary for him to somewhat raise his voice in order to be heard.
[11] *See Rules for Conducting Grievance Hearings*, § IV(D), page 7.
[12] *See Rules for Conducting Grievance Hearings*, § IV(C), page 7.

Weighing Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and grounds in the record for those findings."[14] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[15] 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 the present case, the grievant objects to the hearing officer's consideration of evidence presented. Specifically, the grievant alleges that the hearing officer failed to consider evidence that (1) the padlocks on the recreation cage doors had been properly secured; (2) inmates frequently manufactured keys to various locks in the institution; (3) the padlocks had been exposed to the elements for a number of years; (4) yanking on the padlocks could cause the locks to open; (5) inmate A brought contraband into the recreation cage and picked the lock with the contraband; (6) inmate A spent approximately fifteen minutes manipulating the padlock on his cage; (7) an inmate could easily retrieve contraband from the floor after being strip searched without a corrections officers knowledge; (8) inmate A passed something to inmate B; and (9) the mandatory strip search and clothing x-ray following reentry to the cells was not done.

These challenges simply contest the hearing officer's findings of disputed fact, 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, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Fair Hearing/Mitigating Circumstances

The grievant alleges that he presented evidence demonstrating that another correctional officer at his facility had acted similarly to the grievant, but was not disciplined for his actions. According to the grievant, allowing such inconsistency in disciplinary actions defies the intent of the grievance procedure which "shall afford an immediate and **fair** method for the resolution of employment disputes."[16]

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[13] Va. Code § 2.2-3005(D)(ii).
[14] *Grievance Procedure Manual* § 5.9, page 15.
[15] Va. Code § 2.2-3005(C)(5).
[16] Va. Code § 2.2-3000.

The term "fair," as appearing in the statutory provision above cited by the grievant, applies to the grievance **process** itself.[17] This provision of the grievance statute does not encompass the employing **agency's** duty to act fairly when disciplining its employees, as the grievant has alleged. Nevertheless, this Department agrees that an agency's inconsistency in disciplining similarly situated employees could be unfair and could be used by a grievant in an appropriate case to demonstrate mitigating circumstances.[18]

Under the facts of this case however, it cannot be concluded that the hearing officer erred by failing to consider the grievant's evidence of inconsistent discipline. Here, the hearing officer found that the agency had not disciplined inconsistently because the alleged incident cited by the grievant was not comparable to the grievant's behavior, in that the cited incident was an accident that did not result in the escape of any inmates.[19] As stated previously, findings of disputed fact, 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, and the facts he chose to include in his decision are determinations entirely within a hearing officers authority. Thus, because the hearing officer found no inconsistency in the agency's discipline, it cannot be concluded that he violated the grievance procedure by failing to mitigate the grievant's discipline in this case.

Failure to Prove Written Notice Charges

The grievant maintains that the agency failed to prove the essential elements of the charge on the Written Notice. Specifically, the grievant contends that the agency failed to prove that he was grossly negligent, as that term is defined under the law,[20] or caused serious injury to another state employee. In support of this contention, the grievant states that the agency failed to prove that the grievant's actions were "conscious or voluntary" and the agency admitted at hearing that there was no serious injury to the officer assaulted by the inmate.

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[17] The impartiality of the grievance process was discussed in the *Alleged Bias* section above.

[18] Under the *Rules for Conducting Grievance Hearings*, once the hearing officer has determined that the employee committed the charged act, that the action constituted misconduct, and that the agency's discipline was consistent with law and policy, the hearing officer may mitigate the agency's discipline only after giving due deference to the agency's right to exercise its good faith business judgment in managing employee matters and its operations. This deference standard comports with that established in other merit system case law, which allows for mitigation only where the agency's penalty exceeds the "tolerable limits of reasonableness."[18] *See* Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5 (1981) citing to Douglas v. Veterans Admin., 5 M.S.P.B. 313, (1981). The MSPB "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

[19] *See* Decision of Hearing Officer, Case Number: 544, February 20, 2004.

[20] The grievant defines "gross negligence" as "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party." The grievant does not state from what source this definition was obtained.

The Written Notice form states the nature of offense as "Violation of Employee Standards of Conduct 5-10.17 B. 15 Gross negligence on the job that results in the escape, death, or serious injury of a ward of the State or the death or serious injury of a State employee. Please see attachment." In the attachment to the Written Notice, the agency describes the grievant's unacceptable behavior more fully as a failure to lock the gates on the individual recreation cages, which resulted in an inmate exiting his cage and assaulting an officer. Additionally, the attachment to the Written Notice recognizes that the outcome of the grievant's negligence in the performance of his job duties could have had more serious consequences, and emphasizes the importance of maintaining control and custody of inmates at all times.

The Director of the Department of Human Resource Management (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.[21] Only a determination by that agency could establish whether the act described in the Written Notice and its attachment constitutes misconduct under the *Standards of Conduct*, or whether the hearing officer erred in his interpretation of state and agency policy.[22] In contrast, this Department has the authority to determine whether the hearing officer's findings of misconduct or inappropriate behavior are based upon evidence in the record.[23]

On the Written Notice, DOC charged the grievant with an offense specifically listed in its *Standards of Conduct*.[24] Furthermore, the Written Notice and its attachment appear to sufficiently detail the improper conduct.[25] Pursuant to its ruling dated March 30, 2004, DHRM found that the facts as alleged by the agency and found by the hearing officer constitute misconduct under the *Standards of Conduct* and upheld the hearing officer's interpretation of the state and agency disciplinary policies.[26] Moreover, the hearing officer's findings that the acts described in the written attachment to the Group

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[21] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2), pages 18-19.
[22] *See Rules for Conducting Grievance Hearings*, § VII(A)(2), page 16.
[23] Hearing officers are authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings." *See* Va. Code § 2.2-3005(D)(ii) and *Grievance Procedure Manual* § 5.9, page 15.
[24] *See* DOC *Standards of Conduct* 5-10.17 B.15.
[25] The grievant must have notice of the particular inappropriate behavior with which he is charged. Prior to termination, the United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to give oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond, appropriate to the nature of the case. Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985); Gilbert v. Homar, 520 U.S. 924 (1997). A more comprehensive post-termination hearing would follow termination. Importantly, the pre-termination notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discharge, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Board of Education v. Loudermill at 546. In the present case, the attachment to the Written Notice sufficiently detailed the improper behavior with which the grievant was being charged, thus he had notice of the charges against him.
[26] *See* Policy Ruling of Department of Human Resource Management, March 30, 2004.

Notice occurred and were improper are based upon evidence in the record and the material issues of the case. As such, this Department will not substitute its judgment for that of the hearing officer.

CONCLUSION

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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29] This Department's rulings on matters of procedural compliance are final and nonappealable.[30]

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Claudia T. Farr
Director

[27] *Grievance Procedure Manual* §7.2(d), page 20.
[28] *See Grievance Procedure Manual* §7.3(a), page 20.
[29] *Id.*
[30] Va. Code § 2.2-1001(5).