

Issue: Administrative Review of Case #643; Ruling Date: September 23, 2004; Ruling #2004-720; Agency: Department of Juvenile Justice; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2004-720
September 23, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 643. The grievant contends that the hearing officer exceeded his authority under the grievance procedure by (1) upholding the disciplinary action on grounds that were not set forth in the Written Notice, (2) arriving at incorrect factual conclusions, and (3) failing to hold a pre-hearing conference or otherwise notify the parties of the issues to be resolved at hearing. The grievant further claims that the agency failed to show, by a preponderance of the evidence that its actions were warranted and appropriate.

FACTS

The grievant is a Corrections Captain with the Department of Juvenile Justice (DJJ). On December 8, 2003, the grievant received a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.¹ In the Written Notice, the agency asserted that the grievant had failed to provide requested information to the Superintendent related to a September 8, 2003 incident.²

Following the September 8 incident, the Superintendent instructed the grievant to "provide information/determine what employee/s was/were responsible for opening the doors of the housing unit, allowing the wards to exit, and . . . to determine what employee left his/her post/pod assignment unattended."³ The Superintendent also advised that "more than a talk" would be required to address the performance of the responsible employees.⁴

¹ See Group II Written Notice, dated December 8, 2003.

² On September 8, two group disturbances occurred involving several wards and employees that resulted in injuries to employees and a ward.

³ Second Resolution Step, dated January 12, 2004.

⁴ *Id.*

On September 18, the grievant advised the Superintendent that two employees were responsible for the September 8 events, and that counseling memoranda had been issued as a result. The Superintendent asked the grievant who had authorized the issuance of counseling memoranda; the grievant did not respond.

On November 18, 2003, the Superintendent again advised the grievant that she was waiting for the information she requested. Due to a prior commitment, the grievant asked to be excused from the meeting. The Superintendent instructed the grievant to return to her office later that day, however, the grievant failed to do so. The grievant was absent from work from November 19 to December 7. When the grievant returned to work on December 8, he received a Group II Written Notice for his failure to follow the Supervisor's instructions related to September 8 incident.

The grievant challenged the Written Notice in a December 26, 2003 grievance. The grievant also claimed that the agency wrongfully removed his duties and title of Chief of Security of the facility. The hearing took place on April 20, 2004 and the hearing officer issued his decision on April 22, 2004. In his decision, the hearing officer upheld the Group II Written Notice, concluding that the grievant "understood, or reasonably should have understood, that there was a *problem*" and "disobeyed an unambiguous instruction from his supervisor to return to her office – a Group II offense."⁵ The hearing officer stated that, although it appeared that the grievant *did* answer the Superintendent's request for information, he failed to clear up any miscommunication between the Superintendent and himself.⁶ In addition, the hearing officer concluded that "even if discipline was a factor in the [removal of his Chief of Security responsibilities], the agency has shown that it had ample non-disciplinary reasons to justify the change in duties."⁷

The grievant requested administrative review by the hearing officer and by this Department. The grievant claims that (1) the hearing officer upheld the discipline on the grievant's failure to return to the Superintendent's office on November 18, *not* the grievant's alleged failure to provide information to his supervisor, (2) the agency did not demonstrate by a preponderance of the evidence that the discipline was warranted, (3) there was no pre-hearing conference, and (4) the hearing decision contains an incorrect factual conclusion.

In his Reconsideration Decision, the hearing officer stated that "the Written Notice's description of the offense makes abundantly clear that grievant's offense was his *continuing* failure to provide the superintendent with all the information concerning the incidents that occurred on September 8, 2003" and that it was the "grievant's *ongoing* failure between September 8 and November 18, 2003 to provide all information requested by the superintendent that constituted the offense of failure to follow

⁵ Hearing Decision, Case No. 643, page 7, issued April 22, 2004.

⁶ *Id.*

⁷ *Id.* at page 8.

instructions.”⁸ The hearing officer concluded that the grievant’s failure to return to his supervisor’s office on November 18, 2003 was a continuation of the ongoing offense.⁹ Moreover, the hearing officer stated in the Reconsideration Decision that the “grievant’s perceived pattern of noncompliance with the new superintendent’s instructions . . . was the primary reason she assigned new responsibilities to grievant.”¹⁰

DISCUSSION

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹² Further, “[i]n 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.¹³ 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.¹⁴

Accordingly, 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.

Basis for Upholding Disciplinary Action/Due Process

The grievant argues that “the only material issue before the hearing officer was whether or not the grievant was guilty of the offense set out on the written notice” (failure to provide information to the superintendent, as requested) and that the hearing officer exceeded his authority when he upheld the disciplinary action on grounds *not* set forth in the written notice (the grievant’s failure to report to the superintendent’s office on November 18).¹⁶ The grievant further argues that the hearing officer’s consideration of the additional alleged offense violated the grievant’s due process rights.

⁸ Reconsideration Decision, Case No. 643, page 3, issued May 3, 2004.

⁹ *See id.*

¹⁰ *Id.* at page 3.

¹¹ Va. Code § 2.2-3005(D)(ii).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *See Rules for Conducting Grievance Hearings*, page 11.

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

¹⁵ Va. Code § 2.2-3005(C)(5).

¹⁶ Grievant’s Request for Administrative Review, dated April 30, 2004.

Due process is legal concept and appropriately raised with the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address the issue of due process.

Prior to receiving discipline, 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.¹⁷ A more comprehensive post-disciplinary hearing would follow discipline. Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, 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."¹⁸

On the other hand, post-disciplinary due process requires that the employee be provided with the following: a hearing before an impartial decision-maker, an opportunity to confront and cross-examine the accuser in the presence of the decision-maker, an opportunity to present evidence, and the presence of counsel.¹⁹ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.²⁰ Thus, based on these principles, where an employee is challenging a disciplinary action, "only the misconduct cited on the Written Notice and attachments are subject to adjudication."²¹

¹⁷ Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). While Loudermill discusses the due process afforded employees in termination cases, the same principles apply in a case such as this, where an employee receives a disciplinary action without termination.

¹⁸ Loudermill, 470 U.S. at 546.

¹⁹ Reeves v. Thigpen, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995). See also Garraghty v. Commonwealth of Virginia, 52 F.3d 1274 (4th Cir. 1995) (holding that "[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity" for a full hearing, which includes the right to "call witnesses and produce evidence in his own behalf," and to "challenge the factual basis for the state's action." Garraghty, 52 F.3d at 1284.

²⁰ See Va. Code § 2.2-3004(F) which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. See Va. Code §§ 2.2-3005 and 3006. See also Grievance Procedure Manual §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

²¹ See Hearing Decision, Case No. 551, page 6, issued March 12, 2004. In this hearing decision, the hearing officer cites to *O'Keefe v. United States Postal Service*, 318 F.3d 1310 (U.S. Ct. App.), which states that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply." *O'Keefe*, 318 F.3d at 1315. Moreover, under the rules of the grievance procedure, "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings*, I.

In this case, the only misconduct cited on the grievant's Written Notice was his alleged failure to provide the Superintendent with information concerning the September 8 incident--there is no mention of the grievant's failure to return to the Supervisor's office on November 18, 2003 or of his failure to seek approval from the Superintendent before issuing counseling memoranda to his staff. Although the hearing officer concluded that the grievant had provided the Superintendent with the information that she had originally requested from the grievant, the hearing officer nevertheless upheld the disciplinary action based on the grievant's failure to clear up any miscommunication regarding the incident and follow-up.

Upon first blush, the decision appears to be based, at least in part, on the grievant's failure to follow the Superintendent's order to report to her office on November 18, 2003.²² However, in his Reconsideration Decision, the hearing officer clarified that "grievant's offense was his *continuing* failure to provide the superintendent with all the information concerning the incidents that occurred on September 8, 2003."²³ The hearing officer explains that the grievant's failure to return for the November 18th meeting constituted a "failure to communicate" that "was part of the ongoing offense."²⁴ Thus, while the original decision could cause the reader to believe that the hearing officer viewed the failure to follow the order to report for the November 18th meeting as a separate offense upon which he based his decision to uphold the agency imposed discipline, the Reconsideration Decision makes it clear that this "was not a separate offense but merely a continuation of the ongoing offense."²⁵

Agency's Failure to Demonstrate Misconduct by a Preponderance of the Evidence

The grievant claims that, because the hearing officer concluded that the grievant provided a response to the Superintendent's request for information, the agency failed to demonstrate, by a preponderance of the evidence that the Group II Written Notice was warranted and appropriate under the circumstances.

In this case, there appears to be sufficient record evidence to support the hearing officer's findings that the grievant failed to respond to the Superintendent's question as to who had authorized the issuance of counseling memoranda for the September 8 incident, and subsequently failed to meet with the Superintendent on November 18th to clear up any miscommunication that may have remained from previous attempts to address the Superintendent's concerns, thus warranting the disciplinary action. While the grievant advanced reasons for not meeting with the Superintendent, the hearing officer found the

²² The hearing officer held "Most importantly, he disobeyed an unambiguous instruction from his supervisor to return to her office – a Group II offense. Such an action is unacceptable in any employment situation; however, in a paramilitary organization such as this agency, instructions must be obeyed." Hearing Decision, Case No. 643, page 7, issued April 22, 2004, (emphasis added).

²³ Reconsideration Decision, Case No. 643, page 2, issued May 3, 2004.

²⁴ Reconsideration Decision, Case No. 643, page 3, issued May 3, 2004.

²⁵ *Id.* The hearing officer correctly notes that the grievant's failure to follow the Superintendent's order to return for a meeting on November 18, 2003 could have constituted a separate offense for which the agency could have issued a second disciplinary action. *Id.* at 3.

stated reasons unconvincing.²⁶ This Department cannot conclude that the hearing officer erred in his conclusion that the justifications advanced by the grievant for not meeting with the Superintendent were invalid.

Failure to Hold Pre-Hearing Conference

The grievant also objects to the lack of a joint hearing conference. Under the grievance procedure, “[a] pre-hearing conference, in person or by telephone, is strongly encouraged.”²⁷ While this Department strongly encourages a joint pre-hearing conference, the grievance procedure rules do not require that a pre-hearing conference be held. Moreover, in this case, however, the hearing officer did speak with both parties prior the hearing.²⁸ Accordingly, this Department cannot conclude that the hearing officer violated any provision of the grievance procedure or otherwise abused his authority.

Incorrect Factual Conclusions/Failure of Agency to Demonstrate

The grievant claims that the hearing officer included in his opinion an erroneous factual conclusion. Specifically, the grievant disputes that hearing officer’s finding that the grievant did not provide evidence to rebut the agency’s testimony that the Superintendent verbally instructed employees to seek her approval for issuing disciplinary actions, including counseling memoranda.

The hearing officer explains in his Reconsideration that the grievant did not deny that the Superintendent made that statement; the grievant only said that he could not *recall* her making the statement. The hearing officer further notes that the grievant did not offer any witnesses to rebut the Superintendent’s testimony even though the grievant acknowledged that there were other executive team members in the meeting during which the Superintendent made the statement. The hearing officer observed that the grievant had the opportunity to call these witnesses to rebut the Superintendent’s statement but did not do so. The hearing officer concluded that when a party has the opportunity to call a witness who could rebut testimony, but chooses not to call that witness, it is presumed that the witness’s testimony would not have been favorable to that party.²⁹

²⁶ The grievant asserted that he did not meet with the Superintendent because the Superintendent was busy when he returned. The hearing officer discounted this justification for not meeting observing that the grievant “could have waited for the Superintendent to become available, or at the very least, he could have left a message to arrange a meeting the next morning.” Hearing Decision, Case No. 643, page 7, issued April 22, 2004.

²⁷ *Rules for Conducting Grievance Hearings*, III. (D).

²⁸ Reconsideration Decision, Case No. 643, page 4, issued May 3, 2004. The hearing officer stated in his Reconsideration Decision that he spoke separately with both parties prior to the hearing date because of difficulty in establishing contact with the grievant.

²⁹ *Id.*, pages 3 and 4.

Based on the forgoing, this Department cannot conclude that the hearing officer's findings regarding the Superintendent's purported statement are unsupported by sufficient record evidence.

APPEAL RIGHTS AND OTHER INFORMATION

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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³² This Department's rulings on matters of procedural compliance are final and nonappealable.³³

Claudia T. Farr
Director

³⁰ *Grievance Procedure Manual*, § 7.2(d).

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

³² *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

³³ Va. Code § 2.2-1001 (5).