

Issue: Administrative Review of Hearing Decision; Ruling Date: July 22, 2004; Ruling #2004-727; 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. 2004-727  
July 22, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 678. The grievant contends that (1) his witnesses were either not timely notified of the hearing or were prohibited from attending by the agency, (2) the hearing officer did not require the agency to produce a videotape that the grievant claims is relevant to his claims, and (3) the hearing officer did not allow the grievant to admit evidence of discrimination.

FACTS

Prior to termination on January 24, 2004, the grievant was a Correctional Officer with DOC. On January 21, 2004, the grievant received a Group II Written Notice for failing to attend mandatory fire range recertification training.<sup>1</sup>

Also, on January 21, 2004, the grievant received a Group III Written Notice with termination for "leaving a security post without permission during working hours."<sup>2</sup> According to the agency, on January 19, 2004, the grievant met with two Lieutenants to discuss his failure to attend the mandated training on January 13. The agency claims that the grievant angrily left the meeting and did not return to his assigned post in the housing unit. Instead, the agency claims that the grievant "proceeded to the administration building where [he] took off [his] jacket, shirt, and hat, threw them on the search area desk, and exited the facility."<sup>3</sup> The grievant claims that he became frustrated during the meeting and was taking a break in order to "let off some steam." He further claims that he could not have abandoned his assigned post because he had been relieved of his post to attend the meeting with the two Lieutenants, and that before he could return to his post after his break, he was ordered to leave the facility.

The grievant challenged the two Written Notices in a January 29, 2004 grievance. The hearing took place on April 22, 2004 and the hearing officer issued his decision on April 26,

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<sup>1</sup> See Group II Written Notice, dated January 21, 2004.

<sup>2</sup> Group III Written Notice, dated January 21, 2004.

<sup>3</sup> *Id.*

2004. In his decision, the hearing officer rescinded the Group II Written Notice.<sup>4</sup> However, he upheld the Group III Written Notice, concluding that the grievant “abandoned his housing unit post when he left the Watch Commander’s office without permission and with the intent not to immediately return to his housing unit post.”<sup>5</sup> The grievant requested administrative review by this Department.

The grievant claims that his witnesses were not given adequate notification of his hearing date and time. According to the grievant, one witness in particular was instructed by DOC not to attend his hearing. In addition, the grievant claims that the agency failed to produce a video he requested that would have shown his demeanor while leaving the January 19 meeting. Moreover, the grievant asserts that the hearing officer refused to allow evidence of discrimination.

### DISCUSSION

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>6</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>7</sup> 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.<sup>8</sup> 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>9</sup>

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>10</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.

#### *Witness Issues and Agency’s Failure to Provide Videotape*

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<sup>4</sup> The hearing officer reasoned that the agency only meant to counsel the grievant in the January 19 meeting for failure to attend the mandatory training, but decided to issue a Written Notice only after the grievant abruptly left the meeting. Therefore, the hearing officer found that the Group II Written Notice was issued, not for his failure to attend the training, but for his behavior on January 19, 2004. *See* Hearing Decision, Case No. 678, page 5, issued April 26, 2004.

<sup>5</sup> Hearing Decision, Case No. 678, page 5, issued April 26, 2004.

<sup>6</sup> Va. Code § 2.2-3005(D)(ii).

<sup>7</sup> *Grievance Procedure Manual* § 5.9, page 15.

<sup>8</sup> *See Rules for Conducting Grievance Hearings*, page 11.

<sup>9</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

<sup>10</sup> Va. Code § 2.2-3005(C)(5).

The grievant claims that his witnesses were not notified in a timely manner about the time and date of his hearing. Under the rules of the grievance procedure, “[e]ach party may call witnesses to testify at the hearing.”<sup>11</sup> Accordingly, it is the responsibility of each party to secure his or her own witnesses for hearing. To that end, hearing officers may issue, “upon request of the parties, orders for the appearance of witnesses at hearing.”<sup>12</sup> These orders “are not subpoenas in that they are not judicially enforceable” and the hearing officer can not “compel a witness to testify.”<sup>13</sup>

In this case, the hearing officer issued orders for witnesses on April 16, 2004, six days prior to the grievant’s hearing. Accordingly, it does not appear that the hearing officer violated a substantial provision of the grievance procedure or otherwise abused his discretion with respect to the timeliness of the orders issued to the requested witnesses.

The grievant also claims that the agency (1) prohibited at least one of his witnesses from appearing at hearing and (2) failed to provide a videotape requested by the grievant. He stated in his request for administrative review and during this Department’s investigation that both the witness testimony and the videotape would have shown grievant’s demeanor when he exited the facility.<sup>14</sup> Under the rules of the grievance procedure, the hearing officer “has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer . . . had ordered.”<sup>15</sup>

In his reconsideration decision, the hearing officer stated that evidence “showing [grievant’s] demeanor after abandoning his post would not have altered that conclusion.”<sup>16</sup> In other words, even if the evidence would have demonstrated what the grievant purported, the *manner* in which the grievant left does not affect the hearing officer’s conclusion that the grievant left his post without permission. This finding was based upon the record evidence and the material issues of the case. Therefore, we cannot conclude that the hearing officer exceeded his authority with respect to this determination.

### *Evidence of Discrimination*

In his grievance, the grievant states that the disciplinary action was based on religious discrimination.<sup>17</sup> During this Department’s investigation, he claimed that he did not attempt to present evidence of discrimination at his hearing because the hearing officer stated during the pre-hearing conference that he would not allow testimony about discrimination and would

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<sup>11</sup> *Rules for Conducting Grievance Hearings*, page 6.

<sup>12</sup> *Id.* at page 4.

<sup>13</sup> *Id.* at page 5.

<sup>14</sup> He claims that they would have shown that he “did not throw or toss any of the clothing anywhere.” See Request for Administrative Review, dated May 5, 2004.

<sup>15</sup> *Rules for Conducting Grievance Hearings*, page 9.

<sup>16</sup> Reconsideration Decision, Case No. 678-R, issued May 17, 2004.

<sup>17</sup> The grievant claims that he was discriminated against because he grew dreadlocks based on his spiritual beliefs.

limit the hearing to the issues discussed on the Written Notice.<sup>18</sup> The hearing officer disagrees and stated during this Department's investigation that, because bias was an issue raised on the grievant's Form A, he would not have prohibited testimony about the alleged religious discrimination.

The rules of the grievance procedure strongly encourage a pre-hearing conference.<sup>19</sup> During the pre-hearing conference, the hearing officer may, among other things, explain hearing procedures, clarify the issues qualified for hearing, rule on procedural and evidentiary requests, and explain the standard of proof to be applied.<sup>20</sup> It is important to note that pre-hearing conferences are not recorded and are therefore not part of the official grievance record. In a case such as this, where the grievant and hearing officer have differing perspectives about a statement made during the pre-hearing conference, the burden is on the grievant to demonstrate that he was prohibited from presenting his case at hearing. The grievant has presented insufficient evidence that the hearing officer prevented the grievant from discussing his discrimination claim at hearing. Without more evidence to support the grievant's allegation, this Department cannot conclude that the hearing officer abused or exceeded his authority under the grievance procedure.

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department finds that the hearing officer did not exceed his authority or abuse his discretion under the grievance procedure in deciding Case Number 678.

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>21</sup> 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.<sup>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>24</sup>

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Claudia T. Farr  
Director

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<sup>18</sup> During the investigation for this ruling, the grievant stated that he did not request an order for Witness L, based on his belief that he could not present evidence of discrimination at hearing.

<sup>19</sup> See *Rules for Conducting Grievance Hearings*, pages 3-4.

<sup>20</sup> *Id.* at page 4.

<sup>21</sup> *Grievance Procedure Manual* §7.2(d), page 20.

<sup>22</sup> See *Grievance Procedure Manual* §7.3(a), page 20.

<sup>23</sup> *Id.*

<sup>24</sup> Va. Code § 2.2-1001(5).