Issue: Administrative Review of Case No. 689; grievant claims hearing officer relied upon incorrect witness testimony, not provided documents, scheduling conflicts, witness not presented for hearing; Ruling Date: August 5, 2004; Ruling #2004-742; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling Number 2004-742
August 5, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 689. The grievant claims that (1) the hearing officer relied upon incorrect witness testimony and other evidence in his decision; (2) she was not provided all documents or given access to all information requested relative to her discipline and termination, and the documents she did receive were not provided in a timely manner; (3) scheduling conflicts prevented her from meeting with her attorney until the day prior to hearing; and (4) one of the grievant's witnesses was not present for hearing. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

Prior to her termination, the grievant was employed as an RN Manager I with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). On January 21, 2004, the grievant was given notice of the agency's intent to issue her a Group III Written Notice for sleeping during her hours of work on the morning of January 2, 2004.[1] The following day, the grievant requested information under the Freedom of Information Act (FOIA) regarding the allegations against her. On January 23, 2004 a Group III Written Notice with removal for sleeping during work hours was issued by the agency.[2]

On March 3, 2004, the grievant timely initiated a grievance challenging the Group III Written Notice and termination. On April 15, 2004, the grievant again requested information, pursuant to FOIA, relative to the disciplinary action taken against her. In preparation for a May 12, 2004 hearing, and as instructed by the hearing officer, the parties exchanged proposed

[1] Because the grievant was working third shift, her hours of work began on January 1, 2004 and ended on January 2, 2004. The Written Notice states the date of the offense as January 2, 2004. As such, this Department will refer to the date of the disciplinary incident as January 2, 2004.
[2] The Group III Written Notice has an issuance and removal date of January 23, 2004; however, the grievant did not actually receive the written notice until February 5, 2004.

exhibits and witness lists on May 6, 2004.[3] The grievance proceeded to hearing on May 12, 2004 and in a May 13, 2004 decision, the hearing officer upheld the disciplinary action.[4]

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."[5] 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.[6]

Witness Testimony/Findings of Fact/Weighing Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[9] Accordingly, the technical rules of evidence do not apply.[10] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[11] 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.

The grievant claims that witness testimony and written statements were incorrect and as such, the hearing officer's reliance upon such information was improper. Specifically, the grievant alleges that Witness A testified that the grievant came to work on January 1, 2004 around midnight or 1:00 a.m. and brought doughnuts for the staff at that time. Conversely, the grievant claims that she came to work at 10:03 p.m. and brought the doughnuts when she returned from the local community hospital around 3:45 a.m. In his May 13, 2004 decision, the hearing officer finds that on January 1, the grievant worked the 10:00 p.m. to 8:30 a.m. shift; the

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[3] The grievant claims that she was unable to comply with the hearing officer's directive to present all exhibits and witness lists by 5:00 p.m. on May 6, 2004 because she had not received all of the requested documents from the agency. The hearing officer states that he instructed the grievant to provide what she could on May 6, 2004 and then fax the remainder of information as soon as it became available.
[4] *See* Decision of Hearing Officer, Case Number 689, issued May 13, 2004.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(D)(ii).
[8] *Grievance Procedure Manual* § 5.9.
[9] *See Rules for Conducting Grievance Hearings*, § IV(D).
[10] *Id.*
[11] Va. Code § 2.2-3005(C)(5).

decision makes no mention of when or whether the grievant brought doughnuts to work.[12] Witness A further testified that she and the grievant had known each other most of their lives; however, the grievant claims that although they have know each other for quite some time, they did not associate outside of church or work. The hearing decision states that Witness A "has known grievant for most of her life, gets along well with her, and was reluctant to report grievant because she did not want to cause her trouble."[13]

The grievant also disputes Witness B's testimony that Witness C was unable to provide a written statement of her recollection of the events of January 2, 2004 because Witness C had been on extended leave.[14] In his decision, however, the hearing officer merely finds that Witness C went on family medical disability leave in early January 2004 and was unavailable to testify at the hearing; the hearing decision makes no mention of, nor demonstrates reliance upon, Witness C's ability or inability to provide a written statement of her recollection of the events of January 2, 2004.

The grievant further asserts that she proved at hearing that Witness A could not have seen the grievant sleeping at the time alleged, because Witness A was with a patient at that time.[15] In his May 13, 2004 decision, the hearing officer acknowledges the inconsistency in Witness A's statement of when she saw the grievant sleeping and the observation log. However, in his decision, the hearing officer finds that the time difference between the testimony and the log did not outweigh Witness A's overall testimony, given the fact that Witness A's statement was written from memory five days after the fact and she characterized the time of the event as "around 5:30 a.m."[16]

Finally, the grievant claims that information contained in an unidentified witness statement gives the false impression that she had slept all night, fails to reflect her hours of work accurately, and neglects to mention the numerous duties performed by the grievant on the night in question. However, based upon this Department's review of the hearing decision and exhibits admitted into evidence at hearing, it does not appear that in reaching his May 13, 2004 decision, the hearing officer relied upon this witness statement.

In sum, this Department concludes that the above challenges simply contest the hearing officer's findings of disputed fact, the weight and credibility that he accorded the testimony and evidence, the resulting inferences 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.

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[12] *See* Decision of Hearing Officer, Case No. 689, issued May 13, 2004, page 3.
[13] *Id*. at page 5.
[14] In support of this contention, the grievant provided this Department with a document detailing Witness C's work schedule for the week of January 18 through January 23, 2004. The grievant claims that this document proves that Witness C was not on leave in the days preceding the grievant's termination and thus presumably was available to provide a written statement as to the events of January 2, 2004.
[15] In her written statement, Witness A claims that she saw the grievant sleeping around 5:30 a.m. An observation log admitted at hearing, however, proves that Witness A was with a patient between 5:15 a.m. and 5:45 a.m.
[16] *See* Decision of Hearing Officer, Case No. 689, issued May 13, 2004, page 5.

Moreover, even if this Department were to assume the facts as stated by the grievant and in a light most favorable to the grievant, there is sufficient other evidence in the record to justify upholding the disciplinary action. For instance, the hearing officer found credible other witness testimony and written statements by three other employees who stated that they saw the grievant sleeping during her 10 p.m. to 8:30 a.m. shift. Additionally, there is evidence in the record that the grievant herself admitted during the hearing that she could have "dozed off" and stated in a January 22, 2004 letter that she may "nod off sometimes." Finally, the grievant had an active Group II Written Notice for sleeping during work hours in her personnel file.

Failure to Provide Requested Documents and Access to Information

The grievant also asserts that the agency failed to provide her with all the documents and information she requested relative to her discipline and that the documents she did receive were not provided in a timely manner, thus impairing her ability to adequately prepare for hearing. It appears that all of the grievant's requests for documents and/or access to information possessed by the agency were initiated pursuant to the Freedom of Information Act (FOIA). This Department has no authority to enforce the provisions of the FOIA; rather, a person denied the rights and privileges conferred by FOIA must seek enforcement of FOIA's provisions in a court of law.[17]

However, in addition to the rights conferred by the FOIA, the grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[18] Although the grievant did not specifically request documents relative to her grievance under the document production provisions of the grievance procedure, when a grievant requests documents during the course of her grievance pursuant to the FOIA, this Department will consider the request a plea for documents pursuant to the grievance procedure as well.

When a party fails to produce documents requested relative to a grievance without just cause, the requestor may seek production of the documents through the procedural noncompliance provisions of the grievance procedure.[19] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department's involvement. [20] However, once a hearing officer has been

[17] *See* Va. Code § 2.2-3713(B).
[18] Va.Code § 2.2-3003 (E). This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.
[19] *See Grievance Procedure Manual* § 6.3.
[20] Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. *See Grievance Procedure Manual* § 6.3. In a case where the agency is purportedly out of compliance, the notification of noncompliance is directed to the agency head. If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department. Should this Department find that the party has violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department *may* render a decision against the noncomplying party unless that party can establish just cause for its noncompliance. *Grievance Procedure Manual* § 6.3.

appointed, this Department has long held that all remaining disputes relating to the production of documents should be presented to the hearing officer for his determination.

By statute, hearing officers have the power to order the production of documents.[21] During this Department's investigation, the grievant stated that the hearing officer was aware of the agency's failure to provide her with requested documents prior to the hearing, but could not remember if she objected to that failure by the agency during the hearing itself. Under such circumstances, it seems appropriate to assume that the hearing officer was unaware of any outstanding document requests when the hearing took place. As such, this Department cannot conclude that the hearing officer erred by not addressing the agency's failure to provide all requested documents and access to information.

Significantly as well, during this Department's investigation, the grievant confirmed that on either May 5 or 6, 2004, she received all of the information requested in her April 15, 2004 memorandum[22] with two exceptions: she was denied access to the nursing database and to her personnel files.[23] The grievant claims that the nursing database might have provided her the information necessary to prove a timeline to contradict allegations that she was sleeping;[24] and that access to her personnel file might have revealed documentation and information the agency claims it could not find.

Given the grievant's failure to raise the document issue with the hearing officer, her receipt of most of the information requested, and the remaining evidence in the record supporting the disciplinary action, this Department finds no violation of the grievance procedure or abuse of discretion by the hearing officer as a result of the agency's failure to provide the grievant requested documents and/or access to information. Further, the documents that the grievant did receive were provided, at the latest, nearly a week prior to hearing. As such, it does not appear that the date of receipt of the requested documents prejudiced her hearing in any way.

Inability to Meet With Attorney

The grievant states that her representative's scheduling conflicts prevented her from meeting with him until the day before the hearing, and as a result, they were inadequately prepared for hearing. It should be noted that a party *may choose* to be represented by an attorney

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[21] *See* Va.Code § 2.2-3005(C)(3).

[22] Specifically, the grievant sought and received on May 5 or 6, 2004 the following documents and/or information: witness statements, Database 24 Hour Nursing Reports for January 1 and 2, 2004; MACS 24 Hour Ward Reports for January 1 and 2, 2004; ID notes for patient A for January 1 and 2, 200;, Direct Observation Sheet for patient A; Physician's Order Sheet for patient A for January 1 and 2, 2004; Information Center Phone Log for January 2, 2004; copies of her annual performance evaluations for the past five years; and copies of her timesheet for the week of December 28, 2003 – January 3, 2004.

[23] Under state policy, an employee must be allowed access to his/her employment record. However, in this particular case, because there was substantial evidence in the record to support the hearing officer's findings, there is no reason to disturb the hearing officer's decision.

[24] While a timeline of the grievant's activities on the night in question appears to be relevant, this Department finds it highly unlikely that documentation exists detailing the grievant's whereabouts and state of awareness for every minute during that night.

at the grievance hearing, but is not required to under the grievance procedure.[25] Moreover, the grievant was terminated on January 23, 2004 by means of a Group III Written Notice which expressly informed her that she was entitled to appeal the disciplinary action via the grievance procedure. The grievance procedure, in turn, explicitly states that disciplinary actions automatically qualify for hearing.[26] Thus, the grievant knew or should have known for at least three months before her meeting with her attorney that her grievance would be advancing to hearing.

Additionally, under the grievance procedure, hearings "must be held and a written decision issued within 30 calendar days of the hearing officer's appointment."[27] The 30 day timeframe can be extended only upon a showing of "just cause."[28] The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause."[29] As such, the grievant could have sought a continuance of the hearing so that she and her representative could adequately prepare.[30] During this Department's investigation, the grievant stated that she did not request a continuance because she was unaware that the grievance procedure permitted her to do so. As stated earlier, this Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure. A grievant's (and/or her representative's) lack of knowledge about the grievance procedure and its requirements does not warrant the reopening of a hearing. Furthermore, although one month may be viewed by some as a relatively short period of time to prepare for a hearing, the grievance process is intended to provide a fair, but expeditious means to address workplace disputes. The grievant did not have any less time to prepare for hearing than does the average grievant.

To the extent the grievant is claiming that the agency's failure to timely produce requested documents contributed to her inability to meet with her attorney, this Department finds no violation of the grievance procedure. The parties were advised during the pre-hearing conference, and then in a subsequent letter dated April 19, 2004, that witness lists and exhibits were to be exchanged no later than May 6, 2004 in anticipation of a May 12, 2004 hearing. Thus, the grievant knew as early as April 19, 2004 that sometime after the document exchange deadline of May 6, 2004 it may be necessary to meet with her attorney to prepare for the May 12, 2004 hearing.

Witness Not Present at Hearing

The grievant argues that one of her witnesses was not present at hearing. Under the *Rules for Conducting Grievance Hearings* and the *Grievance Procedure Manual*, a hearing officer has

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[25] *See Grievance Procedure Manual* §5.8.
[26] *See Grievance Procedure Manual* § 4.1.
[27] *Grievance Procedure Manual*, § 5.1.
[28] *Grievance Procedure Manual*, §§ 5.1 and 5.4. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual*, § 9.
[29] *Grievance Procedure Manual*, § 5.2.
[30] It should be noted that this ruling merely states that the grievant could have sought a continuance and does not imply that the grievant's situation amounted to "just cause."

the authority to issue orders for the appearance of witnesses at hearing if a party so requests.[31] During this Department's investigation, the grievant stated that she was not aware that she could seek an order for the appearance of witnesses. Further, it appears that the grievant believes that it was the agency's responsibility to make the grievant's witnesses available for hearing.

Again, this Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure. A grievant's (and/or her representative's) lack of knowledge about the grievance procedure and its requirements does not warrant the reopening of a hearing. The April 19, 2004 letter from the hearing officer advised both the grievant and her representative that they would be responsible for ensuring that their witnesses were informed of the date and location of the hearing.[32] As such, this Department concludes that the hearing officer neither abused his discretion or exceeded his authority under the grievance procedure by proceeding despite the absence of one of the grievant's witnesses.

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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35] This Department's rulings on matters of procedural compliance are final and nonappealable.[36]

Claudia T. Farr
Director

[31] *Rules for Conducting Grievance Hearings*, III (E) and *Grievance Procedure Manual* § 5.7.
[32] The April 19, 2004 letter from the hearing officer was addressed to the grievant's representative, and the grievant was copied on the document.
[33] *Grievance Procedure Manual*, § 7.2(d).
[34] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[35] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).
[36] Va. Code § 2.2-1001 (5).