

Issue: Administrative Review of Cases #684 & 685; Ruling Date: October 18, 2004;  
Ruling Number #2004-758; 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 2004-758  
October 18, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Numbers 684 and 685. The grievant claims that the hearing officer (1) disregarded pertinent information and evidence; (2) allowed the agency's representative and advocate to act inappropriately; (3) allowed irrelevant documentation to be entered into evidence over the grievant's objection; (4) failed to order the production of documents requested by the grievant; (5) came to incorrect conclusions based on skewed information and speculation; (6) disregarded state and/or agency policy; and (7) issued a decision contradictory to law. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The grievant is employed as a Probation and Parole Officer with the Department of Corrections (DOC or the agency). The grievant timely initiated two grievances (Grievances 2 and 3) on October 21, 2003.<sup>1</sup> Grievance 2 alleges that DOC retaliated against the grievant for participating in the grievance process when it failed to grant her an interview for two positions at Facility A.<sup>2</sup> In Grievance 3, the grievant claims that she was not selected to interview for Psychologist I and II positions at Facility F and that her non-selection is a misapplication of policy, discriminatory and in retaliation for her use of the grievance procedure.

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<sup>1</sup> These two grievances are referred to as Grievance 2 and 3 because the grievant had initiated a previous grievance on August 11, 2003 (Grievance 1). Grievance 1 was previously resolved and thus not at issue during the May 26, 2004 hearing.

<sup>2</sup> The grievant also raised in Grievance 2 the issues of misapplication of policy and age/gender discrimination. On January 29, 2004, this Department concluded that the misapplication of policy and discrimination claims in Grievance 2 were duplicative of Grievance 1 and were properly administratively closed by the agency. However, the issue of retaliation was not duplicative and was reopened. *See* EDR Ruling No. 2003-539, issued January 29, 2004.

Upon qualification and consolidation by this Department,<sup>3</sup> Grievances 2 and 3 proceeded to hearing on May 26, 2004. In a June 9, 2004 decision, the hearing officer denied the grievant relief in both Grievance 2 and Grievance 3.

### 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.”<sup>4</sup> 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.<sup>5</sup>

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> Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.<sup>8</sup> Accordingly, the technical rules of evidence do not apply.<sup>9</sup> By statute, 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.

#### *Consideration of Evidence/Findings of Fact/Incorrect Conclusions*

The grievant lists a host of challenges to the hearing officer’s consideration of evidence and findings of fact. While this ruling does not discuss with particularity each of the specific pieces of evidence or information that the hearing officer allegedly failed to consider, failed to include in the decision, or wrongly stated in the findings of fact, all of the grievant’s assertions on this matter have been reviewed and considered in light of this Department’s responsibility to assure that the hearing officer’s conduct of the hearing and written decision comply with the grievance procedure.

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<sup>3</sup> See EDR Ruling No. 2004-553, 2004-558, 2004-638, issued March 26, 2004.

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

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

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

<sup>8</sup> *Rules for Conducting Grievance Hearings*, § IV(D).

<sup>9</sup> *Id.*

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

The grievant's challenges in this regard 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. Further, 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. After reviewing the grievance record, hearing tapes and exhibits, this Department concludes that the hearing officer's findings are based upon evidence in the record and the material issues of the case.

*Alleged Improper Actions by Agency's Representative and Advocate/Hearing Officer Bias*

The grievant alleges that the hearing officer allowed the agency's representative and advocate to act inappropriately during the hearing. Specifically, the grievant claims that the hearing officer allowed the agency's representative to (1) object on multiple and numerous occasions; (2) demean the grievant by accusing the grievant of submitting an outdated policy at hearing; (3) refuse to answer questions; and (4) coach the grievant's witnesses in their responses.<sup>11</sup> Additionally, the grievant claims that the agency advocate was allowed to ask irrelevant and distracting questions and enter into evidence irrelevant documentation over the objection of the grievant. Consequently, the grievant claims that she felt intimidated and as a result, could not effectively present her case at hearing. In addition, the grievant claims that the hearing officer's failure to stop the agency's alleged inappropriate behavior, while reprimanding the grievant for her improper questioning, demonstrates bias in favor of the agency.

The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an "orderly, fair and equitable fashion"<sup>12</sup> and to "maintain order, decorum and civility."<sup>13</sup> Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process<sup>14</sup> and avoid the appearance of bias.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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<sup>11</sup> The grievant claims that during her questioning of Witness B, the agency representative put the DOC policy in question before the witness and coached him on the appropriate section(s) to read and review.

<sup>12</sup> See *Rules for Conducting Grievance Hearings*, § IV(C).

<sup>13</sup> See *Rules for Conducting Grievance Hearings*, § IV(A).

<sup>14</sup> See *Rules for Conducting Grievance Hearings*, § III(D).

<sup>15</sup> See *Rules for Conducting Grievance Hearings*, § II.

<sup>16</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992) (brackets in original).

<sup>17</sup> See e.g. Compliance Ruling of Director #2003-113 and #2004-640.

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 can find no actionable bias on the part of the hearing officer. Nor does a review of the hearing tapes show that the hearing officer conducted the hearing inappropriately, or abused or exceeded his authority under the grievance procedure. The *Rules for Conducting Grievance Hearings* does not prohibit a party’s advocate from objecting to the opposing party’s actions at hearing. As such, the hearing officer’s unwillingness to prohibit the agency’s advocate or representative from objecting is not a violation of the grievance procedure. Moreover, while the hearing officer may have allowed questioning by the agency’s advocate that would not have complied with the rules of evidence, those rules do not apply to grievance hearings,<sup>18</sup> and thus allowing such questioning would not be a violation of the *Rules for Conducting Grievance Hearings*. 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. For instance, the hearing officer allowed both parties to enter into evidence documents and/or ask questions that the opposing party deemed irrelevant.

The hearing tapes confirm that the agency representative frequently objected to the grievant’s questions, accused the grievant of submitting an outdated policy, and refused to answer some of the grievant’s questions. However, the tapes demonstrate that the grievant likewise objected to the agency’s questions and the agency representative admitted later in her testimony that she had inappropriately accused the grievant of submitting an outdated policy. Further, it does not appear that the agency representative was coaching Witness B in his responses as alleged by the grievant, but was merely trying to locate a missing page to the DOC policy that Witness B was reviewing.

#### *Documents*

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.”<sup>19</sup> 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. However, once appointed, the hearing officer, makes relevancy determinations on *all* evidence presented at hearing, thus, any disputes relating to the production of documents should be presented to the hearing officer for his determination. In turn, the hearing officer may, by statute, order the production of the documents.<sup>20</sup>

The grievant claims that the hearing officer either abused his discretion or exceeded his authority by failing to order DOC to produce interview evaluation forms requested by the grievant. The grievant claims that the requested documents would have proven her allegations, and that the hearing officer’s failure to order the production of the

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<sup>18</sup> See *Rules for Conducting Grievance Hearings*, § IV(D).

<sup>19</sup> Va.Code § 2.2-3003 (E).

<sup>20</sup> See Va.Code § 2.2-3005(C)(3).

interview evaluation forms resulted in prejudice to her. Specifically, the grievant maintains that she needed the interview evaluation forms completed by Witness A from interviews conducted at Facility A to compare the handwriting from those forms to the handwriting on the application screening forms for Facility A. In turn, the grievant asserts she could have then ascertained who had completed the application screening forms and ultimately determine who had screened her in for an interview at Facility A. During the pre-hearing conference, the agency allegedly denied the existence of the requested documents, and it does not appear that the grievant refuted the nonexistence of the documents at that time.<sup>21</sup> Given the hearing officer's failure to order the production of the interview evaluation forms, he presumably found the agency's assertion that the documents did not exist to be credible. Such determinations are entirely within the hearing officer's authority. Under these circumstances, this Department cannot conclude that the hearing officer erred by not ordering the production of the requested documents, access to the information contained in such documents, or by failing to further inquire about the existence of the requested documents.<sup>22</sup>

#### *Policy Interpretation/Incorrect Legal Conclusions*

The remainder of the grievant's claims are based on the hearing officer's interpretation of state and/or agency policy and law, which are not issues for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.<sup>23</sup> In addition to her appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.<sup>24</sup> Likewise, questions regarding the decision's conformity with law are to be reviewed by the circuit court in the jurisdiction in which the grievance arose, not this Department.

#### APPEAL RIGHTS AND OTHER INFORMATION

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<sup>21</sup> The grievant alleges that Witness A later confirmed her theory of the existence of the interview evaluation forms when he testified at hearing that he had filled out the interview evaluation forms requested and does not know why DOC would state that such forms do not exist. After reviewing the hearing tapes, this Department believes the grievant has mischaracterized the substance of Witness A's testimony regarding the interview evaluation forms. Specifically, in response to the grievant's questioning regarding the interview evaluation forms, Witness A stated that he "assumes" he was involved in the interviews conducted at Facility A, but makes no mention of the interview evaluation forms.

<sup>22</sup> Significantly as well, this Department concludes that at hearing, it appears that witness testimony revealed the very information that the grievant sought from the interview evaluation forms (i.e., Witnesses A and B testified that Witness A screened the grievant in for an interview at Facility A, but Witness B, the final decision-maker on selecting interviewees, had removed the grievant from the list of applicants to be interviewed for the Facility A position).

<sup>23</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>24</sup> *Grievance Procedure Manual* § 7.2 (a)(2).

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>25</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>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>28</sup>

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Claudia T. Farr  
Director

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<sup>25</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>26</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>27</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>28</sup> Va. Code § 2.2-1001 (5).