Issue: Compliance/administrative review of Case #718; ruling Date: September 17, 2004; Ruling #2004-763; Agency: Department of Corrections; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRT8 /NG

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.[2]

Findings of Fact/Weighing Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[3] and to determine the grievance based "on the material issues and grounds in the record for those findings."[4] Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[5] Accordingly, the technical rules of evidence do not apply.[6] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[7] 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 hearing officer rejected the grievant's argument that staffing shortages prevented him from conducting rounds. The hearing officer found that "although the evidence is clear that the Facility is always understaffed, the expectation of at least two rounds per shift for housing supervisors is reasonable and [the grievant] could have carried out those rounds on February 28, 2004 despite his other duties." The grievant takes issue with the hearing officer's finding that the grievant could not account for his time from 3:30 a.m. through 4:45 a.m. and the grievant submitted evidence to support this objection.[8] While the evidence submitted by the grievant apparently could support his contention that his time was not unaccounted for that entire period, this evidence does not appear to account for the grievant's activities after 4:05 a.m. Moreover, the hearing record contains other evidence supporting the hearing officer's decision to uphold the agency's discipline such as the "credible" testimony countering the grievant's contention that heightened security was not announced until March 2, 2004.[9] Thus, given the totality of the record evidence, this Department cannot substitute its judgment for that of the hearing officer by finding insufficient evidence to uphold the agency's discipline.

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[2] *See Grievance Procedure Manual* § 6.4(3).
[3] Va. Code § 2.2-3005(D)(ii).
[4] *Grievance Procedure Manual* § 5.9.
[5] *See Rules for Conducting Grievance Hearings*, § IV(D).
[6] *Id.*
[7] Va. Code § 2.2-3005(C)(5).
[8] The hearing officer observed that during the period between 3:30-and 4:45, the grievant had ample opportunity to conduct at least one round.
[9] The grievant appears to argue, in the alternative, that the heightening of the level of security was not announced until March 2, 2004, several days after he allegedly failed to perform security checks on February 28, 2004.

The grievant also asserts that the discipline imposed was too severe.[10] The *Rules* expressly state that in cases involving disciplinary action, a "hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct," and that "[s]hould the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so."[11] The *Rules*, however, further explain that "[i]n considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters," and that "[t]he agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."[12] Moreover, the *Rules* recognize that the hearing officer "is not a 'super-personnel officer'" and "management is reserved the exclusive right to manage the affairs and operations of state government."[13]

Here, the hearing officer appears to have given deference to the agency's determination regarding the appropriate level of discipline and the grievant has not provided evidence that the hearing officer erred by upholding the agency's actions in this case. Thus, this Department will not disturb the hearing officer's decision.

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.[14] 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.[15] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[16] This Department's rulings on matters of procedural compliance are final and nonappealable.[17]

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[10] In his ruling request, the grievant states that "I am not saying that I should not have been disciplined, but not to this degree." Ruling Request, p. 2.
[11] *Rules for Conducting Grievance Hearings* § VI (B)(1).
[12] *Id.*
[13] *Rules for Conducting Grievance Hearings* § VI (A). Note that the *Rules* requirement that hearing officers give deference to agency actions is entirely consistent with federal Merit System Protection Board law. In LaChance v. M.S.P.B., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999) the court noted that "it is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." La Chance 178 F.3d at 1251, citing Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984). *See also* Beard v. General Serv. Admin., 801 F.2d 1318 (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . .") Beard, 801 F.2d at 1321; Hunt v. Department of Health and Human Servs., 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").
[14] *Grievance Procedure Manual,* § 7.2(d).
[15] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[16] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).
[17] Va. Code § 2.2-1001 (5).

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