

Issue: Administrative Review of Case #755; Ruling Date: August 16, 2004; Ruling #2004-834; 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 2004-834
August 16, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 755. The grievant claims that (1) the hearing decision does not contain findings of fact on material issues and the grounds in the record for the findings; (2) the hearing officer failed to consider mitigating circumstances; and (3) the hearing decision is inconsistent with policy. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

Prior to her demotion, the grievant was employed as a Program Specialist with the Department of Corrections (DOC or the agency). On May 10, 2004, the grievant was issued a Group III Written Notice with demotion for "[t]hreatening or coercing persons associated with any state agency, including not limited to employees, supervisors, patients, visitors, and students."¹ On that same day, the grievant challenged the Group III Written Notice and demotion through the initiation of a grievance. The grievance proceeded to hearing on July 7, 2004. In a July 14, 2004 decision, the hearing officer upheld the disciplinary action.

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."² If the hearing officer's exercise of authority is not in compliance with the

¹ In a meeting with her supervisor, the grievant allegedly stated that she "could kill" her co-worker.

² Va. Code § 2.2-1001(2), (3), and (5).

grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.³

Findings of Fact

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁵ Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁶ Accordingly, the technical rules of evidence do not apply.⁷ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁸ 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 alleges that the hearing officer has failed to comply with the grievance procedure by issuing a decision that does not “contain findings of fact on material issues and the grounds in the record for the findings.”⁹ Specifically, the grievant claims that (1) her statements and witness testimony confirmed that she never intended to harm anybody and that her demeanor when speaking with her supervisor, while emotional, was not threatening; (2) she never declared that she would kill or harm anyone and she never intended to act on the emotions she expressed that day; and (3) there were no witnesses to her alleged statement.

The grievant’s challenge to the hearing officer’s consideration of evidence simply contests 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 that the cited actions occurred and constituted misconduct 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.

³ See *Grievance Procedure Manual* § 6.4(3).

⁴ Va. Code § 2.2-3005(D)(ii).

⁵ *Grievance Procedure Manual* § 5.9.

⁶ *Rules for Conducting Grievance Hearings*, § IV(D).

⁷ *Id.*

⁸ Va. Code § 2.2-3005(C)(5).

⁹ *Rules for Conducting Grievance Hearings* § V(C).

Here, the record evidence provides sufficient support for the hearing officer's determination that the cited actions occurred and that they constituted misconduct. The hearing officer found credible witness testimony that the grievant stated she could kill her co-worker and that when questioned regarding her statement, the grievant did not "deny a true intention to harm." Accordingly, the hearing officer neither exceeded nor abused his authority in determining that the cited actions occurred and constituted misconduct.

Failure to Mitigate

In support of her claim that the hearing officer improperly failed to consider mitigating circumstances, the grievant claims that she introduced evidence at hearing that management had prior knowledge of the conflict between the grievant and her co-worker, but failed to intervene or take action. Additionally, the grievant highlights the hearing officer's acknowledgment in his decision of the significant conflict between the grievant and her co-worker. The grievant further claims that the discipline taken against her was "not free of improper motive"¹⁰ and is inconsistent with other disciplinary action taken by the agency for violations of the workplace violence policy.

Agency inconsistency in issuing discipline, as well as improper motivation in issuing discipline, may be considered by a hearing officer to determine whether the level of discipline was too severe or disproportionate to the misconduct."¹¹ However, under the *Rules for Conducting Grievance Hearings*, once the hearing officer has determined that the employee committed the charged act, that the action constituted misconduct, and that the agency's discipline was consistent with law and policy, the hearing officer may mitigate the agency's discipline only after giving due deference to the agency's right to exercise its good faith business judgment in managing employee matters and its operations.¹² In this case, it appears that the hearing officer did consider mitigating factors but determined they did not justify a reduction of the agency's discipline.¹³

Policy Interpretation

The remainder of the grievant's claims are based on the hearing officer's interpretation of state and/or agency policy, which is not an issue for this Department to address. Rather, the Director of the Department of Human Resources Management (or

¹⁰ During this investigation, the grievant claimed that the improper motive was the agency's failure to take actions to diffuse the situation between the grievant and her co-worker despite the grievant's repeated requests.

¹¹ *Rules for Conducting Grievance Hearings*, § VI(B)(1).

¹² This deference standard comports with that established in other merit system case law, which allows for mitigation only where the agency's penalty exceeds the "tolerable limits of reasonableness." See *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5 (1981) citing to *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981)). The MSPB "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

¹³ See Decision of Hearing Officer, Case Number 755, issued July 14, 2004 ("no mitigating circumstances exist to reduce the disciplinary action").

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.¹⁴

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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁸

Claudia T. Farr
Director

¹⁴ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

¹⁵ *Grievance Procedure Manual*, § 7.2(d).

¹⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁷ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

¹⁸ Va. Code § 2.2-1001 (5).