

Issue: Compliance/administrative review of hearing decision/claim that hearing decision contains erroneous conclusions/agency failed to meet burden of proof/hearing officer improperly interpreted state and/or agency policy; Ruling Date: November 3, 2004; Ruling #2004-870; Outcome: hearing officer is ordered to modify decision



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-870
November 3, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 801. The grievant claims that (1) the hearing decision contains erroneous conclusions; (2) the Department of Corrections (DOC or the agency) failed to meet its burden of proof; and (3) the hearing officer improperly interpreted state and/or agency policy in rendering his decision.

FACTS

The grievant is employed as a Corrections Sergeant with DOC. Security staff at the grievant's facility would sometimes meet with and assist inmates "in developing and drafting plans to enable inmates to avoid hurting themselves."¹ The grievant often met with Inmate B, who suffered from borderline personality disorder and would frequently injure herself.² As a result of his meetings with Inmate B, the grievant was issued a Group III Written Notice on April 27, 2004 for "Fraternization/Improprieties with an Inmate." The Written Notice further states that: [a]n investigation by the Office of the Inspector General ...concluded that [grievant] did in fact participate in an inappropriate relationship with an inmate. This relationship consisted of spending an inordinate amount of time with the inmate and discussing matters of a personal nature" The grievant timely challenged the disciplinary action by initiating a grievance on May 21, 2004. The grievance proceeded to hearing on August 16, 2004.

In an August 26, 2004 decision, the hearing officer found the grievant's behavior did not rise to the level of a Group III and reduced the discipline to a Group II offense. In support of his determination that a Group III was inappropriate, the hearing officer finds that (1) the grievant's behavior did not constitute fraternization; (2) the agency's delay in issuing the discipline reduced the significance of the grievant's behavior; and (3) the grievant's behavior did not create the appearance of impropriety as alleged by the agency. In support of his conclusion that the grievant's behavior amounted to a Group II offense, however, the hearing officer states:

¹ Decision of Hearing Officer, Case Number 801, issued August 26, 2004.

² See Decision of Hearing Officer, Case Number 801, issued August 26, 2004.

It was appropriate for Grievant to talk with Inmate B about her threats to injure herself. It was appropriate for Grievant to attempt to draft a “plan/contract” with Inmate B wherein she would promise not to hurt herself. This practice was not unusual for security officers working at the Facility. Grievant’s mistake, however, was to assume he was capable of treating Inmate B. He failed to recognize that Inmate B was attempting to manipulate him. His mistake justifies the Agency’s concern about his performance and supports the issuance of a Group II Written Notice.

Upon reconsideration, the hearing officer upheld his August 26, 2004 decision that the grievant’s behavior warranted a Group II offense for what appears to be different reasons than those stated in his original decision. Specifically, in his reconsideration decision, the hearing officer states: “[t]he Written Notice is supported as a Group II offense because the Agency has established that Grievant spent ‘an inordinate amount of time with the inmate...’ and discussed ‘matters of a personal nature.’”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.”⁴ 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.⁵

Erroneous Conclusions

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁷ Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁸ Accordingly, the technical rules of evidence do not apply.⁹ Hearing officers have the duty to “[r]eceive probative evidence,” that is, evidence that “affects the probability that a fact is as a party claims it to be.”¹⁰ They may exclude evidence that is “irrelevant, immaterial, insubstantial, privileged, or repetitive.”¹¹ Where the evidence

³ See Reconsideration Decision of the Hearing Officer, Case Number 801-R, issued September 3, 2004. The Reconsideration Decision is incorrectly headed as 831-R.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005(D)(ii).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § IV(D).

⁹ *Id.*

¹⁰ Edward W. Cleary, McCormick on Evidence § 16, page 52 (1984).

¹¹ *Rules for Conducting Grievance Hearings* § IV(D).

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.

In this case, the grievant challenges the hearing officer's conclusion that the grievant was attempting to "treat" Inmate B.¹² The grievant contends that evidence in the record demonstrated that he was aware he was incapable of treating Inmate B and the hearing officer's reliance upon an assumption to the contrary, and to uphold a Group II offense on that basis, is erroneous. The grievant's opposition to the hearing officer's conclusion that the grievant was attempting to treat Inmate B, is a mere challenge to 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. As stated above, such determinations are entirely within the hearing officer's authority. Moreover, it appears that there was a basis in the record upon which to make this conclusion.¹³

Failure to Meet Burden of Proof

In challenges to disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the discipline was both warranted and appropriate under all the facts and circumstances.¹⁴ Further, the grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision that "contain[s] findings of fact on the material issues and the grounds in the record for those findings."¹⁵

The grievant claims that because the hearing officer concluded that the grievant did not fraternize, intend to fraternize, or otherwise engage in behavior that created the appearance of impropriety, the agency failed to prove the charges on the Written Notice by a preponderance of the evidence and as such, the grievant should have been completely exonerated from all disciplinary action. However, in addition to the charge of "Fraternization/Improprieties with an Inmate," the Written Notice states that the grievant "spent an inordinate amount of time" with Inmate B and "discussed matters of a personal

¹² In the August 26, 2004 hearing decision, the hearing officer concludes: "the evidence shows that Grievant did not intend to fraternize with Inmate B, he intended to treat her and help her stop hurting herself." The hearing officer also states later in the decision that "Grievant's mistake, however, was to assume he was capable of treating Inmate B." See Decision of Hearing Officer, Case Number 801, issued August 26, 2004.

¹³ For instance, in the Findings of Fact, the hearing decision finds that in a written statement during the investigation of his alleged inappropriate relationship with Inmate B, the grievant writes, "I can see now, that the way I was trying to help [Inmate B] is wrong. I can see that mental issues should be handled by the mental health professionals." See Decision of Hearing Officer, Case Number 801, issued August 26, 2004.

¹⁴ *Grievance Procedure Manual* § 5.8(2).

¹⁵ *Grievance Procedure Manual* § 5.9; see also *Rules for Conducting Grievance Hearings* § V(C).

nature.” It is upon these latter accusations, that the hearing officer ultimately upholds the grievant’s behavior as a Group II offense.¹⁶ It appears that the hearing officer relies solely upon the grievant’s written statement that he would spend “hours at a time” with Inmate B to support the conclusion that the grievant spent an “inordinate amount of time” with Inmate B.¹⁷ Importantly, however, the hearing officer failed to discuss in either decision the standard for determining when security staff exceeds the satisfactory amount of time to spend with inmates.¹⁸ This unanswered question of fact is especially significant and could materially affect the outcome of the grievant’s case given the hearing officer’s finding that it was appropriate for the grievant to spend time with Inmate B.¹⁹

Moreover, this Department deems it significant that the hearing officer has failed to identify in either decision why the grievant’s behavior constitutes a violation of the Standards of Conduct, and if so, why the behavior rises to the level of a Group II offense and not some other level of discipline.²⁰ Accordingly, the hearing officer is ordered to modify his written decision by including an explanation of the *findings of fact on the material issues and the grounds in the record for those findings* that justified upholding the grievant’s behavior as a Group II offense.

Policy Interpretation

The grievant claims that the hearing officer’s failure to exonerate him despite the finding that the agency inappropriately delayed in issuing the grievant the Group III Written Notice is not consistent with agency policy.²¹ The hearing officer’s

¹⁶ In his reconsideration decision, the hearing officer states that the Group II is supported because the agency proved by a preponderance of the evidence that the grievant had “spent an inordinate amount of time” with Inmate B and “discussed matters of a personal nature.” See Reconsideration of Hearing Officer, Case Number 801-R, issued September 3, 2004.

¹⁷ See Reconsideration of Hearing Officer, Case Number 801-R, issued September 3, 2004.

¹⁸ This Department recognizes that the grievant has not challenged the hearing officer’s conclusion that discipline is warranted because the grievant spent an inordinate amount of time with Inmate B. However, this Department further notes that the grievant did not have an opportunity to challenge this finding as this conclusion was cited in the reconsideration decision only and does not appear to be a basis upon which the hearing officer relied to uphold a Group II offense in his original August 26, 2004 decision. Because the hearing officer changes the basis for the disciplinary action after the time for submission of administrative review requests had run and the grievant has, in its broadest sense, challenged the hearing decision for lack of evidentiary support, this Department deems it appropriate to seek an explanation as to why the grievant’s time with Inmate B was “inordinate.”

¹⁹ See Decision of Hearing Officer, Case Number 801, issued August 26, 2004.

²⁰ For example, based upon the hearing officer’s stated findings of fact and conclusions, the question arises as to whether the grievant’s behavior warrants, at most, a Group I offense for poor performance.

²¹ In the August 26, 2004 decision, the hearing officer uses the agency’s failure to act in accordance with agency policy to issue discipline “as soon as practicable” as a basis to reduce the Group III Written Notice to a Group II Written Notice. See Decision of Hearing Officer, Case Number 801, issued August 26, 2004. Moreover, in his September 3, 2004 reconsideration, the hearing officer states “it was appropriate to consider the Agency’s delay when determining the level of disciplinary action.” The hearing officer further concludes, however, that policy is void of consequences for an agency’s failure to promptly issue discipline and that “[t]he Agency’s delay was not so unreasonable as to justify removal of all disciplinary action.” See Reconsideration of Hearing Officer’s Decision, Case Number 801-R, issued September 3, 2004.

interpretation of state and/or agency policy is not an issue 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.²² Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

Requests for administrative review must be made and *received* by the reviewer within 15 calendar days of the date of the hearing decision.²³ In this case, the grievant did not request a ruling from DHRM. However, the grievant timely requested an administrative review by this Department. This Department has previously held that timely claims made to the wrong party may proceed.²⁴ Therefore, if the grievant wishes to request DHRM to administratively review the hearing officer's application of the Standards of Conduct, he must do so within 15 calendar days from the date of the hearing officer's revised decision in response to this ruling. Further, under the facts and circumstances of this case,²⁵ this Department deems it appropriate to allow the grievant to seek an administrative review from DHRM as to whether the level of discipline upheld by the hearing officer in his revised decision that responds to this ruling is appropriate under the Standards of Conduct. If DHRM finds that the hearing officer's interpretation of policy was incorrect, the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.²⁶

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department finds that the hearing officer must modify his decision to include an explanation of the findings of fact on the material issue of why the grievant's behavior constitutes a Standards of Conduct violation and warrants the Group II disciplinary level, and the grounds in the record for those findings as outlined above. Further, within 15 calendar days from the date of the hearing officer's revised decision, the grievant may request an administrative review by the Director of DHRM to address the policy concerns as stated above.

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

²² Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

²³ See *Grievance Procedure Manual* § 7.2(a).

²⁴ See EDR Rulings 2000-008 (grievance initiated timely with the wrong party) and 2003-124, 2000-131 (request for administrative review sent to wrong agency).

²⁵ Here, the grievant's claim upon administrative review to this Department, that the agency has failed to meet its burden of proof, by its nature challenges the level of discipline imposed by the agency; also the hearing officer seems to have changed his basis for the discipline in his September 3, 2004 reconsideration. For these reasons, the grievant should be allowed to request DHRM to administratively review the issue of the correct level of discipline, *after* the hearing officer identifies in his revised decision, responding to this ruling, why the grievant's behavior warrants the Group II level of discipline.

²⁶ *Grievance Procedure Manual* § 7.2(a)(2).

November 3, 2004

Ruling #2004-870

Page 7

administrative review have been decided.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹ This Department's rulings on matters of procedural compliance are final and nonappealable.³⁰

Claudia T. Farr
Director

²⁷ *Grievance Procedure Manual*, § 7.2(d).

²⁸ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁹ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

³⁰ Va. Code § 2.2-1001 (5).