

Issue: Administrative Review of hearing decision #7944; Ruling Date: March 15, 2005;  
Ruling #2005-967; 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 2005-967  
March 15, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7944. The grievant claims that he has newly discovered evidence of unspecified phone calls, as well as evidence that the hearing officer engaged in misconduct. For the reasons discussed below, this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The grievant was employed as a Power Plant Operator by the Department of Corrections (DOC or the agency). He was removed from employment effective August 14, 2004 as part of a disciplinary action. On September 7, 2004, the grievant initiated a grievance timely challenging the disciplinary action and his resulting termination. After qualification by the agency, the grievance proceeded to hearing on January 18, 2005. In a January 20, 2005 decision, the hearing officer denied the grievant relief.

By letter dated February 4, 2005, the grievant advised the Director of this Department that he wished to appeal the hearing officer's decision "because there is new evidence that could not have been discovered at time of hearing"—specifically, "phone calls" and "misconduct by hearings officer." The grievant did not expressly identify whether he was making a request that the hearing officer reconsider his previous ruling or was instead asking the Director to review the hearing officer's decision for compliance with the grievance procedure.

On February 7, 2004, the hearing officer responded to the grievant's February 4, 2005 letter. Treating the grievant's letter as a request for reconsideration, the hearing officer issued a decision affirming his previous ruling.

This Department subsequently contacted the grievant by telephone to ask whether he also sought review of the hearing officer's decision by the Director. After the grievant advised the Department that he would only respond to written inquiries, on February 11, 2004, a letter was mailed to the grievant asking him to provide additional information regarding his stated grounds for appeal. In this letter, the grievant was asked to provide

the requested information no later than February 22, 2004. When the grievant had not responded to the Department's letter by February 24, 2004, a voice mail message was left for the grievant giving him the Department's toll-free number and asking him to return the Department's call. As of the date of this ruling, the grievant has not responded to this Department's attempts to contact him.

### 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>1</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>2</sup>

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>3</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>4</sup> Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.<sup>5</sup> Accordingly, the technical rules of evidence do not apply.<sup>6</sup> By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>7</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.

In this case, the grievant's failure to respond to this Department's request for additional information renders it impossible to evaluate the merits, if any, of his challenge to the hearing officer's decision. It is not enough for the grievant simply to make the bald assertion that he has additional evidence of phone calls and misconduct by the hearing officer, without providing further explanation and detail. Rather, he bears the burden of presenting sufficient evidence to show that the hearing officer's actions were not in compliance with the grievance procedure. As the grievant has failed to meet this burden, this Department cannot conclude that the hearing officer violated any provision of the grievance procedure or otherwise abused his authority.

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<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>2</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>3</sup> Va. Code § 2.2-3005.1(C).

<sup>4</sup> *Grievance Procedure Manual* § 5.9.

<sup>5</sup> *Rules for Conducting Grievance Hearings*, § IV(D).

<sup>6</sup> *Id.*

<sup>7</sup> Va. Code § 2.2-3005(C)(5).

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.<sup>8</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>9</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>10</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>11</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>9</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>10</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>11</sup> Va. Code § 2.2-1001 (5).