

Issue: Administrative Review/grievant claims new evidence and agency non-compliance at resolution steps; Ruling Date: March 15, 2005; Ruling #2005-969; Agency: Department of Corrections; Outcome: hearing decision in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections/ No. 2005-969

March 15, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7933. The grievant claims that (1) "new evidence has come forward," and (2) the agency did not comply with the grievance process during the management resolution steps. For the following reasons, this Department finds no error with the hearing decision.

FACTS

The Department of Corrections (DOC or the agency) employs the grievant as a Corrections Lieutenant at one of its facilities. The hearing officer found that on July 16, 2004, at approximately 9:30 p.m., an inmate and Corrections Officer H engaged in a physical altercation in the pod area, forcing the firing of a warning shot to stop the conflict. Following the altercation, the inmate returned to his cell and the door was closed and locked. The grievant and several other corrections officers approached the inmate's cell and the grievant spoke with the inmate, instructing him to present himself to be handcuffed. According to the hearing decision, after the inmate refused, the grievant ordered the cell to be opened. The grievant and at least three officers then entered the cell and physically restrained the inmate and removed him from his cell. Because the extraction was not videotaped and because none of the security personnel were wearing protective gear, the grievant was issued a Group II Written Notice.¹

The hearing officer concluded that on July 16, 2004, the grievant ordered an inmate cell extraction but failed to see that the cell extraction was videotaped and failed to instruct his subordinates to wear appropriate safety gear such as vests and helmets. As a result, the hearing officer concluded that the Agency has presented sufficient evidence

¹ DOC Post Order #6 for Housing Unit Supervisors provides:

any time there is a use of force and time permits, the incident will be videotaped, and this includes cell extractions. The individual using the camera will be familiar with the operation of the camera and the proper procedures for videotaping an incident. When videotaping an incident the taping will be narrated, step-by-step coverage and the camera should never be turned off until the complete incident has been resolved.

Specifically, the Written Notice cited the grievant for failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established policy and procedure.

to support its issuance of a Group II Written Notice for failure to follow established written policy.

DISCUSSION

Hearing Officer Error

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 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

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 Further, 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. However, where there is evidence that a party may not have been afforded a full opportunity to present relevant evidence or respond to evidence presented by the opposing party, then this Department may order the hearing officer to reopen the hearing.

Here the grievant claims that “new evidence has come forward.” However, when the EDR Consultant assigned to this case inquired as to the nature of this new evidence, the grievant explained that he was referring to statements from eight corrections officers that he purportedly proffered to the hearing officer at hearing. According to the grievant, the statements by the eight officers tended to refute the notion that the grievant ordered the cell door to be opened. Noting the absence of any mention of the statements in the hearing decision, the grievant infers that the statements must not have been considered by the hearing officer.

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

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

⁴ Va. Code § 2.2-3005.1(C)(ii).

⁵ *Grievance Procedure Manual* § 5.9.

⁶ *Rules for Conducting Grievance Hearings*.

⁷ *Id.*

⁸ Va. Code § 2.2-3005(C)(5).

In this case, although the grievant refers to the statements as new evidence, they were not new at all. The statements had existed for some time and, moreover, according to the grievant, were proffered to the hearing officer at the grievance hearing. In addition, the *Rules for Conducting Grievance Hearings (Rules)* do not require that the hearing officer address each piece of proffered or admitted evidence, nor does the absence of any mention in the hearing decision of a particular piece of evidence mean that it was not considered by the hearing officer. More importantly, the hearing record contains evidence that supports the hearing officer's finding that the grievant ordered the cell door opened.⁹ Accordingly, this Department finds no error by the hearing officer with respect to his treatment of the statements by the eight officers.

The grievant also complains that the hearing decision identifies him as the Watch Commander rather than Operations Manager. According to the grievant, the significance of this error is that he went to the Watch Commander and asked how he should handle the situation with the inmate and was told "take care of it." According to the grievant, that is precisely what he did—he took care of the situation—and thus did not, as the Written Notice states, fail to follow his supervisor's instructions. The fact that the grievant acted upon the Watch Commander's instruction to handle a situation, however, does not absolve the grievant of the duty of reacting in accordance with policy. The Written Notice also charged the grievant with failure to follow established policy and procedure. The hearing officer addressed the issue of the grievant's alleged failure to follow agency policy and concluded that he did not. Thus, any error attributable to the hearing officer regarding the title of the position held by the grievant on the day in question was ultimately harmless.

Agency Noncompliance during the Resolution Steps

The grievant also complains that the agency did not comply with the grievance process during the management resolution steps. For instance, he complains that (1) the second-step meeting did not take place within five workdays, (2) the third-step response was inadequate, and (3) the third-step respondent did not enter the date that he received the Grievance Form A from the grievant.

The grievance procedure requires both parties to address procedural non-compliance through a specific process.¹⁰ That process assures that the parties first communicate with each other about the non-compliance, and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming non-compliance must notify the other party in writing and allow five workdays for the opposing party to correct any non-compliance.¹¹ In addition, the grievance procedure provides that "[b]y proceeding with the grievance after becoming aware of a

⁹ The record contains two statements by other Corrections Officers that state the grievant did order the door opened: Agency Exhibits Nos. 8 and 9.

¹⁰ *Grievance Procedure Manual*, § 6.

¹¹ *Id.*

procedural violation, one may forfeit the right to challenge the noncompliance at a later time.”¹²

In this case, each of the cited instances of alleged agency noncompliance occurred during the management resolution steps, yet the grievant continued to advance his grievance. Because the grievant continued to advance his grievance after becoming aware of the purported noncompliance, he has waived the opportunity to raise challenges to those acts (or omissions) now. Therefore, this Department will not address claims of noncompliance that occurred during the management resolution steps. This Department’s ruling on the agency’s purported noncompliance is final and nonappealable.¹³

CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer in this grievance neither abused his discretion in his conduct of the hearing nor exceeded his authority in deciding this case. 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

Claudia T. Farr
Director

¹² *Id.* at §6.3.

¹³ Va. Code § 2.2-3003(G).

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*