

Issue: Administrative Review of #8124/Hearing Decision; grievance
issues/discipline/falsifying records; Ruling Date: September 16, 2005; Ruling #2006-
1102; Agency: Department of Corrections; Outcome: Hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of the Department of Corrections
Ruling Number 2006-1102
September 16 2005

The grievant has requested administrative review of the hearing officer's decision in Case Number 8124. The grievant asserts that the hearing decision is inconsistent with policy. He also claims that he was treated more harshly than Corrections Officers who have committed the same offense for which he was disciplined.

FACTS

The grievant is employed as a Corrections Officer Senior. On February 25, 2005, the grievant was issued a Group III Written Notice for falsifying records. On March 2, 2005, the grievant initiated a grievance challenging the disciplinary action. The grievance was qualified, and a hearing was held on August 1, 2005. The hearing officer upheld the Group III Written Notice in his August 2, 2005 decision.

On August 8, 2005, this Department received a written request for administrative review.¹

DISCUSSION

Inconsistency with DHRM Policy

The grievant claims that the hearing decision does not comport with policy. He claims that the agency waited an excessive amount of time before disciplining him. Under the grievance procedure, a request for an administrative review based on inconsistency with policy must be made to the Department of Human Resources Management (DHRM) Director, with a copy also going to the agency. If the grievant wishes to request that the hearing decision be reviewed by the DHRM Director on the basis that the decision does not conform to policy, the grievant must make a written request to the DHRM Director, which

¹ To whom the request for appeal was intended was not readily evident. In the letter requesting administrative review, the salutation was directed to: "Director: Claudia T. Farr." However, the name "Claudia T. Farr" appears to have a line drawn through it. The address listed on the letter is: "Department of Human Resources Management, 101 North 14th St., 12th Floor, Richmond, VA 23219." The letter containing the request was addressed to the hearing officer who presided over the grievant's hearing, at the Department of Employment Dispute Resolution, Division of Hearings, One Capitol Square Building, 830 East Main Street Suite 400, Richmond, VA 23219."

must be **received within 15 calendar days of the date of this ruling.** The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Inconsistency in Discipline

The grievant claims that he was treated more harshly than others who have engaged in the same misconduct, the falsification of documents. Under the *Rules for Conducting Grievance Hearings (Rules)*, a hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.² One of the examples of a mitigating circumstance set forth in the *Rules* is the inconsistent application of discipline, which is defined as "discipline that is inconsistent with how other similarly situated employees have been treated."

Under the facts of this case, this Department cannot conclude that the hearing officer erred by not reducing the discipline. In declining to mitigate, the hearing officer explained in his decision that:

The Grievant argues the Agency has inconsistently disciplined its employees. He offers as an example, another employee who engaged in similar behavior but received only a Group I Written Notice. In that case the matter was referred only to the Associate Warden who had the authority to issue a Group I Written notice. Because the Associate Warden did not believe the disciplinary action should involve suspension or removal, the matter was not referred to the Warden Senior for consideration. The Warden Senior testified that had the matter been referred to him he would have taken action consistent with the action taken against Grievant. Based on the evidence presented, issuance of a Group I Written Notice appears to be an error by the Associate Warden rather than a practice by the Agency to treat differently similarly situated employees.

As stated above, the hearing officer found that the Warden Senior would have taken the same action against the other employee, had the earlier incident been reported to him. Just as the agency's failure to 'appropriately' discipline the similarly situated employee did not preclude it from taking 'appropriate' action against the grievant, neither was the hearing officer bound to sanction the agency for its earlier failure by reducing the grievant's discipline. While the *Rules* expressly cite to inconsistency of discipline as a reason that a hearing officer may reduce discipline, they were never intended to force an

² *Rules for Conducting Grievance Hearings*, VI (B)(1).

agency to repeat earlier mistakes. Thus, under the particular facts of this case, we cannot find that the hearing officer erred when he concluded that the discipline imposed was within the bounds of reasonableness.

APPEAL RIGHTS

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.³ If the grievant does not elect to appeal to DHRM, the decision will become final within 15 days of the date of this decision. If the grievant appeals to DHRM, the decision becomes final when the DHRM Director issues her decision, *and* the hearing officer issues any revised decision ordered by the DHRM Director. The date of the last of these decisions shall be considered the date upon which the hearing decision becomes final. 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.⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁵

Claudia T. Farr
Director

³ *Grievance Procedure Manual*, § 7.2(d).

⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

⁵ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).