

Issue: Administrative Review of #8148; Hearing Decision Appeal; grievance issues: retaliation/grievance activity participation; discipline/leave work without permission; Ruling Date: October 14, 2005; Ruling #2006-1117; Agency: Department of Corrections; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1117
October 14, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8148. In his request for administrative review, the grievant claims that: (1) the action taken by management was retaliatory; (2) the hearing officer failed to properly consider or review all of the evidence; (3) the hearing decision is inconsistent with state and agency policy because all the evidence was not properly considered; (4) the testimony of key witnesses was influenced by management; (5) the disciplinary action is too severe in light of the grievant's outstanding work performance and career; and (6) he should have been allowed a reasonable amount of time to recover from his military duty before being ordered to return to work and that requiring him to return to work may have been a violation of federal law.

FACTS

Prior to his demotion, the grievant was employed as a Corrections Sergeant with DOC. On April 28, 2005, the grievant was issued a Group III Written Notice with suspension, demotion to Corrections Officer Senior and a 10% pay reduction for "[l]eaving a security post without permission during working hours." The grievant was also issued a Group II Written Notice with suspension for "[f]ailure to report to work as scheduled without proper notice [to] supervisor." The grievant challenged the disciplinary actions by initiating a grievance on May 2, 2005. The May 2nd grievance challenges the disciplinary actions as unwarranted and retaliatory.

The May 2nd grievance proceeded to hearing on August 11, 2005. In an August 19, 2005 hearing decision, the hearing officer upheld the Group III Written Notice and reversed the Group II Written Notice.

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.”¹ 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.²

Retaliation

In an attachment to the grievant’s May 2, 2005 grievance, the grievant challenges the disciplinary actions taken against him as retaliatory and improper. On June 29, 2005 the agency head qualified the May 2nd grievance without expressly denying qualification of any of the grieved issues. Accordingly, retaliation was an issue before the hearing officer for adjudication.³ The August 19, 2005 hearing decision does not address, resolve or remedy the grievant’s retaliation claim. In his request for administrative review, the grievant states that: “I still I [*sic*] believe that this action is being taken against me in retaliation for an earlier grievance I had filed in late 2004.” The grievant’s assertion that he still believes the disciplinary action was retaliatory can be properly viewed as a claim that the issue of retaliation still needs to be addressed by the hearing officer.

The grievant, however, failed to present any evidence of retaliation at hearing. Specifically, as indicated in the hearing tapes, at the end of the hearing, the agency representative asked the grievant about his claim of retaliation and in particular, if he was withdrawing his claim given he did not put on any evidence of retaliation. The grievant replied that although he did not have any evidence to support his retaliation claim, he did not wish to withdraw the claim. The agency representative then asked the grievant whether his earlier grievance (i.e., the alleged protected activity) involved Lieutenant G or Lieutenant H. The grievant stated that it did not, but the grievance was reviewed by the administration and as such, he believes that the grievance may have angered the administration and resulted in the severe disciplinary action that was taken against him in the present case.

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

³ See *Rules for Conducting Grievance Hearings* § V(C).

In light of the grievant's failure to put on any evidence in support of his retaliation claim, this Department concludes that the hearing officer's failure to address the retaliation claim in the hearing decision was harmless error.

Failure to Properly Consider or Review all of the Evidence

The grievant argues that the hearing officer failed to properly consider or review all the evidence with regard to the Group III Written Notice.⁴ In essence, the grievant is simply contesting 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. Moreover, 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.

Further, according to the Rules for Conducting Grievance Hearings, "[a]fter the hearing, the hearing officer should deliberate on the evidence presented at the hearing."⁵ Thereafter, 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 Further, "[i]n cases involving discipline, the hearing officer reviews the facts *de novo*" to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action.⁸ Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.⁹ Further, the grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision

⁴ In support of his assertion, the grievant provided this Department with his version of the events leading up to his early departure from the institution on the morning of April 13, 2005. However, the administrative review process is not intended to provide either party with a second opportunity to have the merits of their case assessed by this Department. Accordingly, this ruling will not reconsider the grievant's case in light of the evidence he provided, but will address only his claim that the hearing officer failed to properly consider or review all the evidence presented at hearing.

⁵ *Rules for Conducting Grievance Hearings*, § V(A).

⁶ Va. Code § 2.2-3005.1(c).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *See Rules for Conducting Grievance Hearings*, § VI (B).

⁹ *Grievance Procedure Manual* § 5.8(2).

that “contain[s] findings of fact on the material issues and the grounds in the record for those findings.”¹⁰

While it appears that the hearing officer properly considered or reviewed the majority of evidence in this case, the grievant cites to an apparent inconsistency in the record evidence. Specifically, the grievant alleges that he departed the institution when an officer from a nearby correctional institution (Officer B) arrived to relieve him of his duty and that Lieutenant H, the lieutenant in charge that evening located at a nearby correctional institution, was aware that the officer was being sent to relieve the grievant so that he could go home. In support of his contention that he discussed being relieved of his duty with Lieutenant H, grievant points to a written statement by Officer H, who allegedly overheard the grievant talking with Lieutenant H that evening. Officer H’s written statement was entered as an exhibit at the August 11, 2005 hearing and contains the following information: “[o]n April 12, 2005 while on my post in master control I over heard [grievant] and [Lieutenant H] speak on the telephone about sending an officer over to relieve [grievant]. [Officer B] arrived from [nearby correctional institution] and stated that he was [grievant’s] relieve [*sic*] officer and [grievant] exited.”¹¹

In his August 11, 2005 decision, the hearing officer determined that the grievant did not obtain permission to leave his security post prior to his departure and thus upholds the Group III Written Notice for “leaving a security post without permission during working hours.” It appears that the hearing officer based this conclusion upon the testimony of three witnesses: Lieutenant H; Sergeant H, an officer on duty at the same nearby correctional institution; and Officer H. More specifically, the hearing decision states:

Grievant contends he asked Lieutenant H for permission to have a corrections officer relieve him of his post so that he could go home. Lieutenant H denies this conversation occurred. Sergeant H denies this conversation occurred. Grievant asserts that Officer H overheard some of his conversation with Lieutenant H during which Grievant discussed having someone relieve him so he could go home. Officer H denied hearing that portion of the conversation. Based upon the evidence presented, the Hearing Officer can only conclude that Grievant did not seek and obtain permission from Lieutenant H to leave the facility.¹²

Based on the hearing officer’s conclusion above regarding Officer H’s testimony, it is unclear whether the hearing officer considered the earlier contradictory written statement of Officer H in concluding that Officer H did not hear the grievant discuss having someone relieve him so that he could go home. However, even if this Department were to assume that the hearing officer did in fact fail to consider Officer H’s written statement in deciding this case, there was substantial evidence in the record to support the

¹⁰ *Grievance Procedure Manual* § 5.9; see also *Rules for Conducting Grievance Hearings* § V(C).

¹¹ See Agency Exhibit #5, page 2.

¹² Decision of Hearing Officer Case No. 8148, issued August 19, 2005.

finding that the grievant did not have permission to leave the facility (i.e., the testimony of Lieutenant H and Sergeant H).¹³ Further, if the hearing officer did in fact consider Officer H's written statement in making his conclusion, but simply found Officer H's testimony at hearing to be more credible than his earlier written statement, this Department finds no error because the hearing officer's finding was based upon evidence in the record; namely Officer H's testimony at hearing.

Policy Interpretation

The grievant claims that the hearing decision is inconsistent with state and agency policy because all the evidence was not considered. In making this claim, the grievant references "GPM 5-10." Section 5.10 of the Grievance Procedure Manual is irrelevant to the grievant's assertion that all the evidence was not considered.¹⁴ However, the grievant's claim that all the evidence was not properly considered and whether such alleged failure violated the grievance procedure was discussed in detail above.

Further, to the extent that the grievant is challenging the hearing officer's interpretation of some other policy, such as DOC Policy 5.10, such a claim is not 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.¹⁵ Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

Testimony of Key Witnesses Influenced by Management

The grievant further asserts that witness testimony was influenced by the agency prior to hearing. In support of his assertion, the grievant points to Officer H's contradictory versions of what he overheard on the night in question. However, based upon a review of the record evidence, it does not appear that the grievant raised at hearing any claim or objection regarding the agency's alleged inappropriate influence over a witness. Accordingly, it seems reasonable to assume that the hearing officer was unaware of any alleged inappropriate behavior on the behalf of the agency with regard to witness testimony. As such, this Department cannot conclude that the hearing officer erred by failing to address the grievant's claim.

Failure to Consider Mitigating Circumstances

¹³ Substantial evidence refers to such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Aegis Waste Solutions, Inc. v. Concerned Taxpayer of Brunswick County*, 261 Va 395, 404 (2001). The substantial evidence rule is used to review cases decided under the Federal Administrative Procedure Act and the Virginia Administrative Process Act. While this Department is not bound by either the federal APA or the Virginia APA, cases applying the "substantial evidence" standard are nonetheless instructive and persuasive here.

¹⁴ *See Grievance Procedure Manual* § 5.10, *Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice*.

¹⁵ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

The grievant further argues that the disciplinary action is too severe in light of his outstanding work performance and career. To the extent the grievant is arguing that the hearing officer should have considered his work performance as a mitigating factor in determining whether to uphold the disciplinary action taken by the agency, this Department concludes that the hearing officer complied with the grievance procedure on that issue. While a hearing officer is required to *consider* mitigating circumstances,¹⁶ the hearing officer stated in his decision that “[n]o credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.”¹⁷ Accordingly, the hearing officer appears to have properly considered mitigating circumstances but determined the circumstances did not warrant mitigation of the disciplinary action.

Requiring the Grievant to Return to Work Following Military Duty

The grievant further argues that requiring him to return to work without proper rest following his service on active military duty was improper and may have been a violation of federal law. To the extent that the grievant is arguing that the hearing decision fails to comply with policy, as stated above, such claims are left to the determination of the Director of DHRM, not this Department. Likewise, to the extent the grievant is arguing that the hearing decision fails to comply with law, such questions are to be reviewed by the circuit court in the jurisdiction in which the grievance arose, not this Department.

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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰ This Department’s rulings on matters of procedural compliance are final and nonappealable.²¹

Claudia T. Farr
Director

¹⁶ See *Rules for Conducting Grievance Hearings*, § VI(B).

¹⁷ Decision of Hearing Officer Case Number 8148, issued August 19, 2005.

¹⁸ *Grievance Procedure Manual*, § 7.2(d).

¹⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁰ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2nd 319 (2002).

²¹ Va. Code § 2.2-1001 (5).