

Issue: Administrative Review of #8126/Hearind Decision; grievance issue;
discipline/sleeping during work; Ruling Date: September 26, 2005; Ruling #2006-1119;
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 Corrections
Ruling Number 2006-1119
September 26, 2005

The grievant, through his representative, has requested that this Department administratively review the hearing officer's decision in Case Number 8126. The grievant claims that the hearing officer improperly admitted into evidence an exhibit which contained the results of a polygraph test, as well as a pretest record by the polygrapher.

FACTS

The grievant is employed by the Department of Corrections (DOC or the agency) as a Corrections Officer Senior. On April 27, 2005, the agency issued the grievant a Group III Written Notice for sleeping during work hours. On May 6, 2005, the grievant initiated a grievance challenging the disciplinary action and related suspension. After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.

A hearing was held in this matter on August 17, 2005, and a written decision upholding the disciplinary action and suspension was issued on August 19, 2005. According to the grievant, the agency sought to introduce into evidence a disciplinary referral memorandum which made reference to the results of the grievant's polygraph test, as well as a statement the grievant alleges was a pretest record by the polygrapher. The decision states that the grievant objected to the admission of the document, citing the statutory prohibition against introducing polygraph results in a grievance proceeding, but that the hearing officer admitted the document as evidence because it contained other relevant information. The decision also notes that the hearing officer admonished the agency for failing to redact the polygraph results prior to offering the document at hearing and assured the grievant that he would not consider "any information relating to the polygraph" in making his decision.

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

The grievant, through his representative, argues that the hearing officer failed to comply with the grievance procedure when he allowed the introduction of exhibits related to the polygraph test taken by the grievant. He asserts that under § 4.D of the *Rules for Conducting Grievance Hearings*,” the hearing officer was required to exclude the disciplinary referral memorandum and the pretest record.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”³ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁴ By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁵ Moreover, 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

Further, Va. Code § 40.1-51.4:4.D provides that “the analysis of any polygraph test charts produced during any polygraph examination administered to a party of witness shall not be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10 (§2.2-1000 et seq.) of title 2.2...” This statutory prohibition is incorporated by § 4.D of the *Rules for Conducting Grievance Hearings*, which states that “the results of polygraph tests are not admissible as evidence in a grievance hearing over the objection of any party except as to disciplinary or other actions taken against a polygrapher.”

As the disciplinary referral memorandum included information relevant to the grievance other than the results of the grievant’s polygraph test, the hearing officer correctly admitted the memorandum into evidence. However, to comply with Va. Code 40.1-51.4:4.D, as well as the *Rules for Conducting Grievance Hearings*, the hearing officer should have required the agency to redact those portions of the memorandum referring to the results of the polygraph examination prior to admitting the memorandum

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

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

³ Va. Code § 2.2-3005.1 (C) (ii).

⁴ *Grievance Procedure Manual* § 5.9.

⁵ Va. Code § 2.2-3005(C)(5).

⁶ *Rules for Conducting Grievance Hearings*, § IV(D).

⁷ *Id.*

into evidence. The hearing officer was not required to exclude the signed statement, which the grievant claims was a pretest record, as that document does not reference or refer to polygraph test results.

However, while the hearing officer should not have accepted the unredacted memorandum into evidence, there is no basis on which to remand the hearing decision or to direct other relief. The grievant has not presented any evidence to suggest that the hearing officer considered the results of the polygraph test in reaching his decision, and, indeed, the hearing officer specifically noted that his decision was based solely on the other evidence presented at hearing.⁸ In the absence of evidence that the hearing officer improperly considered the polygraph results, the admission of the unredacted memorandum constitutes harmless error.⁹

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.¹⁰ 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.¹¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹² This Department's rulings on matters of procedural compliance are final and nonappealable.¹³

Claudia T. Farr
Director

⁸ This evidence included the pretest statement, which contained an admission by the grievant that he had been sleeping, and hearsay evidence that others saw the grievant sleeping. See Hearing Decision at p. 6.

⁹ See generally *Hall v. Commonwealth of Virginia*, 421 S.E.2d 455, 462 (Va. Ct. App. 1992).

¹⁰ *Grievance Procedure Manual*, § 7.2(d).

¹¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹² *Id.* See also *Va. Dept. of State Police vs. Barton*, 39 Va. App. 439, 573 S.E. 2d 319(2002).

¹³ Va. Code § 2.2-1001 (5).