

Issue: Administrative Review of Case #7998; Ruling Date: November 28, 2005; Ruling #2006-1157; Agency: Department of Juvenile Justice; Outcome: hearing officer in compliance



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW OF THE DIRECTOR**

In the matter of Department of Juvenile Justice/ No. 2006-1157  
November 28, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7998. The grievant contends that; (1) the Department of Juvenile Justice's (agency's) investigation was untimely, incomplete, and insufficient; and (2) the failure of the agency to conduct a timely investigation should have been viewed as a mitigating factor.

**FACTS**

On November 23, 2004, grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Falsification of time records for the period beginning 6/28/04 through 10/15/04. The hours reported on official time records were inconsistent with the hours documented on assigned in and out log. During this [period] there were twenty five instances of failure to accurately report times of arrival at work; five instances of failure to accurately report the time of your departure and three instances of using the one hour lunch break to offset work hours. Also there were seven weeks in which you failed to work 40 hours.*

On December 2, 2004, the grievant timely filed a grievance to challenge the agency's action. The outcome of the Third Resolution Step was not satisfactory to the grievant and he requested a hearing. On July 12, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2005, a hearing was held at the agency's regional office.

The hearing officer found that the agency did not establish that the grievant intentionally wrote inaccurate times in order to overstate the number of hours he appeared to work, thus he concluded that the agency had not met its burden of proving that the grievant falsified documents. The hearing officer concluded, however, that the grievant had disregarded the instruction to work a minimum of 40 hours per week. Accordingly, the hearing officer reduced the Group III to a Group II, but still upheld the grievant's termination.

## DISCUSSION

### *Policy Interpretation*

The grievant claims that the agency did not conduct its investigation in a timely manner and that the investigation was incomplete and insufficient. Such claims are grounded in the hearing officer's interpretation of state and/or agency policy, which are not issues for this Department to address. Rather, the Director of the Department of Human Resource Management (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.<sup>1</sup>

### *Failure to Consider Mitigating Circumstances*

The grievant claims that the hearing officer failed to consider, as a mitigating circumstance, the agency's alleged failure to conduct its investigation in a timely manner. The grievant points to a decision by another EDR hearing officer, Case No. 7886, in which the hearing officer reduced the agency imposed discipline because of the extreme length of time between the misconduct and the issuance of discipline.

Under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was "warranted and appropriate under the circumstances."<sup>2</sup> A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness.<sup>3</sup> In this case, the hearing decision does not expressly address the issue of the amount of time that elapsed between the alleged offense and the issuance of the written notice; however, the decision states that "[n]o credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*."<sup>4</sup> As discussed below, under the facts of this case, this Department cannot conclude that the hearing officer abused his discretion in finding that the discipline imposed on the grievant did not exceed the limits of reasonableness.

First, the delay here was not nearly as lengthy as that in Case No. 7886. In that case, an agency issued discipline in August of 2004 for offenses that largely occurred in late 2003. In addition, in Case No. 7886, the hearing officer found that the agency was aware of the offenses

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<sup>1</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2). To the extent that the grievant's objection that the investigation was incomplete and untimely is based on non-compliance with the grievance process, the timeliness issue is addressed in the following mitigation section. As to deficiencies with the investigation, the grievant was presented with ample opportunity to challenge, at the grievance hearing, the charges against him as well as the accuracy and thoroughness of the underlying investigation. This Department finds no error as to the adequacy of the investigation as a matter of compliance with the grievance procedure.

<sup>2</sup> See *Rules for Conducting Grievance Hearings*, § VI.B.

<sup>3</sup> *Id.*

<sup>4</sup> Hearing Decision, page 7, note 6.

within a few days of each occurrence. In contrast, in the instant case, the record evidence shows that the grievant was disciplined on November 21, 2004 for conduct that occurred between June 28, 2004 and October 15, 2004.<sup>5</sup> The delay here was thus significantly less than that cited in Case No. 7886.<sup>6</sup> In addition, delays in submissions of timesheets coupled with the deficiencies of some submissions may have contributed to the overall delay in issuing the discipline.<sup>7</sup> Thus, under the facts of this case, this Department finds no error as to the issue of mitigation.

#### 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>5</sup> See Group III Written Notice dated November 23, 2004, Agency Exhibit 1.

<sup>6</sup> In the request for administrative review the grievant asserts that the Agency Director testified that the Human Resource Manager received a tip in early July 2004 that the grievant was falsifying his time sheets. However, a review of the hearing tapes could not confirm this claim. The Agency Director testified that the tip "could have been" received in July but that she was not certain. Hearing Tape 2, at counter No. 160. The review did reveal that an investigator with the Office of the Inspector General (OIG) testified that his office received a request for an investigation from the agency on or about August 30, 2004. Hearing Tape 3, counter at No. 117. He testified that he began his investigation on September 10, 2004. Hearing Tape 2, at counter No. 550. The record appears to show that on or about September 27, 2004, the OIG investigator completed an initial report which he amended on October 27, 2004. As of October 28, 2004, it appears that the investigator was still attempting to procure certain timesheets that had not been submitted or that had to be returned because they contained deficiencies. Management issued discipline on November 21, 2004, just under 3 months after the OIG's office received the request for an investigation.

<sup>7</sup> See October 28, 2004 e-mail with a subject line: "Mr. [grievant]" from the timekeeper to the OIG investigator indicating that the timekeeper is having difficulty obtaining time sheets that the investigator was apparently interested in reviewing. Agency Exhibit 3.

<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).