

Issue: Administrative Review/grievant claims that hearing officer failed to properly consider or review all evidence and improperly interpreted state and/or agency policy in decision; Ruling Date: December 7, 2006; Ruling #2006-1165; Agency: Department of Juvenile Justice; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2006-1165
December 7, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8164. In his request for administrative review, the grievant claims that the hearing officer failed to properly consider or review all of the evidence and improperly interpreted state and/or agency policy in rendering his decision.

FACTS

The grievant is employed as a Senior Juvenile Corrections Officer with the Department of Juvenile Justice (DJJ or the agency). In September 2004, the agency advertised three openings for the position of Corrections Sergeant. The three positions were to be filled through a single applicant pool and selection process. The grievant applied for the three Sergeant positions and received first and second interviews. After the second interview, the hiring panel selected three candidates to fill the vacant positions. The grievant was one of the three applicants selected by the hiring panel. The acting facility superintendent and deputy director approved two of the hiring panel's recommended candidates and those candidates were subsequently offered positions. The recommendation made by the hiring panel with respect to grievant's selection was not approved. "The primary basis for denying the promotion was an incident in which the grievant was found to have threatened a ward; a Group III disciplinary action was issued to grievant for that incident."¹

The grievant challenged his non-selection by initiating a grievance on March 17, 2005. In his March 17th grievance, the grievant claims misapplication and/or unfair application of policy and retaliation. On August 4, 2005, this Department qualified the

¹ Decision of Hearing Officer, Case Number 8164, issued September 23, 2005.

March 17th grievance for hearing and a hearing was subsequently held on September 22, 2005. In a September 23, 2005 hearing decision, the hearing officer found that the grievant had failed to show either a misapplication or unfair application of policy or retaliation and as such, denied the grievant relief.²

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.”³ 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.⁴

Consideration of the Evidence

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁵ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁶ Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁷ 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.

Prior Non-Selections

The grievant argues that in assessing his retaliation claim, the hearing officer improperly failed to consider his non-selection on at least 20 other occasions, including at least 17 non-selections that allegedly occurred prior to the initiation of his November 10, 2004 grievance.⁸ The hearing officer had determined that the grievant’s non-selection on occasions prior to the November 10, 2004 grievance would not be probative of the

² *Id.*

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ Va. Code § 2.2-3005(D)(ii).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ Va. Code § 2.2-3005(C)(5).

⁸ The grievant also claims that the hearing officer failed to admit documents into evidence demonstrating that he was denied selection for promotion on at least 17 occasions prior to his receipt of his November 10, 2003 Group III Written Notice. However, the grievant further states that he is not challenging the hearing officer’s failure to admit these documents, but rather just the failure to consider his non-selection on these previous occasions as evidence in support of his retaliation claim. Accordingly, this ruling will not address whether the hearing officer improperly excluded these documents.

retaliation claim, because the non-selections preceded the grievance and thus could not have been caused by that protected activity. That determination was entirely within his authority. Indeed, repeated non-selections prior to the grievance would appear to support the agency's claim that it did not retaliate against the grievant for filing his grievance, but rather had treated the grievant consistently before and after his protected activity.

It is not clear from the hearing decision whether the hearing officer considered any instances of non-selection that allegedly occurred after the November 10, 2004 grievance. However, even if the hearing officer did not consider such evidence, it would appear to be at most harmless error given the grievant's assertion of at least 17 non-selections prior to the grievance. Again, the evidence of repeated non-selections before and after the November 10 grievance would tend to support the agency's claim of consistent treatment of the grievant before and after his protected activity.

Similarly Situated Employees

The grievant contends that the hearing officer should have considered DJJ's recent promotion of another employee despite the employee's criminal conviction for driving under the influence and an active Group III Written Notice. The hearing officer did consider that argument, however. The hearing decision states that at hearing, the grievant had "asserted that he knew of two employees who were promoted notwithstanding the fact that they had been 'written up' for offenses."⁹ As the record reflects, however, the grievant testified further that he did not know whether any employees were actually given a written group notice for their behavior prior to their alleged promotion.¹⁰

In cases like this, it is the grievant's burden to establish that the agency treated him differently from other similarly-situated employees with respect to promotions.¹¹ Here, the hearing officer apparently found, based upon the record, that grievant had not presented sufficient evidence of one or more employees having active written notices at the time of their alleged promotions. Such a finding is entirely within the hearing officer's authority.¹²

⁹ See Decision of Hearing Officer, Case Number 8164, issued September 23, 2004.

¹⁰ Hearing tapes. In his request for administrative review, the grievant also claims that at some point after the hearing, yet another employee was promoted, despite his alleged arrest for possession of a controlled substance and an active Group III Written Notice. However, this allegation was not before the hearing officer, nor was it timely brought before the hearing officer after the hearing. Thus, no basis exists to find that the hearing officer erred with respect to this particular claim or related evidence.

¹¹ In qualified grievances challenging any action other than formal discipline or dismissal for unsatisfactory performance, the grievant must prove his case by a preponderance of the evidence. See *Grievance Procedure Manual* § 5.8(2) and (3).

¹² This Department recognizes that the grievant is not privy to documents and/or information regarding disciplinary action taken against other employees. However, under the document provisions of the grievance procedure, the grievant could have requested such documents and/or information in redacted form from the agency. See *Grievance Procedure Manual* § 8.2.

Comparison of Group I and Group III Notices

The grievant alleges that in determining the legitimacy of the agency's decision to deny the grievant's promotion based on his active written notice, the hearing officer inappropriately compared a Group I Written Notice for poor attendance to his Group III Written Notice for threatening a ward.¹³ Based upon a review of the hearing decision, it appears that the hearing officer's comparison was used to illustrate his conclusion that it is neither a misapplication nor an unfair application of policy for the agency to evaluate each promotion case individually rather than automatically disqualifying applicants with active disciplinary actions.¹⁴ Neither the grievance procedure nor the *Rules for Conducting Grievance Hearings* prohibit the use of such illustrations.

Reliance upon October 2003 Group III Written Notice

The grievant asserts that the hearing decision's reference to an October 24, 2003 Group III Written Notice (used by the agency as a basis for denying grievant the promotion at issue) was unwarranted and inappropriate. To the extent the grievant's position is that the hearing officer improperly upheld the Group III Written Notice in his September 23rd decision, this Department concludes that the hearing officer did not consider, nor could he consider, the legitimacy of the Group III Written Notice in rendering his September 23rd decision.¹⁵ Rather, the hearing officer appropriately assumed the legitimacy of the Group III Written Notice, which had been upheld in an April 19, 2004 hearing decision.¹⁶ To the extent the grievant is challenging the April 19, 2004 decision, he is untimely. Any such challenge could have been brought through the administrative review process or in circuit court within the appropriate time limits after the issuance of that decision.¹⁷

Policy Interpretation

The grievant challenges the hearing officer's interpretation of DHRM policies. The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are

¹³ In his decision, the hearing officer opines that an employee with an active Group I Written Notice for a minor infraction such as poor attendance may still be promoted if he is otherwise qualified for the position and his attendance has improved, while an employee with an active Group III Written Notice, the most severe of infractions, could be denied promotion. *See* Decision of Hearing Officer, Case Number 8164, issued September 23, 2005.

¹⁴ *See* Decision of Hearing Officer, Case Number 8164, issued September 23, 2004.

¹⁵ The October 24, 2003 Group III Written Notice was not an issue qualified for hearing and as such, the legitimacy of the Group III Written Notice was not an issue before the hearing officer for adjudication. *See Rules for Conducting Grievance Hearings* § V(C).

¹⁶ *See* Decision of Hearing Officer, Case Number 642, issued April 19, 2004.

¹⁷ *See Grievance Procedure Manual* §§ 7.1 through 7.3.

consistent with state and agency policy.¹⁸ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to his appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.¹⁹

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²² This Department's rulings on matters of procedural compliance are final and nonappealable.²³

Claudia T. Farr
Director

¹⁸ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

¹⁹ *Grievance Procedure Manual* § 7.2 (a)(2).

²⁰ *Grievance Procedure Manual*, § 7.2(d).

²¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²² *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2nd 319 (2002).

²³ Va. Code § 2.2-1001 (5).