

Issue: Administrative review of Case #8172; Ruling Date: November 9, 2005; Ruling #2006-1171; 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 2006-1171
November 9, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8172. The grievant claims that the hearing officer improperly refused to allow the grievant's representative to testify. For the reasons discussed below, this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The grievant is employed by the Department of Corrections (DOC or the agency) as a Corrections Officer Senior.¹ On May 26, 2005, the agency issued the grievant a Group II Written Notice of disciplinary action with a 36-hour suspension for failing to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy.² On June 13, 2005, the grievant initiated a grievance challenging the agency's action.³ After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.⁴

A hearing was held in this matter on October 3, 2005.⁵ Prior to hearing, the grievant's representative, Mr. B, made the agency aware that he intended to testify on the grievant's behalf.⁶ At the beginning of the hearing, the agency's representative objected to Mr. B testifying as a witness, on the basis that non-party witnesses are required to be excluded from the hearing room.⁷ After the hearing officer asked Mr. B to give an "approximation" of his testimony, Mr. B explained that he intended to testify regarding a

¹ Hearing Decision at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Hearing Tape 1, Side 1, at Counter Nos. 25-27.

⁷ *Id.* at Counter Nos. 28-32.

conversation he had with another officer involved in the underlying incident, as well as about previous discipline issued by the agency.⁸ The hearing officer explained that he had allowed representatives to testify when called by the opposing party, but that it was not permissible for a representative to offer testimony in support of the party on whose behalf the representative acts.⁹ When Mr. B asked why Warden C, an agency witness, would be allowed to testify when he was also present in the hearing room, the hearing officer explained that the warden had been designated as the agency's party and was therefore permitted to be present throughout the hearing and also testify.¹⁰

The hearing officer issued a written decision upholding the disciplinary action on October 5, 2005.¹¹ On October 12, 2005, the grievant, through her representative, requested an administrative review by this Department.

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.”¹² 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.¹³

The grievant argues that the hearing officer failed to comply with the grievance procedure when he excluded Mr. B's testimony, while allowing the agency to present the testimony of Warden C.¹⁴

The *Rules for Conducting Grievance Hearings* provide that each party may be present during the entire hearing and may testify.¹⁵ In addition, the agency may select an individual to serve its “party” and to testify. As stated in the *Rules for Conducting Grievance Hearings*, “[t]he fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present

⁸ *Id.* at Counter Nos. 36-42.

⁹ *Id.* at Counter Nos. 59-71.

¹⁰ *Id.* at Counter Nos. 73-80. The hearing officer suggested that the parties' representative discuss during the break whether they could stipulate to any of Mr. B's intended testimony. *Id.* at Counter Nos. 111-26. However, the representatives were apparently unable to agree on any such stipulation. Tape 2, Side 3, at Counter Nos. 19-29.

¹¹ Hearing Decision at 1.

¹² Va. Code § 2.2-1001(2), (3), and (5).

¹³ See *Grievance Procedure Manual* § 6.4(3).

¹⁴ At hearing, the grievant's representative also objected to the agency's failure to raise its objection to his testimony prior to the beginning of the hearing. Hearing Tape 1, Side 1, at Counter Nos. 127-30. The hearing officer ruled that although it would have been “better” for the objection to have been addressed earlier, the agency was not required to raise its objection prior to the hearing. *Id.* at Counter Nos. 135-48. The grievant does not renew this objection in her request for administrative review.

¹⁵ *Rules for Conducting Grievance Hearings* § IV.A.

during the entire hearing and may testify.”¹⁶ In addition, each party may have a representative, who may also be present during the entire hearing to examine or cross-examine witnesses and present evidence. In contrast, however, non-party witnesses “may be present in the hearing room only when testifying.”¹⁷

In this case, just as the grievant was a “party,” the agency designated Warden C as its “party.” Because Warden C was a party, he could act as a witness for the agency even though he was also present in the hearing room during the entire hearing, just as the grievant could serve as a witness on her own behalf and remain present in the hearing room during the entire hearing. Mr. B was not a party. Thus, Mr. B could act as the grievant’s representative (and remain present in the hearing room during the entire hearing) or he could act as her witness (and remain present in the hearing room for his testimony only), but he could not do both. By electing to act as the grievant’s representative, Mr. B foreclosed his ability to testify on the grievant’s behalf. Accordingly, we cannot find that the hearing officer erred in refusing to allow Mr. B to testify.

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 *Id.*

¹⁷ *Id.*

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. 2d 319 (2002).

²¹ Va. Code § 2.2-1001 (5).