Issue: Administrative Review/grievant claims agency failed to prove case; Ruling Date: March 2, 2006; Ruling #2006-1228; 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
Ruling No. 2006-1228
March 2, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8213. The grievant claims that the hearing officer failed to require the agency to prove its case by a preponderance of the evidence, as required by the grievance procedure.

FACTS

On July 21, 2005, the grievant was issued a Group III Written Notice with termination for failure to physically intervene and use proper force to protect the safety of wards and to prevent the commission of a crime. The grievant challenged the Group III Written Notice and termination by initiating a grievance on August 19, 2005. The August 19th grievance proceeded to hearing on December 5, 2005. In a December 7, 2005 hearing decision, the hearing officer upheld the Group III Written Notice but through his authority to mitigate rescinded the grievant's termination and imposed a 30 day suspension instead.[1] The hearing officer further upheld his determination in a reconsideration decision dated December 27, 1005.[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]

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[1] *See* Decision of Hearing Officer, Case No. 8213, issued December 7, 2005.
[2] *See* Reconsideration Decision of Hearing Officer, Case No. 8213, issued December 27, 2005.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

Preponderance of the Evidence

The grievant argues that the hearing officer failed to require the agency to prove by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances, as required by § 5.8 of the *Grievance Procedure Manual.* The *Rules for Conducting Grievance Hearings* explain that in deciding whether an agency has made this showing, a hearing officer must review the facts *de novo* to determine (1) whether the employee engaged in the behavior described in the Written Notice, (2) whether that behavior constituted misconduct, and (3) whether the agency's discipline was consistent with law and policy.[5] If the hearing officer finds that the agency has met this burden, he must next consider whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances exist that would overcome the mitigating circumstances.[6]

<u>Did the grievant engage in the behavior described in the Written Notice?</u>

The grievant claims that the record evidence and the hearing officer's conclusions do not support a finding that the grievant engaged in the behavior described in the Written Notice and as such, the agency has failed to establish the first element required to meet its burden of proof. The Written Notice at issue states: "…you failed to physically intervene and use proper force to protect the safety of wards and to prevent the commission of a crime in violation of IOP-218, Use of Force. Your failure to act resulted in a significant injury of a ward."

In his decision, the hearing officer finds that the grievant followed the instructions he received in training, and could not have prevented the start of the attacks on the cadets or all the "blows rained on the cadets."[7] However, despite his findings that the grievant could not have prevented the start of the attacks or otherwise completely prevented injury to the wards involved, the hearing officer also finds that the grievant failed to intervene and assist one of the cadets during a "brief lull in the attack" which

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[5] *See* Rules for Conducting Grievance Hearings, § VI(B).

[6] *Id.*

[7] In his decision, the hearing officer states:

> "[t]he situation grievant faced was difficult at best….Grievant was aware of the policy authorizing the use of force but he was also mindful of the training he received which states that staff safety is just as important as cadet safety. Grievant had to make a quick judgment call as to whether he should attempt the use of force or follow his training to call for help and monitor the situation until help arrived. Grievant opted to avoid the use of force because with the large number of cadets, he was concerned they could turn on him. Grievant could not have prevented the start of the two attacks because they occurred when he was in the shower area. As the agency acknowledges, grievant also could not have prevented all the blows rained on the two cadets." Decision of Hearing Officer, Case No. 8213, issued December 7, 2005.

"might have prevented further injury to the cadet."[8] Based upon this finding, the hearing officer apparently concludes that the grievant engaged in the behavior described in the Written Notice, which fairly read charges the grievant with failure to physically intervene and use proper force to protect the safety of wards and prevent the commission of a crime during the duration of the attacks, not just at the onset of the attacks.[9] The grievant argues that the hearing officer's findings regarding his ability to prevent further injury to a cadet are not based on reliable evidence in the record but rather are based upon "speculation" and a "poor…out of focus" videotape of the incident that was not viewed at the hearing.

By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[10] 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.

The grievant correctly notes that the hearing officer characterizes the quality of the tape as "poor" and finds the images on the tape "out of focus."[11] However, the hearing officer nonetheless concludes that "…the tape is sufficient to verify the basic facts of the attacks and grievant's non-intervention during the attacks."[12] Accordingly, despite the hearing officer's perception of the quality of the tape, he finds it sufficient to verify that the grievant engaged in the behavior described in the Written Notice. Moreover, while recollected testimony of the contents of the tape should not be used as a substitute for the tape itself,[13] witness testimony regarding the actions of the grievant observed on that tape was introduced at the hearing. Specifically, two agency witnesses testified that based upon their review of the tape, there was a point during the attack in which the grievant could have intervened, but failed to do so. As such, the hearing officer appears to have based his decision that the grievant engaged in the behavior described in the Written Notice upon evidence in the record (i.e., the tape and as well as witness testimony regarding the contents of the tape) and the material issue of the case and as such, this Department cannot substitute its judgment for that of the hearing officer with regard to those findings.

Further, it should be noted that prior to any witness testimony at hearing, the grievant was notified that the tape would not be viewed during the hearing due to the

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[8] *See* Decision of Hearing Officer, Case No. 8213, issued December 7, 2005.

[9] In other words, if the record evidence demonstrates that there was an opportunity for the grievant to physically intervene to protect the safety of a ward at anytime during the ongoing attacks, then it is reasonable to conclude that the grievant engaged in the behavior described in the Written Notice.

[10] Va. Code § 2.2-3005(C)(5).

[11] *See* Decision of Hearing Officer, Case No. 8213, issued December 7, 2005.

[12] *Id.*

[13] *See* Rules for Conducting Grievance Hearings, § IV(D).

agency's apparent failure to provide equipment in which to view the tape. At this time, the hearing officer also recognized that both parties had had the opportunity to view the tape prior to hearing and as such, he would allow the parties to describe the videotape during the hearing, which he would later view without the parties present. The grievant did not object during the hearing to the hearing officer's determination regarding the tape and was able to examine and cross-examine witnesses testifying as to the contents of that tape. Moreover, the grievant made no objection to the tape being entered into evidence as an exhibit. Based on the foregoing, we cannot conclude that the manner in which the tape was handled constituted an abuse of discretion or error, especially in light of the fact that there was other evidence in the record, (i.e., witness testimony regarding the contents of the video) supporting the hearing officer's conclusion that the grievant failed to intervene during the attacks.

Did the grievant's behavior constitute misconduct and was the discipline consistent with policy?

The grievant argues that his behavior could not constitute misconduct because the hearing officer found that he did not intentionally or deliberately violate policy. Additionally, the grievant argues that his behavior does not warrant a Group III Written Notice, the most severe level of offense under the *Standards of Conduct* policy.

The Director of the Department of Human Resource Management (DHRM) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state policy.[14] Only a determination by that agency could establish whether the act described in the Written Notice constitutes misconduct under the *Standards of Conduct* and if so, the level of offense warranted. DHRM is further charged with determinations of whether the hearing officer erred in his interpretation of state and agency policy.[15] Accordingly, this Department lacks the authority to determine whether the grievant's behavior constitutes misconduct under policy and if so, the appropriate level of offense warranted for such conduct.

Requests for administrative review must be made and *received* by the reviewer within 15 calendar days of the date of the hearing decision.[16] In this case, the grievant did not request a ruling from DHRM. However, the grievant timely requested an administrative review by this Department. This Department has previously held that timely claims made to the wrong party may proceed.[17] Therefore, if the grievant wishes to request DHRM to administratively review the hearing officer's application of the Standards of Conduct, he must do so **within 15 calendar days from the date of this ruling**. If DHRM finds that the hearing officer's interpretation of policy was incorrect,

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[14] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2).
[15] *See Rules for Conducting Grievance Hearings*, § VII(A)(2).
[16] *See* Grievance *Procedure Manual* § 7.2(a).
[17] *See* EDR Rulings ## 2000-008 (grievance initiated timely with the wrong party) and 2003-124, 2000-131, and 2004-870 (request for administrative review sent to wrong agency).

the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.[18]

CONCLUSION

Within 15 calendar days from the date of this ruling, the grievant may request an administrative review by the Director of DHRM to address the policy concerns as stated above. Further, 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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21] This Department's rulings on matters of procedural compliance are final and nonappealable.[22]

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Claudia T. Farr
Director

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[18] *Grievance Procedure Manual* § 7.2(a)(2).
[19] *Grievance Procedure Manual* §7.2(d).
[20] *See Grievance Procedure Manual* §7.3(a).
[21] *Id.*
[22] Va. Code § 2.2-1001(5).