

Issue: Administrative Review/hearing decision; Ruling Date: June 22, 2006; Ruling #2006-1310; Agency: Department of Juvenile Justice; Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2006-1310
June 22, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8280. For the reasons set forth below, we will not disturb the hearing officer's decision in this case.¹

FACTS

The underlying facts of this case, as set forth in the hearing decision, are as follows:

The Department of Juvenile Justice employs Grievant as a Juvenile Correctional Officer at one of its Facilities. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant and Sergeant C were scheduled to attend an in-service training class on August 18, 2005. As Grievant and Sergeant C passed in the parking lot of the Facility as each was on his way to the class, Sergeant C said "Good morning" to Grievant. Grievant responded, "Don't say good morning to me!" Sergeant C responded, "I am sorry, sir. I say good morning to everybody." Sergeant C continued to walk towards the classroom. Sergeant C entered the classroom and sat at the table. Grievant also entered the classroom and sat at the table.

At approximately 8:05 a.m., the Training Sergeant began the class. Grievant was seated at a table with Sergeant C and was approximately five to six feet from him. Grievant raised his hand in order to be recognized. The Training Sergeant acknowledged Grievant and Grievant said "I want to say something to the class first." The Training Sergeant did not know why Grievant wished to speak but suspected Grievant may have wanted to comment on

¹ While this ruling does not expressly address every point raised in the request for administrative review, each has been carefully considered.

a recent employee death at the Facility. The Training Sergeant told Grievant, “No problem.” Grievant stood up and pointed directly at Sergeant C. Grievant shouted, “Don’t say a motherf—king thing to me. We have an ongoing issue. I don’t want you to say sh-t to me. You hear me, don’t say a motherf—king thing to me.” Grievant’s voice was rude and threatening. Sergeant C did not respond. Sergeant W and the Training Sergeant had Grievant leave the room without further incident.²

The agency issued the grievant a Group I Written Notice of disciplinary action for disruptive behavior on September 23, 2005.³ The grievant subsequently initiated a timely grievance.⁴ After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing. A hearing was held on March 1, 2006; and on March 3, 2006, the hearing officer issued a written decision upholding the disciplinary action.⁵

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.”⁶ 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.⁷

Here, the grievant asserts that the hearing should be reopened because of the alleged bias of the hearing officer. In addition, the grievant alleges that the hearing officer erred in not continuing the hearing to allow him more time to prepare, and he challenges several of the hearing officer’s factual findings and conclusions of policy. These issues are addressed below.

Alleged Bias

In support of his bias claim, the grievant alleges that the hearing officer “sounded as if he could care less what went on . . . as long as he reaps a hefty financial reward.” He also asserts that the hearing officer required him to continue his testimony while the hearing was not being recorded on audiotape, and charges that the hearing officer “intervene[d] to save face” for the agency and acted as the agency’s “defender.”⁸

² Hearing Decision at 2-3.

³ *Id.* at 1.

⁴ *Id.* at 1.

⁵ *Id.* at 1, 5.

⁶ Va. Code § 2.2-1001(2), (3), and (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ In his March 8, 2006 request for administrative review, the grievant asserts that he has new evidence that could not have been discovered before the hearing. However, neither the grievant’s March 8th request, nor the grievant’s

The Rules for Conducting Grievance Hearings require the hearing officer to conduct the hearing in an “orderly, fair and equitable fashion”⁹ and to “maintain order, decorum and civility.”¹⁰ Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process¹¹ and avoid the appearance of bias.¹² However, the Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has “a direct, personal, substantial [or] pecuniary interest” in the outcome of a case.¹³ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹⁴

In this case, the grievant has not presented any evidence that the hearing officer had a “direct, personal, substantial or pecuniary interest” in the outcome of this grievance, other than the grievant’s own supposition about the hearing officer’s alleged “hefty financial reward.” Accordingly, we find no actionable bias on the part of the hearing officer. Moreover, we have reviewed the hearing tapes and find no evidence to support the grievant’s allegations of improper conduct by the hearing officer. We note that while the hearing officer may have intervened at times to clarify questioning or to address relevancy objections¹⁵, the hearing officer’s conduct in this case was consistent with his role as a hearing officer and his obligation to “establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts.”¹⁶

Denial of Continuance

The grievance procedure requires that grievance hearings “must be held and a written decision issued within 35 calendar days of the hearing officer’s appointment.”¹⁷ The *Rules for Conducting Grievance Hearings* and the grievance procedure permit a hearing officer to extend the 35-day period upon a showing of “just cause.”¹⁸ “Just cause” in this context is defined as “circumstances beyond a party’s control.”¹⁹ Examples of “circumstances beyond a party’s control” include, but are not limited to, accident, illness, or death in the family.²⁰ The Virginia Court of Appeals has further indicated that the hearing officer’s decision on a motion for continuance should be disturbed only if (1) the hearing officer’s refusal to grant the extension

subsequent March 18, 2006 submission to this Department, identifies any such evidence regarding the Group I Written Notice or the related grievance. To the contrary, it appears from the March 8th request that the new evidence to which the grievant refers was the alleged bias by the hearing officer.

⁹ See *Rules for Conducting Grievance Hearings*, § IV(C).

¹⁰ See *Rules for Conducting Grievance Hearings*, § IV(A).

¹¹ See *Rules for Conducting Grievance Hearings*, § III(D).

¹² See *Rules for Conducting Grievance Hearings*, § II.

¹³ *Welsh v. Commonwealth of Va.*, 14 Va. App. 300, 315 (1992), (brackets in original).

¹⁴ See e.g. Compliance Ruling of Director #2003-113 and #2001-146.

¹⁵ See, e.g., Hearing Tape 3 at counter numbers 498-519.

¹⁶ See *Rules for Conducting Grievance Hearings*, § IV(C).

¹⁷ *Grievance Procedure Manual*, § 5.1.

¹⁸ See *Grievance Procedure Manual*, §§ 5.1 and 5.4 and *Rules for Conducting Grievance Hearings*, § V(C).

¹⁹ *Rules for Conducting Grievance Hearings*, § III (B).

²⁰ *Id.*

was an abuse of discretion;²¹ and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.²² Further, courts have found that the test for whether there was an abuse of discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented at the time that request is denied.²³ While not dispositive for purposes of the grievance procedure, the standards set forth by the courts is nevertheless instructive and has been used by this Department in past rulings.²⁴

The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including whether the hearing officer abused his discretion by failing to grant a party's request for an extension.²⁵ However, in light of the rules and standards set forth above, the EDR Director will only disturb a hearing officer's decision to deny a request for an extension of the 35-calendar-day period if it appears that: (1) circumstances beyond the party's control existed justifying such an extension; (2) the hearing officer's refusal to grant the extension of time was an abuse of his discretion; and (3) the objecting party suffered undue prejudice.

The grievant asserts that he advised the hearing officer prior to the start of the hearing that he had not had adequate time to prepare, but the hearing officer "chose to proceed[] with the hearing as scheduled." Although the grievant's request for administrative review does not explain why he believes he did not have adequate time to prepare, a review of the hearing tapes indicates that the grievant requested from the agency, but was apparently denied, two days administrative leave prior to the hearing.²⁶ At the same time, however, the hearing tapes indicate that the grievant had at least three non-work days to prepare after receiving the agency's exhibits and witness list (as well as part of another work day, when the agency apparently allowed him to leave early).²⁷ We also note that the grievant has not identified any specific prejudice suffered as a result of the hearing officer's decision. Under these circumstances, this Department cannot conclude that the hearing officer erred or otherwise abused his discretion by failing to grant the grievant's request for an extension.

Challenge to Hearing Officer's Findings of Fact and Conclusions of Policy

²¹ "Abuse of discretion" in this context has been defined by the courts as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991) quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

²² Cf. *Venable v. Venable*, 2 Va. App. 178 (1986). "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." *Venable* at 181, citing to *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). *See also* *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) "to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." *Bakker* at 735 citing to *United States v. LaRouche*, 896 F.2d 815, at 823-25 (4th Cir. 1990).

²³ *See* *LaRouche*, at 823.

²⁴ *See* e.g. *Compliance Ruling of Director ## 2003-130, 2002-213, and 2001-124.*

²⁵ Va. Code § 2.2-1001 (5).

²⁶ Hearing Tape 1, at counter numbers 26-307

²⁷ *Id.*

The grievant also challenges a number of the hearing officer's findings and conclusions. In particular, the grievant appears to dispute the hearing officer's determination that the disciplinary action against him was warranted and appropriate under the circumstances. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²⁸ and to determine the grievance based "on the material issues and the grounds in the record for those findings."²⁹ 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.

In this case, grievant's objections are primarily challenges to the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. As stated above, such determinations are entirely within the hearing officer's authority.³⁰

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.³¹ 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.³² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³³ This Department's rulings on matters of procedural compliance are final and nonappealable.³⁴

Claudia T. Farr
Director

²⁸ Va. Code § 2.2-3005.1(C)(ii).

²⁹ *Grievance Procedure Manual* § 5.9.

³⁰ In his March 8th request for administrative review, the grievant states that he "was set up by clouded judgment." In his subsequent submission of March 18th, he asserts that he has been suffering "from major depression job related" which he states "brought emotional, behavioral, and cognitive changes . . . severe enough to disrupt [his] ordinary functioning." The grievant has not, however, claimed that his ability to function at hearing was impaired by any mental or psychological condition, and indeed, the documentation provided by the grievant from his psychiatrist appears to indicate that his treatment had concluded on January 26, 2006, significantly before the March 1st hearing.

³¹ *Grievance Procedure Manual*, § 7.2(d).

³² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

³³ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

³⁴ Va. Code § 2.2-1001 (5).