

Issue: Administrative Review: Hearing Decision Appeal – Case No. 8509; Ruling
Date: May 9, 2007; Ruling #2007-1576; Agency: Department of Corrections;
Outcome: Hearing Officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2007-1576
May 9, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8509. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

Prior to his termination, the grievant was employed as a Corrections Officer with DOC.¹ On November 27, 2006, the grievant was issued a Group III Written Notice with removal for "failing to count but signing a count sheet indicating he had conducted a physical count."² The grievant challenged the disciplinary action by initiating a grievance on November 30, 2006.³ The November 30th grievance was subsequently qualified for a hearing and a hearing was held on February 1, 2007.⁴ In a February 5, 2007 decision, the hearing officer upheld the disciplinary action.⁵

On February 13, 2007, the grievant requested that the hearing officer reconsider his decision.⁶ In his request, the grievant disagrees with the hearing officer's finding that there were no mitigating circumstances, and offers written witness statements that were available in December 2006, in support of his claim that the way he counted inmates on the day in question was common practice among security staff.

¹ See Decision of Hearing Officer, Case No. 8509 ("Hearing Decision"), issued February 5, 2007, p 2. (The hearing decision was dated February 2, 2007 but because of a problem with the mail meter, it was not mailed until February 5, 2007, which is reflected on the cover letter attached to the decision.).

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 5.

⁶ See Request for Reconsideration dated February 8, 2007, received by the Division of Hearings on February 13, 2007.

On February 15, 2007, the grievant asserts that new evidence, in the form of another witness statement, dated February 15, 2007, was brought to the grievant's attention.

In a February 21, 2007 reconsideration decision, the hearing officer denied the grievant's request for reconsideration because he concluded that the two December statements were not newly discovered.⁷

On February 23, 2007, the grievant requested a second reconsideration decision by the hearing officer based on the "newly discovered evidence" of the February 15, 2007 witness statement.⁸

In his February 26, 2007 decision, the hearing officer declined to address the grievant's February 23, 2007 request for reconsideration on the basis that he lacked jurisdiction to do so.⁹

The grievant appealed to this Department on March 2, 2007, the hearing officer's February 21st determination that the December witness statements were not newly discovered evidence, and on March 4, 2007, the hearing officer's February 26th determination that he no longer had jurisdiction over the case having already issued a reconsidered opinion in the case.

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."¹⁰ 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.¹¹

⁷ See Reconsideration of Hearing Officer, Case No. 8509-R ("First Reconsideration Decision"), issued February 21, 2007.

⁸ In a February 15, 2007 statement, one of the grievant's co-workers alleged that prior to the disciplinary action taken against the grievant, he had told his supervisor that physical counts were not taking place in accordance with policy and the supervisor stated that he would "take care of it." According to this witness, the supervisor failed to address the matter and had he done so, the grievant would not have been punished in this manner. This witness wrote a statement addressed to the hearing officer and asked him to reconsider his findings based upon the information he presented. The statement was provided to the Division of Hearing in the February 23, 2007 Second Reconsideration Request.

⁹ See Reconsideration Decision, Case No. 8509-R2 ("Second Reconsideration Decision"), issued February 26, 2007.

¹⁰ Va. Code §§ 2.2-1001(2), (3), and (5).

¹¹ *Grievance Procedure Manual* §§ 6.4; 7.2 (a) (3).

March 2, 2007 Administrative Review Request

Newly Discovered Evidence

In his March 2, 2007 administrative appeal to this Department, the grievant appears to contend that the hearing officer erred when he concluded that the two December witness statements were not newly discovered evidence.¹²

To establish that evidence is “newly discovered,” the moving party must show

(1) the evidence was first discovered after the hearing; (2) due diligence on the moving party’s part to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were reheard, or is such that would require the hearing decision to be amended.¹³

Using the above definition and principles, this Department cannot conclude that the two witness statements were newly discovered. As the hearing officer found, and the grievant does not appear to dispute, the grievant was aware of the statements prior to the hearing. Accordingly, they cannot be considered newly discovered.

Mitigating Circumstances

The grievant also appears to contend that the hearing officer erred by not properly considering mitigating circumstances in his case. Specifically, the grievant asserts that other employees had committed the same offense and, at hearing, the superintendent conceded that some employee had indeed committed the offense.

In cases involving discipline, the hearing officer must determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁴ In making his determination, the

¹² Although the grievant’s request for administrative review of the hearing officer’s Reconsideration Decision was received by this Department outside of the 15 calendar day period following the original decision, this Department will address the grievant’s request because the hearing officer’s Reconsideration Decision raises an issue that could not have been challenged by the grievant until after the Reconsideration was issued. See EDR Ruling 2004-870 and 2007-1556.

¹³ See *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (citing *Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)). See also EDR Ruling No. 2007-1490 which adopted the Texgas standard.

¹⁴ To do this, “the hearing officer reviews the facts *de novo*” to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with law and policy and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so,

hearing officer is authorized to make “findings of fact as to the material issues in the case”¹⁵ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁶ Further, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹⁷ 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. Further, 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 his original decision the hearing officer held that “Grievant argues [that] his actions were a regular practice among corrections officers at the Facility,” but “[i]nsufficient evidence was presented to support this conclusion.”¹⁸ A review of the hearing tape revealed that when the hearing officer inquired as to whether it was a common practice to use a running count instead of a physical count, the Superintendent conceded that he had discovered that several other officers had used a running count instead of a physical count. While the Superintendent did not explain how those particular employees were treated, he stated that the discipline of termination was consistent with how employees had been disciplined in the past, and, moreover, the grievant did not present any evidence to counter the Superintendent’s assertion that the discipline meted out in the grievant’s case was different from similar circumstances in the past.¹⁹ Accordingly, this Department cannot conclude that the hearing officer abused his discretion by finding no mitigating circumstances in this case.

March 4, 2007 Administrative Review Request

The Hearing Officer’s Determination Regarding Jurisdiction

In his February 26, 2006 Second Reconsideration Decision, the hearing officer states the following:

Grievant seeks administrative review of the February 21, 2007 Reconsideration Decision. The Grievance Procedure Manual does not authorize the Hearing Officer to provide administrative review of a Reconsideration Decision. Upon issuance of the Reconsideration

whether aggravating circumstances existed that would overcome the mitigating circumstances. *See Rules for Conducting Grievance Hearings*, § VI(B).

¹⁵ Va. Code § 2.2-3005.1(C)(ii).

¹⁶ *Grievance Procedure Manual* § 5.9.

¹⁷ Va. Code § 2.2-3005(C)(5).

¹⁸ Hearing Decision, p. 4.

¹⁹ On November 27, 2006, at least one other employee was issued a Group III Written Notice with removal for “failing to count but signing a count sheet indicating he had conducted a physical count.” See EDR Ruling 2007-1556.

Decision on February 21, 2007, the Hearing Officer no longer has jurisdiction of the grievance. Accordingly, Grievant's request is denied.²⁰

Contrary to the hearing officer's conclusion, the grievant's February 26th request for reconsideration does not appear to be a request for administrative review of the First Reconsideration Decision but rather is a second request for reconsideration of the original decision.²¹ We recently held in EDR Ruling 2007-1556 that the hearing officer has jurisdiction to decide any and all requests for reconsideration that are received within the mandated 15 calendar day time period. However, in this case, the February 23, 2007, appeal to the hearing officer, premised on newly discovered evidence, was made after the expiration of the 15 calendar day administrative appeal period, which ended on February 20, 2007. Thus, the request was untimely and the hearing officer was correct to state that he did not have jurisdiction to hear the grievant's February 26th appeal.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this Department will not disturb the hearing officer's decision. In accordance with Section 7.2(d) of the *Grievance Procedure Manual*, the hearing decision is now final.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴

Claudia T. Farr
Director

²⁰ Second Reconsideration Decision at 1.

²¹ In his second request for reconsideration, the grievant states: "I am requesting that you will reconsider your decision regarding my case based on newly found evidence that was recently brought to my attention on February 15, 2007." The evidence to which the grievant referenced was in the form of a written statement that addressed actions that occurred in November of 2006.

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).