

Issue: Administrative Review: Appeal of Hearing Officer's Decision in Case No. 8508;
Ruling Date: July 6, 2007; Ruling #2007-1716; Agency: Department of Corrections;
Outcome: Hearing Officer Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1716
July 6, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8607. For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

This case involves a grievance regarding a Group II Written Notice "for the unauthorized removal of state records, state property or property of another person (i.e., shredding an inmate's appeal documents)."¹ The hearing officer found that the grievant admitted shredding the paperwork for an inmate's appeal, and, therefore, was given a Group II Written Notice with a five-day suspension.² Though this behavior was normally a Group III offense, the agency reduced the discipline to a Group II because of the grievant's past service.³ Furthermore, at hearing, the warden testified that he might have treated the matter as a Group I offense if the grievant had come to him immediately and admitted the conduct.⁴

The grievant argued that because of her prior work for the agency, she should have received no more than a Group I Written Notice.⁵ The hearing officer affirmed the agency's disciplinary action, however.⁶ In her request for administrative review, the grievant makes numerous claims. The grievant principally argues that the hearing officer failed to consider certain evidence in determining whether to mitigate the disciplinary action. The grievant also argues that the hearing officer failed to address the issues of retaliation and/or harassment. The grievant also asserts that the hearing officer was unfair.

¹ Decision of Hearing Officer, Case No. 8607, May 30, 2007 ("Hearing Decision"), at 2.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.*

In addition, the grievant argues that the hearing officer did not conduct a pre-hearing conference in this case. Upon investigation by this Department, the hearing officer states that he attempted to contact both the grievant's attorney and the agency advocate by phone. The hearing officer states that he left messages by phone that the pre-hearing conference would occur on May 2, 2007, at 3:30 p.m. The hearing officer asked the grievant's attorney to coordinate the conference call. The hearing officer further states that he was not contacted by the grievant's attorney on May 2, 2007, or at any time to indicate that the chosen date was inconvenient. As such, no pre-hearing conference was held, and the hearing officer established May 15, 2007, as the date for the hearing.

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."⁷ 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.⁸

Pre-Hearing Conference

The grievant's first argument is that the hearing officer failed to hold a pre-hearing conference. Pursuant to Section III.D of the *Rules for Conducting Grievance Hearings*, the hearing officer shall schedule a pre-hearing conference. The purpose of the pre-hearing conference is to improve the management of the hearing through such efforts as:

Explaining procedures that will be followed at the hearing; establishing the date, time, and location of the hearing; and confirming the roles of the parties, their representatives, and the hearing officer.

Clarifying the issue(s) qualified for the hearing.

Preparing the parties for the presentation of evidence at the hearing, particularly in light of the inapplicability of the technical rules of evidence.

Ruling on preliminary procedural and evidentiary requests.

Encouraging the parties to stipulate to facts or exhibits not in dispute and the applicable policies or laws.

Issuing, upon request of the parties, orders for the appearance of witnesses at hearing and the production of documents.

⁷ Va. Code § 2.2-1001(2), (3), and (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

Establishing the date for the exchange of witness lists and documents, and ruling on any objections to these.

Explaining the standard of proof to be applied and the order of presentation for each party.

Affording the parties the opportunity, upon request, to review the grievance record for completeness and accuracy.⁹

In this case, while the hearing officer states that he scheduled a pre-hearing conference, it is also undisputed that such a conference never took place. The hearing officer left messages for both parties, asked the grievant's attorney to coordinate the conference call, and waited for the grievant's attorney to call on the scheduled date and time. There is no indication that the hearing officer made any further effort to contact the parties at that time to hold the pre-hearing conference.

The pre-hearing conference is an important step in the hearing process and required by the grievance procedure.¹⁰ Accordingly, the hearing officer must take steps to ensure that a pre-hearing conference takes place. Here, the hearing officer attempted to meet this duty of arranging a pre-hearing conference by instructing, via voice mail, the grievant's attorney to coordinate the conference. However, when the parties did not call as instructed, the hearing officer took no further action to ensure that the conference took place, such as calling the parties.

However, the grievant has presented no evidence of prejudice from the failure to participate in a pre-hearing conference. There is no indication that the lack of a pre-hearing conference adversely affected the grievant in any way and would be, therefore, harmless error.¹¹ Moreover, the evidence indicates that the grievant's attorney was contacted by the hearing officer to schedule a pre-hearing conference and failed to contact the hearing officer at the scheduled date and time. As such, the grievant's argument is without merit. The grievant has presented insufficient grounds to warrant a remand to the hearing officer because of the failure to hold a pre-hearing conference.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."¹² Further, the hearing officer's decision must contain a discussion of "any aggravating or mitigating factors that were pertinent to the decision."¹³ The grievant presented evidence and argued that the disciplinary

⁹ *Rules for Conducting Grievance Hearings* § III.D.

¹⁰ *Grievance Procedure Manual* § 5.3.

¹¹ See EDR Ruling No. 2007-1513.

¹² Va. Code § 2.2-3005(C)(6).

¹³ *Rules for Conducting Grievance Hearings* § II.

action she received should be mitigated to no more than a Group I Written Notice.¹⁴ The hearing decision specifically states that the grievant made such an argument.¹⁵ The hearing officer's decision, however, provided no analysis of the grievant's argument and failed to discuss the hearing officer's rationale for not mitigating the disciplinary action in light of the grievant's specific argument.¹⁶

For these reasons, it was error for the hearing officer not to include in his decision an analysis of the grievant's claims and his rationale for declining to mitigate. This ruling in no way determines that mitigation of the disciplinary action at issue in this case is warranted or appropriate. However, in a case such as this, when the grievant specifically argued mitigating circumstances, the hearing officer must address those issues in his decision. Therefore, the grievance must be remanded for the hearing officer to reconsider whether the discipline exceeded the limits of reasonableness in light of the grievant's evidence of mitigating circumstances and explain the rationale for his conclusions in his decision.

While the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness.¹⁷ The Rules for Conducting Grievance Hearings also provide a list of three *examples* of mitigating circumstances: lack of notice, inconsistent application, and improper motive.¹⁸ This list is not exhaustive, but merely meant to describe some examples of potential mitigating circumstances.

Other Grounds

The grievant also contends that the "issues of retaliation and harassment was [sic] not discussed at the hearing, but it was all part of the grievance I filed and I feel that the disciplinary action that I received was due in part to a grievance I had filed." While retaliation may have been a relevant issue in this case, the grievant's attorney specifically stated during the hearing that he chose not to pursue that claim or offer such evidence.¹⁹ There is no indication that the grievant was improperly prevented from presenting this evidence at hearing. As such, the hearing officer appropriately did not address the issues of retaliation and harassment in his decision. Furthermore, there is no reason to reopen the hearing to permit the grievant to offer

¹⁴ Hearing Decision at 2-3. The grievant's evidence includes her past service with the agency, during which she received no other disciplinary action, *see* Hearing Tape, Side B, at Counter Nos. 238-40, and the fact that the warden admitted that he might have only given the grievant a Group I Written Notice if she had reported her conduct immediately. Hearing Tape, Side A, at Counter Nos. 553-56. In her request for administrative review, the grievant also argues that she was not instructed what to do if an inmate brought an appeal to her office. She argues that such evidence should also be considered on mitigation. However, after reviewing the hearing tape, it does not appear the grievant presented any evidence at the hearing regarding her lack of instruction.

¹⁵ Hearing Decision at 3.

¹⁶ *Id.*

¹⁷ *Rules for Conducting Grievance Hearings* § VI.B.1. Indeed, the agency did mitigate this disciplinary action from a Group III to a Group II offense already based on the grievant's past performance.

¹⁸ *Id.*

¹⁹ Hearing Tape, Side A, at Counter Nos. 597-98.

additional evidence as the grievant voluntarily chose not to present arguments regarding her retaliation claims during the hearing.

The grievant also suggests that the hearing officer was “unfair and not impartial.” Beyond a bare allegation, the grievant has not presented any evidence to suggest that the hearing officer was biased or unfair in this case. A review of the hearing record does not reveal any such improper conduct. Having failed to present any evidence of bias, the grievant’s allegation is without merit.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer must consider the grievant’s evidence of mitigating circumstances and determine, based on this evidence, whether the discipline exceeded the limits of reasonableness and provide the analysis and rationale for his conclusions in his decision.

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

Claudia T. Farr
Director

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

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

²² *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).