Issue: Administrative Review of Case #8353/hearing decision; Ruling Date: July 31, 2006; Ruling #2006-1387; Agency: Department of Corrections; Outcome: hearing officer ordered to admit into evidence the statement that was excluded at hearing and revise decision reflecting his findings regarding statement(s).

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2006-1387
July 31, 2006

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 8353.

FACTS

The facts as described in Case 8353 are as follows:

> The Department of Corrections (Hereinafter referred to as: "Agency") has employed Grievant for more than twenty (20) years. He was a Lieutenant. Grievant has one (1) prior active disciplinary action, a Group II Written Notice for violation of DPT policy 2.30 Sexual Harassment. Grievant also has an inactive Group I Written Notice for "inadequate or unsatisfactory job performance." The Commonwealth's policy on sexual harassment defines this term as:
>
> > Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers, or non-employee (third party).
>
> The Grievant became Officer D's Supervisor on or about May 25, 2005.
>
> On August 9, 2005, Officer D requested a transfer from night shift to day shift.

On September 24, 2005, the Grievant reported Officer D for excessive absences from work, which resulted in her being issued a Group I Written Notice for excessive absences for the period beginning February 1, 2005 through September 25, 2005.

On November 7, 2005, Officer D filed a written complaint with a Major and a Captain at the Agency alleging that Grievant had sexually harassed her on Friday, November 4, 2005, as follows:

> I was on break in the staff dining, I was standing taking off my coat when out of nowhere Grievant touched me on my buttocks. Saturday, November 5, 2005, he entered the Control Room of Building 5 to conduct security checks, as I went to unlock the Control Room door again he touched my buttocks.

Officer D met with another officer on November 7, 2005, and indicated to her that she was being sexually harassed. She did not reveal the name of the person who was harassing her, but she did state to this officer the following:

> she was on break yesterday (11-5-05), in the staff dining room and when she went to pass this person, they patted her on the butt; one night she was going into the control booth and when she went passed [sic] him, he grabbed her butt; one night she was in SHU and she went to let this person out of the control room and they squeezed her right breast. . . .

Subsequent to this allegation, the Agency requested the services of the Inspector General's Office, which assigned this case to a Special Agent of the Department of Corrections. On November 14, 2005, that Special Agent interviewed Officer D. The Special Agent's summary of this investigative interview states as follows:

> Regarding the inappropriate touches and remarks, this has been going on since 99-98. The summer of 2005 while I was assigned to the Special Housing Unit he grabbed my breast as I was opening the door for. [sic] On November 4, 2005, he hit me on my buttocks while I was in staff dining. The next night, he was in the Control Room of Building 5 when he asked me if I liked to be f***ed in the ass.

The grievant was issued a Group III Written Notice with termination for sexual harassment, which he timely grieved. In a June 1, 2006, hearing decision, the hearing

officer reversed the agency action and reinstated the grievant. The agency sought reconsideration from the hearing officer on June 16, 2006, and requested an administrative review from this Department. The bases for both requests were largely the same, with the agency raising with this Department objections also raised with the hearing officer. In a June 26, 2006, decision, the hearing officer affirmed his earlier decision in its entirety.

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."[1] 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.[2]

Weight of Evidence

The agency asserts that the hearing officer erred by giving greater weight to the Grievant's unsworn written statement than the unrefuted sworn testimony of the alleged victim. The hearing officer addressed the agency's objection in his reconsideration opinion. The hearing officer explained that he did not give more weight to the grievant's unsworn statements than to the alleged victim's sworn testimony, rather he "gave more weight to the Agency's other witnesses' sworn testimony than he did to the alleged victim's sworn testimony."[3] He explained that "the most persuasive and unbiased witness who testified before the Hearing Officer was the Special Agent presented by the Agency as its witness" and that the hearing officer "did in fact give more weight to his testimony than to the testimony of the alleged victim."[4]

The agency challenge essentially contests 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. Such determinations are entirely within the hearing officer's authority. 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 hearing officer has articulated his reason for giving more weight to the testimony of the Special Agent than the alleged victim: that he was the most persuasive and unbiased witness. This finding regarding

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *See Grievance Procedure Manual* § 6.4(3).
[3] June 26, 2006, Reconsidered Opinion, page 4.
[4] *Id.*

record testimony is precisely the kind of determination reserved to the hearing officer who observes witness demeanor, takes into account motive and potential bias, and considers potentially corroborating or contradictory evidence. Accordingly, this Department has no reason to substitute its judgment for that of the hearing officer.

The agency also asserts that the hearing decision appeared to give no weight to a Group II Written Notice that was issued against the grievant on May 16, 2005, which "was ignored and not mentioned in the hearing decision." The hearing officer addressed this objection in his reconsidered decision, noting that he mentioned the Group II on both pages two and six of his decision and that he "gave the Group II offense the weight that he deemed it should have been given in his Decision." [5] Again, this Department may not substitute its judgment for that of the hearing officer.

The agency also appears to object to the hearing officer's finding that use of a four year old Group I is an "extreme use," which, the agency argues, was an exhibit that the hearing officer considered adversely against the agency. In addressing the claim that the hearing officer considered the Group I Notice adversely against the agency, the hearing officer explained that:

> The Agency of its own accord, chose to introduce the Group I Written Notice and the Grievant's response to it. The mere fact that the Grievant accepted the punishment does not categorically render his statement as to what took place at that time a non factual statement. The fact that the Agency chose to introduce that and to do nothing further, was a decision made by the Agency.[6]

Again, determinations regarding the weight to be accorded evidence are reserved to the hearing officer.

Questioning by the Hearing Officer

The agency alleges that the Hearing Officer incorrectly used his own personal experience as a frame of reference. This objection was also addressed by the hearing officer in his reconsidered opinion. The hearing officer explains that:

> [T]he Hearing Officer was attempting to understand what level, if any, of touching was acceptable within this fact setting. The line of questioning that the Hearing Officer used was an attempt to determine if one could shake hands, if one could congratulate someone with a pat on the back, or if this Agency deemed that any touching, however inconsequential, was subject to a Group III sexual harassment written notice. After the line of questioning was finished, the Hearing Officer now had sufficient

[5] *Id*. at 3.
[6] *Id.*

> understanding of what this Agency expects from its employees and made his findings based on what this Agency seems to expect.[7]

This Department finds the hearing officer's explanation reasonable and we observe nothing in the ruling that causes this Department to believe that the hearing officer improperly substituted his judgment for that of the agency.

Newly Discovered Evidence

The agency objects to the hearing officer's refusal to accept a written statement that it characterized as newly discovered evidence.[8] The statement was purportedly that of another female corrections officer, who alleged that the grievant had previously touched her inappropriately on two occasions.[9] According to the agency, management received the statement from the complainant on the morning of the hearing. The agency asserts that the statement describes incidents of sexual harassment that occurred while the corrections officer was under the supervision of the grievant and during the time period that corresponds with the complaint that led to the grievant's termination. The agency represented that the corrections officer, who works on night shift, was available to testify by phone.

This objection was also addressed by the hearing officer who explained that there is "no evidence that these alleged statements could not have been secured by the Agency prior to the hearing with the exercise of even minimal diligence, much less reasonable diligence."[10] In addition, he characterized the statement as cumulative in his reconsidered opinion.

By statute, hearing officers have the duty to receive probative evidence and to exclude only evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[11] Thus, where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, the hearing officer must nevertheless admit the evidence, but in the interests of due process, must ensure that the opposing party is not prejudiced by the dilatory proffer of evidence, for instance by adjourning the hearing to allow the opposing party time to respond.

As stated, the hearing officer concluded that there was no evidence that the alleged statement "could not have been secured by the Agency prior to the hearing with

---

[7] *Id.* at 4.
[8] The agency asked the hearing officer to consider several statements in its administrative review request to the hearing officer. However, this Department was only asked to rule on the admission of the single statement discussed above. Therefore, the remaining statements mentioned in the administrative review request to the hearing officer and in his reconsidered opinion will not be addressed by this Department.
[9] June 16, 2006, Administrative Review Request to Hearing Officer, page 2.
[10] June 26, 2006 Reconsidered Opinion, page 3.
[11] Va. Code § 2.2-3005(C)(5).

the exercise of even minimal diligence, much less reasonable diligence." The hearing officer appears to imply that the agency's investigation should have included interviews with other female officers under the supervision of the grievant, which presumably would have yielded the statement in question (or a substantially similar one). However, even if the statement could have been obtained prior to hearing, the statement appears to be probative of the allegation of sexual harassment against the grievant[12] and therefore should have been admitted if it was not "irrelevant, immaterial, insubstantial, privileged, or repetitive."

The hearing officer found that the statement would have been cumulative. We must disagree. Cumulative testimony is repetitive testimony that restates what has been said already and adds nothing to it.[13] Here, the statement recounted entirely different alleged acts of harassment by the grievant, against a different individual, in August and October of 2005. Accordingly, the statement should have been admitted into evidence, but the hearing officer should have also taken appropriate action to ensure that the grievant would not be prejudiced by the late proffer of the statement, for example, by adjourning the hearing if necessary.

Based on the above, the hearing officer is ordered to admit into evidence the statement that was excluded at hearing and give it the weight he deems appropriate. We note that the hearing officer observed that there appeared to be two different versions of the statement with internal discrepancies that the hearing officer found troubling. The hearing officer is free to admit both versions into evidence. Furthermore, the reconsidered opinion appears to indicate that the hearing officer received a response from the grievant following the hearing addressing the excluded statement. To the extent that the hearing officer deems it appropriate, he may allow the grievant to supplement this response. The hearing officer, at his discretion, may also reopen the hearing, if he believes it necessary. Finally, the hearing officer shall issue a revised decision reflecting his findings regarding the statement(s).

Consideration of Grievant's Advocate's "Testimony"

---

[12] The hearing officer also noted that the statement did not address the specific incident for which the grievant was issued the Group III Written Notice. However, "evidence of harassment directed at other co-workers can be relevant to an employee's own claim of hostile work environment discrimination." Leibovitz v. New York City Transit Auth., 252 F.3d 179, 190 (2d Cir. 2001); *See also*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415-16 (10th Cir. 1987) (evidence that a number of employees had been sexually harassed by the plaintiff's supervisor was admissible as proof of the plaintiff's hostile work environment). *C.f.* Federal Rule of Evidence 413--Evidence of Similar Crimes in Sexual Assault Cases; "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

[13] Massey v. Commonwealth of Virginia, 230 Va. 436, 442; 337 S.E.2d 754, 758 (1985). Finding that the excluded testimony was not cumulative, the Supreme Court of Virginia notes that the excluded testimony contained facts not mentioned by other witnesses. Massey, at 443, 758.

The final error alleged by the agency is that the hearing officer purportedly considered "testimony" by the grievant's advocate during cross-examination of witnesses and during the presentation of the grievant's case. The basis for this conclusion appears to stem from the hearing officer's inclusion of the advocate on the list of witnesses on the first page of the decision.

This Department notes that the hearing officer does not cite to any testimony by the grievant's advocate in his decision. Thus, even if the hearing officer considered such "testimony," he apparently gave it little if any weight.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

The hearing officer is ordered to admit and consider the above discussed statement in accordance with the terms set forth in this decision. This Department finds no error as to the remaining agency assignments of error.

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.[14] 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.[15] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[16]

_____

Claudia T. Farr
Director

[14] *Grievance Procedure Manual,* § 7.2(d).
[15] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[16] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).