

Issue: Administrative Review/hearing decision; Ruling Date: November 14, 2006;  
Ruling #2007-1414; 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. 2007-1414  
November 14, 2006

The grievant, through her representative, has requested that this Department administratively review the hearing officer's decision in Case Number 8370. The grievant contends that the hearing officer erred and/or abused his discretion by upholding the discipline issued by the agency.

FACTS

Prior to her removal on April 24, 2006, the grievant was employed as a Probation and Parole Officer with the Department of Corrections (DOC or the agency). On April 24, 2006, the grievant was issued a Group III Written Notice with termination for (1) creating a public membership website on the internet and using the DOC badge/logo, which contains the Great Seal of Virginia, as an identifier for the site and identifying herself as a Probation and Parole Officer with the Virginia Department of Corrections; (2) accessing this website numerous times during business hours; and (3) sharing confidential and sensitive information with others about DOC offenders in violation of DOC Operating Procedure 130.1. The grievant challenged the disciplinary action by initiating a grievance.

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.<sup>1</sup> A hearing was held on July 11, 2006.<sup>2</sup> In his decision dated July 19, 2006, the hearing officer found that the grievant engaged in "unauthorized use or misuse of state property," a Group II offense, when she placed the image of the Great Seal of Virginia on her website.<sup>3</sup> The hearing officer further found that the agency presented sufficient evidence to show that the grievant shared confidential and sensitive information about DOC offenders in violation of DOC Operating Procedure

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8370, issued July 19, 2006.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 5.

130.1.<sup>4</sup> More specifically, in his July 19<sup>th</sup> decision, the hearing officer finds the following:

[V]iolation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*’ is a Group III offense. DOC Operating Procedure 130.1 states:

Confidential Information. Information pertaining to the record, offense, personal history, or private affairs of offenders is for official use only. Employees shall seek to obtain such information only as needed for performance of official Department duties, and shall not discuss such information except as required in the performance of official duties.

Grievant posted several comments disclosing confidential information about offenders. For example, she wrote:

So last week I received a call at my office from the victim of one of my offenders. He beat her and was picked up and charged for his 3<sup>rd</sup> A&B.”

He wants to know if there is anything I can do to help his son, who was arrested for assaulting him and his property a couple of weeks ago.

I also told her there was no use in trying to get him out because I was not going to allow him to see her again. (Note: They aren’t married & don’t have any children together – thank GOD).

These examples show Grievant discussed the offenses (e.g. third assault and battery) and private affairs (e.g. they aren’t married and don’t have any children together) of offenders. Grievant knew or should have known she could not discuss information about offenders. This conclusion is supported by Grievant’s statement:

In fact, the offender has to give consent for most info. to be discussed with anyone – even family

The Agency has presented sufficient evidence to show that Grievant acted contrary to DOC Operating Procedure 130.1 thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III

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<sup>4</sup> *Id.* at 7.

Written Notice, removal from employment is permitted. Accordingly, the Agency's removal of Grievant from employment must be upheld.<sup>5</sup>

The hearing decision also concluded that the agency failed to present sufficient evidence to establish that the grievant's use of the internet during business hours violated state policy.<sup>6</sup>

The grievant subsequently sought a reconsideration decision from the hearing officer as well as administrative reviews of the hearing officer's decision from this Department and the Department of Human Resource Management (DHRM). In his October 6, 2006 reconsideration decision, the hearing officer found that "Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied.**"<sup>7</sup>

### 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."<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> In making his determination, the hearing officer is authorized to make "findings of fact as to the material issues in the case"<sup>11</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>12</sup> Further, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>13</sup> Where the evidence conflicts or is subject to varying interpretations,

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<sup>5</sup> See Decision of Hearing Officer, Case No. 8370, issued July 19, 2006 (footnotes omitted).

<sup>6</sup> *Id.* at 6.

<sup>7</sup> Reconsideration Decision of Hearing Officer, Case No. 8370-R, issued October 6, 2006 (emphasis in original).

<sup>8</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>9</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>10</sup> 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, whether aggravating circumstances existed that would overcome the mitigating circumstances. See *Rules for Conducting Grievance Hearings*, § VI(B).

<sup>11</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> Va. Code § 2.2-3005(C)(5).

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. Evidence in the record may include such things as "witness testimony, records, documents, exhibits, tangible objects, etc."<sup>14</sup>

In this case, the grievant claims that the hearing officer failed to comply with the grievance procedure when he found that the agency proved by a preponderance of the evidence that the grievant violated DOC Operating Procedure 130.1. More specifically, the grievant asserts that "although the agency cited [the grievant's] violation of DOC Operating Procedure 130.1 as a reason for her termination in the Written Notice, it failed to address either the policy or [the grievant's] violation of the policy in its presentation of evidence at the grievance hearing. In fact, it did not introduce the policy into evidence." The grievant has correctly noted that the agency did not offer or introduce a copy of DOC Operating Procedure 130.1 during its direct examination of witnesses at the hearing. However, at the conclusion of the agency's case, the hearing officer asked the agency representative if she would be providing him with a copy of DOC Operating Procedure 130.1. The agency did not have a copy of the policy to provide the hearing officer at the hearing; however, the grievant's representative did have a copy of the policy and offered it to the hearing officer at that time. Upon receipt, the hearing officer admitted DOC Operating Procedure 130.1 into the record, without objection, as Agency Exhibit #8.<sup>15</sup>

As stated above, 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. Whether the grievant violated DOC Operating Procedure 130.1 or not was a material issue in this case because the Group III Written Notice being grieved alleged that the grievant violated this policy. Moreover, although it was not offered into evidence during the agency's direct examination of witnesses, DOC Operating Procedure 130.1 was admitted into the record evidence as Agency Exhibit #8. Furthermore, the written comments by the grievant about DOC offenders and quoted by the hearing officer in his decision were admitted into the record evidence as Agency Exhibit #3.

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<sup>14</sup> See EDR's Basic Skills for Presenting Your Case at Hearing, *The Grievance Hearing*, §VI(A).

<sup>15</sup> The following exchange can be found on Hearing tape 2, side A, counter #352-363.

Hearing Officer: "The only question I have... I don't have a copy of that Operating Procedure 130.1, ...can that be submitted at a later time [agency representative]?"

Agency Representative: "Yes sir it can."

Grievant's representative: "I actually have a copy if you..."

Hearing Officer: "Is it in your exhibits?"

Grievant's Representative: "No, but I brought it with me."

Hearing Officer: "I will make this Agency Exhibit 8 or I can make it hearing officer Exhibit 1, do you have a preference [agency representative]?"

Agency Representative: "No."

Hearing Officer: "OK Agency Exhibit 8."

Based on the foregoing, this Department concludes that the hearing officer's conclusion that the grievant shared confidential and sensitive information about offenders in violation of DOC Operating Procedure 130.1 was based upon evidence in the record and the material issues of the case and as such, the hearing decision will not be disturbed by this Department. Whether the hearing officer correctly interpreted and applied DOC Operating Procedure 130.1 is an issue for the Director of DHRM to address, not this Department.

Additionally, the grievant argues that had the agency introduced evidence at the hearing regarding the grievant's violation of DOC Operating Procedure 130.1, she "could have rebutted this evidence by introducing evidence that supports her interpretation of the policy." In particular, the grievant claims she would have introduced evidence that "DOC probation and parole officers routinely speak of offender information in general terms, e.g., when conducting training which is attended by the public" and that these types of disclosures are "never treated as a violation of DOC Operating Procedure 130.1." However, the grievant knew that her alleged violation of DOC Operating Procedure 130.1 was at issue because it was cited on the written notice. Therefore, despite what the agency presented as evidence at the hearing, if the grievant had information and/or evidence to refute the agency's allegation on the written notice that she disclosed confidential and/or sensitive information about offenders, she could have offered such evidence at the hearing.

Moreover, in his reconsideration decision, the hearing officer states:

Grievant contends probation and parole officers routinely speak of offender information in general terms. For example, when conducting training which is open to the public, confidential information will be discussed, according to Grievant. Grievant's argument fails because discussions occurring during training sponsored by the Agency would be within the context of the Agency's business operations over which it has control. DOC policy prohibits employees from discussing confidential information "except as required in the performance of official duties." Confidential information disseminated during training open to the public would be "in the performance of official duties" and, thus, not prohibited by policy. Thus, any evidence Grievant would present during a re-hearing regarding public training would not affect the outcome of this case.<sup>16</sup>

Accordingly, it appears that the hearing officer has considered the grievant's contention that probation and parole officers routinely discuss offender information during trainings and has concluded that the grievant's action in this case is materially different than providing information during a DOC training session.

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<sup>16</sup> Reconsideration Decision of Hearing Officer, Case No. 8370-R, issued October 6, 2006.

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.<sup>17</sup> 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.<sup>18</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>19</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>20</sup>

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Claudia T. Farr  
Director

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<sup>17</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>18</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>19</sup> *Id.* See also Va. Dept. of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E. 2<sup>nd</sup> 319, 322 (2002).

<sup>20</sup> Va. Code § 2.2-1001 (5).