

Issue: Administrative Review of Case #8465/Hearing Decision appeal;
Compliance/Grievance Procedure/resolution steps; Ruling Date: January 25, 2007;
Ruling #2007-1523; Agency: Department of Corrections; Outcome: Hearing decision in
compliance; agency in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2007-1523
January 25, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8465.

FACTS

The grievant is employed as a Corrections Officer with the Department of Corrections (DOC or the agency). On June 20, 2006, the grievant was issued a Group III Written Notice for sleeping during work hours.¹ The grievant challenged the disciplinary action by initiating a grievance on July 17, 2006.² The grievance was subsequently qualified for hearing and a hearing was held on December 12, 2006.³ In a December 14, 2006 hearing decision, the hearing officer upheld the Group III Written Notice.⁴ Thereafter, on December 28, 2006, the grievant requested an administrative review by the EDR Director of the hearing officer's decision.

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."⁵ 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.⁶

¹ See Decision of Hearing Officer ("Decision") Case No. 8456, issued December 14, 2006.

² *Id.* at p. 1.

³ *Id.*

⁴ *Id.* at p. 5.

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

⁶ *Grievance Procedure Manual* §§ 6.4; 7.2.

Date of Receipt of Hearing Officer's Decision

The grievant asserts that “[t]he hearing officer concluded his decision on December 14, 2006 but the envelope was postmarked December 17, 2006 by their office; thereby delaying me three days of my 15-[c]alendar day appeal process throughout a holiday week.”

The grievance procedure provides that the hearing officer is to send his decision to each party by certified mail, return receipt requested, or by fax or e-mail, provided that proof of receipt is established.⁷ In accordance with the grievance procedure, the grievant was sent a copy of the hearing decision by certified mail with return receipt requested. And while there is no postmark date on the certified mail receipt maintained by the Division of Hearings, the receipt indicates that the hearing decision was placed in the mail on December 14, 2006 and was delivered to the grievant on December 21, 2006. This Department subsequently received the grievant's request for administrative review on December 28, 2006, within the required 15 calendar days following the December 14, 2006 decision.⁸ Accordingly, regardless of the actual postmark date in this case, the grievant has not shown, nor has this Department found, that he has suffered prejudice as he was able to timely request an administrative review of the hearing decision.

The Hearing Officer's Findings and Conclusions

The grievant claims that the hearing officer erred and/or abused his discretion by (1) finding that “it is more likely than not that the unusually high blood pressure reading obtained by an LPN on the evening of June 6th was erroneous;”⁹ and (2) finding that in the past three years, two officers have been terminated for sleeping during work hours. Further, the grievant claims that his evidence outweighs that submitted by the agency.

The 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. 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.¹⁰ In making his determination, the hearing officer is

⁷ *Grievance Procedure Manual* § 5.9.

⁸ The *Grievance Procedure Manual* provides that “all requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.” *Grievance Procedure Manual* § 7.2(a).

⁹ See Decision at p. 4.

¹⁰ 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,

authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹² Further, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹³ 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.

Based upon a review of the grievance record in this case, including the hearing tapes, this Department concludes that the hearing officer’s decision was based upon evidence in the record. Specifically, in addition to witness testimony, the agency submitted a videodisc recording of what occurred on June 6, 2006, which according to the hearing officer, “reflects that grievant was leaning back in his chair, with his head on his chest and his eyes closed for a 53-second period the first time, and for three minutes and 40 seconds the second time.”¹⁴ Additionally, although the grievant denies sleeping, he admitted at hearing that he closed his eyes while on duty.¹⁵ Finally, despite the grievant’s assertion that no evidence was presented regarding the treatment of other officers disciplined for sleeping on the job, an agency witness testified that in the past three years, two officers have been terminated from employment at DOC for sleeping during work hours. Based upon the foregoing evidence in the record, this Department cannot substitute its judgment for that of the hearing officer in this case.

Alleged Hearing Officer Bias

The grievant objects to several other alleged actions of the hearing officer. In particular, the grievant claims that the hearing officer (1) made him speak his testimony rather than permit him to read his statement; (2) accepted “[all] of the agency’s evidence with [p]ositive feedback on his response, in contrast to rejecting my evidence with [n]egative feedback, and also making excuses for their violations of their own policies;” (3) marked the agency’s exhibits before testimony was given whereas the grievant’s exhibits were marked after he gave his testimony; and (4) took into evidence the grievant’s copy of the DOC Standards of Conduct policy even though the agency was required to provide the hearing officer with a copy of that policy before the hearing.

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

¹¹ Va. Code § 2.2-3005.1(C)(ii).

¹² *Grievance Procedure Manual* § 5.9.

¹³ Va. Code § 2.2-3005(C)(5).

¹⁴ Decision at p. 2.

¹⁵ Decision at p. 4. The grievant’s position requires that he “provide constant surveillance,” and be “especially alert to inmate activities.” Moreover, “[a]lertness and careful attention to details are essential.” Decision at p. 2.

Although not specifically designated as such, the grievant's assertions can be fairly read to constitute a claim that the hearing officer demonstrated bias in favor of the agency. 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.¹⁶ 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.¹⁷ In this case, the grievant has not claimed nor presented evidence that the hearing officer had a direct, personal, substantial or pecuniary interest in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer's actions, even if true,¹⁸ demonstrated bias in this case.

Policy Interpretation

The grievant challenges the hearing officer's interpretation of agency policy. In particular, the grievant claims that the chain of command was not followed in this case and that "[n]owhere in Policy does it regulate the Warden in making all the decisions of the Standards of Conduct (135.1)." The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.¹⁹ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state and agency policy. If the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling.** The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

¹⁶ Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E. 2d 451, 460 (1992) (alteration in original).

¹⁷ See, e.g., EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

¹⁸ It should be noted that at the hearing, the hearing officer told that grievant that he would "prefer" that he not read his statement and wanted him to "testify from memory." Additionally, the hearing officer entered the agency's exhibits into the record after some witness testimony, but prior to the last witness' testimony, but waited until all witness testimony was over before entering the grievant's exhibits into the record. Moreover, the hearing officer entered into the record the grievant's copy of DOC Operating Procedure 135.1, but as he did so notified the agency that it was actually their responsibility to bring a copy of that policy to the hearing. Finally, with regard to the grievant's assertion that the hearing officer accepted "[all] of the agency's evidence with [p]ositive feedback on his response, in contrast to rejecting my evidence with [n]egative feedback, and also making excuses for their violations of their own policies," the grievant has not identified, nor has this Department found, exactly what actions or statements by the hearing officer could have precipitated these assertions.

¹⁹ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

Grievance Procedure Violations

Finally, the grievant claims that the grievance procedure was violated because “[t]he First Step Respondent was not my immediate supervisor,” and “[t]he Second Step Respondent (Warden [name]) and Third Step Respondent (Regional Director [name]) had [a] conflict of interest. The Regional Director, Warden, and HRO concluded with the original decision on the Written Notice.” These objections challenge alleged procedural violations by DOC prior to the hearing, not an alleged violation of the grievance procedure by the hearing officer.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.²⁰ That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct alleged noncompliance, the grievant may request a ruling from this Department.²¹

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.²² Thus, if Party A proceeds with the grievance after becoming aware of Party B’s procedural violation, Party A may waive the right to challenge the noncompliance at a later time.²³ Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, the grievant claims that an alleged procedural violation occurred at the first, second and third management resolution steps. Although he was aware of a possible procedural error at each of these steps, he continued to advance his grievance to the qualification phase, and then to hearing, without raising the issue of noncompliance with the agency head or with this Department until after he had received his hearing decision.²⁴ As such, the grievant waived his right to challenge the agency’s alleged noncompliance at these steps.

²⁰ See *Grievance Procedure Manual* § 6.

²¹ See *Grievance Procedure Manual* § 6.3.

²² *Id.*

²³ *Id.*

²⁴ The grievant did raise his objection regarding the first step respondent with the second step-respondent and the second step-respondent offered a “redo” of the first management resolution step, which the grievant declined.

Finally, it should be noted that even if the grievant's assertion regarding the resolution steps were indeed correct, he was nevertheless afforded a full and fair opportunity to present his case to a neutral hearing officer, present evidence in support of his case, and to cross-examine witnesses testifying against him. Accordingly, despite any potential non-compliance during the resolution steps, the grievant received adequate due process through the grievance hearing.

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.²⁵ **If the grievant does not appeal to the DHRM Director as described above, the decision will become a final decision 15 days from the date of this decision.**

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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷ This Department's rulings on matters of procedural compliance are final and nonappealable.²⁸

Claudia T. Farr
Director

²⁵ *Grievance Procedure Manual*, § 7.2(d).

²⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁷ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

²⁸ Va. Code § 2.2-1001 (5).