

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8647;
Ruling Date: September 27, 2007; Ruling #2008-1768; Agency: Department
of Juvenile Justice; Outcome: Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2008-1768
September 27, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8647. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

Prior to his removal, the Department of Juvenile Justice (DJJ or the agency) employed the grievant as a Juvenile Correctional Officer at one of its facilities.¹ On February 2, 2007, the grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment.² Other relevant facts as set forth in Case No. 8647 are as follows:

Grievant worked with Juvenile Correctional Officer P. On one occasion while they were working together, Grievant told Juvenile Correctional Officer P that he wanted to perform oral sex on her. On another occasion, Grievant asked Juvenile Correctional Officer P what was her bra size. Grievant also asked her what type of sexual actives [sic] she enjoyed.

Juvenile Correctional Officer P was offended by Grievant's comments. Following his comments, Juvenile Correctional Officer P told Grievant she did not like his comments. Grievant told her he would stop making comments of a sexual nature to her. She believed she had resolved the issue.

¹ See Decision of Hearing Officer, Case No. 8647, issued July 27, 2007 ("Hearing Decision").

² *Id.* at 1.

Grievant and Juvenile Correctional Officer P were attending on-the-job training scheduled for approximately 5 days. Grievant told her he was thinking of getting a hotel room for the remainder of the training session and that she could stay with him for the night. Juvenile Correctional Officer P interpreted Grievant's comment to be an invitation for her to have sex with him in the hotel room. She was offended by Grievant's comments. She believed Grievant would continue to make offensive sexual comments to her despite his prior statement that he would not do so. On December 3, 2006, Juvenile Correctional Officer P approached the Captain and suggested that he review the Facility's sexual harassment policy with staff. The Captain asked her why that was necessary; Juvenile Correctional Officer P told the Captain that someone had been making inappropriate sexually-oriented comments to her. She declined to identify Grievant as the offender. The Agency began an investigation. During the Agency's investigation, Juvenile Correctional Officer P identified Grievant as the employee making the offensive comments to her.

An Agency investigator also spoke with Juvenile Correctional Officer R. Juvenile Correctional Officer R began working for the Facility in September 2005. She worked with Grievant. On several occasions, Grievant told her he wanted to give her a massage. On one occasion, he attempted to give her a neck massage. He placed his hands on her neck and began rubbing, but she brushed him aside and Grievant stopped. In November 2006, Grievant brushed his body against Juvenile Correctional Officer R's body and told her that after he took care of a few things he would return to the unit and take her with him into the staff bathroom. She understood his comment to mean he wanted them to have sex in the bathroom. She did not wish to have sex with Grievant. She called Juvenile Correctional Officer O and told Juvenile Correctional Officer O what Grievant had said to her and asked her to remain on the line when Grievant returned. Juvenile Correctional Officer R said she was concerned about what Grievant would do if she were to hang up the telephone.

Grievant asked Juvenile Correctional Officer O personal questions about her sex life. On one occasion, he asked her whether she was taking birth control. He repeatedly asked her whether she was taking birth control. She answered his question because that was the only way she thought she could get him to stop asking the question.

The Agency also presented testimony from Juvenile Correctional Officer C to support its allegations. The evidence revealed that neither

Grievant nor Juvenile Correctional Officer C liked one another. Grievant's comments to her were not intended by Grievant to be of a sexual nature.³

In his July 27, 2007 hearing decision, the hearing officer upheld the Group III Written Notice with removal for workplace harassment.⁴

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

Witness Testimony/Hearing Officer Bias

The grievant asserts that Juvenile Correctional Officer P’s and Juvenile Correctional Officer R’s testimony at hearing was inconsistent with their statements made during the investigation into the grievant’s alleged harassing behavior and that the hearing officer demonstrated bias by finding the witness’ testimony to be credible.⁷ Moreover, the grievant challenges the hearing officer’s questioning of the witnesses at the hearing and claims that the hearing officer was “leading” witnesses. Each of these issues will be addressed below.

This Department has consistently held that where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that

³ *Id.* at 2-4 (footnotes omitted).

⁴ *Id.* at 6.

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

⁶ *Grievance Procedure Manual* §§ 6.4; 7.2 (a) (3).

⁷ In addition, the grievant claims that Juvenile Correctional Officer P “lied under oath.” This Department has consistently held that a request for a rehearing or reopening cannot be granted except in extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process. *See e.g.*, EDR Ruling #2006-1383. Virginia Court opinions are instructive as to the issues of perjury and the hearing process. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment. *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983). Those courts reasoned that the original trial (or hearing) was the party’s opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. In this case, under the rationale of the courts cited above, the grievant’s claims of changed evidence or perjury, coming after the hearing decision has been issued, would not warrant reopening. Indeed, the grievant had the opportunity at his hearing to question the agency witness about the alleged inconsistencies in her testimony, and to attempt to ferret out any perjury at that time.

evidence, determine the witnesses' credibility, and make findings of fact. In this case, the hearing decision states:

Grievant argues that the statements of the two female officers were not credible and that he did not engage in the behavior alleged. The Agency has met its burden of proof in this case. The testimony of Juvenile Correctional Officer P and Juvenile Correctional Officer R was credible for several reasons. First, the demeanor of each female officer during her testimony reflected truthfulness. Second, Grievant did not present evidence of any motive or reason why either woman would lie about him. Third, Juvenile Correctional Officer O confirmed to the Agency investigator that Juvenile Correctional Officer R called her and said Grievant had asked Juvenile Correctional Officer R to go into the staff bathroom with him. Fourth, the female officers were "reluctant witnesses". Neither woman approached the Agency with the intent to harm Grievant.⁸

These findings regarding record testimony are precisely the kinds of determinations 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 finds no basis to disturb the hearing officer's conclusion that Juvenile Correctional Officers P and R testified credibly.

Moreover, 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, pecuniary interest" in the outcome of a case.⁹ 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.¹⁰ 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 showed bias by concluding that Juvenile Correctional Officers P and R testified credibly.

Finally, according to the *Rules for Conducting Grievance Hearings*, "the hearing officer must establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts" and "during the course of the hearing, the hearing officer may question the witnesses and, if essential to the resolution of a material issue in the case, request a party to provide further documentation."¹¹ A review of the hearing tapes in this case revealed that the hearing

⁸ Hearing Decision at 5.

⁹ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E. 2d 451, 460 (1992) (alteration in original).

¹⁰ *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

¹¹ *Rules for Conducting Grievance Hearings*, § IV(C).

officer asked questions of the witnesses in an effort to develop the facts¹² and in accordance with his authority under the *Rules for Conducting Grievance Hearings*. Accordingly, this Department concludes that the hearing officer did not violate the grievance procedure or otherwise abuse his discretion in this case by asking questions of the witnesses during the hearing.

Failure to Consider Evidence

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.¹³ In making his determination, the hearing officer is authorized to make “findings of fact as to the material issues in the case”¹⁴ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁵ Further, by statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹⁶ As stated above, 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.

In addition to the challenges to the hearing officer’s findings and conclusions regarding Juvenile Correctional Officers P and R’s testimony, the grievant contests other findings of fact by the hearing officer¹⁷ as well as the hearing officer’s failure to include what the grievant believed to be pertinent facts in the hearing decision.¹⁸ The grievant is simply contesting the weight and credibility that the hearing officer accorded to the testimony of the witnesses at the hearing, the resulting inferences that he drew, the

¹² For instance, the hearing officer asked Juvenile Correctional Officer R what kind of relationship she has with Juvenile Correctional Officer’s P and C and further, in reference to her claim that the grievant “attempted to massage” her, the hearing officer asked Juvenile Correctional Officer R whether the grievant actually put his hands on her. Hearing Tape 1, Side B, at counter numbers 078 -121.

¹³ 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).

¹⁴ Va. Code § 2.2-3005.1(C)(ii).

¹⁵ *Grievance Procedure Manual* § 5.9.

¹⁶ Va. Code § 2.2-3005(C)(5).

¹⁷ For example, the grievant claims that the hearing officer “misstated” his claims regarding the agency’s failure to view videotapes of relevant areas in the facility.

¹⁸ For instance, in his request for administrative review, the grievant states that the hearing officer failed to include in his decision the fact that Juvenile Correctional Officers P, R and C were friends outside the workplace and “failed to mention” that he and Juvenile Correctional Officer P went to lunch together five consecutive days during the in-service training.

characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority. More importantly, 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.¹⁹ As such, his decision cannot be disturbed by this Department.

Agency Party Designee

The grievant also challenges the attendance of the Superintendent of his former facility at his grievance hearing. The agency designated the Superintendent as its party designee. Under this Department's *Rules for Conducting a Grievance Hearing*, "[an] agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify."²⁰ As the agency was entitled to designate the Superintendent as its party, this Department finds that the hearing officer did not violate the grievance procedure or otherwise abuse his discretion by allowing the Superintendent to attend the hearing.

Policy Interpretation

The grievant appears to challenge the hearing officer's interpretation of agency policy as well. In particular, the grievant claims "Officer [R] written report states that I never told the Grievant that his comments made her feel uncomfortable and he did not know that the things he was saying was unwanted does not sustain the claim of hostile work environment as describe [sic] in the State policy defining of sexual harassment." The hearing officer's interpretation of state 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.²¹ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state 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, he 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.

¹⁹ For example, during the investigation, Juvenile Correctional Officer P stated that during in-service training, the grievant stated that he was going to get a hotel room and that she could stay with him there. *See* Agency Exhibit 3. Additionally, there is evidence in the record supporting the hearing officer's findings that the grievant told Juvenile Correctional Officer P that he would like to perform oral sex on her and asked her what size bra she wears. *Id.* Further, the grievant admits that he asked Juvenile Correctional Officer R if she were on birth control and told Juvenile Correctional Officer P that he was thinking of getting a hotel room for the remainder of the training session and that she could stop by. *Id.*

²⁰ *Rules for Conducting Grievance Hearings*, § IV(A).

²¹ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

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 and any reconsidered hearing decisions following such review have been decided.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 This Department's rulings on matters of procedural compliance are final and nonappealable.²⁵

Claudia T. Farr
Director

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

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

²⁴ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

²⁵ Va. Code § 2.2-1001 (5).