

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9031; Ruling  
Date: April 10, 2009; Ruling #2009-2263; Agency: Department of Corrections;  
Outcome: Hearing Decision In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2009-2263  
April 10, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9031. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

This case concerns a Written Notice given to the grievant on November 21, 2008 for failure to comply with policy.<sup>1</sup> The grievant was terminated due to accumulation of disciplinary actions.<sup>2</sup> The hearing officer found that the grievant had engaged in misconduct and sustained the Written Notice and termination.<sup>3</sup> The hearing officer declined to change the decision on reconsideration.<sup>4</sup> The grievant now requests administrative review of the hearing 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."<sup>5</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>6</sup>

The grievant appears to assert that the agency did not prove that she engaged in the conduct charged and also disputes some of the hearing officer's findings of fact. Hearing

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<sup>1</sup> Decision of Hearing Officer, Case No. 9031, Mar. 18, 2009 ("Hearing Decision"), at 1.

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

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

<sup>4</sup> Reconsideration Decision of Hearing Officer, Case No. 9031, Mar. 31, 2009 ("Reconsideration Decision"), at 2.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4.

officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>8</sup> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.<sup>9</sup> Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>10</sup> 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 grievant’s arguments contest such issues as the hearing officer’s findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer’s authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.<sup>11</sup> Although the grievant has identified certain inconsistencies in the evidence, resolving such issues are precisely the types of questions on which this Department cannot substitute its judgment for that of the hearing officer. In this case, based upon a review of the record, it appears that sufficient evidence supports the hearing officer’s decision. There is no indication that the hearing officer abused his discretion in making these findings. Consequently, this Department has no reason to disturb the hearing decision.<sup>12</sup>

#### CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer’s 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.<sup>13</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

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<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> The grievant has also raised an issue regarding being dismissed by the hearing officer after the hearing, but the agency employees present were not. This exchange did not occur on the record, so this Department is unable to review any actual conversations that took place. However, simply because the agency employees left the building ten minutes after the grievant does not indicate anything improper occurred. Certainly if the hearing officer dismissed the grievant to have an ex parte conversation with the agency employees, that would be highly inappropriate. However, there is nothing in the hearing decision to indicate that any improprieties occurred. Again, there is sufficient evidence in the record to support the hearing officer’s decision.

<sup>13</sup> *Grievance Procedure Manual* § 7.2(d).

arose.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>

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Claudia T. Farr  
Director

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<sup>14</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).