

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9002;  
Ruling Date: May 28, 2009; Ruling #2009-2277; Agency: Department of  
Corrections; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2009-2277  
May 28, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's March 30, 2009 decision in Case Number 9002. For the reasons set forth below, the grievance is remanded to the hearing officer for consideration of the grievant's evidence as to his retaliation claim.

FACTS

On August 13, 2008, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions.<sup>1</sup> Also on August 13, 2008, the grievant was issued a Group III Written Notice with termination for threatening and abusive behavior.<sup>2</sup> The grievant challenged the disciplinary actions by initiating a grievance on August 25, 2008.<sup>3</sup> In his grievance, the grievant alleges that the disciplinary actions were unwarranted and retaliatory. The grievance was subsequently qualified for a hearing, which was held on January 8, 2009.<sup>4</sup> In a March 30, 2009 hearing decision, the hearing officer rescinded the Group II Written Notice, but upheld the Group III Written Notice with termination.<sup>5</sup> The grievant sought reconsideration of the hearing decision from the hearing officer, which the hearing officer denied on April 13, 2009.<sup>6</sup> The grievant now seeks administrative review from this Department.

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

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<sup>1</sup> Decision of Hearing Officer, Case No.9002, issued March 30, 2009 ("Hearing Decision") at 1.

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

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

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

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Reconsideration Decision of Hearing Officer, Case No. 9002-R, issued April 13, 2009. ("Reconsideration Decision") at 2.

decisions ... on all matters related to procedural compliance with the grievance procedure.”<sup>7</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>8</sup>

### *Retaliation*

In his grievance, the grievant alleges that the disciplinary action taken against him was in retaliation for “going above the head” of the Warden. At the hearing, the grievant testified that when the Warden denied the grievant’s request for a transfer, the grievant went to the Regional Director with his transfer request, and the Regional Director granted the grievant’s request.<sup>9</sup> Similarly, in his request for administrative review to this Department, the grievant states that he was disciplined in retaliation for his “going over [the Warden’s] head to be transferred to [the facility where the grievant worked before being terminated.]” This Department concludes that this statement can be fairly read as a claim that the hearing officer erred and/or abused his discretion by failing to consider whether the disciplinary actions taken against the grievant were retaliatory.

A hearing officer’s decision “must contain ... findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; [and] any aggravating or mitigating circumstances that are pertinent to the decision.”<sup>10</sup> While it is unclear as to whether the grievant has presented sufficient evidence to establish the claim, this issue of alleged retaliation was raised as a material issue in the grievance and at hearing. As such, it was error when the hearing officer failed to address in his decision the grievant’s allegations that the agency disciplined the grievant because of his communications with the Regional Director. Accordingly, the hearing officer is ordered to reconsider his decision by addressing the issue of retaliation. The reconsidered decision must explain the basis for any decision on the issue of retaliation. Also, the hearing officer and parties are reminded that it was the burden of the grievant to establish his retaliation claim by a preponderance of the evidence.

### *Challenge to Hearing Officer’s Findings of Fact and Conclusions*

The grievant also challenges a number of the hearing officer’s findings and conclusions. In particular, the grievant appears to dispute the hearing officer’s determination that the disciplinary action against him was warranted and appropriate under the circumstances. Hearing officers are 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 grounds in the record for those findings.”<sup>12</sup> Further, in cases involving

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<sup>7</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>8</sup> *Grievance Procedure Manual* § 6.4.

<sup>9</sup> Hearing Recording, Case No. 9002, at 2:48:31 through 2:50:39.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § V(C).

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

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

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>13</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>14</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.

The grievant's challenges to the hearing officer's findings of facts and conclusions appear to simply contest the hearing officer's findings of disputed 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 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.

This Department concludes that there was sufficient evidence in the record to support the hearing officer's determination that the grievant engaged in threatening and abusive behavior, thereby warranting the issuance of the Group III Written Notice with termination.<sup>15</sup> Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case.

### *Videotape*

The grievant also claims that the agency improperly erased the videotape of the altercation between the inmate and the grievant, the subject of this grievance. In his request for administrative review, the grievant stated that the videotape would have shown the inmate assaulting the grievant when he pushed the grievant's hand away and the grievant taking a "defensive stance" in response. Under the rules of the grievance procedure, the hearing officer "has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer . . . had ordered."<sup>16</sup>

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<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

<sup>15</sup> For example, the hearing officer finds that the grievant "balled his hands into fists," a fact the grievant does not apparently dispute, and based on witness testimony, told the inmate "I will bust you in the head." Hearing Decision at 3. Such determinations are within the hearing officer's authority and this Department finds no basis to disturb these findings on administrative review.

<sup>16</sup> *Rules for Conducting Grievance Hearings*, § V(B).

While generally recollected testimony of the contents of the tape should not be used as a substitute for the tape itself,<sup>17</sup> the tape in this case no longer exists and witness testimony regarding the actions of the grievant was introduced at the hearing. As noted above, the hearing officer appears to have based his decision that the grievant engaged in the behavior described in the Written Notice upon evidence in the record (i.e., witness testimony regarding the contents of the tape) and the material issue of the case and as such, this Department cannot substitute its judgment for that of the hearing officer with regard to those findings. Based on the foregoing, we cannot conclude that the manner in which the tape was handled constituted an abuse of discretion or error, especially in light of the fact that there was other evidence in the record, (i.e., witness testimony regarding the contents of the video) supporting the hearing officer's conclusion that the grievant engaged in threatening behavior.

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the grievance is remanded to the hearing officer to consider the evidence the grievant offered at hearing in support of his claim of retaliation. 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>18</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>19</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>20</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>21</sup>

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Claudia T. Farr  
Director

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<sup>17</sup> See Rules for Conducting Grievance Hearings, § IV(D).

<sup>18</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>19</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>20</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>21</sup> See Va. Code § 2.2-1001 (5); 2.2-3003(G).