

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9071;  
Ruling Date: September 1, 2009; Ruling #2009-2350; Agency: Department of  
Forensic Science; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Forensic Science  
Ruling Number 2009-2350  
September 1, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9071. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

The salient facts as set forth in Case Number 9071 are as follows:

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued on December 23, 2008 by Management of the Department of Forensic Science (the "Department" or "Agency"), as described in the Grievance Form A dated January 21, 2009.

1. The Grievant is a Forensic Evidence Specialist employed by the Agency. AE 4.
2. Seven (7) employees in the Department (five full-time and two part-time employees) report to the Forensic Evidence Manager (the "Manager") for the Department.
3. The Department provides crime laboratory services for the Commonwealth, having a laboratory in Richmond and three (3) additional regional laboratories.
4. The Commonwealth's law enforcement agents visit the laboratories regularly to bring materials to the laboratories so that the laboratories can process the materials and conduct scientific investigations concerning crime scenes.

5. Five (5) of the employees in the Grievant's laboratory (the "Laboratory") are on a weekly rotational call to respond to fire and/or intrusion alarms at the subject Laboratory during non-business hours.
6. The Grievant was the Department's assigned person on call to respond to alarms on December 16, 2008 when the security company (the "Security Company") monitoring the Laboratory called the Grievant (who was at home some distance from the Laboratory) at 7:03 a.m. to notify the Grievant of an internal intrusion alarm at the Laboratory.
7. The applicable Agency written policy concerning this type of alarm at this Laboratory requires, in part, that "the on-call person will respond to the building to ensure that the area occupied by the Department is secure." AE 1 and 3.
8. The Grievant told the Security Company that someone would be coming to the Laboratory.
9. The Security Company dispatched the local police to the Laboratory at 7:04 a.m. on December 16, 2008. The police arrived at the Laboratory at 7:10 a.m. and after looking around outside the building the police left because no Agency staff person met them to let them in the building.
10. The Manager and another employee arrived on December 16, 2008 to begin work at the Laboratory at their scheduled start-time of 7:30 a.m. and the Manager could tell from the alarm control panel that the alarm system had been activated but the control panel does not provide much more detail such as when the alarm was activated, etc.
11. When the Grievant arrived at work at 8:30 a.m. on December 16, 2008 (his scheduled start-time), the Manager asked the Grievant when he was notified of the alarm and the Grievant responded at 7:03 a.m. The Manager then asked the Grievant whether he responded to the alarm and the Grievant admitted to the Manager that he did not because the Grievant assumed that the Evidence Receiving staff scheduled to start at 7:30 a.m. would address the alarm. However, when the staff arrived at 7:30 a.m. the alarm was no longer sounding and they did not respond.

12. Despite his admission to the Manager that he did not respond to the alarm because he assumed that the Evidence Receiving staff scheduled to arrive at work at 7:30 a.m. would address it, the Grievant argues that he did respond to the alarm in a reasonable time. The Grievant argues that the weather conditions that morning, his long drive, the traffic, etc. delayed his arrival at work any sooner and that his arrival at work at his scheduled start-time was merely coincidental and not due to any lack of haste or effort on the part of the Grievant.
13. The Grievant has received warnings and reminders concerning the importance of responding to alarms in accordance with the Agency's applicable written policy. In this instance he was required to respond to the building within a reasonable time. When he was asked on cross-examination why he did not call in given the alleged delay due to traffic, etc., the Grievant said it slipped his mind and the Grievant also admitted during the hearing that it would have been a good idea to call. The Grievant had called into the Laboratory on previous occasions when the alarm system had been triggered.
14. In his Grievance Form A, the Grievant alleged that others on call have not responded to the building under identical circumstances.
15. However, the Director of the Laboratory conducted his own comprehensive review of about 72 alarm reports over the preceding fourteen (14) months and found this allegation unfounded, finding that the only two (2) infractions involved the Grievant; first, the alarm at issue in this proceeding and, second, a different fire alarm on September 28, 2008 (the "Fire Alarm"), for which the Grievant previously received a counseling memo from the Manager.
16. The hearing officer finds no merit in the Grievant's claims that he was harassed by the Manager when she simply asked him to provide more details concerning his response to the alarm at issue here. The Manager, reasonably exercising her prerogative as the Grievant's direct supervisor, requested the additional information to ensure that the reports were complete and accurately reflected the actions taken so as to give her a complete picture of what had transpired.

17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
19. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.<sup>1</sup>

Based on the foregoing findings of fact, the hearing officer upheld the Group II Written Notice.<sup>2</sup> The grievant now seeks as 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 decisions ... on all matters related to procedural compliance with the grievance procedure.”<sup>3</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>4</sup>

In his request for administrative review, the grievant objects to the hearing officer's findings of facts and conclusions. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>5</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>6</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>7</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>8</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence,

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<sup>1</sup> Decision of Hearing Officer, Case No. 9071, issued June 8, 2009 (“Hearing Decision”) at 1-4.

<sup>2</sup> *Id.* at 6.

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

<sup>4</sup> *Grievance Procedure Manual* § 6.4.

<sup>5</sup> Va. Code § 2.2-3005.1(C).

<sup>6</sup> *Grievance Procedure Manual* § 5.9.

<sup>7</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>8</sup> *Grievance Procedure Manual* § 5.8.

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 this case, the grievant asserts that the hearing officer wrongly found that the grievant "admitted" that he did not "respond to the alarm when asked whether [he] responded" (finding of fact #11). Additionally, the grievant challenges the hearing officer's findings and conclusions with regard to the grievant's claim that others on call have not responded to the building under identical circumstances (findings of fact #'s 14 and 15). The grievant's challenges contest the weight and credibility that the hearing officer accorded to the testimony of a witness at the hearing, 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>9</sup> So 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 admitted to not responding to the alarm when he was required to do so. In particular, this Department's review of the hearing tapes revealed that during her testimony, the Manager stated that when she asked the grievant what he did after being notified of the alarm, he said "nothing, I assumed you and [another member of the staff] would take care of it."<sup>10</sup> Likewise, during his testimony, the grievant stated that when asked by the Manager if he called anybody in response to the alarm, he stated "I thought you and [another member of staff] handled these things."<sup>11</sup> The grievant goes on to state that he believed the Manager would address the alarm because she had done so in the past.<sup>12</sup> While the grievant may disagree with the Manager's statement and/or have a slightly different version of the conversation he had with the Manager upon arriving at work that day, the authority to make such credibility determinations rests entirely with the hearing officer and cannot be disturbed by this Department on administrative review especially when, as is the case here, the hearing officer's finding that the grievant admitted to not responding to the alarm is supported by the record evidence.

In addition, the hearing officer finds, and the hearing record supports, that despite the grievant's assertion that others on call have failed to appropriately respond to an alarm, the Director of Laboratory conducted a review of alarm reports for the previous fourteen (14) months and the grievant was the only one to have committed infractions.<sup>13</sup>

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

<sup>10</sup> Testimony of the Manager during the hearing of Case No. 9071.

<sup>11</sup> Testimony of the grievant during the hearing of Case No. 9071.

<sup>12</sup> *Id.*

<sup>13</sup> Testimony of the Director of Laboratory during the hearing of Case No. 9071.

In his request for administrative review, the grievant asserts that the Director of Laboratory also stated that others on call would not physically attend to the alarm as required by policy but rather would first try to contact an on-site Department staff member to investigate the matter. The grievant asserts that this statement by the Director of Laboratory supports the grievant's claim that others of call have not responded to the building as required under identical circumstances.

Based on this Department's review of the hearing record, the Director of Laboratory does in fact state that although the on call person is generally required under policy to physically respond to the alarm, "it is not uncommon" for the on call person to first contact the building to see if a colleague is there to respond to the alarm and that the grievant himself has done this in the past.<sup>14</sup> The Director of Laboratory's statements however do not appear to support a conclusion of inconsistent application of policy in this case. In particular, there is no evidence in this case that the grievant similarly contacted the building to inquire as to whether someone else was available to respond to the alarm. On the contrary, during his testimony, the grievant admitted that he did not contact anyone upon receiving the call regarding the alarm.<sup>15</sup> Similarly, as discussed above, the grievant told the Manager that he did "nothing" when he was notified of the alarm because he assumed someone else would respond to the alarm. Based on the foregoing, this Department finds no reason to second-guess the hearing officer or to remand the decision.

#### 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>16</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>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>14</sup> *Id.*

<sup>15</sup> Testimony of grievant during the hearing of Case No. 9071.

<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).