

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9087; Ruling
Date: September 4, 2009; Ruling #2010-2366; 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 2010-2366
September 4, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9087. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On February 23, 2009, the grievant was issued a Group III Written Notice with termination for "Failure to Report a Security Threat and Fraternization of an Inmate."¹ The grievant challenged the disciplinary action by initiating a grievance on March 16, 2009.² The grievance proceeded to hearing on June 19, 2009; and in a hearing decision dated June 23, 2009, the hearing officer upheld the Group III Written Notice on the charge of "Failure to Report a Security Threat."³ The grievant subsequently sought reconsideration of the hearing decision which the hearing officer denied on July 16, 2009.⁴ The grievant now seeks administrative review by 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."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 Decision of Hearing Officer, Case No. 9087, issued June 23, 2009 ("Hearing Decision") at 1.

² *Id.*

³ *Id.* at 1 and 4-5. The hearing officer found that the agency failed to meet its burden with respect to the charge of fraternization. *Id.* at 5.

⁴ Reconsideration Decision of the Hearing Officer, Case No. 9087, issued July 16, 2009 ("Reconsideration Decision") at 1-2.

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

⁶ *Grievance Procedure Manual* § 6.4.

The grievant's request for administrative review to this Department challenges the hearing officer's decision on two grounds: (1) that the hearing officer erred in finding that she had failed to report a security threat; and (2) that the hearing officer erred in not mitigating the disciplinary action. These issues are discussed below.

Failure to Report a Security Threat

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁸ 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.⁹ 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.¹⁰ 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 this case, the grievant was charged with failing to report a security threat—specifically, a statement made to the grievant by an inmate in which the inmate referred to having put a "hit on the yard." The grievant contends that she was only told by the inmate that "[t]hey came and got me today, they said I put a hit on the yard"; and that, because she believed from this statement that prison administration was already aware of the potential hit, she did not need to report what the inmate had said. In upholding the disciplinary action, the hearing officer found that the grievant had a duty to report the potential hit to the administration, noting that "[r]egardless of whether other Agency personnel were aware of this threat, it was incumbent on the Grievant to see to it that she reported the threat."¹¹

Although the grievant describes her objection as being made against the hearing officer's alleged failure to hear and understand the audiotape, she appears in fact to be challenging the hearing officer's interpretation of agency policy. She asserts that under the circumstances, she was not required to notify the agency of the inmate's statement regarding the "hit"—a contention with which the hearing officer clearly disagreed, both in his initial decision and in his decision on reconsideration.

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.¹² Only a determination by

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Decision at 4.

¹² See Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. Here, the grievant appears to have requested an administrative review by DHRM.

Mitigation

The grievant also argues that the hearing officer erred in failing to mitigate the disciplinary action. In particular, she identifies another DOC case, from 2005, in which an officer allegedly failed to report a death threat, but was not terminated by the agency. A review of the hearing record, however, indicates that the grievant did not present this argument to the hearing officer at hearing. Accordingly, the hearing officer cannot be found to have erred in failing to consider this allegedly inconsistent discipline.¹³

Further, this Department will review a hearing officer's mitigation determinations only for an abuse of discretion.¹⁴ Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, this Department will not disturb the hearing officer's decision.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷

Claudia T. Farr
Director

¹³ Moreover, this information cannot constitute newly-discovered evidence, as it was readily accessible on this Department's website prior to the hearing.

¹⁴ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts." *Id.*

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).