

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9113;
Ruling Date: September 22, 2009; Ruling #2010-2382; Agency: Department
of Corrections; Outcome: Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2010-2382
September 22, 2009

The Virginia Department of Corrections (DOC or the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9113. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On March 3, 2009, the grievant was issued a Group III Written Notice of disciplinary action with termination.¹ The Written Notice charged the grievant with having entered into an "accord and satisfaction" with an inmate, in return for the dismissal of criminal charges pending against the grievant.² The grievant timely initiated a grievance challenging the disciplinary action, and a hearing was held on July 13, 2009.³ In a hearing decision dated July 14, 2009, the hearing officer reversed the issuance of the Group III Written Notice and termination.⁴ In reversing the disciplinary action, the hearing officer explained:

There is no evidence before this hearing officer to prove any conduct by the claimant other than the act of the accord and satisfaction itself. I am not willing to find that an accord and satisfaction, standing alone, without any evidence of underlying conduct by the Grievant, can be construed as a prohibited relationship under Operating Procedure 130.1. The accord and satisfaction does not excuse the Agency from proving the offensive conduct. To hold otherwise would require speculation or conjecture.⁵

¹ Decision of Hearing Officer, Case No. 9113, issued July 14, 2009 ("Hearing Decision") at 1.

² Hearing Decision at 4; *see also* Agency Exhibit 1.

³ Hearing Decision at 1.

⁴ *Id.* at 1, 5.

⁵ *Id.* at 5.

The agency subsequently sought reconsideration of the hearing decision, which the hearing officer denied on August 5, 2009.⁶ The agency now seeks an administrative review decision from this Department.

DISCUSSION

Although the agency seeks administrative review of the hearing officer's decision on the basis that the hearing decision is in noncompliance with the grievance procedure, the agency has failed to identify any particular conduct or action that it considers to be noncompliant, nor has the agency identified any section of the Grievance Procedure with which it claims the hearing decision failed to comply. Assuming, for the purposes of this ruling only, that the agency seeks administrative review on the same grounds as it sought reconsideration by the hearing officer, the agency asserts that the hearing officer erred in focusing on the nature of the conduct giving rise to the criminal charges against the grievant, rather than on the admitted fact of the accord and satisfaction, along with the accompanying payment by the grievant to the inmate, as being a prohibited action under Agency Operating Procedure 130.1.⁷

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.”⁸ 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.⁹

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹¹ 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.¹²

⁶ Reconsideration Decision of the Hearing Officer, Case No. 9113, issued August 5, 2009.

⁷ Specifically, the agency argues that the hearing officer erred in finding that the “Group III termination was based on the internal investigation report that identified the *criminal charges* against the Grievant and the ultimate accord and satisfaction,” rather than on the grievant's having “engaged in the accord and satisfaction to settle a criminal charge and to preclude a civil action with an inmate under his supervision.” In addition, the agency asserts that the amount of money paid by the grievant to the inmate under the accord and satisfaction “has not been given the weight it is due.” Finally, the agency argues that the charges underlying the accord and satisfaction are irrelevant, as simply the act of entering into an agreement with an inmate and providing money to inmates are prohibited under Agency Operating Procedure 130.1.

⁸ Va. Code § 2.2-1001(2), (3), and (5).

⁹ *Grievance Procedure Manual* § 6.4.

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

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.¹³ 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. Thus, to the extent the agency challenges the hearing officer's findings of fact and his weighing of the evidence,¹⁴ such determinations are entirely within the hearing officer's authority.¹⁵

It appears, however, that the agency's objections are not primarily to the hearing officer's factual findings, but rather to his conclusion that the charged conduct—entering into an accord and satisfaction and paying an inmate to settle criminal charges—does not, in and of itself, constitute a violation of Agency Operating Procedure 130.1. The hearing officer's interpretation of agency 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.¹⁶ Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state or agency policy.

If the agency has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it 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.¹⁷

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

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ We note that the only "finding" specifically challenged by the agency (see footnote 7) was merely part of the hearing officer's recitation of the evidence presented at hearing. See Hearing Decision at 4 ("The Agency's witness testified that the Group III Written Notice with termination from employment was based on the internal investigation report that identified the criminal charges against the Grievant and the ultimate accord and satisfaction.")

¹⁵ After making the request for administrative review, the agency submitted to this Department materials related to the internal investigation of the grievant. Because these materials were not presented to the hearing officer, they will not be considered as part of this ruling.

¹⁶ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

¹⁷ See, e.g., EDR Ruling No. 2008-1829.

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administrative review have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

Claudia T. Farr
Director

¹⁸ *Grievance Procedure Manual* § 7.2(d).

¹⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).