

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9291, 9292, 9293, 9294; Ruling Date: June 30, 2010; Ruling #2010-2636; 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 Numbers 2010-2636
June 30, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Nos. 9291, 9292, 9293, and 9294. 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 of this case, as set forth in the hearing decision in Case Nos. 9291, 9292, 9293, and 9294 are as follows:

On September 4, 2009, Grievant was issued a Group III Written Notice of disciplinary action for behavior unbecoming of a professional correctional officer. On September 8, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. Grievant was removed from employment.

* * * * *

The Department of Corrections employed Grievant is [sic] a Corrections Officer at one of its Facilities prior to his removal from employment. The purpose of Grievant's position was:

Maintain security, custody and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.

Grievant had prior active disciplinary action. On January 30, 2008, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy. On January 27, 2009, Grievant received a

Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.

The Agency's Intelligence Officer intercepted a letter from Ms. F to an inmate inside the Facility. The letter was postmarked August 18, 2009. Four pictures were included with the letter. One of the pictures showed seven African American men including Grievant posing as a group. Several of the men were holding a hand up in the air and displaying their fingers in a manner to show what appeared to be a gang sign. Agency employees were concerned as to the reason why Grievant would appear in a picture being sent to an inmate at the Facility. The Agency initiated an investigation. The Agency's Investigator interviewed Grievant who refused to provide the Investigator with a full explanation regarding the circumstances of the photo. The Investigator spoke with a local law enforcement officer who had experience with identifying members of gangs in his locality. The local law enforcement officer identified three of the seven men in the photo as being members of the gang named AB. Several of the men in the photo including Grievant were holding a hand in the air to display their fingers in a manner that traced the pattern of the two letters of the gang's name. The Agency did not allege or establish that Grievant was a member of gang AB. The Facility Warden concluded it might be appropriate to issue Grievant a Written Notice of disciplinary action for conduct unbecoming a professional correctional officer.

Prior to the issuance of the Group III Written Notice for behavior unbecoming a professional correctional officer, the Warden conducted a due process fact-finding hearing to present the allegations to Grievant and to enable Grievant to present evidence showing why the disciplinary action should not be taken. On September 4, 2009, the Warden met with Grievant. Grievant said that he had been accused by the Investigator of being a member of the Cr gang and the Bl gang. The Warden asked Grievant if he was a member of those gangs. Grievant responded that he was not a member. The Warden said he would like for Grievant to write an incident report describing where he was when the picture was taken and the circumstances surrounding the picture. Grievant refused to write the report. Grievant said he did not wish to write the report in the event it might incriminate him. The Warden told Grievant that as an officer he was obligated to write a report of the incident giving an account of what happened. Grievant again refused to write the report. The Warden stopped the fact-finding hearing and said that "I am giving you an order to give a written account." Grievant said that he was not going to give a written account.¹

Based on these "Findings of Fact," the hearing officer reached the following "Conclusions of Policy":

¹ Decision of Hearing Officer, Case No. 9291/9292/9293/9294, issued April 19, 2010 ("Hearing Decision") at 1-3. Footnotes from the original Hearing Decision have been omitted.

The Agency alleged that Grievant engaged in behavior unbecoming of a professional correctional officer. The Agency did not charge Grievant with fraternization or creating the appearance of fraternization. The Agency did not present a policy defining "behavior unbecoming of a professional correctional officer". Although the list of offenses in the Agency's Standards of Conduct is not all-inclusive, the Agency must present evidence showing that an employee charged with a Group III offense knew or should have known that his behavior would result in disciplinary action up to and including removal. The Agency has not established that Grievant knew that three of the men in the photo were members of a gang and that Grievant knew he was displaying a gang sign. Although Grievant received training informing him that his behavior outside of his work hours could be a basis to take disciplinary action against him, he did not receive training to inform him that that appearing in a photo and making a hand sign could result in disciplinary action resulting [sic] removal. In short, Grievant did not have adequate notice from the Agency that his behavior as displayed in the photo could result in his removal from employment. Accordingly, the Group III Written Notice must be reversed.

Failure to follow a supervisor's instruction is a Group II Written Notice. On September 4, 2009, the Warden, a supervisor, gave Grievant a direct order to write an incident report regarding the circumstances surrounding the picture of Grievant. Grievant refused that order thereby justifying the issuance of a Group II Written Notice of disciplinary action.

Upon the accumulation of two or more Group II Written Notices of disciplinary action, an employee may be removed from employment. With the Group II Written Notice giving rise to this hearing, Grievant has accumulated more than two Group II Written Notices of disciplinary action. Accordingly, the Agency's removal is upheld.

Grievant argued that he had the right to refuse to comply with the Warden's order pursuant to the Fifth Amendment of the United States Constitution. Grievant argued that he cannot be subject to disciplinary action for exercising the rights afforded to him by the United States Constitution. Grievant's argument fails. Grievant's argument would have merit if the Agency were conducting a criminal investigation of him. In this case, the Agency's investigation was an administrative one. Grievant was obligation [sic] to comply with the instruction of a supervisor as part of an administrative investigation.

Grievant filed a third grievance and alleged that he was being stereotyped based on his race and physical appearance because the Agency took disciplinary action against him for appearing in the photo. Grievant claims that he was falsely accused of being a member of the Cr or the Bl gangs. The evidence showed that the Agency did not accuse Grievant of being a member of these gangs but rather

inquired of Grievant regarding whether he was a member of these gangs. The Agency's experts testified that individuals other than African Americans are members of the Cr and the Bl gangs. Thus, the Agency's questioning of Grievant regarding whether he was a member of the two gangs was not racial stereotyping and was not inappropriate.

Grievant filed a fourth grievance restating many of his concerns expressed in the prior three grievances. Since those issues are addressed as part of the prior three grievances, there is no basis to grant Grievant relief.²

Having found no mitigating circumstances that warranted a reduction in the level of discipline, the hearing officer reached the following decision:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action. Grievant's requests for relief for his third and fourth grievance are **denied**.³

The grievant subsequently sought an administrative review from the hearing officer. In a decision dated May 27, 2010, the hearing officer affirmed his original Hearing Decision.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

Documents and Document Related Issues

The grievant asserts that the Department of Corrections (DOC or the agency) was tardy in providing him documents. In addition, the grievant complains that it was improper for the hearing officer to send, during a break in the hearing, the Agency Advocate along with a witness to obtain a document, and that they discussed testimony while retrieving the document.

² *Id.* at 3-5.

³ *Id.* at 5.

⁴ Reconsideration Decision of the Hearing Officer, Case No. 9291/9292/9293/9294, issued May 27, 2010 ("Reconsideration Decision").

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

These allegations, if true, would be troubling.⁷ However, any such behavior, under the particular facts of this case, would not have resulted in reversible error. The hearing officer rescinded the Group III Written Notice based on behavior unbecoming of a professional correctional officer. The grievant has not identified any requested document that was not provided that would appear to have any bearing on the Group II Written Notice that was upheld.⁸ Likewise, the grievant has not identified how any delay in receiving documents or even how any alleged discussion between the Agency Advocate and witness had any bearing on the upheld Group II Written Notice.

Ability to Question

The grievant asserts that his ability to question witnesses was impaired by the hearing officer. He asserts that the hearing officer prodded him to move on several times and characterized his questions as “ridiculous.”

The grievant was admonished by the hearing officer for his “tone” at approximately 41:00 minutes into the hearing. The grievant’s representative had twice posed a question to a witness (the Special Agent) related to what appeared to be one of the grievant’s key legal defenses.⁹ When the witness refused to provide a direct answer to the question, the grievant’s representative attempted to ask his question a third time. Specifically, the grievant’s representative had asked the Special Agent if he read the grievant his Miranda rights, to which the Special Agent responded that Miranda did not apply in this case as he was conducting an administrative investigation. The grievant’s representative persisted by stating that he simply wanted a “yes” or “no” answer. The Special Agent again responded that Miranda did not apply in this case as it was not a criminal investigation. The grievant’s representative’s questioning was interrupted by the objection of the agency’s representative who instructed the witness not to answer the question. At that point the hearing officer first censured the grievant for his “tone,” and for not allowing the witness to answer questions. The hearing officer subsequently instructed the Special Agent to answer the grievant’s representative’s questions.

The hearing officer intervened next at approximately at one hour and ten minutes into the hearing when the grievant’s representative was questioning the Special Agent about his initial report, which had been e-mailed to the Warden.¹⁰ The grievant’s representative appeared to be trying to establish that, contrary to the initial e-mailed report, not every individual shown in

⁷ We note that the hearing officer specifically instructed the witness not to discuss her testimony. Hearing recording at 3:48-3:49.

⁸ In EDR Ruling Nos. 2010-2440, 2010-2447, 2010-2452 this Department held that: “Beyond these specific items, there is no evidence that the agency has failed to produce any other documents. While the grievant may argue that there should be other documents responsive to his request, this Department has found no indication of any other documents that must be produced at this time.” The grievant has not identified to this Department any documents not provided.

⁹ See questioning of Special Agent beginning at 37:00 which addresses the “right to remain silent when interrogated if one feels they are being falsely accused of something he or she reasonably believes could be criminal in nature,” and questioning regarding the nature of the investigation in this matter, that is, criminal versus administrative.

¹⁰ The Special Agent repeatedly asserted that this initial report was not his official report. Hearing recording at 1:06-1:07; 1:10.

the photograph at issue was making a gang sign with their hands. In response to grievant's attempt to get the Special Agent to admit that each person was not flashing a gang sign, the Special Agent repeatedly refused to concede that his initial report was incorrect, repeatedly asserting that it was preliminary and not his official report.¹¹ At that point, the hearing officer intervened and ordered the grievant's representative to "move on," and stated that "this is ridiculous," and finally "I'm not sure where you're heading with this but let's move on to something that's important."¹²

The hearing officer's cutting off the grievant's representative without giving him the opportunity to explain where he was going with his questioning and the characterizing of the questioning as "ridiculous," was unfortunate but not prejudicial error. Again, this line of questioning was related to the rescinded Group III Notice for conduct unbecoming, not the Group II that ultimately led to the grievant's termination.¹³

Findings of Fact/Witness Credibility

The grievant asserts that agency witnesses committed perjury. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.¹⁴ In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.¹⁵ Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. Accordingly, we decline to disturb the decision on this basis.

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

¹¹ The Special Agent also stated that he did not have a copy of his initial e-mail report with him. Hearing recording at 1:09-1:10.

¹² Hearing recording at 1:10-1:11. The hearing officer did not explain why the line of questioning was ridiculous, except that he did not see where the questioning was going. He did not invite the grievant's representative to explain how this line of questioning was relevant to the charges. While we need not speculate where the line of questioning was ultimately headed, we note that the grievant's representative asserted that it was the initial report that informed the Warden's decision to discipline the grievant, not the official report which the grievant asserts was issued after the discipline. Hearing recording at 1:17; 1:23.

¹³ We recognize that this was not the only instance where the hearing officer prompted the grievant's representative to move on. However, this Department's review of the hearing recording revealed no abridgment of the grievant's representative's ability to pose questions pertaining to the sustained Group II Notice.

¹⁴ See e.g., EDR Ruling #2006-1383.

¹⁵ See, e.g., Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

review have been decided.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸

Claudia T. Farr
Director

¹⁶ *Grievance Procedure Manual* § 7.2(d).

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

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