

Issue: Administrative Review of Hearing Officer's decision in Case No. 9552; Ruling Date: June 20, 2011; Ruling No. 2011-2990; Agency: Department of Correctional Education; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Correctional Education
Ruling Number 2011-2990
June 20, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9552. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

On February 2, 2011, the grievant filed a grievance challenging her receipt of a Group II Written Notice with termination. On March 21, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.¹ On April 29, 2011, a hearing was held at the agency's office.²

The relevant facts as set forth in Case Number 9552 are as follows:³

1. Until her termination, the Grievant had been an employee of the Department since February 2007.
2. The Grievant worked as a cosmetology instructor, teaching at the time of her termination twelve (12) inmates in a class at a Department of Corrections ("DOC") women's prison facility (the "Facility") from about 8:00 a.m. – 11:30 a.m., Monday - Friday.
3. The Regional Principal (the "Supervisor") supervised the Grievant for the Department.
4. The Grievant's current (2010-2011) and immediately preceding (2008-2009) EWP provide in part:

**23. Agency/Departmental
Objectives**

**24. Measures for Agency/
Departmental Objectives**

¹ Decision of Hearing Officer, Case No. 9552, issued May 5, 2011 ("Hearing Decision") at 1.

² *Id.*

³ *Id.* at 2-4.

AA Safety

Reads and follows all safety and procedures related to safety and security. Attends all safety/security related meetings.

Constantly follows established policies and procedures in regards to safety and security. Corrects Unsafe work practices in the office or classroom. Is held accountable for all aspects of safety and security in the classroom/office environment. Notifies supervisor of any problems or concerns in a timely manner.

5. On December 6, 2010, the Grievant allowed Inmate S to leave the cosmetology classroom at 10:50 a.m. and to return to the housing unit with Scissors #2 which the Grievant had signed out to Inmate S earlier in the morning at 9:45 a.m. Tapes; AE M.
6. The Grievant only realized that Inmate S had left with the scissors when she began to collect the tools from her class at 11:20 a.m.
7. A DOC employee, Officer G, was assigned until January 1, 2011, to assist the Grievant in her classroom. The Grievant told Officer G of the missing scissors and Officer G retrieved the scissors from Inmate S while the Grievant "locked down" the classroom until the scissors were retrieved.
8. The Grievant accounted for Scissors #2, signing them back in, at 11:40 a.m. after they were returned by Officer G to the classroom. AE M.
9. The final Written Notice issued by Management to the Grievant charged her with a Group II Offense as follows:

You are being issued a group II for not following established procedures, DCE Policy 3-27 Career and Shop Safety, and DCE Policy 3-28 Adult Tool Control. You allowed an inmate to leave the cosmetology classroom and return to the housing unit with a scissors. By not following these policies you have failed to maintain a secure area that may have caused harm to yourself, other state employees, or others in your care.
10. The Grievant has an active Group II Written Notice. AE C. Accordingly, the Agency ended the Grievant's employment, effective January 19, 2011, for accumulation of two (2) Group II Offenses.
11. The Grievant challenges the termination asserting she followed all applicable procedures under DCE Policy 3-27 and 3-28 "to a T".

12. However, the hearing officer finds that the Grievant clearly violated DCE Policy 3-27 and 3-28. This finding is discussed in greater detail below.
13. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
14. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
15. The testimony of the Agency witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency witnesses at the hearing was candid and forthright.

In a May 5, 2011 hearing decision, the hearing officer upheld the discipline and denied the grievant's request for relief.⁴ 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 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

Inconsistency with Agency Policy

The grievant's request for administrative review primarily challenges whether the hearing officer's decision is inconsistent with agency policy. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges the hearing officer's fact findings and argues that the agency did not meet its burden of proof. Hearing officers are authorized to make "findings of fact as to the

⁴ *Id.* at 12.

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

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

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

material issues in the case”⁸ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁹ 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.¹⁰ 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.¹¹ 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.

Based upon a review of the hearing record, sufficient evidence supports the hearing officer’s decision. In particular, the evidence reflects, and the grievant admits, that agency policy required the grievant to maintain a safe and secure classroom area at all times.¹² The hearing officer found that the grievant allowed the inmate to walk away from the classroom and remain unsupervised for almost an hour with scissors “which could potentially be used as a weapon, thereby endangering the safety of staff, inmates, and visitors, thus violating DCE Policy 3-27.”¹³ He specifically found the grievant did not carry out the procedures described in Subsections L, M, N, and U of that policy.¹⁴ The grievant admitted that an inmate left her classroom and returned to the housing unit with scissors.¹⁵ The grievant’s supervisor testified that the grievant’s conduct specifically violated DCE Policy 3-27, Section VI, Subsections L, M, and U.¹⁶ In particular, he testified that the grievant did not keep an orderly classroom since she did not monitor who had what tools and when in violation of Subsection L.¹⁷ He also testified that it was just “common sense” that the grievant’s allowing the inmate to leave her classroom with scissors violated DCE Policy 3-27, which requires agency employees to provide educational programs in a safe and secure environment at all times.¹⁸

The hearing officer also found the grievant “did not ‘maintain’ an accurate inventory list when she allowed Inmate S to wander off with Scissors #2,” in violation of DCE Policy 3.28.¹⁹ The agency’s human resource director testified that the grievant did not adhere to the Standard

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Record at Tape 2, Side B, Tape Counter 620 through 627(testimony of grievant).

¹³ Hearing Decision at 6.

¹⁴ *Id.*

¹⁵ Hearing Record at Tape 2, Side A, Tape Counter 634 through 654 (testimony of grievant).

¹⁶ Hearing Record at Tape 1, Side B, Tape Counter 980 through 1050 (testimony of grievant’s supervisor).

¹⁷ Hearing Record at Tape 1, Side B, Tape Counter 1052 through 1268 (testimony of grievant’s supervisor).

¹⁸ *Id.*

¹⁹ Hearing Decision at 9.

Tool Control Guidelines, also in violation of DCE Policy 3-28.²⁰ 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.

Witness Issue & Adverse Inference

The grievant claims that the hearing officer abused his discretion by failing to draw an adverse inference when an agency employee did not attend the hearing even though ordered to appear by the hearing officer as a witness. Pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who, as in this case, are ordered by the hearing officer to attend the hearing as witnesses.²¹ To that end, consistent with the *Rules for Conducting Grievance Hearings*,²² the hearing officer's witness order was sent to both the agency's representative and the grievant, in addition to the witness.

According to the grievant's representative, the witness was not present for the hearing.²³ As the agency presented no evidence to the contrary, this Department must conclude that the agency failed to require the employee to appear for the hearing. Moreover, there is no record evidence of extenuating circumstances preventing the agency employee from attending. Therefore, because it was the agency's responsibility to have their employee appear for the hearing as a witness, the hearing officer had the authority to draw an adverse inference against the agency if warranted by the circumstances.²⁴

It appears the hearing officer did not draw such an adverse inference, as there is no discussion about it in the hearing decision. At hearing, however, the grievant's representative proffered that the agency employee's testimony would show that other agency employees had been disciplined for a similar violation of policy, but had not been terminated.²⁵ Instead, these employees had received a Group II notice. The hearing officer then indicated they would try to reach the agency employee by telephone later in the hearing, and the grievant's representative stated, "that may or may not be necessary."²⁶ Towards the end of the hearing, the hearing officer once again questioned the grievant's representative whether she wanted to try calling the agency

²⁰ Hearing Record at Tape 1, Side A, Tape Counter 1330 through 1365 (testimony of agency's human resource director). *See also* Hearing Record at Tape 1, Side A, Tape Counter 1580 through 1819 (testimony of agency's human resource director).

²¹ *Rules for Conducting Grievance Hearings* § III.E ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

²² *Id.* ("Orders should be issued in the name of the hearing officer and mailed by the hearing officer to the appropriate individual(s), with a copy to each party.").

²³ Hearing Record at Tape 1, Side A, Tape Counter 164 through 184 (proffer of grievant's representative).

²⁴ *Rules for Conducting Grievance Hearings* § V.B ("Although a hearing officer does not have subpoena power, he 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 or the EDR Director had ordered.").

²⁵ Hearing Record at Tape 1, Side A, Tape Counter 164 through 184 (proffer of grievant's representative).

²⁶ Hearing Record at Tape 1, Side A, Tape Counter 235 through 239 (statements of hearing officer and grievant's representative).

employee. The representative indicated that would not be necessary, which arguably weakens the grievant's argument that an adverse inference should be drawn.²⁷

More importantly, however, the witness's proffered testimony, even if found to be true, would not appear to have affected the outcome of the decision since, unlike the other agency employees who had been disciplined for a similar violation of policy, the grievant had a prior active Group II Written Notice,²⁸ and her termination was based upon the accumulation of two Group II Written Notices.²⁹ For the above reasons, this Department cannot conclude that the hearing officer abused his discretion by not drawing an adverse inference against the agency in this matter.

CONCLUSION AND APPEAL RIGHTS

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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²

Claudia T. Farr
Director

²⁷ Hearing Record at Tape 2, Side B, Tape Counter 766 through 779 (statement of grievant's representative).

²⁸ Hearing Decision at 3.

²⁹ Hearing Record at Tape 1, Side A, Tape Counter 1206 through 1215 (testimony of the agency's human resource director).

³⁰ *Grievance Procedure Manual* § 7.2(d).

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).