

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9588; Ruling  
Date: June 28, 2011; Ruling No. 2011-2996; Agency: Department of Corrections;  
Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2011-2996  
June 28, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9588. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The procedural history of this case is as follows: On February 14, 2011, the grievant was issued a Group III Written Notice of disciplinary action with removal for sexual misconduct with offenders which she timely grieved.<sup>1</sup> On May 13, 2011, a grievance hearing was held at the Department of Correction's (agency's) office but the grievant did not appear at the hearing.<sup>2</sup> The hearing officer upheld the agency's discipline in his May 16, 2011 Hearing Decision.<sup>3</sup>

The relevant Facts and related Conclusion of Policy as set forth in Case Number 9588 are as follows:

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities. The purpose of her position was to, "provide security over inmates at the institution and while in transport; supervises their daily activities and observes and records their behavior and movement to ensure their safe and secure confinement." Grievant had prior active disciplinary action. On May 13, 2010, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory or inadequate job performance. On November 16, 2010, Grievant received a Group I Written Notice of disciplinary action with suspension for unsatisfactory or inadequate job performance.

On December 14, 2010, Grievant was working as a Control Booth Officer at the Facility. She became frustrated with the male inmates in the pod. She posted two handwritten signs for offenders to read. Grievant wrote, "I CAN BUY

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<sup>1</sup> Decision of Hearing Officer in Case 9588, issued May 16, 2011 ("Hearing Decision"), at 1.

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

<sup>3</sup> *Id.* at 4.

A DICK – IF WANT ONE! RUBBER DIFFERENT COLORS and I can be a .....!” Grievant also wrote, “What is SHE DOING? I AM NOT A DIKE GAY, WITCH OR VODO!”

Offenders in the pod were upset by Grievant’s actions and refused to return to their cells. Other Corrections Officers had to enter the pod to calm down the inmates and persuade them to return to their cells.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”

Department of Corrections Operating Procedure 130.1 sets forth the Rules of Conduct Governing Employees Relationships with Offenders. “Sexual misconduct” is defined as:

Any behavior of a sexual nature between employees and offenders is prohibited. Behavior of a sexual nature includes sexual abuse, sexual assault, sexual-harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature. Sexual misconduct will be treated as a Group III offense under Operating Procedure 135.1.

Department of Corrections Operating Procedure 135.1 provides that Group III offenses include:

sexual misconduct with offenders. Any behavior of a sexual nature between employees and offenders under the Department of Corrections supervision is prohibited. This includes behavior of a sexual nature such as, but not limited to, sexual abuse, sexual assault, sexual harassment, physical conduct of a sexual nature, sexual obscenity, and conversations or correspondence of an emotional, romantic, or intimate nature.

Grievant communicated with offenders using sexually charged language in order to intimidate them. Grievant used slang for genitals and sexual orientation rather than addressing offenders and [sic] a professional manner. Grievant angered the

offenders to the point that other Corrections Officers had to intervene and enter the pod to calm down the offenders. Grievant's behavior increased the risk of injury to other Corrections Officers. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an employee may be removed. Accordingly, Grievant's removal must be upheld.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...." Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant submitted documents and requested witnesses prior to the hearing. She failed to appear at the hearing. The Hearing Officer waited approximately 15 minutes for Grievant to appear. Several hours after the hearing was finished and the record was closed, Grievant contacted the Division of Hearings and asked that the hearing be reopened. Grievant wrote:

I am sorry that I did not show up @ the scheduled time. I was thinking it was suppose to be @ 11:00. That 11:00 stayed in my head because the hearing letter stated be advised we will work pass 11:00. I know this does not look good in my favor. Can a hearing be rescheduled?

The Hearing Officer denies Grievant's request to reopen the hearing. Grievant was notified by the Hearing Officer during a prehearing conference that the grievance hearing would begin at 10 a.m. The Hearing Officer sent Grievant a letter confirming the time. Grievant requested witness orders. The Hearing Officer sent Grievant copies of witness orders requesting the appearance of witnesses at 10 a.m. No correspondence was given to Grievant mentioning a time of 11 a.m. Just cause does not exist to reopen the hearing.<sup>4</sup>

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<sup>4</sup> Hearing Decision at 2-4. Footnotes from the original decision are omitted here.

## 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>5</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>6</sup>

### *Failure to Appear at Hearing*

The grievant provided this Department with a comprehensive request for administrative review in which she raises numerous arguments. However, this Department need not labor over many of these objections because the grievant failed to provide any evidence in support of these arguments at the hearing she did not attend. Thus, the arguments relating to (1) her performance evaluation, (2) mitigation (dissimilar discipline), (3) discrimination, and (4) retaliation will not be considered by this Department now. It is unfortunate that the grievant missed her hearing but administrative review does not present any party with an opportunity to have their case reheard.<sup>7</sup> To the extent that the grievant is challenging the hearing officer’s refusal to reschedule/reopen her hearing, this Department finds no error. The grievant was informed of the time and date of the hearing and her misfortune of believing that the hearing was scheduled at 11:00 a.m. instead of 10:00 a.m. is regrettable but not just cause for her failure to appear.

### *Inconsistency with Agency Policy*

The grievant’s request for administrative review challenges whether the hearing officer’s decision is inconsistent with agency policy. The grievant asserts that the found conduct did not rise to the level of a Group III offense. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> DHRM has the authority to take the facts, as found by the hearing officer, and determine whether that conduct rose to the level of a Group III offense. Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> In the same vein, this Department will not now address the grievant’s argument that she was not provided documents that she requested. The grievant has had multiple prior opportunities to raise any concerns about documents improperly upheld. Any lingering concerns should have been raised at hearing.

<sup>8</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

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.<sup>9</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>10</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>11</sup>

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Claudia T. Farr  
Director

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<sup>9</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>10</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>11</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).