

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9573; Ruling
Date: September 6, 2011; Ruling No. 2011-3022; Agency: Department of
Corrections; Outcome: Remanded to AHO to reopen.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
EDR Ruling Number 2011-3022
September 6, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9573.

FACTS

The full facts of this case are set forth in Case Number 9573 and need not be recounted in their entirety here. The sum of those facts is that the grievant, a corrections officer, was disciplined for not conducting a proper search of an inmate who murdered another inmate. The grievant challenged the discipline through the grievance process and following a June 1, 2011 hearing, the hearing officer upheld the discipline imposed by the Department of Corrections ("DOC" or the agency). The grievant timely administratively appealed the hearing decision to 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."¹ 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.²

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges the hearing officer's fact findings and related conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"³ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁴ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

³ Va. Code § 2.2-3005.1(C).

⁴ *Grievance Procedure Manual* § 5.9.

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.⁵ 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.⁶ 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.

Audio Recording of the Hearing

Based upon a review of the hearing record, we cannot conclude that there is sufficient record evidence to support the hearing officer's decision. Due to a recording problem, a verbatim record of the hearing was not created. Because there is no recording of the hearing, this Department has no ability to confirm that the hearing record contains facts (testimony) supporting the decision. Accordingly, the grievant must be granted a new hearing.⁷

Video Recording of the Search

In his request for an administrative review, the grievant asserted that if a video of the search is reviewed, the viewer "will see that [he] did comply with policy and did do a proper search." The hearing record contains no video recording of the search. According to the hearing officer, a video recording was shown at the grievance hearing but was not entered as evidence. Apparently, the agency had security concerns regarding any release of the video. The hearing officer has explained the video was essentially "worthless" due to the distance of the camera from the site where the search occurred. The hearing officer explained that due to the poor quality of the imagery, he reached his decision without any reliance upon the video. A review of the decision appears to support his contention in that there is no mention of the video in the hearing decision.

The hearing officer's attentiveness to the agency's stated security concerns is commendable and appropriate. For agencies like DOC, maintaining security and preserving the integrity of controls are obviously paramount concerns. However, employees who are subject to discipline have an equally compelling interest in any evidence that could potentially clear them of charges of misconduct. In balancing these competing interests, a hearing officer must attempt to accommodate the concerns of both parties by taking measures to ensure the continuing integrity of agency security measures while providing the employee access to potential exculpatory evidence. A hearing officer might accomplish such a balancing, for instance, by

⁵ *Rules for Conducting Grievance Hearings* § VI(B).

⁶ *Grievance Procedure Manual* § 5.8.

⁷ We note that this case differs from others where recording problems occur, but factual findings are not challenged. In such cases, this Department could address non-fact-related issues and no re-hearing would be necessary.

ordering the agency to produce a copy of a video but placing the video under a protective order that limits access to the video to only the parties and any reviewers of the hearing decision including this Department, the Department of Human Resource Management, or the circuit court. Thus, if at the next hearing the grievant moves to have the video entered into evidence, it should be admitted with appropriate safeguards that address the agency's security concerns. The agency should be prepared to identify options through which all valid security concerns can be satisfied.

We understand that the hearing officer concluded that the video was not useful due to the poor quality of the imagery, thus the video had no probative value. While that may be the case, the grievant apparently has a different view of the value of the video. The absence of the video recording in the record (as evidence or as proffered evidence) makes it impossible to confirm what is essentially the hearing officer's finding that the video was "worthless" in determining whether the search was proper. As noted above, where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence and make findings of fact, and 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. However, the absence of the record evidence (or proffer) renders this Department and the circuit court unable to conduct even the most cursory of assessments of the evidence upon which the hearing officer reached his conclusion regarding the lack of value of the recording.

CONCLUSION

For the reasons set forth above, this Department is unable to review the grievant's request for administrative review. Thus, the grievant must be afforded a new hearing. Accordingly, this matter is remanded to the hearing officer for a new hearing which will be at no cost to the agency. The fact that the hearing officer presided over the original hearing shall not, by itself, serve as a basis for recusal or removal of the hearing officer.⁸

Claudia T. Farr
Director

⁸ The mere fact that findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias. *C.f.*, *Al-Ghani v. Commonwealth*, No. 0264-98-4, 1999 Va. App. LEXIS 275 at *12-13 (May 18, 1999) ("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")