

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9661; Ruling
Date: December 7, 2011; Ruling No. 2012-3129; 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 2012-3129
December 7, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9661. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9661 are as follows:¹

The agency issued to the grievant a Group II Written Notice on April 29 for submitting false or fraudulent documents and for failing to follow instructions. The agency had previously issued to this grievant a Group III Written Notice, which Notice remained active on April 29. The agency terminated the grievant from employment on April 29 based on the cumulative discipline.

On April 16 the grievant was working for the agency as a Corrections Officer. His shift on that date was from 9:00 a.m. until 9:00 p.m. At approximately 11:40 a.m. on that date a Captain made rounds through the building where the grievant was stationed. Other officers accompanied the Captain. The grievant reported nothing unusual to these officers at that time.

Shortly before 1:00 p.m., the grievant left his assigned post to turn in count sheets and exchange certain items of laundry. These were part of his assigned duties. While carrying out these duties, he made a stop in the medical unit to converse with another Corrections Officer. This was meant to be a personal conversation, unrelated to any work matters.

When he arrived at the medical unit, the grievant noticed five pills in the floor near a medications cart. He had found loose medications on other occasions. In February 2011, he had turned over medications he had found to the

¹ Decision of Hearing Officer, Case No. 9661 ("Hearing Decision"), issued September 22, 2011 at 1-4.

Warden after hiding them in a closet for an undetermined amount of time. The Assistant Warden counseled him that if pills were again found loose, he should immediately notify his supervisor. Later in that month, the Assistant Warden again counseled the grievant about the importance of following the appropriate chain of command.

When he found the loose pills on April 16 the grievant retrieved them and told the medical unit officer that he was going to file an incident report. He left the medical unit with the pills and made no effort to contact his immediate supervisors. Upon determining that the watch commander was not in his office, the grievant proceeded to the office of the Warden. He described to the Warden what had happened and turned the pills over to him.

The Warden immediately contacted the watch commander who commenced an investigation between 1:30 p.m. and 2:00 p.m. on April 16. The watch commander spoke with the medical unit officer and obtained a statement from him on April 16. He did not contact the grievant until the following day.

The watch commander then directed the grievant to write an incident report. The grievant stated in his initial report that he had found the pills at approximately 9:50 a.m. on the preceding day. The watch commander knew from his meeting with the Warden that the pills had not been turned in until after 1:00 p.m. He also knew that he had spoken with the grievant at 11:40 a.m. on April 16, at which time nothing was said about any pills being found. He ordered the grievant to write a second incident report. The grievant stated in that report that he had the pills in his possession when speaking with the watch commander and the other officers at 11:40 a.m.

Video taken of the medical unit on April 16 did not show the grievant being present there prior to approximately 1:00 p.m. The grievant was not present in that unit prior to that time. The statement in the second incident report about the grievant being in possession of the pills at 11:40 a.m. was false.

The Warden issued to the grievant the Group II discipline and terminated him from employment on April 29. The grievant had previously been issued a Group III Written Notice on June 17, 2010.

In a September 22, 2011 hearing decision, the hearing officer upheld the Group II Written Notice with termination, on the sole grounds of failing to follow the chain of command in reporting his finding of the loose pills.² The grievant now seeks administrative review from this Department.

² *Id.* at 8.

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.”³ 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.⁴

Hearing Officer’s Consideration of the Evidence

In his request for administrative review, the grievant asserts that (1) the hearing officer erred in holding there was no justification for the grievant’s failure to follow his chain of command; (2) the hearing officer inaccurately stated a finding of fact in the hearing decision; (3) the agency did not contradict the grievant’s testimony on rebuttal; and (4) the hearing officer failed to consider the grievant’s evidence of disparate treatment.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁵ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁶ 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.⁷ 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.⁸ 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.

1. Failing to Follow Chain of Command

In his request for administrative review, the grievant asserts that he justifiably did not follow the chain of command because (1) he could not find his next level supervisor when the incident occurred, (2) the Warden had advised him that he had an open-door policy, and (3) that he directly reported the incident to the Warden because of his fear of retaliation by others in his chain of command.

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

We cannot find that the hearing officer exceeded or abused his authority under the grievance procedure by concluding that the grievant's reasons for failing to follow his chain of command were not justified. The hearing officer's conclusions are supported by the record evidence and pertain to the material issue in the case. For example, the record reflects that three witnesses testified that the grievant had been instructed in February 2011 to report all problems or incidents of mishandled medications through his chain of command.⁹ During his own testimony, the grievant admitted that on April 16, 2011, he reported the missing pills directly to the Warden instead of going through his chain of command.¹⁰ Although he tried but could not find the Watch Commander, the grievant admitted that he did not try to go to any of the other officers in his chain of command, including the Assistant Warden, before directly reporting the incident to the Warden.¹¹ The hearing officer found that the grievant's justifications for failing to follow his chain of command were lacking, and that other than the grievant's own testimony, "the grievant presented no evidence to support his assertion that following the chain of command would have been of no avail."¹² Indeed, the hearing officer found that the grievant "failed to show that proceeding further up the chain of command, bypassing any perceived roadblocks stopping short of reporting to the warden, was not feasible."¹³ Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to disturb the hearing officer's findings.

2. Hearing Officer's Alleged Inaccurate Finding of Fact

The grievant also alleges that the hearing officer inaccurately stated in his hearing decision that "[t]he grievant was reporting the failure of the Medical Unit nursing staff to properly handle medications." Specifically, the grievant states that "[a]t no time did Grievant, either in his testimony, or when reporting finding the medications at various times, make any reference whatsoever to the Medical Unit nursing staff." Instead, he alleges he only reported that the medications were lying on the floor in an unsecured area. The grievant's argument here, however, has no bearing on the hearing officer's determination that the grievant unjustifiably failed to follow his chain of command. The content of the grievant's report -- as one alerting management to the apparent carelessness of nursing staff as opposed to alerting management to medication on the floor in an unsecured area -- does not change his failure to report it up the chain of command.

3. No Rebuttal of Grievant's Testimony

The grievant alleges that the "Agency had every opportunity to put on evidence rebutting Grievant's testimony with regard to [named individuals], and Grievant's inability to locate

⁹ See Hearing Recording Tape 1, Side B, Tape Counter 77 through 98 (testimony of Watch Commander), Hearing Recording Tape 2, Side A, Tape Counter 1132 through 1155 and Tape Counter 1155 through 1189 (testimony of Assistant Warden), and Hearing Recording Tape 2, Side B, Tape Counter 80 through 114 (testimony of Warden).

¹⁰ See Hearing Recording Tape 3, Side A, Tape Counter 348 through 360 (testimony of grievant).

¹¹ See Hearing Recording Tape 3, Side A, Tape Counter 1102 through 1142 (testimony of grievant).

¹² Hearing Decision at 6.

¹³ *Id.*

[Watch Commander]. The Agency chose to put on no rebuttal whatsoever regarding any of this testimony ... Therefore, this evidence is uncontradicted.”

However, the core of the charge against the grievant was that he had been instructed to follow his chain of command when reporting incidents of misplaced medication.¹⁴ The grievant admitted that he did not report the incident through his proper chain of command,¹⁵ and the hearing officer held that the grievant’s proffered explanation as to why he had not follow his chain of command was unjustified.¹⁶ Such determinations are within the hearing officer’s authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.¹⁷ 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 (or lack thereof) and the material issues in the case. Consequently, this Department has no basis to disturb the hearing officer’s decision.

4. *Evidence of Disparate Treatment*

The grievant argues that the hearing officer erred by not considering evidence of disparate treatment among agency employees. A review of the hearing record indicates that the grievant did not present evidence of disparate treatment as a potential mitigating factor at hearing. As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.¹⁸ Therefore, based on this Department review of the hearing record, we cannot conclude that the hearing officer’s decision not to mitigate on grounds of alleged disparate treatment constitutes an abuse of discretion.

Conclusions of Law

The grievant alleges that regardless of any failure to follow his chain of command, the hearing officer erred in upholding the discipline because the grievant is protected under the Virginia Code §§ 2.2-3010 and 2.2-3011, Virginia’s Whistle Blower statutes. The hearing officer held that these statutes have a common requirement that the wrongdoing being reported must be of a significant nature.¹⁹ In his hearing decision, the hearing officer concluded that

¹⁴ See Hearing Recording Tape 1, Side B, Tape Counter 77 through 98 (testimony of Watch Commander), Hearing Recording Tape 2, Side A, Tape Counter 1165 through 1132 and Tape Counter 1155 through 1189 (testimony of Assistant Warden), and Hearing Recording Tape 2, Side B, Tape Counter 80 through 114 (testimony of Warden).

¹⁵ See Hearing Recording Tape 3, Side A, Tape Counter 348 through 360 (testimony of grievant).

¹⁶ Hearing Decision at 6. According to the hearing decision, “other than his own testimony, the grievant presented no evidence to support his assertion that following the chain of command would have been of no avail” or that “proceeding further up the chain of command, bypassing any perceived roadblocks but stopping short of reporting to the warden, was not feasible.”

¹⁷ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁸ See *e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. See also *Bigham v. Dept. Of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

¹⁹ Hearing Decision at 6.

reporting five pills missing “does not rise to the level of event for which protection under the Virginia Whistle Blower statute was intended to provide.”²⁰

The issue of whether the grievant is protected under the Virginia Whistle Blower statutes is a legal concept, and not an issue we address upon administrative review as a matter of compliance with the grievance procedure’s *Rules for Conducting Grievance Hearings (Rules)*. Thus, once the hearing decision becomes final, the grievant is free to raise any legal claims with the circuit court in the jurisdiction where the grievance arose.²¹

Inconsistency with Agency Policy

The grievant’s request for administrative review alleges that the hearing officer erred when he found the grievant had violated policy for failure to follow the chain of command. The Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy.²² Accordingly, if he 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.

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵

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Director

²⁰ *Id* at 7.

²¹ See Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²² Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).