

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9680; Ruling  
Date: November 28, 2011; Ruling No. 2012-3148; Agency: Department of  
Corrections; Outcome: Hearing Officer's Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2012-3148  
November 28, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9680. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9680 are as follows:<sup>1</sup>

The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities. He began working for the Agency on February 1, 2001. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On June 6, 2011, the Agency conducted a drug interdiction at the Facility. One of the Agency's objectives was to limit the introduction of illegal drugs by employees and visitors into the Facility. Individuals and vehicles entering the Facility's parking area were subject to search by Agency employees. At approximately 5:11 p.m., Grievant signed a Consent to Search form authorizing Agency employees to search his vehicle and its contents.

The Canine Officer opened the driver's side door of Grievant's vehicle. He observed marijuana seeds in a pocket in the door. As soon as he saw the seeds, he knew based on his experience to look in the vehicle's floorboard. He found seeds, stems, and residue on the floor board. Based on his training and experience, he recognized the substance as marijuana. He picked up the marijuana, put it on the driver's seat and took pictures of it. He then tested the marijuana with a field drug test kit. The field drug test kit showed that the material tested was marijuana.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9680 ("Hearing Decision"), issued October 17, 2011, at 2-3.

The trunk to Grievant's vehicle was opened. Agency employees found a small amount of marijuana leaves and residue. Another employee placed the substance found into a field drug test. The field drug test kit has showed that the material tested was marijuana.

Grievant was sent for drug testing at a local drug testing facility. His test results were negative. Grievant argued that he had never used illegal drugs. There is no reason for the Hearing Officer to disregard Grievant's denial regarding his use of illegal drugs.

\* \* \* \* \*

On June 22, 2011, Grievant was issued a Group III Written Notice of disciplinary action for violation of DHRM Policy 1.05 and conduct unbecoming a corrections officer. Grievant was demoted to a position of Corrections Officer with a 5% disciplinary pay reduction. He received a 40 hour suspension.<sup>2</sup>

On June 30, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 7, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On October 12, 2011, a hearing was held at the Agency's office.<sup>3</sup>

In an October 17, 2011 hearing decision, the hearing officer upheld the Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and 40 hour work suspension.<sup>4</sup> 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."<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>

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<sup>2</sup> *Id.* at 1

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

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

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

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

*Findings of Fact*

The grievant's request for administrative review asserts that the hearing officer's decision was based solely upon hearsay and lacked proper findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>7</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.

As to this Department's review of the hearing officer's finding that the agency presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action, we cannot find that the hearing officer exceeded or abused his authority under the grievance procedure where, as here, his findings were supported by the record evidence and pertain to the material issue in the case. For example, the canine officer testified that the grievant consented to having a search conducted in his car during the facility's drug interdiction.<sup>11</sup> After the canine officer obtained the grievant's consent form, he searched the grievant's car and testified that he found marijuana seeds in the pocket of the driver side door<sup>12</sup> and marijuana residue on the driver side floorboards.<sup>13</sup> Upon discovery, the canine officer testified that he conducted a field drug test of the material and the results indicated it was positive for marijuana.<sup>14</sup> Furthermore, the canine officer testified that he identified marijuana in the trunk area of the grievant's car, and after another field drug test was conducted, the substance tested positive for marijuana.<sup>15</sup> The hearing officer held that the grievant was in possession of marijuana when he entered the agency's property, and that the grievant had dominion and control over the contents of his vehicle.<sup>16</sup> Furthermore, he found that the marijuana was within the grievant's line of sight and easily accessible by him, and therefore, he held that the agency had presented sufficient evidence to support the issuance of a Group III Written Notice.<sup>17</sup> Therefore, because the hearing officer's

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<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8.

<sup>11</sup> See Hearing Record at 15:15 through 16:00 (testimony of canine officer).

<sup>12</sup> See Hearing Record at 17:59 through 18:32 (testimony of canine officer).

<sup>13</sup> See Hearing Record at 18:40 through 19:38 (testimony of canine officer).

<sup>14</sup> See Hearing Record at 20:40 through 20:57 (testimony of canine officer).

<sup>15</sup> See Hearing Record at 21:46 through 22:20 (testimony of canine officer).

<sup>16</sup> Hearing Decision at 3.

<sup>17</sup> *Id.*

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.

*Witness Issue*

The grievant's request for administrative review alleges that the hearing officer made a "premature decision" because he did not consider statements and findings previously made by four named individuals in rendering his final decision. Specifically, the grievant alleges that the statement he submitted from one of the named individuals was not further investigated, nor did the hearing officer consider statements that would have been proffered by the grievant's three witness if they had appeared at hearing.

It appears from the email exchanges within the hearings case file that the grievant requested a witness order from the hearing officer on October 9, 2011, by email, for one of the four named individuals. The hearing officer issued a witness order via email to this particular individual on October 11, 2011, one day prior to the hearing. Within a minute of receiving the email, the agency objected to the hearing officer's order, indicating that the grievant's request was not only untimely, but that the requested individual could not attend the hearing due to an extenuating circumstance.<sup>18</sup> Pursuant to the *Rules for Conducting Grievance Hearings (Rules)*, it is the responsibility of the agency to make an employee available at hearing, and if that employee does not appear, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances.<sup>19</sup> However, the timing of the grievant's request for a witness order appears to have precluded this particular individual from testifying, and hence, the hearing officer had the authority to consider these circumstances when determining whether to draw an adverse inference in this case.

Likewise, the grievant did not request the hearing officer to issue witness orders for the other two named individuals, nor did he request the appearance of the fourth named individual at hearing, which arguably weakens the grievant's argument. Even so, the hearing officer gave the grievant an opportunity to proffer what his witnesses would have testified to and allowed the grievant to submit a statement from one of the four named individuals upon no objection from the agency.<sup>20</sup> In light of all the above, this Department cannot conclude that the hearing officer abused his discretion by not drawing an adverse inference against the agency in this matter.

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<sup>18</sup> The individual requested to appear as a witness was unable to attend the hearing because he was out of town for his daughter's wedding.

<sup>19</sup> *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.").

<sup>20</sup> See Hearing Record at 1:03:13 through 1:04:14 (statement from the hearing officer that the document was admitted into evidence as Grievant's Exhibit One).

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>21</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>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup>

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Claudia T. Farr  
Director

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<sup>21</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>22</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>23</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).