Issue: Administrative Review of Hearing Officer's Decision in Case No. 9674; Ruling Date: December 28, 2011; Ruling No. 2012-3164; 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 2012-3164
December 28, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9674. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The pertinent procedural and substantive facts of this case, as set forth in the hearing decision in Case Number 9674, are as follows:

> On March 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action for falsifying documents. Grievant was demoted to a Corrections Officer and received a 5% disciplinary pay reduction. Grievant was suspended for two workdays.
>
> On March 16, 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 she requested a hearing. On September 6, 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 the party. On October 13, 2011, a hearing was held at the Agency's office.
>
> * * *
>
> The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities until her demotion to Corrections Officer effective March 7, 2011. She has been employed by the Agency for approximately 22 years. The purpose of Grievant's position was to "provide first-line supervision to Correctional Officers in providing security, custody, and control of adult male offenders." No evidence of prior active disciplinary action against Grievant was

introduced during the hearing. Grievant received an overall rating of "Contributor" on her most recent performance evaluation.

Corrections Officers working at the Facility have Post Orders governing their actions while working at a post. On a quarterly basis, the Agency expects Corrections Officers to read their Post Orders, discuss any questions they have with their supervisors, and sign a Post Order Review Log with the following certification:

> I understand it is my responsibility to read and understand these post orders prior to my assuming the duties of this post.
>
> I certify that I have read, discussed with my supervisor and understand the post orders indicated above prior to signing below and prior to assuming the duties of this post.

After a Corrections Officer has signed the Post Order Review Log, the supervisor is supposed to "countersign" the log as well. The purpose of the supervisor's signature is to ensure that the Corrections Officer understands the duties of his or her post.

On January 24, 2011, the Warden was making rounds and observed that the Post Order Review Log for Post Order Number 25 was not completeed correctly. The first seven lines of the Post Order Review Log were as follows:

Officer	**Date**	**Supervisor**
[Officer H]	[1-1-11]	[Grievant's signature]
[Officer R]	1-1-11	[Grievant's signature]
[Officer H]	1-1-11	[Grievant's signature]
[Officer Y]	1-1-11	[Grievant's signature]
[Officer A]	1/1/11	[Grievant's signature]
		[Grievant's signature]
		[Grievant's signature]

The Warden concluded that Grievant had "pre-signed" the Post Order Review Log.

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."

"[F]alsifying any records" is a Group III offense. Falsification is not defined by the Agency's Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as: to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice.*

A Post Order Review Log is a record of the Agency. The Agency maintains these records to ensure that employees are complying with Agency procedures and practices.

Grievant received training regarding the correct procedure for Corrections Officers to review their post orders, discuss any questions they have with their supervisors, and then sign the Post Order Review Log. Grievant received training advising her of her obligation to "countersign" the Post Order Review Log after it was signed by a Corrections Officer. Grievant signed her name thereby indicating that she had reviewed Post Order 25 with two Corrections Officers, answered their questions, and verified that they had signed the Post Order Review Log. The two blank spaces on the Post Order Review Log show that Grievant's countersignature was false. Two Corrections Officers did not review their post orders, ask Grievant any questions they had, and then sign the Post Order Review Log. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of a record. Upon the issuance of a Group III Written Notice, an agency may demote an employee in lieu of removal and reduce that employee's compensation. An agency may also suspend an

employee for up to 30 workdays. Accordingly, Grievant's demotion to a Corrections Officer with a 5% disciplinary pay reduction must be upheld. Grievant's suspension must also be upheld.

Grievant argued that she signed her name on the Post Order Review Log because she had in fact met with two Corrections Officers and answered any questions they had. She contends that she was called away to an emergency in another building before she had a chance to obtain the signatures of the Corrections Officers. The difficulty with Grievant's argument is that there are no facts to corroborate her assertion. Grievant could not identify the two Corrections Officers and have them present testimony or statements indicating that they had met with Grievant prior to her signature but failed to acknowledge that fact by signing the Post Order Review Log. Grievant presented statements from some of her subordinates saying:

> "[Grievant] would sign Post Orders and Log Book when I signed them."
> "[W]hen working for [Grievant], she did sign the post orders every time after I signed them."
> "[W]hile working for [Grievant] did sign post orders every time after I did."
> "[W]hile working for [Grievant] she did sign the post orders every time after I signed them."

The statements do not support Grievant's assertion that two Corrections Officers reviewed their Post Orders on January 1, 2011 but neglected to sign those Post Orders.

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.

Grievant argued that she did not have access to the Agency's policy governing the signing of the Post Order Review Log. Although the Agency did

> not permit its employees to take copies of policies with them, employees have access to Agency policies through the Agency's intranet. Regardless of whether Grievant was able to obtain a copy of Operating Procedure 401.1, it is clear that she was aware of the Agency's policy requiring that she sign the Post Order Review Log after it was signed by a Corrections Officer. Grievant was aware of her obligation regardless of whether she had access to the Agency's policy providing the source of that obligation.
>
> In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[1]

In his October 18, 2011 hearing decision, the hearing officer upheld the discipline and denied the grievant's request for relief.[2] 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."[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]

The grievant challenges the hearing decision on the basis that the agency essentially did not meet its burden of proof. 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

---

[1] Decision of the Hearing Officer in Case Number 9674 issued October 18, 2011 ("Hearing Decision") at 1-5.
[2] *Id.* at 6.
[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.

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. The grievant argued at hearing that she signed her name on the Post Order Review Log because she met with the two Corrections Officers and answered any questions prior to being called away for an incident at Building A. As reflected above, the hearing officer found that the "difficulty with Grievant's argument is that there are no facts to corroborate her assertion." He noted that she could not identify the two Corrections Officers and have them present testimony or statements indicating that they had met with Grievant prior to her signature. The grievant responds to this finding by asserting that if the agency disbelieved the grievant's claims regarding the two Corrections Officers—that they had reviewed the Post Orders—the agency could have called the two Officers as witnesses.

In a disciplinary action, the agency bears the burden of proof of establishing by a preponderance of the evidence that the action was warranted and appropriate under the circumstances.[9] Under the particular facts of this case, this Department cannot conclude that the hearing officer's finding that the agency met its burden was erroneous or without sufficient record evidence support. The facts are not in dispute in that the Log shows that the grievant signed the Log prior to the two Corrections Officers having acknowledged in writing that they had read and reviewed the Post Orders. The grievant asserts that she had discussed the Post Orders with the two Corrections Officers but, as the hearing officer noted, she provided no evidence to corroborate this contention. The grievant offered statements from several Corrections Officers who claimed that the grievant always signed the post orders after they did. However, as the hearing officer correctly notes, these statements "do not support Grievant's assertion that two Corrections Officers reviewed their Post Orders on January 1, 2011 but neglected to sign those Post Orders."

The grievant had argued that she had no way of knowing the identity of the Two Officers who had not signed, seeming to imply that as a result she could not call these witnesses who would have testified that they had reviewed and discussed the Post Orders. This argument fails. The grievant asserts that the agency could have taken a break at the hearing and determined which Corrections Officers were on duty on the date in question. First, this argument misses the point that the grievant could have found out the identity of the two Officers, well prior to the hearing, by requesting documentation that revealed the identities of those working on the day in question.[10] The grievant received the Written Notice on March 7, 2011 and she initiated her

[9] *Id.*

[10] Under the grievance procedure, "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party." Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2. "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9. Examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege. This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

grievance on March 16, 2011. The hearing did not occur until October 18, 2011. Thus, the grievant had months to identify the Two Officers (through the grievance procedure's document production provision) and presumably could have requested that the hearing officer order the two Officers to appear at hearing. Secondly, the agency's hearing representative had earlier in the hearing offered to provide the names of all Corrections Officers working at the facility on the date in question.[11] The grievant did not pursue this offer. More importantly, the grievant advanced—apparently for the first time—at the grievance hearing her contention that she had been called away to Building A to deal with an emergency. The Warden testified that had he known about the alleged emergency call he could have researched it but the grievant had not raised this defense prior to the grievance hearing.[12] Given the totality of the evidence, including (1) the lack of corroborating evidence of any acknowledgment by the Two Officers that they reviewed the Post Orders, and (2) the eleventh hour defense of the purported Building A emergency, this Department cannot conclude that hearing officer erred by concluding that the agency met its burden in this case.[13] Thus, this Department will not disturb the hearing decision.

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.[14] 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

[11] Hearing record beginning at 1:34:00.

[12] In addition, the Warden testified that the grievant "can give me the names now." Hearing record beginning at 1:41:00. The grievant did not follow-up on this apparent offer of further consideration.

[13] It is unclear why the grievant did not raise the issue of the call to Building A prior to hearing. In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) the United States Supreme Court explained that prior to certain disciplinary actions, the federal Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case. Loudermill, 470 U.S. at 545-46 (1985). Pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct her behavior but it is intended to serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-46. When an employee does not avail herself of the opportunity to provide exculpatory information, she can hardly argue that she has been treated unfairly by the agency. It would appear that the grievant had ample opportunity to provide any exculpatory information—such as the Building A emergency—well prior to hearing. *See also Rules for Conducting Grievance Hearings* § VI(B) citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply." Thus, even after the discipline had been issued, the grievant continued to have an opportunity to provided exculpatory information, for instance, at the second step of the grievance process. Under the facts here, where the grievant: (1) chose not to provide the agency with exculpatory information—testimony that could be viewed as self-serving—until the middle of the grievance hearing; and (2) failed to provide any corroborating evidence, this Department cannot conclude that the hearing officer erred in concluding that the agency met its burden.

[14] *Grievance Procedure Manual* § 7.2(d).

arose.[15] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[16]

_____
Claudia T. Farr
Director

[15] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[16] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).