

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9697; Ruling
Date: December 12, 2011; Ruling No. 2012-3175; 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 2012-3175
December 12, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9697. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9697 are as follows:¹

The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 22 years. Grievant had prior active disciplinary action consisting of a Group III Written Notice issued March 7, 2011. Grievant received an overall rating of Contributor on her October 24, 2010 annual performance evaluation.

Grievant is African American. Officer S is African American. Officer R is white.

On April 17, 2011, Grievant was standing by the Sergeant's office in Building B. Grievant was supervising two African American inmates who were cleaning the Sergeant's office. Officer S looked into the Sergeant's office and noticed that the inmates were doing a good job of cleaning the office. He complemented [sic] the inmates on the quality of their work. Grievant heard Officer S's complement [sic] and stated "we ni--ers have to clean, if you want something to look nice." Officer S was offended by Grievant's comment. He believed Grievant's comments were unprofessional especially with the inmates being present.

Officer S mentioned the possibility of having the two inmates clean the Unit Manager's office. Grievant responded that the inmates were not going to clean that office because "they don't want no ni--ers working here." Grievant said, "If anything gets stolen, you know who they gonna blame? - me, the negro."

¹ Decision of Hearing Officer, Case No. 9697 ("Hearing Decision"), issued October 24, 2011 at 2-3.

Officer S was offended by Grievant's comments. Officer R also heard Grievant's comments and was offended by them.

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On May 23, 2011, Grievant was issued a Group III Written Notice of disciplinary action with a two workday suspension for workplace violence and violating an Equal Employment Opportunity policy.²

On June 17, 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 26, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 13, 2011, a hearing was held at the Agency's office.³

In an October 24, 2011 hearing decision, the hearing officer reduced the Group III Written Notice of disciplinary action with a two workday suspension to a Group II Written Notice of disciplinary action with a two workday suspension.⁴ 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."⁵ 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.⁶

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact on the basis that (1) two of the agency's witnesses were not credible and (2) the hearing officer ignored two statements written by inmates who were present during the incident.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁸ Further, in cases involving discipline, the hearing officer reviews the facts *de*

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 5.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

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.⁹ 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.¹⁰ 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.

The grievant argues that “[t]he only evidence against Grievant was the testimony of [Officer S] (proven, in part, to be false) and [Officer R] (also proven in part to be false).” Hence, the grievant alleges that the agency's witnesses were not reasonably believable or credible. The grievant also alleges that the hearing officer “completely ignored the written statements of both African-American inmates which reported no use whatsoever of the word ‘ni--er.’”

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's decision that the grievant used the word “ni--er” in the workplace. For example, two officers testified that they overheard the grievant use the word “ni--er.”¹¹ Likewise, the officers' Lieutenant testified that Officer S immediately reported the incident and Officer R reported the incident approximately thirty minutes thereafter to him.¹² The Lieutenant also testified that Officer R personally told the Lieutenant that she was offended by the comment.¹³ In contrast, the grievant testified that she did not use the word “ni--er” in the workplace,¹⁴ and likewise stated that the two inmates who were present at the time indicated in their written statements that she did not use the word “ni--er.”¹⁵ Such determinations, however, are precisely the sort of findings reserved solely to the hearing officer. Where the evidence (here, testimony and statements) 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. In his hearing decision, the hearing officer found the testimony of the two officers credible and held that the agency “presented sufficient evidence to support its assertion that Grievant said “ni--er.”¹⁶ Therefore, because 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.

We also note that one of the central purposes of the grievance hearing is to ferret out any falsity or inaccuracies. The grievant had this opportunity at hearing. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ See Hearing Record at 7:45 through 8:19 (testimony of Officer S), 10:44 through 11:18 (testimony of Officer S), and 27:41 through 29:12 (testimony of Officer R).

¹² See Hearing Record at 44:34 through 45:40 (testimony of Lieutenant).

¹³ See Hearing Record at 45: 57 through 46:39 (testimony of Lieutenant).

¹⁴ See Hearing Record at 1:20:29 through 1:20:35 (testimony of grievant).

¹⁵ See Hearing Record at 1:23:40 through 1:25:39 (testimony of grievant). The inmates' written statements were admitted as grievant's exhibits 1 and 2.

¹⁶ Hearing Decision at 4.

hearing.¹⁷ In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.¹⁸ Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The same principles described above generally apply to other forms of allegedly false evidence as well as one-sided or incomplete testimony. Accordingly, we decline to disturb the decision on this basis.

Inconsistency with Agency Policy

The grievant alleges that the hearing officer erred in holding that the grievant violated the agency's equal employment opportunity policy; the grievant asserts that the agency did not prove that the racial statement would offend a reasonable person, which the grievant alleges is a requirement. The Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁹ Accordingly, if she 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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²

Claudia T. Farr
Director

¹⁷ See e.g., EDR Ruling #2010-2451; 2006-1383.

¹⁸ See, e.g., Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

¹⁹ Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

²⁰ *Grievance Procedure Manual* § 7.2(d).

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

²² *Id.*; see also Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).