Issue: Administrative Review of Hearing Officer's decision in Case No. 9691; Ruling Date: December 22, 2011; Ruling No. 2012-3176; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

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

## ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2012-3176
December 22, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9691. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

### FACTS

The relevant facts as set forth in Case Number 9691 are as follows:

> The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities. He had been employed by the Agency for approximately 12 years prior to his removal effective July 21, 2011. The purpose of his position was to, "provide security over of adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement." Grievant had prior active disciplinary action. On March 12, 2010, Grievant received a Group II Written Notice.
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> The Facility maintains a Duty Roster which lists the names of each employee who is scheduled to work on a particular day. The Duty Roster has blank spaces for employees to write their "Time In" and Time Out". Muster is scheduled for 5:45 a.m. every day. Employees are expected to report to the Support Building for muster and are expected to sign the Duty Roster with a time of 5:45 a.m. An employee who is late for muster is not expected to sign the Duty Roster with a time of 5:45 a.m. because the employee did not report for muster on time. When an employee leaves his or her post, the employee is expected to write the "Time Out" on the Duty Roster. The Time Out should reflect the time the employee left his or her post even though an employee may actually leave the Facility four or five minutes later after passing through security gates.
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> Grievant was scheduled to work on May 13, 2011. The Lieutenant authorized Grievant to leave the Facility at 11 a.m. so that Grievant could attend a medical appointment.
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> On May 13, 2011, Grievant arrived at the Facility at 6:10 a.m. Muster had ended. He could not locate the Duty Roster to sign in. He could not locate the Watch Commander to be assigned a post. He walked to the Boulevard inside the

Facility and spoke with a supervisor. He worked for a short period of time and concluded he needed to leave early because he did not feel well. He spoke with the Sergeant. The Sergeant told Grievant to be sure to sign out when he left. At 8:17 a.m., Grievant left the Facility and did not return. Before Grievant left the Facility, he located the Duty Roster and wrote his Time In as 5:45 a.m. and his Time Out as 11 a.m.

* * *

"[F]alsifying any record" is a Group III offense. Falsifying 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 ($6^{th}$ 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.*

Grievant falsified the Duty Roster. Grievant arrived at the Facility after muster had been completed. Because he knew he had missed muster, he knew that he had not arrived at the Facility prior to 5:45 a.m. Nevertheless, Grievant wrote his Time In as 5:45 a.m. thereby falsifying the Duty Roster. Grievant left the Facility at 8:17 a.m. He wrote on the Duty Roster that he left his post at the Facility at 11 a.m. Grievant left the Facility one hour and 43 minutes prior to the time he wrote in the Duty Roster. Grievant knew or should have known when he wrote 11 a.m. in the Duty Roster that he was not actually leaving the Facility at 11 a.m. Grievant falsified the Duty Roster by signing his Time Out as 11 a.m. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that he did not intentionally sign the wrong times in the Duty Roster. He argued that he was taking medication that could have influenced his decision making. Grievant's arguments fail.

Grievant knew that he was late to work. Grievant knew that he should have written a time later than 5:45 a.m. in the Duty Roster. Grievant left the Facility one hour and 43 minutes prior to the time he wrote in the Duty Roster. It is unlikely that Grievant confused the time of 8:17 a.m. with 11 a.m.

> Insufficient evidence was presented to show that Grievant's medical condition affected his ability to determine his time of entry and departure at the Facility. Simply because an employee does not feel well, does not establish that the employee lacks the ability to determine time correctly.[1]

The hearing officer, finding no mitigating circumstances, upheld the discipline against the grievant.

## 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."[2] 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.[3]

*Findings of Fact*

The grievant's request for administrative review challenges, among other things, the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[5] 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.[6] 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.[7] 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.

Here, the grievant challenges the hearing officer's finding that the grievant falsified documents. The facts are really not disputed that the grievant entered on a log times that did not accurately reflect the actual times he arrived and departed from the workplace. What is disputed is whether the grievant intentionally misrepresented those times. As stated above, when evidence is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence. Questions regarding the witness credibility are answered by the hearing officer,

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[1] Decision of the Hearing Officer, issued on October 26, 2011 ("Hearing Decision") at *Id*. at 2-4 (footnote from original hearing decision omitted here.)
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3005.1(C).
[5] *Grievance Procedure Manual* § 5.9.
[6] *Rules for Conducting Grievance Hearings* § VI(B).
[7] *Grievance Procedure Manual* § 5.8.

not this Department. Here, the hearing officer apparently found the grievant's testimony regarding his intent less than fully credible. This Department has no authority to second-guess the hearing officer as to his findings regarding the grievant's testimony and credibility. Therefore, we will not disturb the decision on this basis.

*Alleged Bias of Hearing Officer*

The grievant also claims the hearing officer was biased. Specifically, the grievant points to the hearing officer's refusal to grant a stay of the hearing based on the agency refusal to timely produce requested documents. The grievant asserts that he had a very limited amount of time to review documents that should have been produced well before the hearing.

The EDR *Rules for Conducting Grievance Hearings (Rules)* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[8]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[9]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.[10] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[11] We find the Court of Appeals standard instructive and hold that in compliance reviews by the EDR Director of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[12]

The grievant has offered insufficient evidence of bias. The fact that the hearing officer did not grant a stay in this case does not appear to serve as evidence of bias. The hearing officer could have stayed the decision but the fact that he did not, alone, hardly serves as evidence of

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[8] *Rules* at II.
[9] EDR Policy 2.01, p. 3.
[10] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[11] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[12] Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

bias. It is not clear when the first request for documents was made by the grievant but the grievant was disciplined on July 21, 2011 and initiated his grievance on August 8, 2011, months prior to the hearing. Any dispute over the production of documents could have long been resolved prior to hearing had a request been promptly made.[13] Therefore, this Department has no reason to remand the decision on the basis of bias.

*Mitigating Factors*

Finally, the grievant contends his disciplinary action should be mitigated. The hearing officer has the sole authority to weigh all of the evidence and to consider whether the facts of the case constitute misconduct and whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[14] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." 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.[15]

The *Rules* further state that:

> Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[16]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[17] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed

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[13] *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.").

[14] Va. Code § 2.2-3005(C)(6).

[15] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

[16] *Id.*

[17] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id. See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d

to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

The grievant contends his disciplinary action should be mitigated because other employees made similar mistakes. The hearing officer found that:

> In order to show the inconsistent application of disciplinary action, an employee must show that the Agency singled out him or her for disciplinary action. Although it may be the case that employees at the Facility were leaving at times different from the times they wrote in the Duty Roster, no evidence was presented that this behavior was presented to Agency Managers for action. The evidence is insufficient for the Hearing Officer to believe that the Agency singled out Grievant for disciplinary action.

In light of the hearing officer's findings on the issue of mitigation, this Department cannot conclude that the hearing officer erred in not mitigating the discipline in this case.

## CONCLUSION

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.[18] 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20]

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Claudia T. Farr
Director

389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).

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

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

[20] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).