

Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 9573;  
Ruling Date: February 15, 2012; Ruling No. 2012-3195; Agency: Department of  
Corrections; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2012-3195  
February 15, 2012

The grievant has requested that this Department (“EDR”) administratively review the hearing officer’s Reconsideration Decision in Case Number 9573 with the Virginia Department of Corrections (“agency”). For the reasons set forth below, this Department finds no reason to disturb the hearing officer’s decision in this case.

FACTS

The full facts of this case are set forth in Case Number 9573 and need not be recounted in their entirety here. The sum of those facts is that the grievant, a Corrections Officer, was disciplined for not conducting a proper search of an inmate who murdered another inmate. The grievant challenged the discipline through the grievance process, and following a June 1, 2011 hearing, the hearing officer upheld the discipline imposed by the agency. The grievant timely appealed the hearing decision to this Department for administrative review. Because of a problem with the recording of the hearing, in EDR Ruling No. 2011-3022, this Department ordered a rehearing. On October 14, 2011, a second hearing was held and, in a November 28, 2011 Reconsideration Decision, the hearing officer again upheld the discipline imposed against the grievant. The grievant now appeals the November 28<sup>th</sup> Reconsideration Decision.

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>1</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>2</sup>

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<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>2</sup> *Grievance Procedure Manual* § 6.4.

*Burden of Proof and Findings of Fact*

The grievant asserts that the agency failed to meet its burden of proof. For the reasons below we disagree.

The *Rules for Conducting Grievance Hearings* “Rules” state that:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.<sup>3</sup>

The hearing officer makes no assumptions regarding alleged facts; the agency must present evidence in support of the charge. The *Rules* require that he examine the “facts de novo (afresh and independently, as if no determinations had yet been made).” The hearing officer is authorized to make “findings of fact as to the material issues in the case”<sup>4</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>5</sup> Where the evidence conflicts or is subject to varying interpretations, the hearing officer has 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.

In this case, the hearing officer determined that the agency met its burden of establishing the charge against the grievant. The agency presented evidence in the form of testimony to support the charge that the grievant failed to properly search the offender who murdered another. The Chief of Security testified that the prevailing theory of how the contraband was permitted to pass to an area where it was then used to strangle an offender was that the grievant had failed to properly search the inmate’s shirt.<sup>6</sup> Based on the record evidence (testimony of the Chief of Security) this Department cannot conclude that the hearing officer erred in finding that “based on

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<sup>3</sup> *Rules for Conducting Grievance Hearings* (“Rules”) at VI(B).

<sup>4</sup> Va. Code § 2.2-3005.1(C).

<sup>5</sup> *Grievance Procedure Manual* § 5.9.

<sup>6</sup> Hearing recording beginning at 1:07:00. The Chief of Security testified that the length of time require to conduct a “good, thorough search” varies depending on the conduct of the particular offender but averages about “five to seven minutes.” Testimony beginning at 1:03:00. He further testified that the search in this case appeared to take “barely over a minute.” *Id.*

the evidence presented” the “most logical explanation” for how the offender “was able to get the strips into the cage,” was that he “hid the strips in his clothing and took them with him from his cell to the cage.” Accordingly, this Department has no basis for substituting its judgment for that of the hearing officer with respect to this finding and therefore will not disturb the decision.

#### APPEAL RIGHTS AND OTHER INFORMATION

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.<sup>7</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>8</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>7</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>8</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>9</sup> *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).