

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9740; Ruling
Date: April 2, 2012; Ruling No. 2012-3291; Agency: Department of Corrections;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2012-3291
April 2, 2012

The Department of Corrections (DOC or the agency) issued the grievant a Group III Written Notice, which the hearing officer upheld in Case Number 9740. The grievant has requested that this Department administratively review the hearing officer's decision. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

The relevant facts and associated conclusions as stated in the hearing decision in Case No. 9740 are set forth below.

The Department of Corrections employs Grievant as an Equipment Repair Supervisor at one of its Facilities. He has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency conducted an investigation of allegations made by an offender. The Investigator spoke with the Inmate. The Inmate told the Investigator of information she claimed Grievant told her about his personal life. The Inmate told the Investigator the name of Grievant's son, the name of Grievant's girlfriend, and the name of an online dating service with which Grievant had an account. The Inmate told the Investigator about a recent encounter Grievant's son had with the court system. The Inmate told the Investigator the name of a local restaurant that Grievant visited. The Investigator believed that the Inmate was being truthful when she said that Grievant was the one who told her the personal information.

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.”

Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25), *Standards of Conduct*, states that Group III offenses include “[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees’ Relationships with Offenders*.

Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization. The Inmate knew about Grievant’s personal matters. For example, she knew the name of Grievant’s son, the name of his girlfriend, the name of a dating website with which Grievant had an account. She knew that Grievant’s son had had an encounter with the court system. The Inmate told the Investigator that she learned this information from Grievant. The Investigator believed that the Inmate was telling the truth.

Grievant argued that he did not tell the Inmate personal information. He argued that the Inmate obtained the information by eavesdropping on conversations between him and other employees. Grievant argued that the Inmate could have overheard employees discussing Grievant’s personal information when they used the Agency’s radio system. Based on the evidence presented, Grievant’s arguments fail. Grievant did not testify during the hearing. There is no basis for the Hearing Officer to determine the credibility of Grievant’s denial. Grievant presented testimony from an Agency employee who testified it would be unlikely that the Agency’s radio system would be used to discuss personal information about Grievant. The evidence before the Hearing Officer consists of hearsay statements made by the Inmate and believed by the Investigator. Without evidence to contradict the Agency’s evidence, the Agency has met its burden of proof.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.¹

The grievant has requested that this Department administratively review the hearing officer’s 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.”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

Consideration of Evidence

In cases involving discipline, the hearing officer must determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴ In making his determination, the hearing officer is

¹ Decision of Hearing Officer, Case No. 9740, issued February 8, 2012 (“Hearing Decision”) at 2-4, footnotes from the original decision are omitted here.

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

³ *Grievance Procedure Manual* §§ 6.4; 7.2 (a) (3).

⁴ To do this, “the hearing officer reviews the facts *de novo*” 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 and policy 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. See *Rules for Conducting Grievance Hearings*, § VI(B).

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 the grounds in the record for those findings.”⁶ Further, by statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁷ As stated above, 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.

In this case, the grievant asserts that the hearing officer erred by accepting the testimony of an inmate as sufficient evidence to uphold the charge of fraternization. This Department cannot conclude that the hearing officer’s determination constitutes error. As the hearing officer observed, the grievant decided not to testify himself. Accordingly, while the grievant was not obligated to testify, his decision left the hearing officer with no ability to evaluate his credibility regarding his denial that he disclosed the information. Thus, given that the inmate had obtained personal information regarding the grievant, and that the inmate had indicated the source of that information was the grievant, in the absence of testimony to support the grievant’s denial that he was the source, we cannot conclude that the hearing officer erred in finding that the agency had met its burden of showing that the discipline was warranted and appropriate in the case. Accordingly, this Department 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 and any reconsidered hearing decisions following such review have been decided.⁸ 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.⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁰

Claudia T. Farr
Director

⁵ Va. Code § 2.2-3005.1(C)(ii).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ Va. Code § 2.2-3005(C)(5).

⁸ *Grievance Procedure Manual*, § 7.2(d).

⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁰ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).