

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9756; Ruling
Date: May 18, 2012; Ruling No. 2012-3310; 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 2012-3310
May 18, 2012

The grievant, a former employee of the Department of Corrections (“DOC” or “the agency”), has requested that this Department (“EDR”) administratively review the hearing officer’s decision in Case Number 9756. For the reasons set forth below, we will not disturb the decision of the hearing officer.

PROCEDURAL FACTS

The facts of this case as set forth in the March 8, 2012 Decision of Hearing Officer (“Hearing Decision”) are relatively straight-forward. The grievant was issued a Group III Written Notice of disciplinary action with removal for violation of the state’s Workplace Harassment policy. The grievant filed a grievance to challenge the discipline, and on February 29, 2012, the grievance advanced to hearing. While the complaining employee had alleged several acts of misconduct, the only allegation sustained was that the grievant had made the statement that the complainant could have been a stripper. The grievant admits that he made this statement.

The grievant argues in his Request for Administrative Review that the hearing officer’s decision does not comply with Section 5.9 of the *Grievance Procedure Manual* which requires that the hearing decision contain findings of fact on material issues. This objection is addressed below.

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.”¹ 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.²

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

Here, the grievant essentially asserts that the hearing officer has failed to sufficiently explain the basis of his decision that the grievant's actions rose to the level of a Group III offense with discharge. Hearing officers are authorized to make "findings of fact as to the material issues in the case"³ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁴ 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.⁵ 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.⁶ 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.

While the hearing officer could have provided more discussion in his decision as to why he concluded that the "stripper" comment warranted the discipline imposed, the paucity of discussion certainly does not warrant any remand. The hearing officer's role is to determine whether: (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.⁷ The *Rules for Conducting Grievance Hearings* § V(C) similarly requires that the hearing decision must contain a statement of the issues qualified and findings of fact on material issues and the grounds in the record for those findings, and any related conclusions of law or policy.⁸ The hearing officer met these requirements by finding that the grievant made the "stripper" comment (an undisputed fact), and by concluding that the statement alone was sufficient to justify the Group III Notice. While further explanation of why he thought the comment by itself would support the discipline would have been preferable, the question of whether the misconduct is properly viewed as a Group I, II, or III is ultimately a question of policy that the Department of Human Resource Management ("DHRM") Director must answer. The DHRM Director has sole authority to make a final determination on whether the decision comports with policy.⁹ The grievant has appealed to the DHRM Director and she (or her designee) alone can ultimately answer the question of whether the stripper statement alone rises to the level of a Group III offense with termination.

³ Va. Code § 2.2-3005.1(C).

⁴ *Grievance Procedure Manual* § 5.9.

⁵ *Rules for Conducting Grievance Hearings* § VI(B).

⁶ *Grievance Procedure Manual* § 5.8.

⁷ *Rules for Conducting Grievance Hearings* § VI(B). The agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness. *Id.*

⁸ *Id.* at § V(C).

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

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.¹⁰ 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.¹¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹²

Claudia T. Farr
Director

¹⁰ *Grievance Procedure Manual* § 7.2(d).

¹¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).