

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9892; Ruling
Date: October 17, 2012; Ruling No. 2013-3442; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2013-3442
October 17, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9892. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9892 are as follows:¹

The Agency employed Grievant as a security officer, with approximately 2 years of service with the Agency. The Grievant has a record of several performance counseling memos. Testifying for the Agency were the facility warden, institutional investigator, chief of security, and the human resources officer. On June 19, 2012, the Grievant started her shift at 5:45 a.m., attending muster for approximately 15 minutes standing at attention before starting her post assignments. On the afternoon of Tuesday, June 19, 2012, the Grievant was observed exhibiting unusual behavior, including unsteadiness, slurred speech, and actually dozing off. Inmates and other staff observed the behavior and reported it. All the Agency witnesses testified that the Grievant could not have performed her duties in such a state. The Grievant was ultimately brought to the human resources office, whereupon reasonable cause for a drug test was found and so administered. The drug test was an oral swab, and the human resources officer testified that the Grievant actually dozed off during the test. The drug test was positive for morphine, a controlled substance not prescribed for the Grievant. The Grievant stipulated to the validity of the drug test.

¹ Decision of Hearing Officer, Case No. 9892 ("Hearing Decision"), September 11, 2012 at 1, 3-4 (page citations refer to actual page number, which are incorrectly numbered in original). (Some references to exhibits from the Hearing Decision have been omitted here.)

The Grievant advances the cause of her morphine consumption as a mistake. She testified, as did her friend and her friend's mother, that she spent the prior Saturday night, June 16-17, 2012, at her friend's house. When she awakened on Sunday morning, she had sciatica pain and asked her friend for an aspirin. The friend testified that the Grievant complained of a migraine headache. The friend asked his mother for an aspirin, and she directed him to a pill box that also contained her prescribed morphine pills that are a white tablet similar in appearance to a white tablet of aspirin. According to the Grievant, the friend and the friend's mother, the Grievant must have ingested a morphine pill by accident on Sunday morning.

The warden testified that her Agency is required to terminate an employee who is shown to have violated OP 130.2, and that is the Agency's disciplinary experience with other cases. The only exception is for instances where the violation has a legally sufficient reason. The warden also testified that the facility is a multi-level custody facility that includes the most severe offenders. The inmate population includes a high percentage of drug violators, making for strict enforcement of the Agency's alcohol and drug policies.

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On July 7, 2012, the Grievant was charged with a Group III Written Notice, with job termination, for violation of the Agency's drug and alcohol policy on June 19, 2012. The Grievant had prior corrective counseling memos for performance issues.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On August 8, 2012, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Through pre-hearing exchanges, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, September 5, 2012, on which date the grievance hearing was held at the Agency's facility.

In a September 11, 2012 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written notice with removal.² The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all

² *Id.* at 6.

matters related to procedural compliance with the grievance procedure.”³ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

Inconsistency with Agency Policy

The grievant’s request for administrative review asserts that the hearing officer’s decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁵ All arguments made by the grievant regarding the application of the Standards of Conduct to the offense for which she was terminated would be properly considered by the Director of DHRM. The grievant has requested such a review.

Burden of Proof

The grievant also asserts that the hearing officer improperly imposed the burden of proof on the grievant, rather than the agency. As the grievant correctly notes, because her claim involved a disciplinary action, the agency was required to show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.⁶ Further, the grievance procedure requires that the hearing officer’s determination be supported and documented through a hearing decision that “contain[s] findings of fact on the material issues and the grounds in the record for those findings.”⁷

The grievant claims that because the facility presented no evidence to contradict the testimony that she unknowingly took the morphine on Sunday, June 17, and/or show that the effects of a morphine pill taken on Sunday could not have produced the behavior exhibited on Tuesday, the agency did not carry its burden of proof. The grievant argues that the burden of proof was thus improperly shifted to her, in violation of the grievance procedure. We find this argument to be without merit. The agency had the burden to prove that the disciplinary action was warranted and appropriate under the circumstances. The hearing officer concluded that the agency met this burden on the basis of the uncontested positive drug test results and the grievant’s behavior in the workplace on the day in question.⁸ He found that the grievant’s conduct in reporting to work while under the influence of morphine was severe and the agency’s applicable policy, while strict, warrants the Group III disciplinary action. The burden of proving a defense to the agency’s case fell to the grievant, not the agency.⁹

Here, the hearing officer found that the grievant did not prove her defense, i.e., that the positive drug test result was causally related to the allegedly accidental ingestion of the morphine

³ Va. Code § 2.2-1202.1(2), (3), and (5).

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

⁶ *Grievance Procedure Manual* § 5.8.

⁷ *Grievance Procedure Manual* § 5.9; see also *Rules for Conducting Grievance Hearings* § V(C).

⁸ Hearing Decision at 4.

⁹ *Grievance Procedure Manual* § 5.8.

pill on Sunday, June 17. He found insufficient evidence to show that a mistaken ingestion on Sunday would render the intoxicating behavior on Tuesday afternoon, even assuming such ingestion was a mistake.¹⁰ Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹² 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. In this case, we cannot conclude that the hearing officer failed to comply with the grievance procedure. Accordingly, we decline to disturb the decision on that basis.

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.¹³ 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.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵



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¹⁰ Hearing Decision at 4.

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Grievance Procedure Manual* § 7.2(d).

¹⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁵ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).