

Issue: Administrative Review of Case #8248; Ruling Date: April 25, 2006;
Ruling #2006-290; Agency: Department of Corrections; Outcome: hearing
officer directed to clarify decision as per ruling



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2006-1290
April 25, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8248.

FACTS

The grievant was employed by the Department of Corrections (DOC or the agency) as a corrections officer.¹ On September 8, 2005, the agency issued the grievant a Group II Written Notice for failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy.² The grievant timely grieved the disciplinary action.³ After the parties failed to resolve the grievance during the management resolution steps, the grievance proceeded to hearing on February 7, 2005.⁴

The grievant states that at the conclusion of the hearing, the hearing officer issued a verbal decision upholding the disciplinary action taken by the agency. On February 9, 2005, the hearing officer issued a written decision in which he affirmed the challenged disciplinary action.⁵

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."⁶ 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.⁷

¹ Hearing Decision at 1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Va. Code § 2.2-1001(2), (3), and (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁸ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁹ 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 argues that the hearing officer failed to comply with the grievance procedure by: (1) giving a verbal decision at the conclusion of the hearing; (2) not mitigating the discipline taken against the grievant; and (3) admitting into evidence notes allegedly taken by the facility’s HRO during the second-step meeting. Each of these issues is addressed below.

Verbal Decision

The grievant alleges that at the conclusion of the hearing, the hearing officer announced his verbal decision upholding the disciplinary action. The grievant asserts that the hearing officer was required to deliberate on the evidence, after the conclusion of the hearing, before reaching a decision. He bases this argument on § V.A. of the *Rules for Conducting Grievance Hearings*, which states, in relevant part, “After the hearing, the hearing officer should deliberate on the evidence admitted at the hearing and arrive at a decision in an expeditious fashion.”

Certainly, the better practice is for a hearing officer to issue a single decision, in writing, after a careful review of the evidence presented at hearing. However, we do not read the language cited by the grievant—or any other language in the *Grievance Procedure Manual* or *Rules for Conducting Grievance Hearings*—as mandating that a hearing officer deliberate for a particular amount of time after the completion of the evidence at hearing before issuing a decision. Although a hearing officer may not issue a decision prior to the conclusion of evidence, in this case, the grievant admits that the allegedly issuing a verbal decision at the conclusion of the hearing.¹⁰

⁸ Va. Code § 2.2-3005.1(C)(ii).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ We note that while the grievance procedure does not preclude the issuance of a preliminary verbal decision, a hearing officer is required by the grievance procedure to issue a written decision. *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* § V.C. In this case, the hearing officer issued a written decision on February 9, 2006.

Failure to Mitigate

The grievant also argues that the hearing officer erred by failing to consider mitigating circumstances in upholding the disciplinary action. At hearing, the grievant apparently asserted that he did not comply with his sergeant's orders because he was acting in compliance with his post orders, which stated that an employee should not obey instructions where doing so would cause a breach in security or serious injury.¹¹ In response to the grievant's argument, the hearing officer stated,

The Grievant asserts that his Post Orders allowed him to disobey the order given to him multiple times by his commanding Sargent [sic]. The totality of the evidence makes it very clear that, if there was a problem with an inmate on that day, the commanding Sargent [sic] clearly stated to the Grievant that he would take charge of that inmate and that the Grievant should return to his post and continue with the shake-down process. At all times, the Grievant refused to do so. The Agency has clearly shown that the Grievant refused to follow his supervisors [sic] instructions and to perform the assigned work that had been given to him and his failure to comply with written policy. While the Post Orders clearly gave the Grievant the right to question the order by contacting his next higher supervisor, those orders did not allow him to arbitrarily refuse to follow subsequent orders. The Hearing Officer finds it highly unusual that the Grievant never pursued any institutional action against the inmate who allegedly caused the Grievant to fear for his safety.

In his request for administrative review, the grievant contends that the hearing officer should have considered "lack of notice" as a mitigating circumstance. More specifically, the grievant asserts that the evidence at hearing showed that the post orders did not "clearly explain the course of action and interpretation," that the hearing officer himself found that the grievant complied with the post orders, and that his supervisor's supervisor did not give him any further instruction but "rather allowed the supervisor to handle the situation. . . ."

Under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was "warranted and appropriate under the circumstances."¹² Among the examples of possible mitigating circumstances identified by the *Rules* is the employee's "lack of notice" of a rule, an agency's interpretation of a rule, or the possible consequences of not complying with a rule.¹³ Where the hearing officer finds that mitigating circumstances justifying a reduction or removal of the grieved disciplinary action exist, he must then consider whether there are also aggravating circumstances which would "overcome the mitigating

¹¹ Hearing Decision at 2.

¹² See *Rules for Conducting Grievance Hearings* § VI.B.

¹³ *Id.* at § VI.B.1

circumstances.”¹⁴ A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness.¹⁵ Moreover, this Department will find that a hearing officer failed to comply with the grievance procedure with respect to mitigation of disciplinary action only where the hearing officer’s action constituted an abuse of discretion.

Here, the hearing officer does not indicate in his written decision whether he considered “lack of notice,” or any other mitigating circumstance, in deciding to uphold the disciplinary action against the grievant. It is therefore unclear from the written decision what, if any, mitigating evidence the hearing officer considered. For this reason, the hearing officer is directed to clarify his written decision to identify any mitigating (and, if appropriate, aggravating) circumstances and address whether those circumstances warrant mitigation of the disciplinary action in this case.

Admission of HRO’s Notes

In addition, the grievant argues that the hearing officer erred by accepting into evidence “a document created by Ms. [C], HRO at [the employing facility], in which she recorded the second step meeting.” The grievant alleges that admission of this document into evidence was inappropriate because the agency did not allow him to have a representative in the second step meeting. The agency objects to the grievant’s characterization, stating that the document at issue was not a “recording” of the meeting, but rather merely the typed notes of the HRO, and that the document was not introduced into evidence. The agency also states that he did not raise this issue at hearing or prior to the hearing through a compliance ruling.

Assuming, for purposes of this ruling only, that the document in question was admitted into evidence by the hearing officer, we cannot conclude that its admission was in violation of the grievance procedure. By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.¹⁶ Stated another way, hearing officers *must* admit relevant evidence, as long as it is not also immaterial, insubstantial, privileged, or repetitive.

In this case, the grievant does not argue that the HRO’s notes were irrelevant, or that they were immaterial, insubstantial, privileged, or repetitive. Instead, he argues that the notes are inadmissible because he was not allowed a representative during the second step meeting. While a hearing officer could certainly consider the denial of a representative in assessing the evidentiary value of the HRO’s notes, the alleged refusal of the agency to allow the grievant a representative at the second step meeting would not constitute a basis for denying admission of the notes. Further, with respect to the grievant’s argument that he was denied an opportunity to have a representative in the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Va. Code § 2.2-3005(C)(5); *see also* EDR Ruling No. 2005-1027.

second-step meeting, the grievant was required to address this issue through the compliance process at the time of the meeting.¹⁷ Accordingly, we cannot conclude the hearing officer failed to comply with the grievance procedure with respect to the HRO's notes.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is ordered to reconsider his decision in accordance with this ruling. 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 This Department's rulings on matters of procedural compliance are final and nonappealable.²¹

Claudia T. Farr
Director

¹⁷ See, e.g., EDR Ruling No. 2004-752, EDR Ruling No. 2005-943.

¹⁸ *Grievance Procedure Manual*, § 7.2(d).

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

²⁰ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

²¹ Va. Code § 2.2-1001 (5).