

Issues: Accommodation of disability, denial of in-band adjustment, retaliation; Hearing Date: 04/22/09; Decision Issued: 05/06/09; Agency: DJJ; AHO: William S. Davidson, Esq.; Case No. 9062; Outcome: Partial Relief; **Administrative Review:** **EDR Ruling Request received 05/21/09; EDR Ruling #2009-2324 issued 04/08/10; Outcome: Remanded to AHO; Remand Decision issued on 04/19/10; Outcome: Original Decision Affirmed; Administrative Review: DHRM Ruling Request received 05/21/09; DHRM Ruling issued on 05/17/10; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Powhatan Circuit Court (06/15/10); Outcome: Hearing Officer's Decision Reversed; Judicial Review: Appealed to the Court of Appeals (date??); Outcome pending.**

9062

COMMONWEALTH OF VIRGINIA  
FOURTEENTH JUDICIAL CIRCUIT

L.A. HARRIS, JR., JUDGE  
CATHERINE C. HAMMOND, JUDGE  
GARY A. HICKS, JUDGE  
DANIEL T. BALFOUR, JUDGE  
BURNETT MILLER, III, JUDGE



GOVERNMENT COMPLEX  
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CIRCUIT COURT OF HENRICO COUNTY

August 5, 2010

Senior Assistant Attorney General  
900 E. Main Street  
Richmond, VA 23219

Department of Juvenile Justice v  
Grievance Appeal

Dear

I have reviewed the appellant's memorandum of law and the notebook filed by

I find that the rulings of the hearing officer were contrary to the law as established in Va. Code § 2.2-3006(B) and therefore should be set aside. There is no evidence to support a retaliation claim, as it did not result in any adverse employment action.

is still employed as a Senior Juvenile Corrections Officer, did not challenge his non-selection for a Sergeant position, is paid within the pay scale of comparable employees in comparable positions, and the chair issue is one that is controlled by security at the institution. Additionally the third grievance was based on a rescinded notice that no longer existed.

I ask to prepare the Order.

Very truly yours,

*George F. Tidey (JWB)*  
George F. Tidey  
Judge

GFT/jwb

cc: William Maxey, Jr., Clerk

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9062

Hearing Date: April 22, 2009  
Decision Issued: May 6, 2009

**PROCEDURAL HISTORY**

The Grievant filed an employee grievance on October 19, 2007 for the following issues:

1. Whether or not I am the victim of unfair and disparate treatment
2. Whether or not I am the victim of retaliation
3. Whether or not these disparate and retaliatory acts constitute an adverse employment effect
4. Whether or not I possess the knowledge, skills and ability (KSA) for the position of Sgt. <sup>1</sup>

The Grievant filed an employee grievance on November 1, 2007 for the following issues:

1. Whether or not Superintendent Dr. A is in violation of written policy (Salary Administration Plan).
2. Whether or not these violations are retaliatory in nature.
3. Whether or not these retaliatory acts constitute an adverse employment effect. <sup>2</sup>

The Grievant filed an employee grievance on April 22, 2008 for the following issues:

1. Whether or not I violated security protocol and policies, IOP 212-4.2, 223-4.1, 214-4.4 and 108-4.6
2. Whether or not DJJ Training Guidelines were followed and/or violated
3. Whether or not the issuance of a Group II Written Notice was arbitrary and capricious
4. Whether or not the Group II Written Notice constitute[s] unfair application or misapplication of policy
5. Whether or not I am the victim of unjust harassment
6. Whether or not IOP 218 was violated
7. Whether or not a Group II Written Notice is justified and warranted
8. Whether or not I am the victim of retaliatory acts <sup>3</sup>

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<sup>1</sup> Agency Exhibit 1, Tab 1, Pages 1-3

<sup>2</sup> Agency Exhibit 1, Tab 2, Pages 1-3

The Grievant filed an employee grievance on September 11, 2008 for the following issues:

1. Whether or not state policy and procedure is being violated
2. Whether or not I am the victim of disparate treatment
3. Whether or not this disparate treatment constitute[s] harassment
4. Whether or not this harassment is retaliatory in nature
5. Whether or not these actions are unjust and warranted<sup>4</sup>

Pursuant to the Qualification and Consolidation Ruling of Director dated January 22, 2009, EDR consolidated these four (4) grievances for purposes of a hearing. On March 27, 2009, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On April 22, 2009, a hearing was held at the Agency’s location.

### **APPEARANCES**

Agency Representative  
Advocate for Agency  
Grievant  
Witnesses

### **ISSUE**

1. The issues for each grievance were set out in Procedural History and will not be repeated here.

### **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency’s disciplinary action. Implicit in the Hearing Officer’s statutory authority is the ability to independently determine whether the employee’s alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are

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<sup>3</sup> Agency Exhibit 1, Tab 3, Pages 1-3

<sup>4</sup> Agency Exhibit 1, Tab 4, Pages 1-3

consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to prove his claims against the Agency by a preponderance of the evidence. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing nine (9) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing fifteen (15) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

In her Qualification and Consolidation Ruling of Director dated January 22, 2009, the Director of EDR set forth several aspects of the law which are pertinent to this Ruling. Her discussion regarding these issues is enclosed herein.

#### Retaliation

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government. Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or applied unfairly.

In this case, the grievant alleges that after filing past grievances, the agency has retaliated against him for this protected conduct. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee

engaged in a protected activity; (2) the employee suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a non-retaliatory business reason for the materially adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.

The initiation of a grievance is clearly a protected activity. In addition, these grievances raise a sufficient question as to whether management's actions were "materially adverse," such that a reasonable employee might be dissuaded from participating in protected conduct. While this standard is objective, it may also take into account the particular circumstances of the employee. The United States Supreme Court held in the *Burlington Northern* decision that the anti-retaliation provisions of Title VII, which are comparable with those under the grievance procedure and state policy, are "not limited to discriminatory actions that affect the terms and conditions of employment." The Supreme Court noted that "an act that would be immaterial in some situations is material in others." In this case, the grievant has presented sufficient evidence that the change in assignment, the denial of in-band pay adjustment, and the issuance of discipline and NINs, only to have them later rescinded, could be viewed as materially adverse acts.

Finally, the grievance raises a sufficient question as to whether the actions taken by the actions had a nexus with the protected conduct. Although the agency denies that it has engaged in retaliation against the grievant, the circumstances described above, including the previous finding of retaliation and the "irreconcilable nature of the prior testimony of a Major and Captain in Case No. 8460, the ultimately rescinded Written Notices and NINs, and the alleged comment from a senior member of management that "[grievant] will never get a Sergeant Position as long as I'm here," collectively raise a sufficient question of whether the grieved actions may have been prompted by a retaliatory animus.<sup>5</sup>

Regarding the Finding by Hearing Officer in Case No. 8460, this Hearing Officer is cognizant of the Circuit Court Order entered in that matter wherein the Judge stated in part in his Final Order as follows:

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<sup>5</sup> EDR Qualification and Consolidation Ruling dated January 22, 2009, pages 3 and 4

...Having reviewed the record in that matter, Decision No 8460, the Court finds that the decision of the hearing officer that Appellant retaliated against Appellee...for using the Grievance Procedure to be contradictory to law.<sup>6</sup>

It is unfortunate that the Circuit Court Judge did not indicate why he felt that the decision of the Hearing Officer was contradictory to law. However, the Circuit Court Judge indicates that he reviewed the record in this matter and this Hearing Officer does not feel that he is in the position to attempt to determine which parts of the Hearing Officer's decision in Case No. 8460 he is entitled to follow and which parts he determines he cannot follow as they were contradictory to law. Accordingly, this Hearing Officer will make rulings in this matter as if the entirety of Case No. 8460 did not take place.

In the first grievance, the Grievant is alleging that he felt the reason that he had not been promoted to Sergeant was retaliation for having previously used the Grievance Process. A witness for the Grievant testified that the Assistant Deputy Director of this Agency told this witness that, "[Grievant] will never get a Sergeant position as long as I am here." This particular witness had worked for the Agency for a number of years and retired in 2008. The Grievant testified that he had applied for a Sergeant's position approximately thirty (30) times. He pointed out that in each application process one first goes before a Board composed of citizens who have the ability to advance the application to a second Board consisting of members of the Agency. In all cases, he had been advanced to the second Board interview. The Grievant testified that, in applying for a Sergeant position at the Unit, he had been told by the Superintendent there that the Assistant Deputy Director of the Agency would have the "last word on selection." The Grievant interpreted that statement to mean that he would not ever be selected for Sergeant for so long as the current Assistant Deputy Director was in place. The Grievant also testified that when he questioned the Superintendent of the Reception and Diagnostic Center regarding an application for Sergeant at that location, the Superintendent there told him to "take it up with [the Assistant Deputy Director]."

The Agency called the Assistant Deputy Director as one of its witnesses and he testified that he had never made the statement that, "[the Grievant] would never become a Sergeant as long as I am here." He did testify that he told the Grievant that he would not be promoted, "as long as he had an active Group III Written Notice." This witness also testified that he did not remember talking to the heads of the xxxx Unit or the xxxx Unit regarding the Grievant. This witness did testify that there was not a written policy prohibiting promotion of an employee with an active Group III Written Notice.

The evidence before the Hearing Officer in this matter was that the Grievant did have an active Group III Written Notice for many of his interviews when he was applying to be a Sergeant. When he interviewed at the location where he currently works, the Group III Written Notice only had approximately two (2) weeks before it would be removed from his file.

The second grievance which the Hearing Officer heard challenged a denial of an in-band pay adjustment to the Grievant's salary. The Grievant asserted that the pay denial was retaliatory. On June 25, 2007, the Grievant filed with the Human Resource Manager at his

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<sup>6</sup> Grievant Exhibit 1, Tab 1, Page 1

location a request for an in-band pay adjustment. At the request of the Superintendent of this location, the Human Resource Manager requested the Agency review the pay of all Corrections Officers at this location to see if any of the numbers were skewed.<sup>7</sup> Based on the data contained therein, the Superintendent wrote to the Grievant on December 21, 2007 and stated that there was no significant difference between Grievant's salary and other employees with comparable years of relevant service.<sup>8</sup>

The Hearing Officer notes that the Grievant has nine (9) years of total service and has an education level of having completed high school.<sup>9</sup> The Hearing Officer notes that there appeared to be twelve (12) Security Officer III employees, which is the Grievant's designation, that have either nine (9) years total service or 9.1 years total service and a high school education. The lowest paid Security Officer III in this group was paid \$30,471 per year and the highest paid Security Officer III in this group was paid \$33,587 per year. The Grievant was paid \$30,522 per year. This means that the Grievant was paid approximately ten percent (10%) less than the highest paid member of his particular cohort and approximately one-tenth of one percent (.01%) more than the lowest member of his cohort. The Hearing Officer notes that the next highest paid member in this cohort was making approximately \$1,510 more than the Grievant or approximately five percent (5%) more on an annual basis. The next highest member was making approximately \$634 more per year or approximately two percent (2%) more in annual pay.

The Human Resource Manager testified that she thought any difference of more than \$100 would be deemed significant. She also testified, if there was simply one (1) outlying employee in a particular cohort, that would not be enough to raise any type of issue. It seems clear that at least thirty-three percent (33%) of this particular Grievant's cohort were making substantially more than \$100 annually than he. Further, the Hearing Officer notes that there was one Security Officer III with one (1) year less total seniority who was making the same as the Grievant. There are three (3) Security Officer III employees with one (1) year less seniority who are making more than the Grievant, including one, who appears to be making approximately nine and one-half percent (9.5%) more than the Grievant. Neither the Human Resource Manager nor the Superintendent could offer any explanation or justification for these discrepancies.

The third grievance challenged the discipline that the Grievant received pursuant to a Group II Written Notice which he received on April 9, 2008. The Third Management Step rescinded that Group II Written Notice on July 18, 2008. This grievance seemed to center around the fact that the Agency, through its Superintendent, issued the Grievant a Group II Written Notice on April 9, 2008 for failure to follow security protocol in that the Grievant allowed a resident to exit his room while not in full restraints.<sup>10</sup> The Hearing Officer heard substantial evidence regarding this matter. The post order for this location stated as follows:

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<sup>7</sup> Agency Exhibit 1, Tab 2, Pages 13-17

<sup>8</sup> Agency Exhibit 1, Tab 2, Page 4

<sup>9</sup> Agency Exhibit 1, Tab 2, Page 16

<sup>10</sup> Grievant Exhibit 1, Tab 4, Page 62



Anytime an ASU Level One ward is to leave his cell he is to be cuffed before the door is opened; he is to remain cuffed anytime he is out of his cell...<sup>11</sup>

On March 11, 2008, the Assistant Superintendent of Security issued a Special Security Protocol wherein he stated, regarding a particular resident that, "a minimum of two (2) officers must be present in order to open his door and Resident will be in full restraint every time he exits his room."<sup>12</sup> Witnesses defined "full restraint" as meaning the Resident would be in leg irons, handcuffs, and waist chain. A second Security Memorandum dated March 11, 2008 appears to have been issued by the same Assistant Superintendent of Security regarding this resident and it stated that, "Any time he is to exit the room, or staff enters the room, handcuffs and black box are to be placed on him through the tray slot before the door is opened. The handcuffs and black box will be kept in B-Master."<sup>13</sup>

As it turns out, this resident was allowed out of his cell in handcuffs only in order to make a phone call. During the course of making the phone call, he became agitated, apparently tore up a log book, destroyed a phone, and took a broken broom handle as a weapon. The Grievant was able to de-escalate this matter and get the resident into his cell.

There was a video recording of this transaction which was reviewed by management. The Assistant Superintendent of Security, who seems to have issued two (2) different protocols with the exact same date, testified that he was unaware of those until the grievance hearing. However, a Major who testified on behalf of the Agency stated that he was shown the two (2) conflicting protocols on the day after the incident. It is clear to this Hearing Officer that the Agency witnesses are conflicted as to how many different protocols were available for the Security Officers to follow, who placed them there and why there was a difference in the language. The Agency, through its representative, attempted to imply that the Grievant may have been able to alter these protocols in some way after the fact. This line of argument was completely refuted when the Agency's own witness testified that the protocols were shown to him the next day after the incident. Because this grievance was ultimately overturned in the Third Step, a Memorandum was entered in the Grievant's file on September 12, 2008. That Memorandum was from the Chief of Security and it was delivered to the Grievant. In that Memorandum, the Chief of Security states in part as follows:

Through investigation and your admission, the above policies were not followed; however, you felt that you had the situation under control.<sup>14</sup>

The Grievant strongly denied ever admitting that the "above policies" were not followed. Those policies were as follows:

During this incident, several security and safety policies were violated to include, supervision of residents, radio communication, search procedures, and written security protocols.<sup>15</sup>

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<sup>11</sup> Grievant Exhibit 1, Tab 4, Page 76

<sup>12</sup> Grievant Exhibit 1, Tab 4, Page 77

<sup>13</sup> Grievant Exhibit 1, Tab 4, Page 80

<sup>14</sup> Grievant Exhibit 1, Tab 4, Page 74

<sup>15</sup> Grievant Exhibit 1, Tab 4, Page 74

The Hearing Officer believes that had the Grievant admitted to violating all of those policies, then the Group II Written Notice would not have been dismissed. In observing the demeanor of the Chief of Security when he testified on behalf of the Agency, it was clear that this witness was displeased that the Group II Written Notice was overturned.

The final grievance before the Hearing Officer was one where the Grievant asserts that the Agency continues to retaliate against him and particularly doing so by moving him to another post location. On June 10, 2008, the Grievant submitted to the Human Resource Manager a note that included a doctor's note indicating, "due to medical issues, please permit [Grievant] to utilize a regular chair with back support in his duties."<sup>16</sup> This note also included a statement signed by the Grievant's physician that the Grievant was released to his current position with no further restrictions.<sup>17</sup> On July 2, 2008, the Human Resource Manager wrote to the Superintendent and indicated that the Grievant's doctor had released him to perform the position of a Juvenile Corrections Officer. However, she noted that the doctor indicated in a separate note that, "due to medical issues, please permit [Grievant] to utilize a regular chair with back support in his duties." She further noted that, due to security reasons, some posts do not allow the type of chair that is being requested by the Grievant's doctor.<sup>18</sup> On July 22, 2008, the Superintendent wrote to the Grievant acknowledging all of the above and stating in part as follows:

We certainly will attempt to accommodate wherever possible, assigning you to a post that allows a chair with a back, or chair that allows you to touch the floor. However, we cannot guarantee you that you will always be assigned to a post with such accommodation. As you are aware not all posts have chairs and chairs are not utilized in most of these assignments based upon security and safety concerns.<sup>19</sup>

As of the date of this hearing, the Grievant had not been assigned to a post where such a chair was available.

Testimony in this matter was given for approximately eleven (11) hours. It is clear to the Hearing Officer that the Grievant and this Agency have had multiple disagreements as evidenced by the recitation of historical facts set forth in the Qualification and Consolidation Ruling of Director dated January 22, 2009. It is of note that, with the exception of the Group III Written Notice of some years ago, every time this Agency has raised an issue regarding this Grievant, it has subsequently lost.

Regarding each of the individual grievances herein, the Hearing Officer notes that the Grievant had an active Group III Written Notice for a substantial period of time that covered many of the more than thirty (30) applications that he has made for Sergeant. However, the Hearing Officer notes that at least some of the applications were subsequent to the life span of that Group III Written Notice. The Grievant and at least one (1) witness for the Grievant testified that the Assistant Deputy Director either stated to them or to others who relayed that message that the Grievant would never become a Sergeant for so long as the Assistant Deputy

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<sup>16</sup> Agency Exhibit 1, Tab 5, Page 4

<sup>17</sup> Agency Exhibit 1, Tab 5, Page 5

<sup>18</sup> Agency Exhibit 1, Tab 5, Page 2

<sup>19</sup> Agency Exhibit 1, Tab 5, Page 1

Director was in that position. The Assistant Deputy Director categorically denied that. While the Hearing Officer did not have the advantage of hearing from the Superintendent at the xxxx Unit or the Superintendent at the xxxx Unit regarding the issue of the Assistant Deputy Director's purported statement that the Grievant would never be a Sergeant for so long as he was the Assistant Deputy Director, in considering what was said by the Assistant Deputy Director in his own testimony and in reviewing his demeanor as a witness as opposed to the Grievant and the Grievant's other witnesses' demeanor on this issue, the Hearing Officer finds that it is more likely than not that such a statement had been made. It is entirely possible that when the Assistant Deputy Director made a statement that the Grievant would not be promoted to Sergeant for so long as he was serving as Assistant Deputy Director, that he was thinking about the fact that he did not want to promote someone with a Group III Written Notice. However, the Hearing Officer believes that it is entirely likely that that statement was made without the necessary explanation.

The second grievance regarded the in-band pay increase. While the Hearing Officer appreciates the Agency's logic of wanting to test all Corrections Officers' pay when only one (1) had asked for a review of his pay, the Hearing Officer finds that the Agency is being disingenuous with that explanation. The Hearing Officer finds that it is more likely that the Agency was attempting to find a way, any way, to not increase the Grievant's pay. The Agency testified that a "significant difference" would appear if more than \$100 in pay difference was found. Clearly, there is substantially more than that, both in this Grievant's cohort with the approximate same experience, and in the cohort that had less experience. The Hearing Officer finds that the Grievant has borne his burden of proof in this grievance.

Regarding the third grievance and the violation of security protocol, the evidence was abundantly clear that there were multiple protocols that should have been followed, and many of them contradicted each other. The Agency's own witnesses acknowledged that there were multiple protocols and could offer no justification for the difference in them. The Hearing Officer finds that the issuance of the Group II Written Notice which led to this grievance was in fact given by the Agency without proper justification. The Hearing Officer finds that the Grievant has borne his burden of proof regarding this grievance.

Regarding the fourth grievance and the issuance of a chair with back support, the Hearing Officer notes that the Superintendent has stated that the Agency would attempt to accommodate the Grievant wherever possible. The Hearing Officer fully understands that security is an issue and that is an issue left with the Agency. However, the Hearing Officer is fully cognizant of the Superintendent's statement that he would attempt to accommodate the Grievant wherever possible, yet to date, he seems to have been unable to do so for more than six (6) months.

The Hearing Officer finds that the Grievant did engage in a protected activity and that he has suffered a material adverse effect in that he has been denied an in-band pay increase, he may well have been denied promotion to Sergeant and continues to be used in an area where the type of chair requested by his doctor appears to be unavailable. The Grievant in the first grievance herein expressly states that he is, "not challenging non-selection for a Sergeant position," but rather he is, "challenging the retaliation that continues." Accordingly, while the Hearing Officer finds that it is more probable than not that retaliation took place, the Hearing Officer does not feel that the issue is before him to order that the Grievant be promoted to Sergeant. Regarding the in-band pay increase, the Hearing Officer finds that retaliation took place, even though it was carefully disguised, and the Hearing Officer will order that this matter be revisited. Regarding

the third and fourth grievances, again the Hearing Officer finds that retaliation took place and the Hearing Officer will order that the retaliation cease immediately.

At the beginning of this Decision, the Hearing Officer stated that he would treat this Decision as if Hearing Office Decision No 8460 had not taken place. While the Hearing Officer believes that that is the only position he can take, inasmuch as a Circuit Court found that the Hearing Officer's Decision in Case No 8460 was contradictory to law, this Hearing Officer's Decision would still be the same even if the Hearing Officer's Decision in Case No 8460 had been deemed perfectly valid by the Circuit Court Judge.

### **DECISION**

The Hearing Officer finds that the Grievant did carry the burden of proof regarding grievance number 1. The Agency is ordered to refrain from retaliating against the Grievant and, should he apply for promotion to Sergeant, the current serving Assistant Deputy Director of the Agency should be removed from any decision-making ability in that process.

The Hearing Officer finds that the Grievant did bear the burden of proof regarding grievance number 2 and he orders that the Grievant's request for an in-band pay increase be submitted to the appropriate parties at the Agency level, not his Superintendent, and that the Agency either grant him an in-band pay increase or specifically justify why there are numerous other employees in the same employment designation, some with less experience, who are being paid substantially more.

The Hearing Officer finds that the Grievant did bear the burden of proof regarding grievance number 3 and directs that the Agency cease all retaliation against this Grievant.

The Hearing Officer finds that the Grievant did bear the burden of proof regarding grievance number 4. The Hearing Officer directs that, provided this Grievant has more seniority than others, his physical situation be accommodated and that he be placed in an assignment that allows him to have a chair with back support.

### **APPEAL RIGHTS**

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

Department of Human Resource Management  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main Street, Suite 301  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>20</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>21</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson  
Hearing Officer

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<sup>20</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>21</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER**

In re:  
Case No: 9062

Hearing Date: April 22, 2009  
Decision Issued: May 16, 2009

EDR Request Received: April 8, 2010  
Response to EDR Request: April 19, 2010

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management (DHRM) and the Department of Employee Dispute Resolution (EDR). The Grievant, on May 21, 2009, requested of EDR a review of the Hearing Officer's response to the Grievant's Reconsideration Request. On April 8, 2010, EDR produced a First Administrative Review of Director and, in that Opinion, EDR found as follows:

1. The hearing officer is therefore directed to clarify whether he finds that the Deputy Director acted from a retaliatory motive in making this statement, and if not, whether the remaining evidence is sufficient to establish that the agency's stated reason for the non-selection is a pretext for retaliation. Further, the hearing officer's clarification must identify the grounds in the record for his conclusions regarding the presence or absence of a retaliatory causal connection between the grievant's protected activity and his nonselection for the promotion at issue.<sup>22</sup>
2. Accordingly, the hearing decision is remanded to the hearing officer to clarify whether his apparent belief that the agency had prevailed only once in grievances filed by the grievant played any part in his finding of a retaliatory motive on the part of the agency.<sup>23</sup>
3. What is not clear, however, is why or how that finding evinces retaliatory intent rather than, for example, some other non-retaliatory reason for the agency's failure to provide a post with a seat. The hearing officer is therefore instructed to clarify on remand the basis and record support for the apparent inference of retaliation that he drew from the above fact-finding.<sup>24</sup>
4. In this case it is unclear from the hearing decision whether the hearing

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<sup>22</sup> Administrative Review of Director, #2009-2324, Dated April 8, 2010, Page 4

<sup>23</sup> Administrative Review of Director, #2009-2324, Dated April 8, 2010, Page 5

<sup>24</sup> Administrative Review of Director, #2009-2324, Dated April 8, 2010, Page 6

officer found that, but for the retaliation, the grievant would have been permanently assigned to a position with a chair. Accordingly, (and assuming the hearing officer does not change his finding of retaliation with respect to the failure to provide a chair), he is ordered to reconsider and clarify his decision with respect to this issue of relief.<sup>25</sup>

The Hearing Officer will address the issues raised by the EDR Director in the order in which they were set forth in her Ruling.

Regarding the EDR Director's first reason for remanding this matter to the Hearing Officer, the statement made by the Deputy Director was, "The Grievant will never get a Sergeant position as long as I am here." The Agency misreads the Hearing Officer's statement in the Original Decision regarding this matter wherein on page 9 it is stated,

It is entirely possible that when the Deputy Director made the statement...he was thinking about the fact that he did not want to promote someone with a Group III Written Notice. However, the Hearing Officer believes that it is entirely likely that statement was made without the necessary explanation.<sup>26</sup>

While the Hearing Officer may have in artfully worded his thoughts, the intent was to state that, while it may have been possible that the Deputy Director qualified this statement in a proper way by justifying it with the Grievant's existing and active Group III Written Notice, the Hearing Officer found that it was "entirely likely" that this proper justification language was not appended with the statement. In other words, the Hearing Officer's finding, based on the demeanor of the Deputy Director when he testified was that there is little likelihood that the Deputy Director properly qualified this statement or intended to so qualify it. The reason for the lack of such a qualification was that the Deputy Director did not in fact believe that the Group III Written Notice was the reason for such a statement, but rather was retaliating against the Grievant because of his use of prior protected activities.

Further, this statement by the Deputy Director cannot be taken in isolation to the remainder of the evidence that was presented to the Hearing Officer. The Grievant was given written disciplinary notices and they were rescinded. The Grievant's pay did not fall within the guidelines set forth by the Agency's own witnesses at this hearing and, the Superintendent for this Agency testified that he would attempt to accommodate the Grievant wherever possible regarding the issuance of a chair with back support or the placing of the Grievant in a location where he would have such a chair with back support. The fact that the Superintendent said that he would attempt to accommodate the Grievant clearly implies that such position exists. If none existed, the Superintendent would have testified to this. The evidence was very clear that six (6) months have passed and the Superintendent has been unable to accommodate the Grievant and there was no testimony from the Superintendent to indicate why he had been unable to find such a position. When all of these facts are considered, and when the Hearing Officer weighs the demeanor of the Deputy Director when he testified, and when the Hearing Officer considered the number of facts that the Deputy Director simply could not remember, it is clear to the Hearing

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<sup>25</sup> Administrative Review of Director, #2009-2324, Dated April 8, 2010, Page 7

<sup>26</sup> Hearing Officer's Decision, Case #9062, Dated May 6, 2009

Officer that the testimony regarding the Group III Written Notice was pretextual in content and was being used as a justification, where it clearly was not the fact for why the Grievant was not promoted.

Regarding the EDR Director's second reason for remanding this matter to the Hearing Officer, while in error regarding the fact that the Agency had prevailed in only one (1) grievance, that error had nothing to do with the Hearing Officer's finding of retaliation. In reconsidering his Decision based on all of the facts presented to him at the hearing, the Hearing Officer finds that this fact alone is not sufficient to cause the Hearing Officer to reconsider his finding of retaliation.

Regarding the EDR Director's third reason for remanding this matter to the Hearing Officer, as stated already in this Reconsideration, the Superintendent stated that he would attempt to accommodate the Grievant regarding a "post with a chair with back support." The statement that he would try to accommodate the Grievant clearly implies that such a post exists. Otherwise, the Superintendent was simply not being truthful with the Grievant when he made that statement. If there were no such posts at this Agency, then the Hearing Officer finds that the Superintendent would have been truthful and would have told the Grievant that no such post(s) existed.

When the Hearing Officer considers the demeanor of several of the Agency's witnesses in this matter, the fact that at least one (1) of the Agency witnesses implied or attempted to imply that the Grievant forged post orders, that other Agency employees clearly testified that this was not possible, that the Grievant has been an employee of this Agency for more than a decade, the fact that the Hearing Officer has determined that the Grievant was not being paid properly, that the Grievant has been denied promotions because of retaliation and that the Grievant was issued written disciplinary notices which were then rescinded, then the Hearing Officer finds that either the Superintendent lied to the Grievant when he said that he would attempt to accommodate him, or the accommodation has been withheld for some reason and that reason is retaliation.

Finally, regarding the EDR Director's fourth reason for remanding this matter to the Hearing Officer, the finding is simply that the failure to provide this accommodation is retaliation. The Hearing Officer in his original Decision noted that the Grievant's physical situation should be accommodated "provided this Grievant has more seniority than others." If the Agency can show that there are a limited number of such positions and that the Grievant's seniority would not justify one of those positions, then the Hearing Officer finds that while there may have been retaliation, there is no cure. If such positions existed at this Agency, and if the Grievant was more senior than other employees with similar medical needs, the Superintendent testified that he told the Grievant that he would make the appropriate accommodation. The Agency introduced no evidence to indicate that such positions did not exist. The Agency introduced no evidence to indicate that there were Agency employees, with more seniority than the Grievant and with similar medical issues, who had taken all such positions. Accordingly, the Hearing Officer finds that the only logical conclusion is that retaliation is the reason for denial of such a position to the Grievant.

### **APPEAL RIGHTS**



You may request a judicial review if you believe the decision is contradictory to law.<sup>27</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>28</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson  
Hearing Officer

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<sup>27</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>28</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Juvenile Justice  
May 17, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9062. The agency objects to the hearing officer's decision on the bases that it believes that the decision in two of the grievances is inconsistent with policy. The agency also requested an administrative review by the Department of Employment Dispute Resolution. For reasons stated below, this Department will not disturb the hearing decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

**FACTS**

The Department of Juvenile Justice employs the grievant as a Security Officer III at one of its facilities. He filed four grievances in which he alleged the following: (1) he was the victim of unfair and disparate treatment and he was the victim of retaliation; (2) the agency did not follow the provisions of the agency's Salary Adjustment Plan, and thus he was not paid properly; (3) the agency had different security protocols and thus he was unfairly disciplined (the written notice was rescinded by management); (4) he was not given the requested chair to support his back with which he had a medical problem.

Upon appeal, the original hearing decision was remanded to the hearing officer by the Director of the Department of Employment Dispute Resolution for clarification on certain parts of the decision. The hearing officer clarified his decision but his clarifications did not change the overall outcome of his decision.

The agency appealed the hearing officer's decision on grievance one and grievance two only. Thus, this Department will restrict its administrative review to only those matters related to these two grievances.

The hearing officer's **Findings of Facts** state, in part, the following:

In the first grievance, the Grievant is alleging that he felt the reason that he had not been promoted to Sergeant was retaliation for having previously used the Grievance Process. A witness for the Grievant testified that the Assistant Deputy Director of this Agency told this witness that, "[Grievant] will never get a Sergeant position as long as I am here." This particular witness had worked for the Agency

for a number of years and retired in 2008. The Grievant testified that he had applied for a Sergeant's position approximately thirty (30) times. He pointed out that in each application process one first goes before a Board composed of citizens who have the ability to advance the application to a second Board consisting of members of the Agency. In all cases, he had been advanced to the second Board interview. The Grievant testified that, in applying for a Sergeant position at the Unit, he had been told by the Superintendent there that the Assistant Deputy Director of the Agency would have the "last word on selection." The Grievant interpreted that statement to mean that he would not ever be selected for Sergeant for so long as the current Assistant Deputy Director was in place. The Grievant also testified that when he questioned the Superintendent of the Reception and Diagnostic Center regarding an application for Sergeant at that location, the Superintendent there told him to "take it up with [the Assistant Deputy Director]."

The Agency called the Assistant Deputy Director as one of its witnesses and he testified that he had never made the statement that, "[the Grievant] would never become a Sergeant as long as I am here." He did testify that he told the Grievant that he would not be promoted, "as long as he had an active Group III Written Notice." This witness also testified that he did not remember talking to the heads of the Hanover Unit or the RDC Unit regarding the Grievant. This witness did testify that there was not a written policy prohibiting promotion of an employee with an active Group III Written Notice.

The evidence before the Hearing Officer in this matter was that the Grievant did have an active Group III Written Notice for many of his interviews when he was applying to be a Sergeant. When he interviewed at the location where he currently works, the Group III Written Notice only had approximately two (2) weeks before it would be removed from his file.

The hearing decision stated, "The Hearing Officer finds that the Grievant did carry the burden of proof regarding grievance number 1. The Agency is ordered to refrain from retaliating against the Grievant and, should he apply for promotion to Sergeant, the current serving Assistant Deputy Director of the Agency should be removed from any decision-making ability in that process." The hearing officer stated further, "While the Hearing Officer did not have the advantage of hearing from the Superintendent in Hanover or the Superintendent at the RDC regarding the issue of the Assistant Deputy Director's purported statement that the Grievant would never be a Sergeant for so long as he was the Assistant Deputy Director, in considering what was said by the Assistant Deputy Director in his own testimony and in reviewing his demeanor as a witness as opposed to the Grievant and the Grievant's other witnesses' demeanor on this issue, the Hearing Officer finds that it is more likely than not that such a statement had been made."

The agency has expressed concerns that "the Hearing Officer appears to conclude that the grievant's Group Three Written Notice would be removed from his personnel file when it became inactive, and that the agency would be prohibited from any further consideration of the written notice at that point in time." The evidence does not support the DJJ concern. We find no language in the hearing decision that either mandates the DJJ to remove written notices from the grievant's personnel file or prohibits the DJJ from considering the grievant's disciplinary history.

Thus, this Department has no basis to interfere with the hearing decision regarding grievance number 1.

Regarding grievance number 2, in his **Findings of Fact**, the hearing officer stated, in part, the following:

The second grievance which the Hearing Officer heard challenged a denial of an in-band pay adjustment to the Grievant's salary. The Grievant asserted that the pay denial was retaliatory. On June 25, 2007, the Grievant filed with the Human Resource Manager at his location a request for an in-band pay adjustment. At the request of the Superintendent of this location, the Human Resource Manager requested the Agency review the pay of all Corrections Officers at this location to see if any of the numbers were skewed. Based on the data contained therein, the Superintendent wrote to the Grievant on December 21, 2007 and stated that there was no significant difference between Grievant's salary and other employees with comparable years of relevant service.

The Hearing Officer notes that the Grievant has nine (9) years of total service and has an education level of having completed high school. The Hearing Officer notes that there appeared to be twelve (12) Security Officer III employees, which is the Grievant's designation, that have either nine (9) years total service or 9.1 years total service and a high school education. The lowest paid Security Officer III in this group was paid \$30,471 per year and the highest paid Security Officer III in this group was paid \$33,587 per year. The Grievant was paid \$30,522 per year. This means that the Grievant was paid approximately ten percent (10%) less than the highest paid member of his particular cohort and approximately one-tenth of one percent (.01%) more than the lowest member of his cohort. The Hearing Officer notes that the next highest paid member in this cohort was making approximately \$1,510 more than the Grievant or approximately five percent (5%) more on an annual basis. The next highest member was making approximately \$634 more per year or approximately two percent (2%) more in annual pay.

The Human Resource Manager testified that she thought any difference of more than \$100 would be deemed significant. She also testified, if there was simply one (1) outlying employee in a particular cohort that would not be enough to raise any type of issue. It seems clear that at least thirty-three percent (33%) of this particular Grievant's cohort were making substantially more than \$100 annually than he. Further, the Hearing Officer notes that there was one Security Officer III with one (1) year less total seniority who was making the same as the Grievant. There are three (3) Security Officer III employees with one (1) year less seniority who are making more than the Grievant, including one, who appears to be making approximately nine and one-half percent (9.5%) more than the Grievant. Neither the Human Resource Manager nor the Superintendent could offer any explanation or justification for these discrepancies.

The Hearing Officer finds that the Grievant did bear the burden of proof regarding grievance number 2 and he orders that the Grievant's request for an in-band pay increase be submitted to the appropriate parties at the Agency level, not his Superintendent, and that the Agency either grant him an in-band pay increase or specifically justify why there are numerous

other employees in the same employment designation, some with less experience, who are being paid substantially more.

The agency maintains that the hearing decision is inconsistent with DHRM Policy in that the policy does not require that new employees be given salaries that are less than current employees are, or that employees with equivalent amounts of state service earn the same salary. The agency continues, "On page 19 of the agency Salary Administration Plan, it states that Organizational Unit Heads are the persons in charge of and responsible for the operation of organizational units."

Normally, it would be appropriate for the organizational head to approve all salary requests. However, in the instant case, the hearing officer found that the Superintendent was a party to the retaliation. Therefore, it is the opinion of this Department that the hearing officer's decision in this regard is appropriate. Regarding the DJJ's concern about starting pay and internal salary alignment, this Department has no authority to challenge the hearing officer's assessment of the evidence in his findings of retaliation. We find no language in the hearing decision that restricts the DJJ in any manner as to how it elects to justify the grievant's salary in comparison to other similarly situated employees. Thus, this Department has no basis to interfere with the hearing decision in grievance number 2.

### **DECISION**

This Department has no basis to interfere with the application of this hearing decision

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Ernest G. Spratley  
Assistant Director,  
Office of Equal Employment Services

9062

COMMONWEALTH OF VIRGINIA  
FOURTEENTH JUDICIAL CIRCUIT

L.A. HARRIS, JR., JUDGE  
CATHERINE C. HAMMOND, JUDGE  
GARY A. HICKS, JUDGE  
DANIEL T. BALFOUR, JUDGE  
BURNETT MILLER, III, JUDGE



GOVERNMENT COMPLEX  
4301 E. PARHAM ROAD

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CIRCUIT COURT OF HENRICO COUNTY

August 5, 2010

Senior Assistant Attorney General  
900 E. Main Street  
Richmond, VA 23219

Department of Juvenile Justice v  
Grievance Appeal

Dear

I have reviewed the appellant's memorandum of law and the notebook filed by

I find that the rulings of the hearing officer were contrary to the law as established in Va. Code § 2.2-3006(B) and therefore should be set aside. There is no evidence to support a retaliation claim, as it did not result in any adverse employment action.

is still employed as a Senior Juvenile Corrections Officer, did not challenge his non-selection for a Sergeant position, is paid within the pay scale of comparable employees in comparable positions, and the chair issue is one that is controlled by security at the institution. Additionally the third grievance was based on a rescinded notice that no longer existed.

I ask to prepare the Order.

Very truly yours,  
*George F. Tidey (GFT)*  
George F. Tidey  
Judge

GFT/jwb

cc: William Maxey, Jr., Clerk