

Issue: Group III Written Notice with Termination (breach of public safety); Hearing Date: 06/16/10; Decision Issued: 06/23/10; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 9326; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 07/08/10; EDR Ruling No. 2011-2704 issued 09/07/10; Outcome: Remanded to AHO; Remand Decision issued 10/19/10; Outcome: Original Decision affirmed; **Administrative Review**: DHRM Ruling Request received 07/08/10; DHRM Ruling issued 11/03/10; Outcome: AHO's decision affirmed; **Administrative Review**: AHO Reconsideration Request on 10/19/10 Remand Decision received 11/02/10; Reconsideration Decision issued 11/04/10; Outcome: Request declined; **Administrative Review**: EDR Ruling Request on 10/19/10 Remand Decision and on 11/04/10 Reconsideration Decision received; EDR Ruling No. 2011-2823, 2011-2833 issued 01/20/11; Outcome: Remanded to AHO for second time; Second Remand Decision issued 02/03/11; Outcome: Prior AHO Decisions affirmed; **Judicial Review**: Appealed to Wythe County Circuit Court; Outcome: Hearing Officer's Decision Reversed (03/13/12) [CL-11-000061-00].

DECISION OF HEARING OFFICER

IN RE: CASE NO. 9326

HEARING DATE: JUNE 16, 2010

DECISION ISSUED: June 23, 2010

**PROCEDURAL HISTORY**

On January 2, 2009, Grievant filed a grievance against the Agency challenging a Group III Written Notice and termination regarding incidences of 9/8/07 and 9/17/07 which discipline was issued to her on 11/6/2007. The Notice states:

On 09-08-07, you allowed an offender who had been placed on probation for threatening to kill a Circuit Court Judge by cutting his personal vehicle's brake line to move to a residence out of our district. This move allowed the offender to reside in closer proximity to the judge's residence. You did not attempt to notify the receiving district until 10-29-07. Your last personal contact with this offender was on 08-03-07.

On 9-18-07, you allowed an offender, who is being supervised for Unlawful Wounding and Involuntary Manslaughter and who has serious mental health problems, to change his residence out of our district. This move allowed the offender to return to the town where the Involuntary Manslaughter occurred. As of this date, you have not notified the receiving district of his presence in their district. You last personal contact with this offender was 08-03-07.<sup>1</sup>

---

<sup>1</sup> Agency Exhibit H

Grievant filed her grievance in a timely fashion after she had exhausted a first resolution step (2-23-10), a second resolution step (3-01-10) and a third resolution step (3-16-10).

The matter qualified for a hearing on April 5, 2010.

Grievant requests reinstatement with back pay and benefits, costs and attorney fees.

On May 15, 2009, the Director of the Department of Employment Dispute Resolution issued Compliance Ruling Numbers 2009-2272, 2009-2289 stating the agency is ordered to produce the requested documents as identified above."<sup>2</sup>

At the time of the Hearing, Grievant's attorney noted that Form B as mailed to the Hearing Officer addressed only the issue of one parolee. However, within the package, the Written Notice described both infractions. The Agency requested a ruling from EDR as to whether Form B or the Written Notice controlled. A conference call was made to EDR during the Hearing, and the EDR verbal ruling was that the Written Notice described the issues to be heard.

In a letter dated April 23, 2010 the Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR) effective April 28, 2010. The matter was scheduled for a hearing during a pre-telephone conference on May 6, 2010, at which time the case was set for hearing on June 16, 2010 at 10:00 am in the conference room of the Law Office of Browning, Lamie & Gifford.

### **APPEARANCES**

Agency advocate  
Four (4) Agency witnesses  
Grievant's attorney

---

<sup>2</sup> Grievant Exhibit I

Four (4) Grievant witnesses  
Grievant

### **ISSUES**

Was a Group III Written Notice of 11/6/2007 and termination warranted?

Are any mitigating circumstances relevant to the action?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievant has the burden of proof to show that the relief sought should be granted. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

The Grievant challenges a Group III Written Notice and termination issued in November of 2007. On August 30, 2007 Grievant noted on the Officer's Log Sheet that an offender was moving on September 8<sup>th</sup> and 9<sup>th</sup>, 2007 from her jurisdiction, (District 16), to (District 28). A transfer of offender request to District 28 was not dictated until 9/28/07. The Log shows that the dictation was not given to the transcriptionist until October 25, 2007.<sup>3</sup> This was a period of two months. This offender was found guilty of

---

<sup>3</sup> Agency Exhibit E

obstruction of justice by making threats directed toward a Circuit Court Judge. The Transfer Request was mailed to the receiving jurisdiction on October 29, 2007.<sup>4</sup>

On 9/18/2007 Grievant noted on the Officer's Log Sheet that an offender had moved from her jurisdiction, District 16, to District 28. No notification of transfer of offender was ever originated or sent to the receiving jurisdiction. In an email dated November 1, 2007, Grievant's supervisor sent an email to the receiving jurisdiction stating, "I have found another case that has moved to your District...I will follow up with a transfer request."<sup>5</sup> This offender had been convicted of involuntary manslaughter and had mental health issues.

Transfer requests that advise a receiving jurisdiction a parolee is coming into their district are to be made in a timely fashion. The receiving district then has forty-five (45) days to process a request once given. *Commonwealth of Virginia Department of Corrections Divisions of Operations Community Corrections Operating Procedures 4-6.0(3), 4-6.1(1).*<sup>6</sup>

#### **APPLICABLE LAW**

Unacceptable behavior is divided into three (3) 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 (2) Group II offenses normally should warrant

---

<sup>4</sup> Agency Exhibit E

<sup>5</sup> Agency Exhibit F

<sup>6</sup> Agency Exhibit D

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.<sup>7</sup> While the Grievant's conduct does not specifically fit any of the non-inclusive examples of unacceptable Group III offenses, it is still of a serious enough nature to warrant termination.

Va. Code § 2.2-3005.1<sup>8</sup> authorizes the Hearing Officer 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.

### OPINION

Grievant, a Senior Parole Officer for the Virginia Department of Corrections received a Group III Discipline and Dismissal for her failure to advise receiving jurisdictions in two

---

<sup>7</sup> Agency Exhibit I

<sup>8</sup> Va Code § 2.2-3005.1

(2) identified cases that parolees were being relocated to their jurisdiction. In one instance, the Notice was finally given two (2) months after transfer, and in the other case, the Notice was never sent by Grievant.

Grievant believes she caused no harm by not making timely notice, and therefore should not be disciplined. There was considerable testimony about the definition of "public safety". While no bright line was defined, Grievant's actions (or lack thereof) were clearly by all measures a significant breach of public safety.

Grievant's history indicates she was self-motivated to attend college, as education is not particularly valued in her family. She did volunteer work at the local parole office before being hired. After being hired, she eventually attained the level of Senior Parole Officer. She did take extra training in substance abuse counseling and conducted group sessions.

There was evidence at the time of the infractions that Grievant was over-worked and may have had medical problems. She apparently did not discuss this with her supervisor or request assistance. It is regrettable the Agency was not able to work with her on these issues as it appears they lost a well-trained employee. Nothing, however, mitigates Grievant's abrogation of her basic and important duty to notify supervising personnel that a serious offender has moved to their district.

Protecting the public was clearly a responsibility of Grievant in her position as Senior Parole Officer. Grievant's failure to notify the receiving jurisdiction of a parolee transfer to their location is egregious and clearly a breach of public safety.

## DECISION

For the above reasons, the Group III Disciplinary Action, including termination of employment, is **upheld**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.<sup>9</sup> Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in

---

<sup>9</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 and EDR Consultant.



compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution  
600 East Main Street, suite 400  
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose.<sup>10</sup> You must give a copy of your notice of appeal to the Director of the Department of

---

<sup>10</sup> An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

---

Sondra K. Alan, Hearing Officer

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 9326  
HEARING DATE: June 16, 2010  
DECISION ISSUED: June 23, 2010  
RECONSIDERATION: October 19, 2010

RECONSIDERATION

After proper request by Grievant for review by the Department of Employment Dispute Resolution, this Hearing Officer has been directed to reconsider the following matters:<sup>11</sup>

1. Did the Hearing Officer apply the appropriate standard for the burden of proof?
2. Did the Hearing Officer correctly consider the issue that "waiver" status altered Grievant's duty to send transfer information to the receiving jurisdiction?
3. Did the Hearing Officer consider other examples of delayed transfer to show Grievant's punishment was inconsistently applied?

OPINION

Did the Hearing Officer apply the appropriate standard for the burden of proof?

In reaching the original decision, this Hearing Officer did apply the standard of placing the burden on the Agency<sup>12</sup>, who was the forward party in the hearing, of proving their disciplinary action was warranted as proved by a preponderance of the evidence.<sup>13</sup> While not stated clearly, the Hearing Officer applied a duty on the Grievant only on proving her allegations that there were mitigating circumstances not considered by the Agency sufficient to reduce her Group II Discipline. For the reason stated in the Opinion, the

---

<sup>11</sup> Section 7.2(c) Dept. of Employment Dispute Resolution (EDR) *Grievance Procedure Manual (GPM)*

<sup>12</sup> GPM §5.8 (2)

<sup>13</sup> GPM §9

Hearing Officer did find the Agency had met its burden of proving offenses serious enough to warrant a Group II Disciplinary Action had occurred.

Did the Hearing Officer correctly consider the issue that "waiver" status altered Grievant's duty to send transfer information to the receiving jurisdiction?

This Hearing Officer did hear evidence regarding the concept of "waiver" as it applied to Grievant. Grievant believed she was not under a duty to report the parolees' location to receiving jurisdiction because the matters were in "waiver". This forty-five (45) day "wavier" period was described differently by Grievant than the Agency. This Hearing Officer found the Agency's explanation to be the more plausible. That is, as stated by Agency in testimony, "waiver" is the forty-five days after the receiving jurisdiction has been given notice of the parolee's move. To sufficiently provide for the parolee's care during this forty-five day time period, the sending Agency is to assist in the care and control of the parolees. The waiver period is a benefit for the receiving jurisdiction but not intended as a safety net before reporting by the sending Agency. Therefore, the Hearing Officer believed the "waiver" period should not be a defense of Grievant's failure to report even if she was still tracking the parolee.

Did the Hearing Officer consider other examples of delayed transfer to show Grievant's punishment was inconsistently applied?

This Hearing Officer heard evidence of other employees' infractions of duty as presented by the Grievant. Grievant believed these were examples that should mitigate Grievant's punishment.<sup>14</sup> In both cases, the person responsible for the alleged transfer

delay was not noted on the exhibit presented.<sup>15</sup> In one case, the matter was filed by an unknown person rather than properly being given to the probationary officer. In another, the Agency stated earlier transfer papers had been sent and the papers found in the exhibit as being sent later were simply a follow-up. It would, of course, be impossible to punish an unknown person. In neither case was Grievant able to show a specific named person had received different punishment than Grievant.<sup>16</sup> Therefore, the Hearing Officer did not find any examples that would warrant unfair application of her punishment.

## DECISION

For the above reasons, the previous decision in this case is **upheld**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

4. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly

---

<sup>4</sup> 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 EDR director's *Rules for conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

<sup>5</sup>Grievant's Exhibit A

<sup>16</sup> *Rules* VI(B)(1) describe as a mitigating circumstance: "Inconsistent Application: The discipline is inconsistent with how other similarly situated employees have been treated." The *Rules* do not expressly address what constitutes a similarly situated employee. However, courts have held that in order "[t]o make out a claim of disparate treatment the charges and the circumstances surrounding the charged behavior must be substantially similar." *Abaqueta v. U.S.A.*, 255 F. Supp. 2d 1020, 1029 (2003 D. Ariz.) quoting *Archuleta v. Department of Air Force*, 16 M.S.P.R. 404,406 (1983).

discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

5. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

6. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

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

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose.<sup>17</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

---

Sondra K. Alan, Hearing Officer

---

<sup>17</sup> An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Corrections

November 3, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9326. The grievant is challenging the decision because she believes the hearing decision is inconsistent with law and policy as listed below in the Discussion section of this ruling. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

**FACTS**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer made, in relevant part, the following observations in the Findings of Fact:

The Grievant challenges a Group III Written Notice and termination issued in November of 2007. On August 30, 2007 Grievant noted on the Officer's Log Sheet that an offender was moving on September 8th and 9th, 2007 from her jurisdiction, (District 16), to (District 28). A transfer of offender request to District 28 was not dictated until 9/28/07. The Log shows that the dictation was not given to the transcriptionist until October 25, 2007. This was a period of two months. This offender was found guilty of obstruction of justice by making threats directed toward a Circuit Court Judge. The Transfer Request was mailed to the receiving jurisdiction on October 29, 2007.

On 9/18/2007 Grievant noted on the Officer's Log Sheet that an offender had moved from her jurisdiction, District 16, to District 28. No notification of transfer of offender was ever originated or sent to the receiving jurisdiction. In an email dated November 1, 2007, Grievant's supervisor sent an email to the receiving jurisdiction stating, "I have found another case that has moved to your District...I will follow up with a transfer request." This offender had been convicted of involuntary manslaughter and had mental health issues.

Transfer requests that advise a receiving jurisdiction a parolee is coming into their district are to be made in a timely fashion. The receiving district then has forty-five (45) days to process a request once given. Commonwealth of Virginia Department of Corrections Divisions of Operations Community Corrections Operating Procedures 4-6.0(3), 4-6.1(1).



## APPLICABLE LAW

Unacceptable behavior is divided into three (3) 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 (2) 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. While the Grievant’s conduct does not specifically fit any of the non-inclusive examples of unacceptable Group III offenses, it is still of a serious enough nature to warrant termination.

Va. Code § 2.2-3005.18 authorizes the Hearing Officer 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.

## OPINION

Grievant, a Senior Parole Officer for the Virginia Department of Corrections received a Group III Discipline and Dismissal for her failure to (sic) advice receiving jurisdictions in two (2) identified cases that parolees were being relocated to their jurisdiction. In one instance, the Notice was finally given two (2) months after transfer, and in the other case, the Notice was never sent by Grievant.

Grievant believes she caused no harm by not making timely notice, and therefore should not be disciplined. There was considerable testimony about the definition of “public safety”. While no bright line was defined, Grievant’s actions (or lack thereof) were clearly by all measures a significant breach of public safety.

Grievant’s history indicates she was self-motivated to attend college, as education as not particularly valued in her family. She did volunteer work at the local parole office before being hired. After being hired, she eventually

attained the level of Senior Parole Officer. She did take extra training in substance abuse counseling and conducted group sessions.

There was evidence at the time of the infractions that Grievant was over-worked and may have had medical problems. She apparently did not discuss this with her supervisor or request assistance. It is regrettable the Agency was not able to work with her on these issues as it appears they lost a well-trained employee. Nothing, however, mitigates Grievant's abrogation of her basic and important duty to notify supervising personnel that a serious offender has moved to their district.

Protecting the public was clearly a responsibility of Grievant in her position as Senior Parole Officer. Grievant's failure to notify the receiving jurisdiction of a parolee transfer to their location is egregious and clearly a breach of public safety.

### **DECISION**

For the above reasons, the Group III Disciplinary Action, including termination, is upheld.

In a Reconsideration Decision dated October 19, 2010, the hearing officer upheld the original decision.

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is not in compliance with human resource management policy and procedure.

In her request to this Department and to EDR for administrative reviews, the grievant asserts the following:

1. that the agency's discipline was not consistent with law and policy
2. the agency's discipline exceeded the limits of reasonableness
3. the hearing officer confused and misapplied the burden of proof
4. the hearing officer failed to make findings of fact sufficient to support her opinion.

The Director of the Department of Employment Dispute Resolution addressed some of the above issues and remanded a single issue to the hearing officer for reconsideration. In her administrative review, the Director of EDR stated, in part, "...grievant has appropriately raised her concerns regarding policy with the Director of DHRM and only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy."

An appeal of the hearing decision must identify with which human resource policy or procedure the hearing decision is inconsistent. The grievant has failed to identify any such policy or procedure, therefore this Agency has no basis to interfere with the application of the original hearing decision.

The grievant requested a second administrative review from the Department of Human Resource Management prior to the hearing officer issuing a reconsideration decision. Again, the grievant failed to identify any such policy or procedure with which the hearing decision is inconsistent. In our opinion, the concerns raised by the grievant represent evidentiary issues which this Department has no authority to address.

### **CONCLUSION**

Based the review by the Department of Human Resource Management, we find no bases to interfere with the application of this hearing decision.

---

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

DECISION OF HEARING OFFICER  
IN RE: RECONSIDERATION OF CASE NO. 9326  
DECISION ISSUED: February 3, 2011

PROCEDURAL HISTORY

In a letter dated January 20, 2011, the Director of the Department of Employment Dispute Resolution issued a ruling on a Reconsideration of Case No. 9326 regarding the Hearing Officer's Decision and Reconsideration of that case.

ISSUES

The sole matter ruled for the Hearing Officer to reconsider is:

1. Did the Hearing Officer err when finding as to whether or not the Grievant had produced, by the preponderance of the evidence, a similar case of misconduct which was treated differently than Grievant's discipline?

BURDEN OF PROOF

Grievant has the burden of proof to show that the relief sought should be granted.<sup>18</sup> A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not.<sup>19</sup>

APPLICABLE POLICY

Va. Code § 2.2-3005.18 authorizes the Hearing Officer 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.

Here, Grievant is entitled to proffer evidence of similar situations or events wherein an employee was disciplined differently than Grievant. Grievant did produce Grievant's Exhibit A. If employees are punished differently for the same offense, Grievant is entitled to request mitigation of Grievant's discipline.<sup>20</sup>

---

<sup>18</sup> Grievance Procedure Manual (GPM) § 5.8

<sup>19</sup> GPM § 9.

<sup>20</sup> Section VI(B)(1) of the *Rules* provides that "Inconsistent Application," defined as discipline "inconsistent with how other similarly situation employees have been treated" serves as an example of mitigating circumstances.

## OPINION

Grievant's evidence was a transfer letter signed by a specific employee and dated well after probationer was released from jail.<sup>21</sup> Grievant's evidence did not include officer log sheets (such as was evidenced in Grievant's cases). Upon examination of the evidence, there is no indication that the Probationer had not been in Wythe County his first six months after released from jail. The report states "Offender has lived in Connecticut for twenty-two years. Never has lived in Virginia. (emphasis added)" which refers to past tense. Probationer may have lived in Virginia for six months while transfer was considered and he then returned home. Upon release from jail, the employee in charge did verify probationer's Connecticut connections, but that did not mean he was already there. Further, the employee in this matter stated at hearing that the letter in evidence may have been provided to attach additional information and dated when that information was sent. He stated he did not remember the specifics of the case and he did not state that he knew an earlier transfer (if any) was filed as was incorrectly stated by the Hearing Officer.

However, it remains the Grievant's burden to prove her claim. While suspicion may arise from the documents produced, the testimony of the employee was one possible explanation. Further, Grievant did not produce any additional evidence to corroborate her claim such as officer log sheets or contrary witness testimony. The employee in question was not punished but it is possible he was not disciplined because there was no cause for discipline.<sup>22</sup> From the record, there is no way of confirming misconduct had occurred and there is no discipline to compare to Grievant's discipline.

## DECISION

For the reasons stated herein, the Hearing Officer's decision of June 23, 2010 and reconsideration of October 19, 2010 are **UPHELD**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.<sup>23</sup> Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

7. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
8. A challenge that the hearing decision is inconsistent with state policy or a challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must

---

<sup>21</sup> Grievant's Exhibit A

<sup>22</sup> Hearing transcript at 177

<sup>23</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 and EDR Consultant.

cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

9. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

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

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision.

However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

5. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
6. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose.<sup>24</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

---

Sondra K. Alan, Hearing Officer

---

<sup>24</sup> An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

9326

RECEIVED  
MAR 22 2012  
EDH

VIRGINIA:

IN THE CIRCUIT COURT OF WYTHE COUNTY

	)	
	)	
Grievant	)	
	)	Case No. CL11-000061-00
v.	)	
	)	ORDER
Virginia Department of Corrections,	)	
	)	
Respondent	)	
_____	)	

Upon consideration of the record in this case, including pleadings, exhibits, transcripts, counsels' respective memoranda, and arguments made at the hearing on November 2, 2011, and in accordance with the Court's Opinion dated January 30, 2012 which is incorporated by reference into this Order, the Court holds that the decision of the hearing officer in this matter is "contradictory to law" within the meaning of Code of Virginia §2.2-3006 B.

The Court further holds that grievant was denied her right to procedural due process guaranteed by both the Constitution of the United States and the Constitution of Virginia and further holds that the hearing officer violated Code of Virginia §§2.2-3000 A, 2.2-3004 F and 2.2-3005 C 6 by not allowing counsel for grievant adequately to cross-examine witnesses or elicit or to produce evidence in mitigation.

The Court further holds that grievant was denied her right to procedural due process guaranteed by both the Constitution of the United States and the Constitution of Virginia and further holds that the hearing officer violated Code of Virginia §§2.2-3000 A and 2.2-3004 F by not allowing counsel for grievant to cross-examine a Department of Corrections witness pertaining to Operating Procedure 4 and its relevance to "public safety" concerns for which grievant was written up.

The Court further holds that grievant was denied her right to procedural due process guaranteed by both the Constitution of the United States and the Constitution of Virginia in that the hearing officer upheld the discipline imposed by the Department of Correction when the Department admitted not only that it failed to follow its own policy that it conduct a "full and thorough disciplinary investigation," but that it conducted no investigation at all.

It is therefore ORDERED that the decision of the hearing officer is REVERSED and this matter is REMANDED with directions to:

1. allow grievant to fully develop the issue of disparate treatment of like employees and consider if such evidence impacts mitigation of offenses and less severe disciplinary action; and
2. in light of this opinion, reconsider the agency's total lack of any "full and thorough investigation" of offenses, and the degree to which agency's reliance on unreliable sources may have impacted the severity of the discipline; and
3. disregard any consideration of alleged violation of Operating Procedure 4 as it was not mentioned in grievant's Written Notice.

Upon motion of counsel for grievant and after reasonable notice properly served upon counsel for the Department of Corrections, this Order is entered without endorsement of counsel for the Department of Corrections, *to all of which the court duly notes the objection by counsel for the Department.* *GHS*  
The Clerk shall provide a certified copy of this Order to the Virginia Department of Employment Dispute Resolution and to counsel of record.

ENTER: 3-13-12

*Charles H. Smith, Jr.*  
Judge *Deignate*

Requested:

*David G. Harrison*  
David G. Harrison, Esquire (VSB #17590)  
Counsel for Grievant

A COPY TESTE:  
HAYDEN H. HORNEY, CLERK  
CIRCUIT COURT OF WYTHE COUNTY, VA  
2 *Ashley King* DEP. CLERK