Issue: Administrative Review of Hearing Officer's Decision in Case No. 10476; Ruling Date: January 15, 2015; Ruling No. 2015-4075; Agency: Department of Corrections; Outcome: Remanded to AHO for reopening of hearing.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2015-4075
January 15, 2015

The Department of Corrections (the agency) has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 10476. For the reasons set forth below, EDR remands the matter to the hearing officer for further proceedings as outlined below.

FACTUAL AND PROCEDURAL BACKGROUND

Based on the agency advocate's description of the documents, on September 16, 2014, the grievant received two Written Notices from the agency: 1) a Group III Written Notice for falsifying documents related to class attendance registers on August 25 and 27 when the grievant was not present to teach the classes, and 2) a Group II Written Notice for failing to obtain supervisory permission to leave work on August 25 and 27. The grievant was terminated as a result of the disciplinary action(s) on September 16 as well.

On September 19, 2014, EDR received a single dismissal grievance from the grievant purporting to challenge her termination. EDR provided a copy of the dismissal grievance to the agency and requested "Written Notice(s) or other documentation reportedly resulting in the grievant's termination . . . ." In response, the agency provided to EDR only the Group III Written Notice and documentation associated with that disciplinary action. The agency also only listed the Group III Written Notice as the only issue on the Form B. EDR received no documentation regarding the Group II Written Notice. Thus, EDR had no knowledge that a second disciplinary action existed at that time. The case was then appointed to the hearing officer with only the Group III Written Notice included in the appointment packet.

The hearing in Case Number 10476 occurred on December 9, 2014. The agency's advocate presented her opening statement and made no mention of the Group II Written Notice.[1] At that time, the grievant's advocate raised the question of whether the Group II was a part of the case and what the next steps would be.[2] A review of the hearing record discussion between the parties and the hearing officer about these preliminary matters indicates a confusion of events.

During the discussion of these preliminary matters, the agency's advocate appears to have taken the position, or at least made statements leading to a conclusion, that the Group II

[1] Hearing Recording at Track 1 2:28 – 6:34.
[2] *Id.* at 6:38 – 8:15.

was not a part of the hearing and the agency was not prepared to move forward on that disciplinary action as part of the hearing.[3] Indeed, nothing about the Group II Written Notice was included in the agency's proposed exhibits. The agency's advocate created further confusion by representing to the hearing officer that she had recently received an acknowledgement e-mail from EDR regarding a second grievance or separate hearing involving the grievant, which she surmised was regarding the Group II. Thus, the agency's advocate represented to the hearing officer that the Group II was to be heard in a separate hearing matter with another hearing officer.[4] Unfortunately, the agency's advocate was mistaken. EDR never sent a notification about a second grievance or a separate hearing.

At this point during the hearing, EDR was contacted by phone and the undersigned EDR Director spoke with the parties and the hearing officer. The hearing officer described the concern that there was apparently a second Group II Written Notice that may have been challenged in a separate grievance or subject to a separate hearing matter. The agency's advocate again represented that she had received an acknowledgement from EDR about a second hearing on the Group II Written Notice separately. The grievant's attorney requested to have both matters consolidated for the single hearing, which was currently progressing, by phone.[5] It was during this phone call that EDR first became aware that there was a Group II Written Notice at all. Up until that time, EDR had never known there was a second disciplinary action in this case.

During the telephone call, the EDR Director indicated that the question was not necessarily one of consolidation, because both Written Notices could have potentially been challenged in the single dismissal grievance. The EDR Director stated that such a question could be addressed by the hearing officer with input from the parties as to what Written Notices had been challenged in the grievance. If both grievances were determined to have been grieved in the single dismissal grievance and if the parties were not prepared to move forward on the other Group II Written Notice, the case could be continued until a later date.[6] The grievant's attorney sought "consolidation" of the two Written Notices (which cannot be done[7]) through EDR's "inherent authority."[8] The EDR Director indicated that EDR does not consolidate cases by phone, especially in the middle of a hearing, and that EDR had not seen any paperwork regarding a second grievance, if it existed, and thus would be unable to determine whether consolidation was appropriate.[9]

Following the call, the grievant's attorney sought to move forward only on the Group III Written Notice at the hearing with the stipulation that the other Group II Written Notice would

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[3] *Id.* at 8:22 – 8:5, 23:42 – 24:54. This position would appear to be at odds with the agency's current statement in its administrative review request, wherein it was stated that the dismissal grievance challenged both the Group III and the Group II.
[4] Hearing Recording at Track 1, 8:22 – 8:45, 17:48 – 19:00.
[5] *Id.* at 20:09 – 20:49; 21:46 – 22:48.
[6] *Id.* at 20:49 – 21:45.
[7] EDR's consolidation authority is to address the combination of multiple *grievances* for a single hearing, not the combination of multiple disciplinary actions challenged in a single grievance for a single hearing. *See Grievance Procedure Manual* § 8.5. If a single grievance challenges multiple disciplinary actions, all the challenged disciplinary actions are at issue in the hearing on that particular grievance. It does not require a consolidation ruling to combine them.
[8] Hearing Recording at Track 1, 22:57 – 23:02, 25:44 – 28:23.
[9] *Id.* at 28:24 – 29:00.

not be considered or addressed in any respect by the hearing officer in making a decision on the Group III and the termination. The agency's advocate agreed to the stipulation and the hearing proceeded on just the Group III Written Notice.[10]

In his decision, the hearing officer reduced the Group III Written Notice to a Group II because, based on his factual determinations, the agency had not proved that the grievant intended to falsify the documents identified, but rather had included incorrect information by oversight, mistake, or otherwise poor performance.[11] Thus, the disciplinary action did not rise to the level of a Group III offense in the hearing officer's application of the Standards of Conduct policy. Because the resulting disciplinary action was only a Group II, which could not support termination on its own, the hearing officer ordered that the grievant be reinstated to her former position.[12]

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to procedural compliance with the grievance procedure."[13] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[14]

In its request for administrative review, the agency has challenged the hearing officer's determination that the grievant did not falsify documents with the requisite intent. The agency additionally asks EDR to "correct its oversight and acknowledge the Grievant's grievance of the Group II also issued to her on September 16, 2014, which she timely grieved . . . ." The agency also asserts that the hearing officer failed to follow the *Rules for Conducting Grievance Hearings* because he did not "withhold final disposition of the issue of termination until the Grievant's other grievance of her Group II" was decided. Each of these arguments will be addressed generally below.[15]

Hearing Officer's Consideration of the Evidence

The agency's request for administrative review challenges the hearing officer's determinations that the grievant did not falsify state records with the requisite intent based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues and grounds in the record for those findings."[17] Further, in cases involving discipline, the hearing officer reviews the evidence *de*

[10] *Id.* at 31:44 – 33:24.
[11] Decision of Hearing Officer, Case No. 10476, December 18, 2014, at 4 – 5.
[12] *Id.* at 6.
[13] Va. Code §§ 2.2-1202.1(2), (3), (5).
[14] *See Grievance Procedure Manual* § 6.4(3).
[15] Many of the particulars of the briefing in this case will not be addressed further as they will largely be considered moot due to the overall disposition of this matter. To the extent there are points or arguments in either party's briefs that are not addressed expressly herein, it should not be taken as an indication that EDR agrees with those positions.
[16] Va. Code § 2.2-3005.1(C).
[17] *Grievance Procedure Manual* § 5.9.

novo to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[18] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[19] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. This is such a case. In this instance, the hearing officer's factual findings and determinations were based upon record evidence and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Nevertheless, much of the agency's argument on this point also appears to challenge the interpretation of policy by the hearing officer in the definition of falsification and what intent is required to be proved by the agency. Such matters are questions of state and/or agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[20] The agency has requested such a review. Accordingly, the agency's policy arguments in this regard will not be addressed in this review.

Alleged "Oversight" by EDR

The agency's administrative review request further seeks to have EDR correct its alleged "error" in failing to identify the Group II Written Notice as an issue for the grievance hearing. When this case was appointed to the hearing officer, EDR did not know about the Group II Written Notice. A reading of the dismissal grievance without knowledge of the fact that there was such a second Written Notice and without knowledge of the grounds for that second Written Notice does not reasonably reveal any indication that such a second Written Notice existed. EDR had no way of knowing that a second Written Notice existed to identify it in any meaningful way to the hearing officer and parties.

Although the agency's advocate does not state where EDR allegedly failed to identify the Group II as an issue for the hearing, the only document that could reasonably be construed in this regard is the Form B provided with the appointment packet to the hearing officer. However, it was the agency that completed this form and listed the hearing issues as only the Group III Written Notice, making no reference to the Group II. When the grievance was initially filed, the agency only submitted the Group III to EDR. EDR had no way of identifying a Written Notice it did not know existed as an issue for the hearing.

Furthermore, the agency's advocate's argument would appear to place some heightened importance on the Form B that does not exist. Nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* states that the Form B defines what issues can be considered in the hearing. Rather, it is the Grievance Form A that defines what has been grieved

[18] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[19] *Grievance Procedure Manual* § 5.8.
[20] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

and it is the hearing officer's purview (with potential compliance review by EDR) to assess the Grievance Form A and determine what matters are at issue. The parties were advised as much during the hearing by the undersigned EDR Director, as discussed above.

To the extent the hearing officer ruled that he did not have authority to address the Group II, it was in error. As the agency now concedes, and EDR agrees, both Written Notices, though not explicitly identified, were challenged as part of the dismissal grievance. Thus, both Written Notices should have been addressed in the hearing process, potentially at a reconvened hearing. However, the parties' actions further complicated this question and essentially prevented the hearing officer from taking the steps necessary to properly consider and address the entire disciplinary record in the hearing decision.

First, the agency did not present and was not prepared to present any evidence regarding the Group II Written Notice at the hearing on December 9, 2014. The Group II Written Notice was not an exhibit offered by the agency at the hearing. Without even a copy of the Group II Written Notice admitted into the record, the hearing officer could not consider it at all, even as background information and/or as to prior disciplinary history.

Second, the grievant and the agency agreed to proceed with the hearing on December 9 on just the Group III. In so doing, the advocates for both sides expressly stipulated that the hearing officer would not address the Group II in any way in making a decision in the case, including as to accumulation. As such, it is not surprising that the Group II was not considered in the hearing decision; it was a result of the parties' agreement.

A multitude of different missteps could be pointed out to explain how this case has progressed to the procedural morass it has become. Moreover, the parties and the hearing officer had the ability and opportunity to correctly handle this matter without EDR's involvement. Although not consistent with its position at hearing or with its conduct in the preliminary stages of this hearing process, the agency now admits that the grievant's dismissal grievance challenged both the Group III and Group II Written Notices. Thus, both Written Notices should have been considered at issue in this case and addressed by the hearing officer. The undersigned EDR Director advised the parties when called on the phone during the hearing that, with input from the parties, the hearing officer could determine what matters were at issue, potentially to include both Written Notices, and the question of consolidation of multiple grievances (which did not exist) was not apt. The parties' actions prior to and during the hearing prevented that result; it was not caused by any action or inaction by EDR. Now that EDR is asked to address the situation, we will do so to bring procedural coherence to this matter. To conclude, as to the agency's claim of some "oversight" or "error" by EDR in this case, there was none.

Failure to Withhold Final Disposition

The agency correctly cites Section VI(B)(3) of the *Rules for Conducting Grievance Hearings*, which provides the following:

> If the grievance involves an agency action based on accumulated active Written Notices, the hearing officer must ascertain from the agency whether any of the other Written Notices supporting the action are being grieved. If so, final disposition of the grievance before the hearing officer must wait until the

> grievances on the other Written Notices have been decided. The hearing officer should determine immediately the appropriate level of discipline (Group I, II, or II) for the grievance before him or her, but must await the outcome of the other grievance(s) to determine whether there are sufficient cumulative active Written Notices to support the agency's disciplinary action.

While this case did not initially involve an agency action "based on accumulated active Written Notices," the hearing officer and all parties were aware at hearing that two disciplinary actions existed. The clear purpose of this section of the *Rules* is for hearing officers not to rule on the final disciplinary action, i.e., a termination, until all grieved Written Notices are heard and decided so that an employee's full disciplinary record is properly considered. Whether a result of the parties' stipulation or confusion created by the agency's advocate, that did not occur in this case.

During the hearing, the hearing officer was operating under the assumption that either the two Written Notices were grieved separately and would be heard in different hearings, or both Written Notices were grieved in the single dismissal grievance. Under the first assumption, the hearing officer did not adhere to the parameters of the above-cited section of the *Rules for Conducting Grievance Hearings*. If the hearing officer was operating under the second assumption, he should not have permitted the parties to agree to the stipulation to forego adjudication at that time or at a reconvened hearing on the Group II without the consequences for both parties addressed at hearing and in the decision more fully. This stipulation has led to a variety of unacceptable consequences prejudicing both sides in different respects. EDR sees no other appropriate option except to remand the case back to the hearing officer to reopen the hearing.

CONCLUSION AND FURTHER PROCEEDINGS

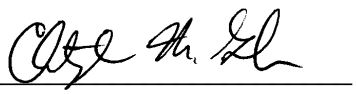
For the reasons stated above, the case is remanded to the hearing officer for reopening and further proceedings consistent with this ruling. The hearing officer is directed to reconvene the hearing to hear the grievant's challenge to the Group II Written Notice (and the agency's case in chief in support of that Written Notice). The grievant's entire disciplinary record, including both Written Notices, must then be considered in determining the final disposition of the grievant's termination or reinstatement, consistent with the *Rules for Conducting Grievance Hearings*.

The parties may perceive a certain degree of prejudice to both sides resulting from this remand. However, EDR's goal is to return the case to the point where the problems occurred for a proper handling of the matter. EDR is also attempting to avoid the prejudice created by the parties' stipulation to keep the Group II from consideration by this hearing officer. First, that stipulation appears to have been influenced, at least in part, by a false presumption that there could exist a second hearing on the Group II. That misunderstanding needs to be fixed. Secondly, the parties' stipulation would have essentially waived the grievant's challenge to the Group II and conceded the agency's ability to consider both resulting, active disciplinary actions. Indeed, any remand to provide one side with either of those opportunities must necessarily include the other to be balanced.

Further, a likely potential outcome if this case is not remanded at this time is that the grievant will be left with two active Group II Written Notices in her file. She would presumably be reinstated, but then the agency might likely seek to immediately dismiss her again because of the two active Group II Written Notices. Whether such an action is appropriate or permissible, the end result would be another hearing on the Group II with the same questions at issue that will be considered at the remanded hearing EDR is ordering now. The only difference would be more time and efforts wasted. EDR seeks to bring a more efficient conclusion to this matter. Thus, the remand described above is the only way to properly address the errors that have occurred: return the case to the point where things went wrong.

EDR directs for the remand to occur before DHRM addresses the agency's administrative review based on questions of compliance with state and/or policy. The parties will have the opportunity to request administrative review again (both from EDR and DHRM) on any issues arising in the remand decision issued by the hearing officer. In addition, following the remand decision, DHRM will have the opportunity to address all issues of policy timely raised by either party previously.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[21] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]



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[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).