Issue: Compliance-Hearing Decision; Ruling Date: January 7, 2002; Ruling #2001-200; Agency: Department of Corrections; Outcome: not appropriate for this agency to determine this issue.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2001-200
January 7, 2002

The agency, through its representative, has appealed the hearing officer's October 9, 2001 decision in Hearing Nos. 5298 and 5313.[1] The agency objects to the decision on the grounds that the hearing officer relied on dictionary definitions of "accessory" and "fraternize," placing more emphasis on those definitions than on the agency's interpretations of those terms. The agency asserts further that the grievant had notice of its policy and that its interpretation of its own policy is entitled to substantial deference. As discussed further below, it is not appropriate for this Department to determine this issue.

FACTS

The grievant was employed as a Corrections Officer with Department of Corrections (DOC). On August 3, 2001, he received two Group III Written Notices for "accessory to fraternization" and "fraternization with an inmate." The first Written Notice arose from the grievant's knowledge that two other Corrections Officers had received tattoos from inmates and from his failure to report these incidents to the appropriate authorities. The second group notice alleges that he fraternized with an inmate, in violation of agency policy, by passing a message from an inmate to the two officers who had received tattoos. The two Group III Written Notices resulted in discharge from his position.[2]

The grievant challenged his termination and the issuance of these two Written Notices, and a grievance hearing was held on October 9, 2001. In his hearing decision, the administrative hearing officer noted that DOC Policy does not name "accessory to fraternization" as an offense, but that the list in the policy was not all-inclusive.[3] However, because the policy does not define what is meant by "accessory," the hearing officer looked to a dictionary definition to determine the meaning of the word.[4] He also relied on Virginia case law and concluded that merely *knowing* of an offense while not

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[1] On September 27, 2001, the Director of this Department consolidated the grievant's separate challenges to two written notices.
[2] The *Standards of Conduct* states that "the normal disciplinary action for a Group III offense is the issuance of a Written Notice and discharge." DHRM Policy 1.60, page 11.
[3] *See* DOC Policy No. 5-10, § 5-10.17.
[4] Decision of Hearing Officer, page 4. The hearing officer looked to *Black's Law Dictionary* (6th ed.) and found that "accessory" meant "contributing to or aiding in the commission of a crime."

disclosing it does not make an individual an "accessory."[5] Although the hearing officer determined that the grievant was not an accessory, he did find that the grievant violated agency policy by failing to report "'suspicious activity or irregularities at once to [sic] supervisor,'" a Group II offense.[6] The agency claims that the hearing officer abused his authority, thus violating the grievance procedure, by placing an emphasis on the dictionary definition and on the court's determination of what constitutes an accessory, rather than accepting the agency's interpretation that the grievant was an accessory to the offense.

With respect to DOC's fraternization claim, the hearing officer again found no definition or explanation in agency policy as to what was meant by "fraternization." He again looked to a dictionary and determined that the word could be interpreted to mean association "in a friendly or brotherly way."[7] Upon examining the evidence, the hearing officer determined that there was nothing to indicate that the grievant's conversation with the inmate was "friendly" or "brotherly," and that it is common practice in DOC for inmates to ask Corrections Officers to ask other Officers to speak with the inmates.[8] Thus, he rescinded this Group III entirely.

In response to the agency's appeal, the grievant asserts that the hearing officer did not violate the rules of the grievance procedure because he used the plain meaning of the terms "accessory" and "fraternization." The grievant argues that by using dictionary definitions to define the terms, the hearing officer has not placed an undue burden on the agency to prove the meaning of "accessory" and "fraternization." Further, the grievant states that DOC did not meet its burden of proving that he was guilty of fraternizing with inmates.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "render all decisions related to procedural compliance. Further, such decisions shall contain the reasons for such decision and shall be final."[9] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[10] The Department of Human Resource Management (DHRM) has the authority to determine whether the hearing decision is consistent with state or agency policy.[11] The hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by this Department or DHRM, the hearing

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[5] Decision of Hearing Officer, page 4. The hearing officer relied on the law in *Wren v. Commonwealth*, 67 Va. 952, 957 (1875) which states that "knowing of a felony, [and] failure to make it known to the proper authorities . . . would [not] be sufficient to make the party an accessory after the fact."
[6] Decision of Hearing Officer, page 5 (quoting DOC Policy No. 5-10, § 5-10.16(B)(1)).
[7] *Webster's II New Riverside Dictionary*. *See* Decision of Hearing Officer, page 5.
[8] *See* Decision of Hearing Officer, page 5.
[9] Va. Code § 2.2-3003 (A) and (G).
[10] *Grievance Procedure Manual* § 6.4(3), page 18.
[11] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2), page 19.

officer has issued a revised decision.[12] Final hearing decisions may be appealed to the circuit court in the jurisdiction in which the grievance arose to determine whether the hearing decision is consistent with law.[13]

In accordance with the above, whether the hearing officer's interpretation of state or agency policy is correct is a matter for DHRM, not this Department, to determine.

Without question, an agency's interpretation of its own policy is generally enforceable and is entitled to substantial deference, assuming that the grievant received fair notice of the policy.[14] Where the written policy may be susceptible to more than one reasonable interpretation, the grievant should receive fair notice of the agency's interpretation of that policy.[15] This case presents the question of whether the grievant had "fair notice" that failure to report the fraternization of his co-workers was a Group III offense of "accessory to fraternization," which could subject him to a disciplinary termination. In this case, it is undisputed that "accessory to fraternization" is not listed as an offense at any level in agency policy.[16] In addition, there is an agency policy in place that requires that DOC employees immediately report any "suspicious activity or irregularities" to their supervisors, with a failure to follow that policy as a Group II offense.[17] Furthermore, the agency's request for review to this Department does not argue or demonstrate that the grievant received notice through some other means, such as training or counseling memoranda. As a result, we cannot conclude that the hearing officer erred procedurally by not finding in his decision whether the grievant had notice of the agency's interpretation of "accessory to fraternization" (a Group III offense), or by reducing the challenged discipline.

In this case, the nature of the agency's claim is largely based on the hearing officer's interpretation of DOC Policy No. 5-10. In essence, the agency claims that the hearing officer violated the grievance procedure in the way in which he interpreted the meaning of the words "accessory" and "fraternize," the definitions of which determined the outcome of the hearing. The crux of the agency's argument is a policy interpretation question, which is not appropriate for this Department to address. Rather, the Director of DHRM has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state policy.[18] DOC has properly requested an administrative policy determination by DHRM. Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of agency policy. If DHRM finds that the hearing officer's interpretation of policy was incorrect, the DHRM Director's authority is limited to asking

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[12] *Grievance Procedure Manual* § 7.2(d), page 20; *see also Grievance Procedure Manual* § 7.3, page 20, for discussion on circuit court appeal.
[13] Va. Code § 2.2-3006 (B).
[14] *See* EDR Ruling No. 2001-064.
[15] *Id.* The grievant may receive fair notice through the plain language of the written policy or by other means such as training or written counseling.
[16] While this alone is not fatal to the agency's case, it can be read with other agency policies to demonstrate that the grievant did not have notice of the offense of "accessory to fraternization."
[17] DOC Policy No. 5-10, § 5-10.16(B)(1).
[18] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

the hearing officer to reconsider his decision in accordance with its interpretation of policy.[19]

CONCLUSION

For the reasons discussed above, this Department cannot find that the hearing officer abused his discretion in his conduct of the hearing or exceeded his authority procedurally in deciding this case. This Department's rulings on matters of compliance are final and nonappealable. [20]

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[19] *Grievance Procedure Manual* § 7.2 (a)(2).
[20] Va. Code § 2.2-3003(G).