Issue: Compliance/Hearing Decision; Ruling Date: January 6, 2003; Ruling #2002-226; Agency: Department of Corrections; Outcome: Hearing officer in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
No. 2002-226
January 6, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5568. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by 1) finding the grievant guilty of a Group I offense, described as "disruptive behavior" when such an offense was not originally charged and is not a lesser included offense of the actual offense charged; 2) finding that an additional Group I offense coupled with a prior Group III offense can cause the grievant to be terminated from employment when the employee was not given the notice allegedly required under Department of Corrections (DOC or the agency) procedure for issuance of a Group III Written Notice; and 3) failing to find mitigating circumstances which would result in some form of disciplinary action less than termination. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

On February 26, 2001, the grievant received a Group III Written Notice for leaving his security post without permission and threatening an inmate. Subsequently, on August 19, 2002, the grievant was issued another Group III Written Notice with termination for violation of employee Standards of Conduct 5-10.17 (B)(3) which states: "Willfully, or by acts of gross negligence, damaging or defacing state records, state property or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors, volunteers, contractors, and students." In Attachment I to the Group III Written Notice, the agency details the events that led to the grievant's alleged destruction of state property, including the undisputed fact that the grievant had grabbed the control room window and slammed it shut in the midst of conducting multiple tasks related to inmate activity within the facility.

On September 18, 2002, the grievant timely initiated a grievance challenging the Group III Written Notice. The grievance was qualified for hearing on October 17, 2002, and a hearing was held on November 20, 2002. In his decision dated November 25, 2002, the hearing officer found that while the grievant had "slung the window shut"

causing a "loud shotgun sound" to be heard throughout the control room, the actual damage to state property was *de minimis* and representative of damage that would occur due to normal wear and tear.[1] The hearing officer went on to find, however, that the grievant's slamming of the control room window was deserving of a Group I Written Notice because it was "disruptive" as evidenced by the loud shotgun sound it caused, which had resulted among other things, in one inmate attempting to drop down to the floor.[2] The hearing officer further held that the Group I Written Notice coupled with the earlier Group III Written Notice warranted upholding the grievant's termination.[3] Finally, the hearing officer found mitigation of removal to be inappropriate under the circumstances.[4]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to procedural compliance with the grievance procedure."[5] "In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[7]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de 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. 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.[10] Additionally, if misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline.[11] "Should the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so without citing one of the specific offenses listed in the

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[1] *See* Decision of Hearing Officer, Case Number: 5568, November 25, 2002.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *See* Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* §6.4, page18.
[7] *See Grievance Procedure Manual* § 6.4(3), page 18.
[8] Va. Code § 2.2-3005(D)(ii).
[9] *Grievance Procedure Manual* § 5.9, page 15.
[10] *Grievance Procedure Manual* § 5.8(2), page 14.
[11] *Rules for Conducting Grievance Hearings*, page 11.

Standards of Conduct; however he must identify in general terms the misconduct that occurred."[12]

Hearing Officer's Finding of Disruptive Behavior

The grievant asserts that the hearing officer, by finding that the grievant exhibited "disruptive behavior" and upholding the termination, violated DOC Procedure No. 5-10.14(A) and thus denied the grievant due process.[13] Additionally, the grievant asserts that the hearing officer abused his authority by charging the grievant with "disruptive behavior" when it is not a lesser included offense of a damage to state property charge. For the reasons discussed below, this Department concludes that the grievant's due process rights were not violated.

Prior to termination, the United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to give oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond, appropriate to the nature of the case.[14] A more comprehensive post-termination hearing would follow termination. Importantly, the pre-termination notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discharge, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[15]

While the Group III Written Notice and Attachment I primarily focus on the alleged resulting damage to state property and do not specifically charge the grievant with "disruptive behavior", it is clear from the Notice and Attachment that the grievant's frustrated behavior was also in question, not just the physical impact of that frustrated behavior on the window being slammed or on any other state property.[16] As such, the grievant was on notice that he would be asked to defend the behavior he had exhibited on July 25, 2002. While the hearing officer did not find that the grievant's behavior resulted in damage to state property, he did find that the grievant's behavior was disruptive. This behavior was the basis for the hearing officer's reduction of the Group III Written Notice for property damage to a Group I Written Notice for "disruptive behavior." Because the Notice and Attachment called into question grievant's behavior in slamming the window,

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[12] *Id.* at p. 12.
[13] DOC Procedure No. 5-10.14(A) states, "Prior to any disciplinary demotion, transfer, suspension, or disciplinary removal actions, an employee shall be given (1) an oral or written notice of the offense; (2) an explanation of the agency's evidence in support of the charge; and (3) a reasonable opportunity to respond."
[14] Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985); Gilbert v. Homar, 520 U.S. 924 (1997).
[15] Board of Education v. Loudermill at 546.
[16] In Attachment I to the Group III Written Notice, the agency states that the grievant's position in a Level VI Super Maximum Security Prison requires that he behave appropriately during stressful situations and that taking his frustrations out on state property is not the way to control stress.

this Department concludes that the grievant was not denied due process when the hearing officer reduced the discipline to a Group I offense for "disruptive behavior."

While the grievant's "lesser included offense" argument is generally a criminal law concept, the lesser included offense notion can be used illustratively to explain that the hearing officer's finding of disruptive behavior was warranted and appropriate under the circumstances.

In order to prove damage to state property, it must be shown that (1) an act was committed; and (2) as a result of that act, (3) damage to property occurred. In this case, the hearing officer found that the grievant's act of slamming the control room window in frustration did occur, which, in a prison control room setting, can be viewed as inherently disruptive. Therefore, the act, in this context, could be treated as an offense in and of itself. As such, the disruptive behavior finding by the hearing officer could, by analogy, be considered a lesser included offense of the damage to state property charge.

Accumulation of Group Notices

The grievant further asserts that under DOC Procedure No. 5-10.17(C)(2), he cannot be removed based on the accumulation of disciplinary action because he was not notified when he received the February 26, 2001 Group III Written Notice that any additional disciplinary action could result in his removal.[17] In his decision, the hearing officer construed the language contained in DOC Procedure 5-10.17(C)(2) to "provide Agency staff with a procedure it should follow to better manage its employees."[18] The hearing officer went on to conclude that the notification language in DOC Procedure 5-10.17(C)(2) is not a condition precedent to issuing subsequent disciplinary action resulting in removal of an employee with an active Group III Written Notice.[19]

The crux of the grievant's argument centers on the hearing officer's interpretation of policy, which is not an issue for this Department's administrative review. Rather, the Director of the Department of Human Resource Management (DHRM) has the authority to review hearing decisions for consistency with state and agency policy.[20]

Failure to Find Mitigating Circumstances

The grievant claims that the hearing officer erred by not finding mitigating circumstances which would result in some form of disciplinary action less than termination. In support of this contention, the grievant claims the hearing should have

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[17] DOC Procedure No. 5-10.17(C)(2) states: "If an employee is not removed, due to mitigating circumstances, the employee is to be notified that any subsequent written notice issued during the 'active' life period, regardless of level, may result in removal."
[18] *See* Decision of Hearing Officer, Case Number: 5568, November 25, 2002.
[19] *Id*.
[20] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2). See also Virginia Dept. of State Police vs. Barton, No. 2853-01-04, slip op. at 8 (Va. App. Dec. 17, 2002).

considered the following: the grievant's years of service and progressive positive work evaluations, the hearing officer's failure to find that the grievant committed the offense with which he was charged, the disruptive behavior the hearing officer found the grievant guilty of was so minor as to render termination unwarranted, and the failure of the agency to give the grievant notice after his February 26, 2001 Group III Written Notice that future disciplinary action could lead to dismissal.

Under the grievance procedure, however, "the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct."[21] Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee's length of service.[22] The grievance procedure, however, does not *require* hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation.

APPEAL RIGHTS

For the reasons discussed above, this Department concludes that the hearing officer neither abused his discretion nor exceeded his authority under the grievance procedure in conducting or deciding this case.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25] This Department's rulings on matters of procedural compliance are final and nonappealable. [26]

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Director

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[21] *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).
[22] *Id.*
[23] *Grievance Procedure Manual*, § 7.2(d), page 20.
[24] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.
[25] *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).
[26] Va. Code § 2.2-1001 (5).