Issue: Administrative Review/ grievant claims agency did not prove its case by a preponderance of the evidence; Ruling Date; December 28, 2005; Agency: Department of Corrections; Outcome: decision remanded to hearing officer for clarification.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF THE DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1188
December 28, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8186. The grievant claims that the hearing officer failed to require the agency to prove its case by a preponderance of the evidence, as required by the grievance procedure.

FACTS

The grievant was employed as a Corrections Officer Senior with the Department of Corrections (DOC or the agency).[1] Agency policy requires that when employees are unable to report to work because of illness, they must notify their supervisors at least two hours prior to the beginning of their shift.[2] Agency policy provides that if the supervisor is not on duty at the time of the notification, the employee is required to speak to the supervisor on duty.[3] The agency alleges that under its call-in policy, the grievant was required to notify her direct supervisor when she was going to be absent because of illness, even when she had previously called in and spoken to the supervisor currently on duty.[4]

The grievant was scheduled to work the evening of June 13, 2005, beginning at 6:00 pm.[5] At 12:30 or 1:00 a.m. on June 13th, the grievant notified the officer in charge that she would be unable to attend work that day, as she was just leaving the emergency room and had been taken out of work for "the next couple of days" by her doctor.[6] The grievant asked the officer in charge to relay her message to her supervisor, and the officer in charge did so.[7] At 4:10 that afternoon, the grievant's supervisor called her home to inquire whether she would be in to work on June 14th or 15th.[8] The grievant was sleeping

[1] Hearing Decision at 2.
[2] *Id.* at 4.
[3] *Id.*
[4] *Id.* at 1-2.
[5] *Id.* at 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*

at the time of her supervisor's call.[9] The supervisor told the grievant that she had not called to speak to her supervisor, to which she responded, "Oh."[10]

On June 30, 2005, the grievant was issued a Group II Written Notice for violating "the Department's call-in policy for the second time in less than 60 days."[11] Because the grievant also had an active Group III Written Notice, the agency terminated her employment.[12]

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.[13] A hearing was held on October 21, 2005.[14] In his decision dated October 25, 2005, the hearing officer found that the Group II Written Notice was unwarranted, as the grievant had complied with agency policy and the agency had not shown that she had failed to follow a supervisor's instruction.[15] Finding, however, that the grievant's conduct constituted inadequate or unsatisfactory job performance, the hearing officer reduced the Group II Written Notice to a Group I.[16] Because the Group I Written Notice, together with the grievant's active Group III Notice was sufficient to warrant termination, the hearing officer upheld the agency's decision to remove the grievant from employment.[17]

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."[18] 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.[19]

In disciplinary actions, the agency must show at hearing, by a preponderance of the evidence, that the discipline was warranted and appropriate under the circumstances.[20] Hearing officers make "findings of fact as to the material issues in the case"[21] and determine the grievance based "on the material issues and grounds in the

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[9] *Id.* The grievant asserts that the medication she was prescribed at the hospital made her drowsy. *Id.* at 1-2.
[10] *Id.* at 3.
[11] *Id.* at 1-2.
[12] *Id.*
[13] *Id.* at 2.
[14] *Id.* at 1.
[15] *Id.* at 4 n. 3.
[16] *Id.* at 4-5.
[17] *Id.* at 4.
[18] Va. Code § 2.2-1001(2), (3), and (5).
[19] *See Grievance Procedure Manual* § 6.4(3).
[20] *See Grievance Procedure Manual* § 5.8(2).
[21] Va. Code § 2.2-3005.1(C)(ii).

record for those findings."[22] 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. Further, as long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant argues that the hearing officer failed to require the agency to prove by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances, as required by § 5.8 of the *Grievance Procedure Manual.* The *Rules for Conducting Grievance Hearings* explain that in deciding whether an agency has made this showing, a hearing officer must review the facts *de novo* to determine (1) whether the employee engaged in the behavior described in the Written Notice, (2) whether that behavior constituted misconduct, and (3) whether the agency's discipline was consistent with law and policy.[23] If the hearing officer finds that the agency has met this burden, he must next consider whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances exist that would overcome the mitigating circumstances.[24]

In this case, the grievant was disciplined for violating the Department's call-in policy.[25] The agency asserts that the grievant failed to comply with a requirement that she speak directly with her supervisor when she was unable to report to work because of illness.[26] The hearing officer found that the agency had not shown that the grievant engaged in the alleged misconduct, as it had not proven that the grievant had failed to comply with a written policy or an instruction. Specifically, he concluded that the grievant complied with applicable agency policy and that the grievant's obligation to speak with her supervisor arose only because of an alleged verbal instruction by that supervisor.[27] He found that the agency failed to prove that the alleged instruction had been given, stating:

> Lieutenant B [the grievant's supervisor] did not testify at hearing or document in writing Lieutenant B's conversation with Grievant. The evidence is insufficient to determine whether Lieutenant B's April 18, 2005 discussion with Grievant was merely a comment regarding Grievant's work performance or was a specific instruction such that Grievant's failure to call amounted to failure to follow a supervisor's instruction, a Group II offense.[28]

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[22] *Grievance Procedure Manual* § 5.9.
[23] *See* Rules for Conducting Grievance Hearings, § VI(B).
[24] *Id.*
[25] Hearing Decision at 1-2.
[26] *Id.*
[27] *Id.* at 5.
[28] *Id.* at 4 n. 3.

However, the hearing officer concluded that although the agency had failed to show that the grievant had been given a specific instruction to speak to her supervisor, her conduct nevertheless constituted inadequate or unsatisfactory work performance justifying a Group I Written Notice.

As the hearing officer noted, "[i]n order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties."[29] Thus, under the analysis set forth by the hearing officer, to demonstrate inadequate or unsatisfactory work performance, the agency was required to show that the grievant was responsible for performing the duty of speaking to her supervisor when absent. In finding that a Group I Written Notice was warranted, the hearing officer appears to have concluded that the grievant had been charged with performing this duty. However, this conclusion appears to be in conflict with his findings that the grievant complied with written policy and that the evidence was insufficient to determine if Lieutenant B's discussion with the grievant was "merely a comment" or a "specific instruction." The hearing officer is therefore directed to reconsider his hearing decision to clarify in his decision the basis for his conclusion that the grievant's conduct constituted inadequate or unsatisfactory performance.

Further, in determining whether the agency had met its burden of proof, the hearing officer also failed to address whether the disciplinary action was consistent with law and policy. Specifically, the hearing officer did not address whether the agency's discipline was consistent with state and agency leave policies, and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, which is incorporated by reference in those policies.[30] In particular, the hearing officer's decision did not consider if the grievant was covered by the FMLA; if so, whether her illness constituted a "serious health condition" under the FMLA; and if both of these questions were answered in the affirmative, whether the requirement that the grievant speak with her supervisor was in accordance with the limitations imposed under that statute, and if not, whether the grievant could be disciplined for failing to comply with that requirement.[31] The hearing officer is therefore ordered to reconsider his decision to address these questions. If additional information is required, the hearing officer is directed to reopen the hearing as necessary to take appropriate evidence from the parties.

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[29] *Id.* at 4.
[30] *See, e.g.*, Department of Human Resource Management (DHRM) Policy 4.20.
[31] *See, e.g.*, 29 CFR §§ 825.303 ("The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ('fax') machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.")

Lastly, the final step in the analytical framework set forth by the *Rules for Conducting Grievance Hearings* requires the hearing officer to consider whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[32] One example of a potentially mitigating circumstance is an employee's lack of notice of a rule, the agency's interpretation of a rule, and/or the possible consequences of failing to follow a rule.[33] The hearing officer may also consider the particular circumstances present in a specific case in determining whether the discipline exceeds the bounds of reasonableness. Although in this case the hearing officer noted in a footnote that "no credible evidence was presented" to justify mitigation in this case,[34] it is unclear from the decision which, if any, possible mitigating circumstances the hearing officer considered. Accordingly, if the hearing officer determines on reconsideration that the agency has shown by a preponderance of the evidence that the grievant engaged in misconduct and that the discipline issued comports with law and policy, the hearing officer is ordered to reconsider the issue of mitigation and to state in his decision the specific grounds for his determination.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reconsider his decision in accordance with this ruling. 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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37] This Department's rulings on matters of procedural compliance are final and nonappealable.[38]

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Claudia T. Farr
Director

[32] We note, however, that mitigation should only be considered in a disciplinary case where a hearing officer has concluded that the agency has satisfied its burden of showing that the grievant engaged in behavior constituting misconduct and that the disciplinary action was consistent with law and policy.

[33] *Rules for Conducting Grievance Hearings*, VI (B) (1). While the *Rules* set forth examples of when mitigation may be appropriate, this listing is not intended to be all-inclusive. For example, a hearing officer may consider any limitations or conditions which hinder an employee's ability to comply with policy or instruction.

[34] Hearing Decision at 4 n. 4.

[35] *Grievance Procedure Manual,* § 7.2(d).

[36] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).

[37] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

[38] Va. Code § 2.2-1001 (5).