Issue: Administrative Review – Appeal of Hearing Officer's Decision in Case No. 8508; Ruling Date: June 29, 2007; Ruling #2007-1563, 2007-1637, 2007-1691; Agency: Department of Corrections; Outcome: 2007-1563 – Hearing Decision in Compliance; 2007-1637 – Hearing Officer in Compliance; 2007-1691 – Hearing Officer Not in Compliance -- Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Nos. 2007-1563, 2007-1637, and 2007-1691
June 29, 2007

The grievant has requested that this Department administratively review the hearing officer's decisions in Case Number 8508. The hearing officer is ordered to modify his decision in accordance with the provisions set forth below.

FACTS

Prior to his termination, the grievant was employed as a Corrections Officer with DOC.[1] On November 27, 2006, the grievant was issued a Group III Written Notice with removal for "failing to count but signing a count sheet indicating he had conducted a physical count."[2] The grievant challenged the disciplinary action by initiating a grievance on November 30, 2006.[3] The November 30th grievance was subsequently qualified for a hearing and a hearing was held on February 1, 2007.[4] In a February 2, 2007 decision ("Original Hearing Decision"), the hearing officer upheld the disciplinary action.[5]

On February 9, 2007, the grievant requested the hearing officer to reconsider his decision. In a February 14, 2007 reconsideration decision ("First Reconsideration Decision"), the hearing officer denied the grievant's request for reconsideration.[6] On February 19, 2007, the grievant requested a second reconsideration decision by the hearing officer based on "newly discovered evidence." In a February 21, 2007 decision ("Second Reconsideration Decision"), the hearing officer declined to address the grievant's February 19, 2007 request for reconsideration on the basis that he lacks jurisdiction to do so.[7] Also on February 21, 2007, the grievant requested an administrative review by the Director of EDR of the hearing officer's Original Hearing

[1] *See* Decision of Hearing Officer, Case No. 8508, issued February 2, 2007.
[2] *Id.* at 1.
[3] *Id.*
[4] *Id.*
[5] *Id*. at 5.
[6] *See* Reconsideration of Hearing Officer, Case No. 8508-R, issued February 14, 2007.
[7] *See* Reconsideration Decision, Case No. 8508-R2, issued February 21, 2007.

Decision and First Reconsideration Decision. Additionally, on February 23, 2007, the grievant requested an administrative review by the EDR Director of the hearing officer's Second Reconsideration Decision. [8]

On April 11, 2007, the grievant sought yet another reconsideration decision from the hearing officer based on "newly discovered evidence." The hearing officer did not respond to the April 11, 2007 request as it was received outside the mandated 15 calendar day time period for administrative review requests following the Original Hearing Decision. As a result of the hearing officer's failure to respond to the grievant's April 11th request, the grievant sought another administrative review from this Department on April 12, 2007.

Pursuant to EDR Ruling #2007-1556, the hearing officer issued a third reconsideration decision ("Third Reconsideration Decision") on May 10, 2007.[9] The hearing officer again denied the grievant's request for reconsideration. Accordingly, on May 16, 2007, the grievant requested another administrative review by this Department.

At issue here are the grievant's February 21, April 12 and May 16, 2007 requests for administrative review to this Department. Each request will be discussed in turn below.

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."[10] 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.[11]

February 21, 2007 Administrative Review Request

Newly Discovered Evidence

In his February 21, 2007 administrative appeal to this Department of the Original Hearing Decision and First Reconsideration Decision, the grievant appears to contend

[8] This Department addressed the grievant's February 23, 2007 request for administrative review in EDR Ruling #2007-1556. In our ruling, this Department determined that the hearing officer has jurisdiction to consider any and all requests for reconsideration that are received within the mandated 15 calendar day time and as such, ordered the hearing officer to address and consider those issues raised in the February 19th request for reconsideration that were not previously addressed and considered in the First Reconsideration Decision. EDR Ruling #2007-1556.
[9] *See* Reconsideration Decision, Case No. 8508-R3, issued May 10, 2007.
[10] Va. Code §§ 2.2-1001(2), (3), and (5).
[11] *Grievance Procedure Manual* §§ 6.4; 7.2.

that the hearing officer erred when he concluded that the two December witness statements were not newly discovered evidence.[12]

To establish that evidence is "newly discovered," the moving party must show

> (1) the evidence was first discovered after the hearing; (2) due diligence on the moving party's part to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were reheard, or is such that would require the hearing decision to be amended.[13]

Using the above definition and principles, this Department cannot conclude that the two witness statements were newly discovered. As the hearing officer found in his First Reconsideration Decision, and the grievant does not appear to dispute, the grievant was aware of the statements at the time of the hearing.[14] Accordingly, they cannot be considered newly discovered.

Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[17] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the grievant challenges the hearing officer's finding in the First Reconsideration Decision that the grievant was keeping a running count of the inmates entering the kitchen.[18] The grievant contends that the night shift officers kept the running

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[12] In his February 9, 2007 request for administrative review to the hearing officer, the grievant disagreed with the hearing officer's finding that there were no mitigating circumstances and offered written witness statements dated December 2006 in support of his claim that the way he counted the inmates on the day in question was common practice among security staff.

[13] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (citing Taylor v. Texgas Corp., 831 F. 2d 255, 259 (11th Cir. 1987)). *See also* EDR Ruling No. 2007-1490 which adopted the Texgas standard.

[14] First Reconsideration Decision at 1-2.

[15] Va. Code § 2.2-3005.1(C).

[16] *Grievance Procedure Manual* § 5.9.

[17] Va. Code § 2.2-3005(C)(5).

[18] The First Reconsideration Decision states, "[t]he evidence showed Grievant was keeping a 'running count' of the inmates entering the kitchen. When the count was supposed to be performed, he relied on his

count, not the grievant, a day shift officer. Even if true, the grievant's contention is immaterial to the outcome of this case. In particular, the grievant was disciplined for "failing to count but signing a count sheet indicating he had conducted a physical count."[19] The record contains evidence that supports the hearing officer's findings related to that charge. Accordingly, we will not substitute our judgment for that of the hearing officer.

Mitigating Circumstance

The grievant also appears to contend that the hearing officer erred by not properly considering as a mitigating circumstance his charge that other employees had committed the same offense and, at hearing, the superintendent conceded that some employees had indeed committed the offense.

According to the *Rules for Conducting Grievance Hearings*, if the hearing officer finds that the agency has proven by a preponderance of the evidence that the employee engaged in the behavior described in the Written Notice, that the behavior constituted misconduct and the discipline was consistent with law and policy, 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.[20] A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances and may mitigate the agency's discipline only if, under the record evidence, the discipline exceeds the limits of reasonableness.[21] The hearing officer may consider the particular circumstances present in a specific case in determining whether the discipline exceeds the bounds of reasonableness.

In his Original Hearing Decision, the hearing officer held that "Grievant argued that his actions were a regular practice among corrections officers at the Facility," but "[i]nsufficient evidence was presented to support this conclusion."[22] A review of the hearing tape revealed that when the hearing officer inquired as to whether it was a common practice to use a running count instead of a physical count, the Superintendent conceded that he had discovered that several other officers had used a running count instead of a physical count. While the Superintendent did not explain how those particular employees were treated, he stated that the discipline of termination was consistent with how employees had been disciplined in the past. Moreover, the grievant did not present any evidence to counter the Superintendent's assertion that the discipline

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running totals rather than actually going to the kitchen to physically count the inmates there." First Reconsideration Decision at 1.

[19] Original Hearing Decision at 1.

[20] *See* Rules for Conducting Grievance Hearings, § VI(B).

[21] *Id.*

[22] Original Hearing Decision at 4.

meted out in the grievant's case was different from similar circumstances in the past.[23] Accordingly, this Department cannot conclude that the hearing officer abused his discretion by failing to mitigate the discipline on this basis.

April 12, 2007 Request for Administrative Review

The grievant's April 12, 2007 request for administrative review to this Department challenges the hearing officer's lack of response to the grievant's April 11, 2007 request for reconsideration. This Department recently held in EDR Ruling Numbers 2007-1556 and 2007-1576 that the hearing officer has jurisdiction to decide any and all requests for reconsideration that are received within the mandated 15 calendar day time period. However, in this case, the grievant's April 11, 2007 appeal to the hearing officer, premised on newly discovered evidence, was made after the expiration of the 15 calendar day administrative appeal period, which ended on February 20, 2007.[24] Thus, the grievant's April 11, 2007 request was untimely and the hearing officer did not err in failing to respond to the grievant's appeal.[25]

May 16, 2007 Request for Administrative Review

The grievant's May 16, 2007 request for administrative review challenges the hearing officer's findings and conclusions in his Third Reconsideration Decision.[26] In his third request for reconsideration to the hearing officer, the grievant presented the hearing officer with a witness statement from Corrections Officer M. In this statement, Corrections Officer M says that on November 5, 2006, four days prior to the incident that resulted in the grievant's termination, he told Lieutenant D that the inmate count had been improperly conducted that morning. Lieutenant D allegedly told Corrections Officer M that miscounts were "a big deal" and that he would "take care of it." According to Corrections Officer M, Lieutenant D did not mention proper counting procedures to staff either on that day or at subsequent briefings on November 6th and 7th

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[23] On November 27, 2006, at least one other employee was issued a Group III Written Notice with removal for "failing to count but signing a count sheet indicating he had conducted a physical count." *See* EDR Ruling 2007-1576.

[24] In this case, the fifteenth calendar day after the issuance of the Original Hearing Decision was Saturday, February 17, 2007. When the 15th day falls on a weekend or holiday, as was the case here, the party shall have until the following business day to timely seek an administrative review. The following business day in this case was Tuesday, February 20, 2007 because February 19th was a holiday. *See* EDR Ruling No. 2003-486 (extending time period for requesting administrative review when final day fell on a weekend); EDR Ruling No. 2002-140 (same).

[25] While this Department concludes that the hearing officer did not err in failing to respond to the grievant's April 11th request for reconsideration, for clarification purposes and to potentially avoid any future issues on appeal, the better practice in this case would have been for the hearing officer to issue a brief decision or letter stating why the April 11th request for reconsideration would not be considered.

[26] Although the grievant's request for administrative review of the hearing officer's Third Reconsideration Decision was received by this Department outside of the 15 calendar day period, this Department will address the grievant's request because the hearing officer's Third Reconsideration Decision raises an issue that could not have been challenged by the grievant until after the Third Reconsideration Decision was issued. *See* EDR Ruling 2004-870.

and that had Lieutenant D addressed the matter, the miscount on November 9th that resulted in the grievant's termination would not have occurred.

In his Third Reconsideration Decision, the hearing officer concluded that:

> Grievant's letter from Corrections Officer M does not change the outcome of this case. Grievant should not have needed to be reminded that he should only write that he had conducted a count when he had actually performed a count. Grievant knew what the Agency meant by the word "count" and that he was obligated to conduct and report his count numbers. Grievant received training at the DOC Academy and on-the-job training at the Facility regarding how to conduct counts and when to report count information. Grievant knew he should not have reported that he completed a count when in fact, he merely made an estimate. Lieutenant D was not obligated to notify Grievant that other employees failed to properly count. Lieutenant D's failure to notify Grievant that other employees at the Facility failed to properly count is not a mitigating circumstance.[27]

In his request for administrative review of the hearing officer's Third Reconsideration Decision, the grievant asserts that the hearing officer has failed to consider mitigating circumstances in upholding the disciplinary action. More specifically, the grievant claims that (1) contrary to the hearing officer's decision, Lieutenant D was obligated to notify the shift of proper count procedures and if he had done so, the grievant would not have been terminated; (2) despite his academy training, when he arrived at the unit he was shown by the field training officer (FTO) how to count and had been counting in this manner for 18 ½ months prior to his termination; and (3) the hearing officer could have called the grievant's unit to determine if the grievant was working on the day Officer M reported that count was being conducted improperly.[28]

Before addressing whether the hearing officer appropriately considered Officer M's statement on mitigation, it must be determined whether the hearing officer could consider Officer M's statement at all given that it was not introduced until after the hearing decision was issued. As discussed previously, under the *Rules for Conducting Grievance Hearings*, a hearing officer may reconsider his decision or reopen a hearing based on "newly discovered evidence."[29] In his Third Reconsideration Decision, it is

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[27] Third Reconsideration Decision at 2 (footnotes omitted).

[28] In his Third Reconsideration Decision, the hearing officer states that "Corrections Officer M does not name the employees [that failed to count properly]. Whether Grievant was one of those employees is not known." Third Reconsideration Decision at 2, footnote 1. The grievant further contends that he has been treated inconsistently as one of the other employees terminated for violating count procedures was recently reinstated. The grievant raised this contention as "newly discovered evidence" in his April 11, 2007 request for reconsideration to the hearing officer. However, as noted above, the grievant's request regarding this alleged "newly discovered evidence" was untimely and thus, was not considered by the hearing officer. As such, this information cannot be considered by this Department.

[29] *See* Rules for Conducting Grievance Hearings, § VII(A)(1).

unclear whether the hearing officer found Officer M's statement to be "newly discovered evidence." Accordingly, the hearing officer is ordered to modify his decision and clarify whether or not Officer M's statement is "newly discovered evidence" under the standard enunciated above.

If the hearing officer determines that Officer M's statement is "newly discovered evidence" warranting consideration, he must then assess whether the statement is sufficient to warrant mitigation. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[30] EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." 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.[31]

Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness.[32] The hearing officer may consider the particular circumstances present in a specific case in determining whether the discipline exceeds the bounds of reasonableness.

In this case, the hearing officer found that the agency established that the grievant was deserving of a Group III Written Notice for failing to count but signing a count sheet indicating that he had conducted a physical count.[33] As with all Group III violations, the normal disciplinary action is termination.[34] This Department concludes, therefore, that a hearing officer's finding of a Group III violation effectively creates a rebuttable presumption that termination is a reasonable disciplinary action. However, if there is sufficient evidence that the agency's discipline (i.e., termination) nevertheless exceeded the limits of reasonableness, the discipline must be mitigated by the hearing officer.

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[30] Va. Code § 2.2-3005(C)(6).
[31] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1 (alteration in original).
[32] Hearing Rules § VI.B.
[33] Original Hearing Decision at 4.
[34] DHRM Policy No. 1.60, *Standards of Conduct*.

As stated above, the hearing officer concludes in his Third Reconsideration Decision that "Lieutenant D's failure to notify Grievant that other employees at the Facility failed to properly count is not a mitigating circumstance." Contrary to the hearing officer's conclusion, management's alleged acquiescence to the incorrect counting procedures employed by its staff could constitute a mitigating circumstance in this case as it could be argued that the grievant did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule.[35] If it is determined that the grievant did not have notice of the rule regarding proper counting procedures, [36] the grievant's termination could be viewed as outside the "bounds of reasonableness."

Accordingly, in this case, if the hearing officer finds that (i) Officer M's statement was "newly discovered evidence" and (ii) the grievant did not have adequate notice of the rule regarding proper counting procedures, he must reconsider his mitigation determination in accordance with the *Rules'* mitigation standard, consistent with this administrative review ruling.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is directed to (i) clarify in his decision whether Officer M's statement constitutes "newly discovered evidence" and, if so (ii) consider the grievant's argument regarding management's acquiescence to improper counting at the grievant's facility prior to the November 9th incident on mitigation and determine, based on these factors, whether the discipline, i.e., termination, exceeded the limits of reasonableness.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[37] 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.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

Claudia T. Farr
Director

[35] *See* Rules for Conducting Grievance Hearings, § VI(B)(1).
[36] This is a factual determination that must be made by the hearing officer. The hearing officer is permitted to reopen the hearing for the limited purpose of determining the impact of Officer M's statement on the issue of mitigation.
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).