Issue: Administrative Review of Hearing Officer's Decision in Case No. 8620; Ruling Date: September 19, 2007; Ruling #2008-1765; Agency: Department of Juvenile Justice; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2008-1765
September 19, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8620.[1] For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

Prior to his removal, the Department of Juvenile Justice (DJJ or the agency) employed the grievant as a Probation Officer at one of its facilities.[2] On March 14, 2007, the grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying State records.[3] Other relevant facts as set forth in Case No. 8620 are as follows:

> [The grievant] had been employed by the Agency for approximately 11 years until his removal effective March 13, 2007. His work performance had been satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
>
> Probation officers are obligated by Agency policy to meet face-to-face with juveniles under their supervision and with the juvenile's family

[1] The grievant addressed his request for administrative review to the hearing officer, the Director of this Department and the Director of the Department of Human Resource Management (DHRM). Pursuant to its authority, this Department will only address those issues that raise a question as to whether the hearing decision fails to comply with the grievance procedure. *See* Grievance Procedure Manual § 7.2(a). It should be noted that the grievant has identified certain issues in his request for administrative review as grievance procedure violations that are actually policy questions that should be addressed by the Director of DHRM. For instance, the grievant states that the grievance procedure was violated by the agency giving him his Group III Written Notice with Termination on the same day that his termination was effective and by reassigning all of his cases prior to the effective date of his termination. This is actually a question of whether the Standards of Conduct policy was violated and as such, this issue should be addressed by the Director of DHRM, not this Department.
[2] *See* Decision of Hearing Officer, Case No. 8620, issued July 25, 2007 ("Hearing Decision").
[3] *Id*. at 1.

or guardian at least once every 90 days. They are also obligated to maintain monthly contact with the family or guardian of a juvenile to provide identified services and support consistent with the Parole Supervision and Family and Involvement Plan.

The Agency maintains a Juvenile Tracking System to record and monitor the services provided to juveniles and their families. Probation officers are responsible for entering information into the Juvenile Tracking System.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's father on August 4, 2006. Grievant wrote:

> "PO met with [Father] and informed him that I am the new parole officer for [Juvenile K] and any concerns they have they can address with me. [Father] stated that he and his wife visit [Juvenile K] at least once a month. When [Juvenile K] is released they planned for him to live with them. Supervision plans reviewed and understood with parent."

Juvenile K's Father did not meet with Grievant. The Father had not met with Juvenile K in jail.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on September 14, 2006. Grievant wrote:

> "PO met with [Mother] who stated that [Juvenile K] call[s] home every week and he is progressing well thus far. [Mother] stated that when [Juvenile K] is released they planned for him to live with them. Supervision plans reviewed and understood with parent."

Grievant did not meet with the Mother on September 14, 2006. Juvenile K was only allowed one telephone call per month. He did not call his parents weekly as Grievant wrote.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on November 7, 2006. Grievant wrote:

> "PO talk[ed] with [Mother], she informed this officer that she is disappointed that [Juvenile K] was not released on this review date. I informed [Mother] that [Juvenile K] had very serious charges and that [is] why he was not

> released[.] Family involvement plans reviewed and understood with [Mother]."

The Mother did not meet with Grievant on November 7, 2006 and did not make the statements Grievant wrote in the Juvenile Tracking System.

Grievant wrote in the Juvenile Tracking System that he had a face-to-face meeting with Juvenile K's Mother on December 6, 2006. Grievant wrote:

> "PO met with [Juvenile K's Mother], she informed this officer that everything is progressing well in the home and she plans for [Juvenile K] to return home to live with her upon his release. Family involvement plans reviewed and understood with [Juvenile K's Mother]."

Grievant did not meet with Juvenile K's Mother on December 6, 2006. Indeed, Juvenile K's Mother informed Grievant's Supervisor that she had never met Grievant.[4]

In his July 25, 2007 hearing decision, the hearing officer upheld the Group III Written Notice with removal for falsification of state records.[5] The grievant appealed the July 25th hearing decision and in an August 30, 2007 reconsideration decision, the hearing officer denied the grievant's request for reconsideration.[6]

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."[7] 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.[8]

Perjury

The grievant claims that a witness at the hearing "perjured herself in reference to evidence that was apart [sic] of the bases of my grievance" and "provided documentation that was false and unproven as evidence and as bases for my termination."

This Department has consistently held that a request for a rehearing or reopening cannot be granted except in extreme circumstances, for example, where a party can

[4] Hearing Decision at p. 2-4.
[5] *Id.* at 6.
[6] *See* Reconsideration of Hearing Officer, Case No. 8620-R ("Reconsideration Decision"), issued August 30, 2007.
[7] Va. Code §§ 2.2-1001(2), (3), and (5).
[8] *Grievance Procedure Manual* §§ 6.4; 7.2 (a) (3).

clearly show that a fraud was perpetrated upon the hearing process.[9] Virginia Court opinions are instructive as to the issues of perjury and the hearing process. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.[10] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation.

In this case, the grievant does not state specifically what testimony and documentation he is referring to that was allegedly falsified. Accordingly, we conclude that there is no clear evidence of extreme circumstances or fraud perpetrated upon the hearing process such as to warrant a rehearing. More importantly, under the rationale of the courts cited above, the grievant's claims of changed evidence or perjury, coming after the hearing decision has been issued, typically would not warrant reopening. Indeed, the grievant had the opportunity at his hearing to question the agency witness about the alleged inconsistencies in her testimony, and to attempt to ferret out any perjury at that time.

Additionally, 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. The grievant's challenge to the witness' testimony in this case simply contests the weight and credibility that the hearing officer accorded to the testimony of the that witness at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority. Moreover, the hearing officer's findings are based upon evidence in the record and the material issues of the case. For example, Agency Exhibit #3 contained reports and investigative interview notes demonstrating that the grievant had falsified state records. The hearing officer appears to have relied upon the information contained in Agency Exhibit #3 to support his findings and conclusions.

Mitigating Circumstances

The grievant contends that the hearing officer erred by not properly considering his length of service and satisfactory work performance as mitigating circumstances in his case.

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

[9] *See e.g.*, EDR Ruling #2006-1383.
[10] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

accordance with rules established by the Department of Employment Dispute Resolution."[11] 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.[12]

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.[13] This Department will find that a hearing officer failed to comply with the grievance procedure by not mitigating disciplinary action only where the hearing officer's action constituted an abuse of discretion.

Here, the hearing officer found, and the record evidence supports, that the agency established a Group III violation for falsification of state records.[14] As with all Group III violations, the normal disciplinary action is termination.[15] Therefore, a hearing officer's finding of a Group III violation effectively creates a rebuttable presumption that termination is a reasonable disciplinary action; i.e., it does not exceed the bounds of reasonableness.

In this case, the grievant has presented insufficient evidence to rebut the presumption that termination was reasonable in this case. That is, neither the grievant's length of service nor his otherwise satisfactory work performance are so extraordinary as to justify mitigation of the agency's decision to terminate the grievant for conduct that was determined by the hearing officer to be terminable, i.e., a Group III offense.[16] Thus,

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[11] Va. Code § 2.2-3005(C)(6).
[12] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1 (alteration in original).
[13] Hearing Rules § VI.B.
[14] Hearing Decision at 4-5.
[15] DHRM Policy No. 1.60, *Standards of Conduct.*
[16] Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. DHRM Policy No. 1.60, *Standards of Conduct*. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. Moreover, as stated above, the hearing officer is required to give deference to the agency's consideration and assessment of any mitigating circumstances. According to the hearing decision, the agency argued at hearing that while it may not have

this Department concludes that the hearing officer did not abuse his discretion in failing to mitigate the Group III with termination for falsification of state records.

Moreover, fairly read, the grievant is also asserting that his discipline should be mitigated because his discipline is inconsistent with the discipline received by other DJJ employees. The grievant's alleged evidence of inconsistent discipline was raised in his request for administrative review as "newly discovered evidence." In his Reconsideration Decision, the hearing officer addressed this alleged "new evidence" of inconsistent discipline and found that:

> Grievant contends he has discovered new evidence that would show that the Agency has been unfair in its disciplinary process of certain employees. There is no basis to grant Grievant's request based on new evidence. Grievant has not shown that he exercised due diligence to obtain the evidence prior to the hearing. In addition, the evidence the Grievant seeks to present would not likely produce a new outcome if the case were retried. Losing a case file is not the same as falsifying official State records. Willfully or negligently damaging or defacing State property is not the same as falsifying state documents. An employee who is permitted to resign in lieu of termination relates to how the Agency treated an individual following the filing of a grievance and not with respect to the act of issuing disciplinary action. Reconsideration Decision at 1-2.

This Department finds no reason to disturb the hearing officer's conclusion that the evidence of inconsistent discipline is not "newly discovered" such that a reopening of the hearing would be warranted. Accordingly, this Department cannot consider this alleged "new evidence" of inconsistent discipline in determining whether the hearing officer erred in failing to consider this evidence as a mitigating factor.

Compliance Issue

The grievant also claims that the agency failed to forward his grievance to this Department within the mandated five workdays and as such, violated the grievance procedure. This objection challenges an alleged procedural violation by the agency prior to the hearing, not an alleged violation of the grievance procedure by the hearing officer.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[17] That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five

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stated so on the Written Notice form, it did in fact consider the grievant's length of service and work performance in determining whether to mitigate the disciplinary action. *See* Hearing Decision at 5.

[17] *See Grievance Procedure Manual* § 6.

workdays for the opposing party to correct any noncompliance. If the agency fails to correct alleged noncompliance, the grievant may request a ruling from this Department.[18]

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.[19] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[20] Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, the grievant claims that an alleged procedural violation occurred at the qualification stage of the grievance process. Although he was aware of a possible procedural error at this step, he advanced to the hearing, without raising the issue of noncompliance with the agency head or with this Department until after he had received his hearing decision. As such, the grievant waived his right to challenge the agency's alleged noncompliance at this step.

Finally, it should be noted that even if the grievant's assertion was indeed correct, he was nevertheless afforded a full and fair opportunity to present his case to a neutral hearing officer, present evidence in support of his case, and to cross-examine witnesses testifying against him. Accordingly, despite any potential non-compliance prior to the hearing, the grievant received adequate due process through the grievance hearing.

APPEAL RIGHTS AND OTHER INFORMATION

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.[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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[18] *See Grievance Procedure Manual* § 6.3.
[19] *Id.*
[20] *Id.*
[21] *Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[23] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).

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