Issue: Administrative Review of Hearing Officer's Decision in Case No. 8669; Ruling Date: January 2, 2008; Ruling #2008-1829; Agency: Department of Corrections; Outcome: Hearing Decision In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2008-1829
January 2, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8669. For the reasons set forth below, EDR will not disturb the decision.

FACTS

The facts of this case are set forth in the September 13, 2007 Decision of the Hearing Officer in Case Number 8669. Pertinent facts[1] from the ruling are described below:

> Grievant has been employed by the Virginia Department of Corrections ("D.O.C.") as a Dentist since August of 1997. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> On March 9, 2007 Grievant was issued a Group III Written Notice with disciplinary action of termination (effective 3/9/07) for Threatening Behavior, Gross Negligence on the job causing serious injury, and Disruptive Behavior. On April 4, 2007, Grievant timely filed a grievance to challenge the Written Notice and disciplinary action of termination. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head, on June 27, 2007, qualified the grievance for a hearing. On July 30, 2007, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer.

[1] The original decision in its entirety is available on EDR's website at: http://www.edr.virginia.gov/searchhearing/2008-8669%20Decision.pdf.

On October 12, 2005 Grievant performed a dental extraction on SP, an inmate within D.O.C., removing one tooth (#32). On 10/26/05 an exposed bone was smoothed at the extraction site by Grievant. SP was admitted to a hospital on 10/29/05 and discharged on 10/31/05 with a diagnosis of dental infection and cervical cellulites. He returned to hospital on 11/1/05 and was discharged 11/06/05.

On April 6, 2006 a dental peer review of Grievant's work was conducted and he was found to need improvement in four areas:

1. A complete treatment plan should be developed before start of routine dental treatment.
2. Surgical patients should be recalled within 6 days to assess post surgical healing.
3. Extraction technique should be modified to prevent crown fractures.
4. Appropriate pain medication should be prescribed for post surgical pain relief.

On April 27, 2006 Grievant extracted 5 teeth (#14, 16, 17, 18, and 19) from inmate WC. Medical saw him on weekend of 4/30/06 and ordered Amoxicillin and Motrin due to swelling and a temperature of 98.1. On 5/1/06 Grievant saw him and ordered Tylenol #3 to take with Motrin for increased pain. On 5/02/06 he was seen at the Emergency Department and discharged that date with diagnosis of peritonsillar cellulites and uvulitis.

On May 11, 2006 Agency instructed Grievant that he will cease to perform any oral surgery procedures until he has successfully completed a continuing education course on oral surgery. The course was required to be approved and was to be a course that provides oral surgery training for the general dentist. On June 9, 2006 Grievant was instructed that a dentist was secured to provide oral surgery one day a week. Grievant was to refer oral surgery cases to him, schedule patients for him to see, and be present in the dental clinic when he is treating patients.

On February 21, 2007 Grievant and DA [Dental Assistant] had a disagreement concerning a number of issues. Grievant made statements to DA while maintaining a close, nose to nose, proximity to DA. Grievant came up to DA and got nose to nose with her. When, a number of times, she attempted to back away Grievant stepping [sic] forward to maintain the close proximity.

Grievant worked with two Agency dental assistants who have resigned. One indicated to Agency when she gave her two week notice (given on March 27, 2006) she was resigning as she no longer was feeling

> comfortable with the situation in the Dental Department of Correctional Center.[2]

As to the charge that the grievant engaged in threatening behavior towards a DA (*"at 'nose to nose' closeness, caused Dental Assistant to retreat while accusing her of 'back biting statements'"*), the hearing officer found that the agency had met its burden of proving the charge.[3] The hearing officer explained that:

> Grievant admitted to Chief Dentist of being within 16 inches of DA during their exchange when DA backed up with Grievant moving forward. Grievant contended he did not make remarks of the count being confusing, didn't say he would not work with someone he did not trust, and did not make the "back stabbing" accusations. Grievant also indicated if he did move towards DA while speaking, it was either so-as-to not shout above the noise of the machinery or to better hear as he had lost about 40% of hearing in one ear.
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> In his written response to charges which was dated 3/9/07 Grievant wrote that he did tell DA that he could not work with someone that he could not trust and that he "placed my face close to her face" because he had a hearing problem and wanted to hear what she was saying.
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> DA testified Grievant did not make any threatening statement or gesture to her that she felt placed her in fear for her physical safety. However, as far as physical threatening, this was indicated in the actions of Grievant who, when DA would attempt to back up, would move forward. This backing up by DA and Grievant stepping forwards toward DA was repeated a number of times with Grievant each time attempting to stay in close, nose to nose, proximity to her.
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> Chief Dentist considered the statements from DA, the fact that Warden felt Grievant presented a problem at institution, and the way he spoke in close proximity to DA. Chief felt Grievant's actions warranted a Group III after his investigation into matters.
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> While DA's version of matters appears to be consistent, Grievant version of matters which he has provided at different times, both in writing and orally, appear to vary.[4]

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[2] September 13, 2007 Decision of the Hearing Officer in Case Number 8669, p. 2-3 (footnotes omitted).
[3] Id at 5.
[4] Id.

The hearing officer concluded that the grievant engaged in threatening behavior, which the hearing officer found to constitute a Group III offense.[5]

As to the charge of gross negligence related to tooth extraction, the hearing officer found that the grievant had not engaged in grossly negligent behavior.[6] The hearing officer likewise found that the agency had not borne its burden in establishing that the grievant engaged in disruptive behavior (causing the resignation of two long term dental assistants by not permitting them to perform routine duties).[7]

Having concluded that the grievant had committed the Group III offense of engaging in threatening behavior, and observing that the normal disciplinary action for a Group III offense is a Written Notice with removal from state employment, hearing officer upheld the agency's discipline, finding no mitigating circumstances that would otherwise warrant a reduction in the discipline.

On September 25, 2007, the grievant appealed the decision to the EDR Director and sought reconsideration by the hearing officer. On October 5, 2007, the hearing officer issued his reconsidered opinion in which he affirmed his earlier decision.[8]

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."[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]

Policy Question

The grievant asserts that the hearing officer's factual finding and legal conclusion that the grievant was guilty of threatening behavior were erroneous because the DA testified that she never felt either physically or psychologically threatened.[11] The hearing officer addressed this point in his reconsidered decision. He concedes that the DA testified that she did not feel threatened by any statements made by the grievant or by gestures he made with his arm or fist.[12] A review of the hearing tapes seems to affirm

[5] Id. at 10.
[6] Id. at 7.
[7] Id. at 8.
[8] See October 5, 2007 Reconsideration Decision of Hearing Officer in Case Number 8669, p. 2.
[9] Va. Code § 2.2-1001(2), (3), and (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] The grievant couches this argument both in terms of error of law and error regarding evidence. Objections based on errors of law are properly raised with the circuit court in the jurisdiction in which the grievance arose. *See Grievance Procedure Manual* §7.3(a).
[12] October 5, 2007 Reconsidered Decision of the Hearing Officer in Case Number 8669, p. 1.

this conclusion.[13] The hearing officer noted, however, that in response to the question: did she have psychological fear; the DA testified that she had "concerns."[14] The hearing officer also found that the DA attempted to retreat from the grievant.[15] Furthermore, the hearing officer observed that the DA testified that as she backed up, the grievant advanced, nose to nose.[16] The hearing officer pointed out that the grievant admitted in testimony that he was within 16 inches of the DA when making certain statements and accusations.[17] Finally, the hearing officer observed that the DA was bothered enough about the incident that she brought her concerns to the Warden.[18] Based on the totality of the circumstances in this case, the hearing officer found that the grievant engaged in threatening behavior of a serious nature.[19]

Without expressly couching his reconsidered decision in terms of subjectivity versus objectivity, it appears that the hearing officer found the grievant's behavior to be such that a reasonable person would find the grievant's actions objectively threatening despite the DA's admission that, subjectively, she did not find the behavior threatening. It is not clear whether under state and/or agency policy, a potential victim must find the behavior in question to be subjectively threatening before the state can issue discipline against the potential offender.[20] The hearing officer appears to have concluded that there is no requirement that an employee subjectively perceive an act as threatening. Questions regarding the hearing officer's interpretation of state and/or agency policy are not issues for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.[21] Only a determination by DHRM can establish whether or not the hearing officer erred in his

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[13] The quality of the recording of the hearing is poor. However, it appears that the DA did testify that the grievant did not make any threatening statement nor did he make any threatening gesture with his fist or arm. Hearing Tape 1, Side A, beginning at 640.

[14] October 5, 2007 Reconsidered Decision of the Hearing Officer in Case Number 8669, p. 1.

[15] Id. at 2.

[16] Id. at 1. *See also*, grievant's statement (Agency Exhibit Tab 4, page 2) ("By this time we had entered the dental lab area still nose to nose, my backing up as [the grievant] moved forward.") The grievant appears to concede that he advanced toward the DA as he spoke but asserts that he did so "either so-as-to not shout above the noise of the machinery next to [them] and/or (both) to better hear what she was saying to [him]." (Agency Exhibit Tab 4, page 4) The grievant asserts that he has a 40% hearing loss in one ear and that electrical pumps in the vicinity make "considerable noise." Id.

[17] Id.

[18] Id. at 2.

[19] Id.

[20] For example, under Title VII of the Civil Rights Act, to prevail on a claim of a racially hostile work environment, an employee must show that the harassment was (1) unwelcome, (2) based on race, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) that there is some basis for imposing liability on the employer. Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998). The harassment must be both objectively and subjectively severe or pervasive. Harris v. Fork Lift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). The objective severity or pervasiveness of the harassment is judged from the perspective of a reasonable person in the plaintiff's position. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

[21] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

interpretation of state and agency policy. If the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, he must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Mitigation

The grievant argues that the hearing officer failed to comply with the grievance procedure by not mitigating the disciplinary action. Specifically, the grievant asserts that the hearing officer should have mitigated the discipline because the actions of the grievant constituted, at most, a Group I, non-terminable offense such as "disruptive behavior."

The determination of the appropriate level of an offense (Group I, II, or III) occurs prior to mitigation. Under the *Rules for Conducting Grievance Hearings*, a hearing officer must determine whether: (1) employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the discipline was consistent with law and policy. [22] In determining whether the discipline is consistent with policy, the hearing officer looks to DHRM Policy 1.60, the Standards of Conduct (SOC), to determine whether the misconduct has been appropriately designated as a Group I, II, or III offense under the SOC. Only after establishing that (1) the conduct occurred, (2) it constituted misconduct, and (3) the discipline conformed to law *and was properly categorized as a Group I, II, or III offense*, does the hearing officer move on to determine whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action.[23]

Here, while the grievant couches his objection in terms of mitigation, the objection is really one challenging the hearing officer's determination that the conduct in question constituted misconduct and was appropriately categorized as a Group III offense. This is properly viewed as a challenge to the hearing officer's finding on whether the discipline is consistent with policy, which is properly a question for DHRM to answer, rather than this Department under mitigation.[24] Accordingly, if the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, he must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**.

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

[23] A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *See* Rules for Conducting Grievance Hearings, § VI(B)(1).

[24] The grievant did not identify any mitigating factors that should have been considered by the hearing officer other than the purported improper designation of the level of offense discussed above. The hearing officer expressly stated that the discipline imposed by the agency did not exceed the bounds of reasonableness. October 5, 2007 Reconsidered Decision of the Hearing Officer in Case Number 8669, p. 2.

Again, because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

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 and any reconsidered hearing decisions following such review have been decided.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27] This Department's rulings on matters of procedural compliance are final and nonappealable.[28]

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Claudia T. Farr
Director

[25] *Grievance Procedure Manual,* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[27] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[28] Va. Code § 2.2-1001 (5).