Issues: Compliance – Grievance Procedure (Documents) and Administrative Review of Hearing Officer's Decision in Case No. 8840; Ruling Date: March 13, 2009; Ruling #2009-2157, 2009-2174; Agency: Department of Corrections; Outcome: Agency In Compliance; Remanded back to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING and ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2157, 2009-2174
March 13, 2009

The grievant has requested a compliance ruling to challenge various issues regarding the Department of Corrections' (the agency's or DOC's) alleged failure to produce certain documents. Additionally, the grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8840.

FACTS

In this case, the grievant received two Group II Written Notices related to his storage of personal, non-work-related files on the agency's computer system.[1] The grievant was demoted and transferred as a result of these disciplinary actions.[2] The hearing officer, in a decision dated October 17, 2008, upheld the Written Notices.[3]

DISCUSSION

Compliance

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[4] This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. The grievant asserts that he had requested documents from the agency, which the hearing officer had additionally ordered to be produced, but certain documents were not provided. Because the hearing in this matter has concluded, the proper way to address an issue of alleged noncompliance for failure to produce documents is through the drawing of adverse inferences by the hearing officer. As such, this issue will be considered as part of the request for administrative review below.

The grievant has requested additional forms of relief for the agency's alleged failure to provide the requested documents, relief which this Department declines to order. To the extent

[1] Decision of Hearing Officer, Case No. 8840, Oct. 17, 2008 ("Hearing Decision"), at 8-9.
[2] *Id.* at 9-10.
[3] *Id.* at 16.
[4] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

the grievant's allegations are true, the agency's alleged noncompliance in this case is not sufficiently severe here to warrant a finding of substantial noncompliance or an award of relief to the grievant. This Department cannot find that the agency's actions, if any noncompliance occurred, were driven by bad faith or a gross disregard of the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.[5]

Administrative Review

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."[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 action be correctly taken.[7] The grievant has presented numerous arguments in his request for administrative review and related briefs, which are addressed below.

Noncompliance - Documents

The grievant asserts that the hearing officer has failed to "enforce the mandates of the grievance process" and address the agency's alleged "substantial non-compliance." It appears that the grievant is referring to the agency's alleged failure to produce certain requested documents.[8] However, the grievant has not substantiated his claim that the agency has failed to produce documents, beyond the matter concerning Grievant's Exhibit 44 (GE 44) discussed below. During the hearing, upon questioning by the hearing officer, the grievant was not able to identify particular documents that the agency had failed to provide. The grievant identified certain materials that "should" have existed, but, apart from the issues with GE 44, did not provide any indication of existing documents that the agency had withheld.[9] As such, this Department has no way of knowing if there are other documents outstanding that were not provided.

The hearing decision indicates that the grievant "waived his right to a [hearing] continuance to await the EDR decision [on document requests], electing instead to proceed to hearing."[10] While this appears to be true, it misses the important point that by proceeding to hearing, the agency also waived continuance of the hearing to await EDR's decision on document requests. Further, although both parties may have waived their right to delay the hearing further, the grievant *never* waived his request for the documents that the hearing officer

[5] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Although the grievant quotes many provisions of the *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings*, it is not clear how the grievant is alleging these provisions were violated. The only specific conduct described as noncompliance during the hearing and in the grievant's documents appears to reference the issue of the production of documents. *See, e.g.*, Hearing Record, Tape 9, Side A.
[9] *See* Hearing Recording, Tape 9, Side A; Hearing Decision at 16.
[10] Hearing Decision at 16.

ordered to be produced.[11] The agency requested a ruling from EDR to challenge the hearing officer's document production orders.[12] By proceeding to hearing, the agency effectively waived the benefit of receiving EDR's input. As such, the agency was still subject to complying with the hearing officer's orders for production of documents. Though these orders were later modified by EDR, given the unique procedural opportunity that occurred in the case (as noted in Ruling No. 2009-2087), the agency was still required to comply with the orders, as modified, which it apparently attempted to do in its written response to the grievant in GE 44.

GE 44 is largely a memo responding to the various orders for production of documents. Most of the agency's responses in GE 44 indicated either that it had already provided the requested documents or there were no such documents. The only substantive response was to the hearing officer's Order No. 2 in the First Supplemental Order for Production of Documents, which ordered the production of "[c]opies of … Written Notices … pertaining to Misuse of the Computer and/or Storage Of Personal Documents On the State's Computer." Instead of providing copies of the Written Notices,[13] the agency provided an extremely brief listing of certain disciplinary actions.

Although the hearing officer's order indicated that the agency could provide a "listing in database form" in lieu of the actual documents, GE 44 falls far short of providing the substantial equivalent of the requested information. Also, in light of EDR Ruling 2009-2087, indicating that the relevant portion of such personnel documents were not protected from disclosure, the agency's refusal to provide the actual documents and prepare only a brief summary is questionable. In general, a summary listing of documents is utilized by agreement between the parties, when the records requested are voluminous. Given that the agency apparently only discovered a handful of responsive disciplinary actions, it is not clear why the agency chose to provide the limited information in GE 44. Even a "listing" would seem to need to include more information than was provided.[14] Therefore, the hearing officer should reconsider whether an adverse inference should be taken against the agency with regard to this information and this request. Thus, the grievance must be remanded for the consideration and application, if any, of an adverse inference.[15]

Except for the matter of GE 44 and the corresponding document request, there is no evidence to support a finding of other noncompliance by the hearing officer with respect to document production. However, in his decision, the hearing officer seems to identify some kind of noncompliance by the agency.[16] If the record before the hearing officer reflects further noncompliance sufficient to take additional adverse inferences, the hearing officer must do so on remand. The grievant's arguments submitted to this Department, however, do not have sufficient

[11] *See* Order for Produc. of Docs.; First Suppl. Order for Produc. of Docs.; Second Suppl. Order for Produc. of Docs.
[12] *See* EDR Ruling No. 2009-2087.
[13] EDR Ruling No. 2009-2087 had allowed the agency to redact non-relevant personal information before providing copies of the requested Written Notices to the grievant.
[14] For instance, for the disciplinary actions cited, there is no description of the employees' misconduct similar to what would be included on the actual Written Notice forms.
[15] *See Rules for Conducting Grievance Hearings* V (B).
[16] Hearing Decision at 16.

specificity for this Department to direct that consideration of any further adverse inferences be taken.

Failure to Address Grievant's Arguments

The grievant argues that the hearing officer failed to address certain arguments and claims he raised during the grievance process. The issues he has raised are collectively addressed below.

Unauthorized Search

The grievant asserts that the search of his computer to discover the various non-work-related files stored on the agency's computer system was unauthorized and without just cause, thus inconsistent with policy. As a result, the grievant asserts, any evidence obtained through that search must be excluded under the Fourth Amendment of the United States Constitution.

The language cited by the grievant to support his position that the agency violated policy by failing to conduct an authorized search does not appear in policy, but rather in a blank agreement form. The promises made in that form would appear to obligate a signatory to obtain appropriate authorization from the agency Inspector General or information security officer before engaging in the observation of user data. Consequently, if the appropriate authorization(s) were not obtained, the effect of this form language might be to subject a signatory to some kind of disciplinary action for violation of the agreement he or she signed. It does not appear, however, that any failure by the agency to obtain internal authorization to observe or monitor the grievant's computer usage would affect or alter the general standard that the grievant, as an employee of the agency, had no expectation of privacy in his computer.[17]

Although the hearing officer did not directly address this point, this Department sees no need to have the hearing officer reconsider the grievant's arguments on remand. Based on a review of the record, this Department finds no violation of the grievance procedure in the admission and consideration of the evidence gained by the search. Nor does there appear to be an arguable legal basis for the grievant's assertion that would necessitate remand.[18] To the extent the grievant argues that this portion of the hearing decision is contradictory to law, he can raise that matter with the circuit court.[19]

Grievance Issues on Form A

In reviewing the grievant's Form A and attachments, it appears that most of the issues raised by the grievant derive from the two Group II Written Notices he received, and thus would be addressed within the hearing officer's consideration of those Written Notices. Nevertheless,

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[17] *E.g.*, DOC Policy 310.2, *Information Technology Security* § VI(A).
[18] *See, e.g.*, United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000) ("To establish a violation of … rights under the *Fourth Amendment*, [the employee] must first prove that he [or she] had a legitimate expectation of privacy in the place searched … that society is prepared to accept as objectively reasonable.").
[19] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3.

the grievant is correct that there are a few issues not specifically addressed in the hearing decision.

For instance, the grievant alleges "[m]istreatment, discriminatory, unprofessional and demeaning management." It is unclear, however, to what the grievant is referring, and the hearing record does not clarify this specific allegation beyond the grievant's arguments against the Written Notices and the agency's implementation of the disciplinary actions, which are discussed elsewhere in this ruling. The grievant also alleges "harassment" that occurred following the issuance of the Written Notices. Although there was hearing testimony and exhibits submitted about these occurrences, it appeared that the evidence was being offered in furtherance of the grievant's arguments of retaliation, which will also be addressed later in this ruling. Lastly, the grievant complained of the compromise, dissemination, and alleged failure to notify about the release of personally identifiable information, presumably his. It appears the grievant is asserting this claim pursuant to provisions of the Government Data Collection and Dissemination Practices Act ("Government Data Act").[20] However, based on a review of the hearing record, it is unclear that the grievant's case presented evidence to support any such allegation. In any event, a grievance hearing is not the proper venue to seek relief from a violation of the Government Data Act. That Act has its own enforcement mechanism.[21]

In light of all the above, there is no need for the hearing officer to address other issues raised on the grievant's Form A, beyond what is specifically ordered in this ruling.

Lack of Similarly Situated Persons

The grievant appears to argue that it is part of the agency's burden to establish that it has taken similar action in other cases. That is not the case; it is the grievant's burden to prove such mitigating or retaliatory factors.[22] The agency's treatment of similarly situated persons, however, are potentially relevant to the grievant's retaliation and/or mitigation claims, which are discussed elsewhere in this ruling.

Allegedly Exceeding Policy through Transfer AND Demotion

The grievant alleges that Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, only permits an agency to either transfer or demote an employee receiving two Group II Written Notices. Although it does not appear that the hearing officer explicitly addressed the grievant's argument on this point, by finding that the imposition of the transfer and demotion was consistent with policy,[23] the hearing officer has effectively found that DHRM Policy 1.60 permitted the agency's action in this case. Whether this interpretation is consistent with state policy is a determination for DHRM.[24] Accordingly, while it is this

[20] Va. Code §§ 2.2-3800 et seq.
[21] *See* Va. Code § 2.2-3809.
[22] *See, e.g.*, Kissner v. OPM, 792 F.2d 133, 134-35 (Fed. Cir. 1986); *see also* EDR Ruling Nos. 2006-1099, 2006-1104 (discussing burden of grievant to show that disciplinary action was discriminatory).
[23] *See* Hearing Decision at 16.
[24] *See* Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

Department's understanding that the grievant has submitted a request for administrative review to DHRM, if the grievant's request to DHRM does not raise this specific claim, but he still 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**. Because the initial request for review to this Department was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Similarity Between Written Notices

The grievant asserts that the hearing officer failed to address his argument that the two Group II Written Notices he received were almost identically worded and describe the same behavior. The hearing officer's failure to address this point is puzzling. The misconduct described on the two Written Notices appears to be identical. The only difference is that one Written Notice makes reference to past counseling and a past disciplinary action for other computer use violations. As such, the hearing officer must consider, and the hearing decision must address, what specific conduct is being charged by each of the two Written Notices before him in this case.

Two agency witnesses appeared to explain the differences between the two Written Notices. This testimony appears to indicate that the first was issued because the grievant's storage of personal files on the agency's computer system was the third example of problems with the grievant's computer usage, indicating a pattern of a failure to follow policy. The second was for the misuse of the computer system by storing various personal files both in an excessive amount and with certain allegedly prohibited items.[25] Given this explanation, however, it is unclear how the conduct charged by these two Written Notices differs at all. Including discussion of the grievant's past misconduct would not create another disciplinable offense. Rather, the grievant's past disciplinary history might be an aggravating factor relevant to the agency's discipline of the actual alleged misconduct at issue here: the grievant's storage of various personal files on the agency's computer system.

In sum, while there was a great deal of testimony about the various issues surrounding the grievant's alleged storage of personal documents, the hearing officer must review the conduct actually charged on the Written Notices and the record evidence pertaining to that charged conduct. The grievant's argument that the Written Notices have effectively disciplined him twice for the same conduct must be addressed, and is remanded to the hearing officer to reconsider this point.

Retaliation Claim

The grievant argues that the hearing officer neither made sufficient findings nor addressed the evidence he presented regarding his retaliation claim. A retaliation discussion appears in the hearing decision,[26] but the brevity of that discussion, and the significant analysis

[25] Hearing Recording, Tape 2, Side A; Tape 2, Side B; Tape 3, Side A.
[26] Hearing Decision at 15.

of the agency's points rather than the grievant's, creates questions as to whether the hearing officer fully considered the grievant's claim. There is no explanation in the hearing officer's analysis or consideration of the facts to provide the reader with any information that he did.

In this case, the grievant claims that he was either disciplined (or disciplined more harshly) because of support he provided to a subordinate employee in her grievance with the agency.[27] While the hearing decision includes a description of the elements of a retaliation claim,[28] there is no discussion of how the evidence applied to each element and if the grievant met his burden as to any. The hearing officer identifies the agency's non-retaliatory rationale, but he did not discuss the grievant's evidence attempting to show that the rationale was pretextual.[29] A retaliation analysis does not end if the agency puts forth a non-retaliatory reason for the adverse action.[30] The evidence must be assessed to determine whether that rationale was pretextual. Indeed, the grievant provided evidence of a number of different facts that should be addressed.[31] Therefore, this matter must be remanded to the hearing officer for the additional purpose of fully considering the grievant's retaliation claim and explaining the hearing officer's findings and conclusions as to the grievant's evidence and all the elements of that claim.[32]

Other Alleged Policy Violations

The grievant states that the hearing officer failed to adequately consider various arguments he asserted regarding alleged policy violations by the agency. The grievant states that he submitted briefs detailing his arguments after the hearing. The hearing officer dismissed without comment the grievant's "innumerable" arguments.[33] While many of the alleged policy violations appear to be irrelevant, unsupported, or, at most, arguable violations of policy, the hearing officer's flat dismissal of these points was not proper. The hearing decision must demonstrate due consideration of the grievant's arguments and address those which are not obviously spurious. The hearing officer may need to provide only minimal responses to most of the grievant's points (other than those mentioned elsewhere in this ruling), but they must be addressed nonetheless.[34]

In addition, further comment is necessary about the hearing officer's sweeping findings of fact that the agency's "actions concerning the issues grieved in this proceeding were

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[27] *See* Hearing Decision at 10.
[28] Hearing Decision at 15.
[29] The hearing decision does include a statement that the agency's stated rationale was not pretextual, but no analysis of the evidence was provided. *See* Hearing Decision at 10.
[30] *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[31] Examples of such evidence include, but are not limited to, 1) the manner in which the grievant was escorted from the building and the handling of his office materials, *e.g.*, Hearing Recording, Tape 8, Side A; 2) at the second step meeting for the subordinate employee's grievance he was questioned about what he had told the grievant about the selection at issue, *e.g.*, Hearing Recording, Tape 4, Side A; 3) the proximity in time between his involvement in the subordinate employee's grievance and the Written Notices, *e.g.*, Gr. Ex. 43. The hearing record and the grievant's briefs contain other evidence and arguments.
[32] The hearing officer may also need to consider the effect of adverse inferences drawn on remand, if any.
[33] Hearing Decision at 14.
[34] However, if any of the grievant's arguments were not presented at hearing or in a brief during the hearing phase (including post-hearing, prior to the issuance of the decision), they need not be addressed.

warranted and appropriate under the circumstances … [and] reasonable and consistent with law and policy."[35] Though such statements may be appropriate as summaries to the hearing officer's more detailed analysis, the inclusion of these broad statements as findings of fact leaves unclear how many issues the hearing officer is intending to sweep into them. The grievant has raised a number of concerns and alleged policy violations in his grievance. While it is not clear whether the grievant has established that the agency violated policy, at least one issue bears further comment.

The grievant provided evidence of how, in his view, the agency effectuated the disciplinary actions in an improper manner. According to the grievant, because he had a substantial amount of personal books, files, papers, etc. and did not want to be "paraded" in front of his peers, he elected to retrieve his office items later. He was then escorted out of the facility. Agency employees apparently boxed up his office items, amounting to numerous boxes. The grievant appears to have attempted to arrange a time to pick up these materials given the voluminous nature. However, the grievant alleges that the agency merely notified him when they would be placed outside the facility for him to retrieve. When the grievant received that call from the agency, he states he noticed that it was raining and asked that the boxes be put in a covered location or if a different time could be arranged. The agency allegedly declined, leaving his materials in the rain.[36]

As stated, it is not clear, and the hearing officer has yet to address, whether the facts occurred as the grievant has described and if so, whether the agency complied with its policies and practices in taking those steps. It is questionable whether the agency's alleged actions, as described by the grievant, could be viewed as "reasonable" or "appropriate," given that the grievant, though demoted and reassigned, was still an agency employee. The alleged treatment of the grievant (being escorted out of the building) and the agency's alleged refusal to accommodate his reasonable requests for the return of his office materials, if these actions occurred, might be viewed as unreasonable, inappropriate, and/or contrary to the agency's policies or practices. As such, on remand, the hearing officer should be mindful of all the issues in this grievance and consider whether the agency actions raised by the grievant were each truly "appropriate" and "reasonable" as seemingly indicated in the findings of fact.

Lack of Hearing Officer Rationale

The grievant has also asserted that the hearing officer failed to provide any rationale for certain conclusions and findings. The individual issues affected by these arguments are addressed below.

Obscenity

The hearing officer found that "certain materials within [the grievant's] personal files of which the Agency complains are obscene material."[37] However, the hearing officer did not

[35] Hearing Decision at 10.
[36] *See* Hearing Recording, Tape 8, Side A.
[37] Hearing Decision at 10.

identify which "materials" met the definition and how the "materials" met that definition. As such, the matter is remanded to the hearing officer for further clarification of these findings. On reconsideration, the hearing officer must also address the grievant's argument that he was not charged with storing "obscene" materials in the Written Notices.

Derogatory or Inflammatory

The grievant also disputes the hearing officer's determination that "certain materials within his personal files of which the Agency complains are of a derogatory or inflammatory nature."[38] Again, the hearing officer has not identified which "materials" were derogatory or inflammatory, what definition he used to assess those terms, and how the "materials" met one or both of those definitions. As such, on reconsideration, the hearing officer must further clarify his findings.

The hearing officer has, however, addressed the grievant's challenge that the materials could not be "derogatory" or "inflammatory" if they were not distributed or available for access by others.[39] The hearing officer indicates that he was not persuaded by that argument,[40] and this Department has no basis to remand because of that finding. The DOC policy language prohibiting mere creation or storage of "material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature"[41] would appear to encompass the grievant's alleged misconduct, if the files are found to meet the definition of one or more of those terms.[42]

Incidental Use

In reviewing the record, there was frequent discussion of the so-called personal use "safe harbor" provision of the relevant agency policy. That provision provides:

> *Personal Use of the Computer and the Internet.* Personal use means use that is not job-related. Internet Use during work hours should be incidental and limited so as to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. Personal use is prohibited if it:
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> 1. Adversely affects the efficient operation of the computer system; or
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> 2. Violates any provision of this procedure, any supplemental procedure adopted by the agency supplying the Internet or electronic communication systems, or any

[38] Hearing Decision at 10.
[39] Hearing Decision at 14.
[40] *Id.*
[41] DOC Policy 310.2 § X(D)(3)(f).
[42] To the extent the grievant disputes the hearing officer's interpretation of the policy, this would be an issue for DHRM to determine. *See* Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

> other policy, regulation, law or guideline as set forth by local, State or Federal law. (*see COV §2.2-2827*)[43]

The hearing officer determined that the grievant's personal use was "not limited, occasional or incidental" within the meaning of this "safe harbor."[44] However, it is unclear how the hearing officer arrived at that conclusion because no factual or explanatory rationale was provided. This case must be remanded to the hearing officer to explain how the facts demonstrated that the grievant's use was "not limited, occasional or incidental."

In addition, the hearing officer must reconsider broadly the language of this "safe harbor" provision of the policy. For instance, the "incidental and limited" language appears in the sentence on "Internet Use."[45] Though the policy definition of Internet is broad, the hearing officer must consider whether "Internet Use" would encompass the conduct of storing files on agency computer systems charged in the Written Notices. Depending on the hearing officer's interpretation of the language, it is unclear whether the sentence about "incidental and limited" "Internet Use" would be applicable to the storage of files on an agency computer. As such, the policy may not provide an explicit "safe harbor" for non-Internet personal use of the computer, but rather would prohibit personal use only if it "[a]dversely affects the efficient operation of the computer system" or otherwise violates law or policy.[46] If that is so, the hearing officer would need to address whether evidence in the record establishes that the grievant's use of the agency computer system had an adverse effect on the system's efficient operations or whether it otherwise violated law or policy.[47]

An agency's interpretation of its own policies is generally afforded great deference. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, a hearing officer should give the agency's interpretation of its own policy substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[48] Further, we have held that even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the grievant had fair notice of the agency's interpretation.[49] On remand, the hearing officer is directed to consider these issues and any record evidence of the agency's interpretation of the relevant policy.

Additional Lack of Rationales

In general, the hearing decision in this case lacked sufficient explanation for the hearing officer's broad findings, especially given the amount of contested issues and arguments asserted

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[43] DOC Policy 310.2 § VI(C).
[44] Hearing Decision at 4, 14.
[45] DOC Policy 310.2 § VI(C).
[46] *Id.*
[47] It is noted that the hearing officer already found that the grievant's use violated other provisions of the policy. Hearing Decision at 10, 14.
[48] *See, e.g.*, EDR Ruling No. 2008-1956 and 2008-1959.
[49] *Id.*

by the grievant. This is exemplified by the hearing officer's statement "[c]oncerning the Grievant's unauthorized use/misuse of the computer the hearing officer will allow the volume and nature of the Grievant's personal materials to speak for themselves."[50] These determinations are precisely the responsibility of the hearing officer to decide, rather than let them "speak for themselves." A hearing decision must include an explanation of the bases and rationales of the hearing officer's determinations of material issues. On remand, the hearing officer should apply the framework for determining whether discipline was warranted and appropriate as established in the *Rules for Conducting Grievance Hearings*.[51] In addressing the various points raised in this ruling, as well as his findings generally, the hearing officer should revise the hearing decision to conform to this framework, make the applicable findings, and explain the supporting evidence, applicable policies, and rationales for his determinations.

Seven Additional Files

The grievant has raised an issue concerning seven computer files about which an agency witness, the grievant's supervisor, testified. The hearing decision contains one sentence about this issue: "Even after the Grievant was supposed to have deleted all the personal files from his computer, the Supervisor discovered what he classified as seven (7) additional inappropriate files including one of a sexual nature which showed a male's genitals fully exposed."[52]

The testimony about these additional files was provided by the agency as "rebuttal evidence."[53] The grievant objected to the agency's use of these documents to show additional improper files the grievant had on his computer, allegedly after the issuance of the two Written Notices. The hearing officer, before hearing the agency's position, asserted what he felt was the agency's purpose for offering the evidence.[54] As the hearing tapes reflect, the hearing officer appeared to agree that the testimony about the additional files could not be used to support the Written Notices.[55] Rather, the hearing officer appeared to indicate that the testimony could only be used, as it was rebuttal evidence, to dispute the grievant's evidence that there were delays in restoring his access to files or that there was a higher percentage of personal files in the

[50] Hearing Decision at 15.
[51] For this framework, see *Rules for Conducting Grievance Hearings* § VI(B), which provides, in part:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) 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.

[52] Hearing Decision at 14.
[53] Hearing Recording, Tape 9, Side B.
[54] *Id.*
[55] *Id.*

grievant's computer than he asserted.[56] However, because neither of these issues are discussed in the hearing decision, it remains unclear why this rebuttal evidence was admitted, and how it was considered.

To the extent these seven additional files were discovered after the issuance of the Written Notices, were not presented to the grievant, and/or were not presented as part of the agency's case-in-chief, there would appear to be an issue as to whether this evidence could be used to meet the agency's burden of proof, i.e., to demonstrate that these were additional inappropriate files stored on the agency's computer system by the grievant. If the agency had not considered the grievant's alleged storage of these seven additional files in issuing the disciplinary actions, the files would appear to be irrelevant to the disciplinary actions. Thus, to admit them now, after the fact, in an attempt to justify disciplining the grievant for storing them could potentially pose due process concerns.[57]

On remand, if the hearing officer views this testimony as admissible and appropriate for his consideration of the merits of the case, rather than simply rebuttal evidence, the reconsidered hearing decision must address why this evidence was admitted, how the evidence was considered by the hearing officer, and his resulting findings. If the hearing officer views this testimony as inadmissible and/or inappropriate for his consideration of the merits of the case, the reconsidered hearing decision must explain why.

Reprinting Content of Documents

The grievant argues that the hearing officer improperly reprinted the text of certain documents and the Written Notices in the hearing decision. The grievant asserts that it was prejudicial for the hearing officer to reproduce this information in such a manner. The grievant's assertions are not persuasive. The inclusion of the actual language from the Written Notices is entirely appropriate. The quoted text is needed to establish what the agency has alleged the grievant has done wrong.

Similarly, the inclusion of the two selected documents in the hearing decision was not improper in this case. First, contrary to the grievant's "cherry picking" argument, it is understandable why these particular documents were included in the decision. They were the two files from the grievant's computer most frequently referenced at hearing. Further, the inclusion of the actual language of an exhibit is appropriate, when relevant, to be able to assess adequately the basis of the hearing officer's decision in context. However, as already discussed above, the hearing officer, in his finding that "certain" files on the grievant's computer were "derogatory" and/or "obscene," did not identify the particular documents. If the reprinted documents were not the particular documents that were viewed by the hearing officer as "derogatory" or "obscene," reprinting in the hearing decision would appear to be superfluous. Given this Department's remand to the hearing officer to elaborate further on his findings as to

[56] *Id.*

[57] *Cf.* O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) ("Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.").

the particular documents that violated policy, it is assumed that this lack of clarity will be cured upon reconsideration.[58] In general, however, this Department will not interfere with a hearing officer's choice of language and exhibits included in a decision, as long as they are relevant. Such matters are within the hearing officer's sound discretion.

Bias

The grievant claims that the hearing officer was biased, based on the grounds of the analysis contained in the hearing decision, which the grievant argues demonstrated "extreme bias … toward the Agency's position, testimony and evidence … reflect[ing] little to no consideration of the Grievant's wealth of materials and evidence." The Virginia Court of Appeals has indicated, however, that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[59] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[60]

In this case, the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance. Rather, the grievant's claims of alleged bias are essentially his grounds for appeal to this Department on various other aspects of the hearing officer's alleged noncompliance with the grievance procedure. Those issues have been addressed where indicated in this ruling and will be reconsidered by the hearing officer on remand. In sum, this Department cannot conclude that the hearing officer showed actionable bias in this case.

Appearance of Bias

The grievant also cites to portions of the *Rules for Conducting Grievance Hearings* addressing the need for hearing officers to avoid the appearance of bias. The general conduct of the hearing and the manner of questioning witnesses is within the sound discretion of the hearing officer.[61] Thus, noncompliance with the grievance procedure and *Rules for Conducting Grievance Hearings* on such grounds will only be found if the hearing officer has abused that discretion. Based on this Department's review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. Both parties were able to present their cases adequately and neither was materially prejudiced. However, given the importance of avoiding the appearance of bias during the hearing process, the following is offered as guidance.

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[58] For instance, if the hearing officer finds that nothing in the "reprinted" documents quoted in the hearing decision violated a specific prohibition in DOC Policy 310.2, they should be eliminated from the decision. On the other hand, if the "reprinted" document(s) are found to be, for instance, "derogatory" or "obscene," inclusion of the actual language in the hearing decision is helpful to explain the basis of the hearing officer's decision.

[59] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992) (alteration in original).

[60] *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

[61] *E.g.*, EDR Ruling No. 2009-2091.

The *Rules for Conducting Grievance Hearings* provides that "the hearing officer may question the witnesses."[62] The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[63] The frequency of the hearing officer's questions alone is not problematic if the questions are relevant and helpful to consideration of the facts of the case,[64] but the manner in which hearing officer interjections are made must be appropriate to an adjudicative forum.

Hearing officers must attempt to avoid leading questions or statements. While there may be times when a leading question could be the only way to determine a witness's testimony or an advocate's position, such times should be rare. Clarification of muddled testimony is an appropriate reason to pose questions. However, open-ended questions should be utilized, not leading questions unless absolutely necessary and as a last resort.

Unless ruling on a procedural matter or other motion,[65] the hearing officer should not indicate his or her opinion of the substantive facts or other determinations during the course of the hearing. To do so is contrary to the basic principle that a hearing officer withholds judgment until the parties' submission of all the evidence. Hearing officers must also refrain from making judgments about a party's position during the hearing. If the hearing officer has questions about a party's argument, open-ended questions could be used to assist with an understanding of the party's position.

Grievance hearings are not appellate arguments. A hearing officer's discussions with party advocates can result in those advocates testifying about facts when they are not witnesses under oath. Further, protracted engagement of a party or representative, in something akin to oral argument, could have the appearance that the hearing officer was challenging that position, rather than attempting to understand the party's position. Hearing officers must be cognizant of their conduct, the potential for the appearance of bias it may create, and must attempt to let the parties put on their own evidence and arguments, with follow up only if necessary. Hearing officers should limit the amount they debate facts and arguments during the hearing with party advocates. While it may be helpful and necessary to do so at times, a hearing officer's frequent exchanges with advocates (and witnesses) throughout the hearing could create the appearance of bias.

Factual Conclusions

The grievant has also raised a number of different challenges to the hearing officer's factual conclusions and assessments of the evidence and witnesses' testimony. Hearing officers

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[62] *Rules for Conducting Grievance Hearings* § IV(C).
[63] *Id.*
[64] *See* EDR Ruling No. 2009-2091.
[65] Hearing officers should also avoid responding to a party's objection before the other side provides a response unless the proper ruling is so clear that the opposing viewpoint need not be consulted. Failure to do so could appear as advocacy for a party as the hearing officer interjects to respond to an objection for a party.

are authorized to make "findings of fact as to the material issues in the case"[66] and to determine the grievance based "on the material issues and grounds in the record for those findings."[67] 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, or aggravating circumstances to justify the disciplinary action.[68] 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.[69] 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.

In making his arguments, the grievant appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[70] For instance, a hearing officer has the authority to accept an agency's position if supported by the record. Based upon a review of the hearing record (and except for those matters discussed elsewhere in this ruling), this Department cannot find that the hearing officer's findings of fact and conclusions of law and policy, as challenged by the grievant, are unsupported. Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the remaining findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no basis to disturb the hearing officer's decision based on any of the grievant's other factual disputes.

Mitigation

The grievant argues that the hearing officer failed to consider "well established factors of mitigation." Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive 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."[71] EDR's *Rules for Conducting Grievance Hearings* provides 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

[66] Va. Code § 2.2-3005.1(C).
[67] *Grievance Procedure Manual* § 5.9.
[68] *Rules for Conducting Grievance Hearings* § VI(B).
[69] *Grievance Procedure Manual* § 5.8.
[70] *Rules for Conducting Grievance Hearings* § VI(B).
[71] Va. Code § 2.2-3005(C)(6).

> 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.[72]

Therefore, for a hearing officer to mitigate a disciplinary action that he or she found to be consistent with the facts, policy, and law,[73] the rules require a finding that the agency's discipline nevertheless exceeded the limits of reasonableness upon consideration of the record evidence. This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[74] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

Here, the hearing officer addressed mitigating circumstances by stating:

> The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's apparent refusal to recognize and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.[75]

From the hearing officer's discussion, it is entirely unclear what he considered on mitigation. Indeed, this paragraph appears to merely be a statement of the agency's position, which is not consistent with a hearing officer's duty to analyze the evidence on mitigating circumstances under the "exceeds the limits of reasonableness" standard established in the *Rules for Conducting Grievance Hearings*. Further, the meaning of the hearing officer's conclusion that the agency has "taken full account of any mitigating factors" is unclear. Even if the agency had considered all mitigating factors, the hearing officer must still determine whether the disciplinary actions exceeded the limits of reasonableness.[76]

As such, on remand, the hearing officer is ordered to reconsider his mitigation determinations. The hearing officer must state what circumstances are being considered and why they are either mitigating or aggravating factors. For instance, the grievant's request for administrative review identifies a number of alleged mitigating circumstances. The hearing

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[72] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[73] The issue of mitigation is only reached if the hearing officer finds the agency has sustained it burden of showing that "(i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy." *Rules for Conducting Grievance Hearings* § VI(B).
[74] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[75] Hearing Decision at 15-16.
[76] *Rules for Conducting Grievance Hearings* § VI(B).

officer must address the grievant's arguments, to the extent they are not addressed elsewhere already.[77] Requiring such discussion is consistent with this Department's previous rulings.[78] However, there are certainly cases in which a hearing officer would not need to respond individually to every argument raised and, for instance, could respond collectively, as long as due consideration of all those arguments is demonstrated. Indeed, there may be certain of the grievant's claims that require only minimal responses.

In addition, it appears that the hearing officer may have considered as an aggravating factor the fact that the grievant did not accept culpability for his actions and continued to maintain that he did not violate policy. While an employee's contrition might be relevant in some cases on mitigation, an employee's lack of contrition is not necessarily probative. An employee must be free to take a position in a grievance that opposes the agency's rationale for issuing a Written Notice, without any prejudice for doing so. To do otherwise would contravene the purpose of the grievance procedure.[79] Thus, while it cannot be said that an employee's failure to recognize his or her misconduct can *never* be relevant, hearing officers must be cautious in considering such facts so that grievants have the ability to raise their arguments at hearing.

Further, even if consideration of a lack of contrition would be appropriate in a particular case, this factor would be relevant only as an aggravating factor for a hearing officer to weigh against other mitigating circumstances in his or her mitigation determination.[80] An employee's lack of contrition after receiving discipline must not be considered as part of the agency's case-in-chief, as it would not be relevant in determining whether the disciplinary action was supported by the evidence, policy, and law.[81] In light of the above discussion, the hearing officer must reconsider whether the fact that the grievant did not agree that he violated policy is pertinent to this case, and if so, how.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration

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[77] It would appear that certain of the grievant's arguments on mitigation, some duplicative to his other challenges to the hearing decision, are not necessarily appropriately considered on mitigation, but rather as to the elements of the case-in-chief. *See Rules for Conducting Grievance Hearings* § VI.

[78] *E.g.*, EDR Ruling No. 2008-1903 (because the hearing officer failed to make an individualized assessment of the potential mitigating factors in the case, the hearing decision was remanded); *see also* EDR Ruling No. 2007-1716; EDR Ruling No. 2007-1481; EDR Ruling No. 2006-1188; EDR Ruling No. 2005-1073.

[79] *See, e.g.*, Va. Code § 2.2-3000.

[80] *See* EDR Ruling No. 2004-583.

[81] It is not clear whether the hearing officer improperly considered the grievant's refusal to admit to any misconduct at any other stage other than on mitigation. For instance, the agency's argument regarding the grievant's lack of contrition is included in the findings of fact. Hearing Decision at 10. If the hearing officer considered this potential aggravating factor in any way other than on mitigation, he is directed to revise the decision to confine his consideration of this factor only to the mitigation stage.

decision (i.e., any matters not previously part of the original decision).[82] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[83]

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.[84] 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.[85] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[86]

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Claudia T. Farr
Director

[82] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[83] *See Grievance Procedure Manual* § 7.2(a).
[84] *Grievance Procedure Manual* § 7.2(d).
[85] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[86] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).