Issue: Administrative Review of Hearing Officer's Decision in Case No. 9028; Ruling Date: June 10, 2009; Ruling #2009-2253; Agency: Department of Corrections; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2009-2253
June 10, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9028. For the reasons set forth below, the decision is remanded for further clarification.

FACTS

The facts, as set forth in the hearing decision issued in Case Number 9028, are as follows:

1. During July 8-9, 2008, the Grievant was employed by the Agency at a maximum security facility (the "Facility") as a Treatment Program Supervisor ("TPS"). Under the Facility's Unit Management concept, the unit managers provide counselors the direct administrative supervision such as days off or vacation time, while the Grievant had supervisory authority regarding treatment aspects concerning how counselors should complete their annual reports or progress reports or deal with their treatment programs, such as substance abuse or therapeutic counseling. Tape 1, Side B.

2. The Grievant had accepted a promotion within the Department which would take her as a Computation Supervisor – Senior to the Courts and Legal Division of the Agency at the Department's headquarters in Richmond. However, because of the discipline at issue in this proceeding, Grievant's promotion was rescinded by management although Grievant did ultimately end up in the Courts and Legal Unit in the lower position of an auditor.

3. On the night of July 8, 2008, the Secretary of Public Safety at the Virginia Governor's Office contacted the Director of Corrections concerning a scheduled execution of inmate J ("J") on July 10, 2008. AE 3(A).

4. Counselor S from the Facility contacted the Governor's Office by telephone, admittedly at least in part in her official capacity as an employee of the Department (AE 3(C)), because of a concern that J's execution would thwart the exoneration of inmate D ("Inmate D") who is presently serving a sentence of 135 years.

5. Amongst other things, Counselor S informed the Governor's Office that J had previously signed a written statement which was notarized by a different counselor ("Counselor D") stating that J's co-defendant, Inmate D, was innocent of all charges for which he had previously been convicted. Counselor S informed the Governor's Office that the notarized letter was mailed to Inmate D's mother but she had lost the letter. Counselor S asked the Governor's Office to assist in obtaining a letter from J to exonerate Inmate D.

6. The Director of Corrections called the Regional Director of the Agency at approximately 8:00 p.m. on July 8, 2008, to enquire about the contact with the Governor's Office. In turn, the Regional Director called the Warden of the Facility who said she knew nothing about the matter but undertook to look into the matter. Because of the serious nature of the situation, in the context of an imminent capital murder execution, the Regional Director, who was scheduled to be somewhere else the next day, changed his plans, to travel to the Facility to arrive early the next day to get to the bottom of things.

7. In the meantime, in an effort to find out what was going on, the Warden first called the Housing Manager for Housing Unit 3 where death row inmates are housed. This Housing Manager informed the Warden that approximately two (2) weeks earlier he had seen Counselor S coming out of Housing Unit 3. This was unusual because Counselor S was assigned as a counselor to Housing Unit 2, not 3. Counselor D was the counselor assigned to Housing Unit 3. The Housing Manager asked Counselor S what she was doing and Counselor S responded that she was trying to get a letter from deathrow inmate J. The Housing Manager told Counselor S to leave it alone. Counselor S returned to her building, Unit 2, told her Housing Manager about it and was told by her own Housing Manager to leave it alone.

8. The Warden then called the Housing Manager for Housing Unit 2 who was the direct administrative supervisor of Counselor S and the Warden was informed again that this Housing Manager also

told Counselor S to leave the matter of obtaining the letter from J alone.

9. The Warden next called the Grievant, Counselor S's treatment supervisor, and told the Grievant that the Warden had received a phone call about Counselor S emailing the Governor and the Warden asked the Grievant what she knew about the matter. In fact, Counselor S had telephoned and not emailed the Governor's Office but the Warden only finally understood this the next day, July 9, 2008. The Grievant said that Counselor S had been upset about the letter matter and the Grievant said she told Counselor S to leave it alone. The Grievant said she had no knowledge about Counselor S emailing to the Governor.

10. The Warden next called Counselor D to determine whether he had any involvement in the matter. Counselor D informed the Warden that approximately one (1) year ago, the Grievant instructed Counselor D to notarize a letter from J which allegedly contained the information exonerating Inmate D.

11. After his mother lost the letter, Inmate D had asked Counselor D to go to J and ask J to rewrite the letter. J advised Counselor D that he would not. Additional attempts by both Counselor D and Counselor S to get J to rewrite the letter proved unsuccessful.

12. Counselor D told the Warden that on July 8, 2008, while returning in the van from lunch, Counselor D overheard the Grievant tell Counselor S that the only person that could do something about the letter matter was the Governor.

13. During the phone call with the Warden, the Grievant expressed no knowledge concerning Counselor S's contact with the Governor's Office pertaining to the scheduled execution of J on July 10, 2008.

14. On July 9, 2008, the Regional Director arrived at the Facility at approximately 7:30 a.m. to, as he put it in the hearing, get to the bottom of the matter.

15. On July 9, 2008, when the Regional Director, Warden and Assistant Warden interviewed Counselor S, the Grievant was present when Counselor S stated that the Grievant responded on the van returning from lunch on July 8, 2008 that the Governor was the only person who could intervene on behalf of Inmate D when Counselor S asked at one point what could be done for Inmate D.

16. Counselor S also said, amongst other things, in the Grievant's presence, that the Grievant gave Counselor S the telephone number for the Governor's Office, assisted Counselor S in navigating the Governor's website and wished her "good luck". Counselor S had approached two (2) Housing Unit Managers concerning the Inmate D matter and was advised to drop the matter but took the Grievant's response, in her supervisory position as TPS, as approval from a superior to contact the Governor's Office.

17. After the Warden had heard Counselor S relay the information about the Grievant's role, the Warden asked the Grievant why the Grievant had not told the Warden about her role the previous night during the telephone call. The Grievant responded that she did not know and that she was sorry. Tape 1, Side B.

18. Counselor S stated that she first got involved in the exoneration of Inmate D matter about two (2) weeks before July 9, 2008.

19. The Warden and the Regional Director asked the Special Investigations Unit ("SIU") of the Office of the Inspector General ("OIG") within the Department to conduct a thorough investigation and to determine whether the potential disciplinary infraction "Undermining the effectiveness of the Agency" concerning the Virginia Department of Correction's Operating Procedure Number 135.1 Standards of Conduct was founded concerning the Grievant, Counselor S and Counselor D.

20. Four (4) special agents from SIU participated in a thorough, fair, independent investigation and concluded that the allegation "Undermining the effectiveness of the Agency" was founded concerning each of the three subjects.

21. The Warden explained that she had taken the Grievant to the lunch on July 8, 2008, that the Warden had been at the Facility over the prior two (2) week period and that the Grievant had undermined the effectiveness of the Agency by not following the chain of command, by not acting in the best interests of the Agency and the Facility in not reporting to the Warden the attempted exoneration effort throughout and, particularly, when questioned by the Warden on the night of July 8, 2008. Additionally, the Warden contends that the Grievant's assistance to and encouragement of Counselor S on how to contact the Governor's Office (with Counselor S's concomitant understanding of approval from a

superior within the institution) also undermined the effectiveness of the Agency and precipitated the whole debacle.

22. In short, the Governor's Office received an emergency, official contact from the Facility in the context of an execution without even the knowledge of the Warden. The Grievant facilitated and encouraged this contact by Counselor S outside of any official chain of command and without even informing the Warden, even when given the specific opportunity on the night of July 8, 2008, when the Warden called her to enquire generally about the very subject.

23. Grievant's actions undermined the effectiveness of the Agency.

24. Despite Grievant's protestations that she received no specific training concerning permissible contacts with the Governor's Office, Grievant received significant education and training from the Agency about the chain of command, the mission of the Department and for her role as a supervisor. *See* AE 4 and 6. General precepts for EWP's reminded her, for example, that "when dealing with problems, use procedures, procedural intent, or the best interest of the institution in determining the appropriate course of action." AE 4, Paragraph 24(j).

25. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

26. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

27. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

28. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, positions taken by the Grievant conflict with documents she has signed and defy logic and common sense. The Grievant's testimony at the hearing was inconsistent.

The salient portion of the discussion and holding in Hearing Decision 9028 is set forth below.

> [T]he agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

> While the specific infraction – "Undermining the effectiveness of the Agency" – is not specifically listed under XII(B) [of the Standards of Conduct], as the Agency argues, it is not required to be. The Agency did not seek to restrict the Grievant's or any other person's rights to express opinions to state or elected officials on matters of public concern in violation of *Va. Code* 2.2-2902.1, but rather to channel through the appropriate chain of command official contacts from the Facility and the Agency with the Governor's Office regarding a matter of vital public interest in the form of an imminent execution of a death row inmate. In short, neither the Facility nor the Agency, can afford to have unauthorized persons running their own agendas outside the chain of command to the total oblivion of those who rightfully should be in charge.

The Grievant has alleged retaliation but has failed to carry her burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007). The Grievant steadfastly maintained at the hearing that she did nothing wrong and that the Agency retaliated against her because she had accepted the promotion to headquarters and because of the contact with the Governor's Office. However, the hearing officer finds that these two events did not cause the Agency to retaliate. The Warden testified that she was surprised by the whole episode as up until the incident the Grievant had been an "exemplary" employee.

In the hearing, the Warden exhibited no ill-will or malice toward the Grievant but rather exhibited the demeanor of a calm, composed professional who was forced to investigate a bad predicament in the wake

of the call from the Regional Director after he himself had found himself in a difficult predicament following the call from the Director.

Additionally, concerning the Group III Written Notice, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain discipline and orderly operations.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant argues that the Agency has not properly considered mitigation and her past admittedly exemplary service. 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 seriousness of the infraction for which the Grievant could have been terminated, the Grievant's apparent refusal to recognize and accept the seriousness of her violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

The Grievant also complains that Counselor D only was informally counseled regarding his role in the matter and that Counselor S, a probationary employee, was not disciplined but only transferred to a different facility. The Grievant goes on to argue that this disparate treatment is evidence of overreaching by management and of a malicious intent on the management's part. However, the hearing officer finds the facts and circumstances concerning the subordinates very different from the Grievant in certain critical respects. The Grievant was a supervisor, did not fully reveal her involvement in the matter when asked about it and maintained at the hearing and steadfastly continues to maintain her blamelessness concerning the whole incident. This approach and attitude of the Grievant contrasts significantly with the approach and attitude of her two subordinates who willingly volunteered all the information concerning their roles. Counselor S did not seek to deflect total culpability in the matter but rather accepted responsibility, expressed remorse and apologized.

In her written statement to the SIU special agents, the Grievant admits that she read the phone number to the Governor's Office to Counselor S but at the hearing the Grievant denied that she "gave" the phone number to Counselor S. This distinction between "giving" and "reading" a phone number is wholly artificial and unconvincing and even during the hearing the Grievant could not maintain such an artifice. For example, on Tape 4, Side A almost right after the Grievant testifies that she did not give Counselor S the Governor's phone number, the following exchange takes place with her attorney:

> Attorney: "I mean this information that you gave to [Counselor S], anybody could get it, right?"
> Grievant: "Yes, sir."
> Attorney: "It's public information isn't it?"
> Grievant: "Yes, it is."
> Tape 4, Side A (Emphasis added).

The Grievant also wrote and signed in her statement the following: "I do regret not having told the truth during the original questioning. I felt as though I needed to protect myself in some way" (AE 3(D), page 6); and "My career and time in the Department has been so important and meant so much it is difficult to see one mistake has so much weight on what I have tried to accomplish" (AE 3(d), page 6). When asked by the hearing officer during the hearing, the Grievant clarified to the hearing officer that although she had written "mistake", at the time of the hearing the Grievant did not consider she had made any mistake, alleging that the investigators tricked or coerced her into writing the statement where she accepted any blame. For their part, the two (2) Special Agents who testified at the hearing testified that the Grievant was cooperative and gave her statement knowingly, voluntarily and intentionally, free of any duress or coercion. The hearing officer finds the testimony of the special agents credible and convincing and rejects the Grievant's claims of coercion, etc. as meritless.

Accordingly, while the Agency's decision not to discipline Counselor S, in particular, is somewhat problematic for the hearing officer, these differences in facts and circumstances militate against the hearing officer upsetting the Agency's personnel decisions concerning the three (3) subjects of the investigation. In short, the hearing officer finds that the different disciplinary outcomes are within the legitimate prerogative of the Agency and within a permissible zone of reasonableness given that the hearing officer is not a super-personnel officer who might have made a different personnel decision or decisions if faced with the same facts.

DECISION

> The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group III Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.[1]

The grievant, through her attorney, has raised several objections to the hearing decision. They are discussed in detail below.

DISCUSSION

Due Process Notice

The grievant (through counsel) asserts that the grievant's due process was violated because the agency attempted to expand the scope of her alleged misconduct beyond what is listed on the Written Notice.[2] The grievant asserts that the date of the offense, as set forth on the Written Notice, is July 9, 2008 (or at the very earliest, July 8, 2008, a date mentioned in the agency's attachment to the Written Notice), and that any conduct occurring prior to those dates cannot serve as a basis for discipline.[3]

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[4] is a legal concept which may be raised with and addressed by the circuit court.[5] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of

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[1] Hearing Decision, Case No. 9028, issued March 5, 2009.
[2] The grievant's counsel raises the same point at hearing. Hearing tape 2, side A at 400.
[3] Request for Administrative Review by the Director of EDR of the Grievance Hearing Decision Issued on March 5, 2009 ("Review Request"), at 18.
[4] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing).
[5] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[6] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[7] In addition, the *Rules* provide that "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[8] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

In this case, the July 21st Written Notice Form itself describes the charged conduct simply as "Group III Offense--Undermining the effectiveness of the agency—see attachment." The attachment to the Form provides further detail as follows:

- During a phone interview with [the Warden] on July 8, 2008 you [the grievant] failed to render all of the information you had regarding the subject of contact being made with the Governor's office
- During a subsequent interview with the Warden, Regional Director and Assistant Warden on July 9, 2008 you did not fully disclose your role as it related to providing specific information to Counselor [S], mainly the website/ number to the Governor's office
- Per your written statement to Special Agents [K], [Q] and [M] (Inspector General's office] you indicated that you regret not having told them the truth during the original questioning[9]

Here, the only offenses charged by the agency on the grievant's Written Notice Form and attachment, and the only charges qualified for hearing are her alleged failure to disclose information on July 8th (all information regarding contact with the Governor's Office) and on July 9th (all information regarding the grievant's role as it related to providing contact information to the Counselor S). The Written Notice did not inform the grievant that she was being charged with failure to report the evolving effort to exonerate Inmate D, nor did it inform her that she was being disciplined for assisting another employee with contacting the Governor's Office (working outside of the chain of command). Under the *Rules for Conducting Grievance Hearings*, the discipline against the grievant cannot be sustained on any basis other than the charged failure to disclose

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[6] *Rules for Conducting Grievance Hearings § VI(B)* citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly 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."
[7] *See* EDR Rulings ## 2007-1409; 2006-1193; 2006-1140; 2004-952; 2004-720.
[8] *Rules for Conducting Grievance Hearings § I.*
[9] Attachment to July 21, 2008 Written Notice.

information during two specific instances on July 8th and 9th. Accordingly, the July 8th and 9th "failure to disclose" charges were the sole offenses by the grievant before the hearing officer for review.

The hearing decision is unclear as to whether the hearing officer upheld the discipline against the grievant (even if only in part) because of the grievant's participation in facilitating contact with the Governor's office, her alleged failure to follow agency chain of command, or her failure to report the exoneration efforts. The finding that the grievant's actions undermined the effectiveness of the agency (Finding No. 23) falls between Finding No. 22, which recounts the grievant's facilitation and encouragement of Counselor S in contacting the Governor's office, and Finding No. 24 which holds, in part, that "[d]espite Grievant's protestations that she received no specific training concerning permissible contacts with the Governor's Office, Grievant received significant education and training from the Agency about the chain of command, the mission of the Department and for her role as a supervisor." Additionally, Finding No. 21 references the Warden's explanation that the grievant undermined the effectiveness of the agency by not following the chain of command, by not acting in the best interest of the agency and not reporting the exoneration effort.[10]

Accordingly, the decision is remanded to the hearing officer to clarify whether he upheld the agency's discipline on any basis other than the charges documented in the Written Notice, even if only in part, or upheld the discipline solely upon the charges expressly set forth on the Written Notice. To the extent that the decision is based, to any degree, on offenses by the grievant other than those listed on the Written Notice and attachment, the hearing officer is ordered to reconsider his decision and confine his consideration to only those charges stated on the Written Notice and attachment.

Findings of Fact

The grievant challenges several finding of fact and related conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[13] 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.

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[10] *See also* Hearing tape 1, side B at 75 and 100 (same testimony from Warden). Again, this testimony is irrelevant as the grievant was not given notice of any intent to charge her with this conduct.
[11] Va. Code § 2.2-3005(C) (ii).
[12] *Grievance Procedure Manual* § 5.9.
[13] Va. Code § 2.2-3005(C)(5).

Beginning with Finding No. 22, the grievant challenges the determination that contact with the Governor's office was an "official contact" and that the grievant "encouraged" the contact.[14] The grievant further asserts that any contact with the Governor's office was protected by law and, therefore, the agency could not discipline the grievant for any contact.[15] As explained above, because the hearing officer could not uphold the discipline against the grievant based on an offense other than that listed on her Written Notice (failure to fully disclose information on July 8th and 9th), we need not address the objections raised by the grievant regarding finding No. 22. All issues raised regarding Finding No. 22 such as whether the contact was official, encouraged, or protected by law are irrelevant (except as discussed in the *Mitigation* section, *Retaliation* sub-section below) because the grievant was not charged in the Written Notice or its attachment with any form of violation of the chain of command.

As to the conclusions drawn by the hearing officer regarding the veracity of testimony by the grievant and other witnesses, as stated above, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. This Department will not substitute its judgment for that of the hearing officer.

Failure to Determine the Proper Level of Offense

The grievant asserts that the hearing officer erred by not determining the proper level of offense. The grievant is correct that the rules require a hearing officer to determine whether the charged misconduct supports the level of discipline issued. In this case, the decision has been remanded to the hearing officer to clarify whether he considered conduct other than that listed on the Written Notice. We have instructed the hearing officer to limit, if he has not already done so, his consideration to only the alleged misconduct listed on the Written Notice. In on reconsideration, he finds the conduct charged on the Written Notice to have occurred, he must then determine the appropriate level of discipline for the charges listed on the Written Notice and attachment.

Mitigating Circumstances

The grievant contends that the hearing officer erred by not properly considering several mitigating circumstances.

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."[16] EDR's *Rules for Conducting Grievance Hearings* provide in part:

[14] Review Request, pp. 4-5.
[15] *Id.* at 5-10.
[16] Va. Code § 2.2-3005(C)(6).

> 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.[17]

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.[18] 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.

A. Similarly Situated Employees

The grievant asserts that two other employees engaged in the same conduct—violation of the chain of command policy—but received no formal discipline. As explained above, the hearing officer is required to consider only those offenses listed in the Written Notice. The crux of those offenses is the failure to fully disclose information on July 8th and 9th, *not* contacting the Governor's office outside of the appropriate chain of command. Moreover, on the issue of disclosure of information, the hearing decision finds that the three involved employees were not similarly situated in that the grievant "did not fully reveal her involvement in the matter," whereas the other two "volunteered all the information concerning their roles."[19] Because the employees do not appear to be similarly situated with respect to their disclosures on July 8th and 9th, we cannot conclude that the hearing officer erred by not mitigating the discipline on this basis.

B. Lack of Notice

The grievant asserts that the hearing officer erred by not finding that the grievant had insufficient notice to make her aware that her involvement with facilitating contact with the Governor's office could result in discipline. As discussed above, because she was not charged on the Written Notice or attachment for such conduct, her knowledge of whether she could be charged is irrelevant.

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[17] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1 (alteration in original).
[18] Hearing Rules § VI.B.
[19] Hearing Decision at 9.

C. Retaliation

The grievant asserts that the hearing officer erred by not mitigating on the basis of retaliation. She asserts that DOC disciplined her for having engaged in protected activity under Section 2.2-2902.1 of the Code of Virginia.[20] That Section states that it shall not be construed to prohibit or otherwise restrict the right of any state employee to express opinions to state or local elected officials on matters of public concern, and that a state employee shall not be subject to acts of retaliation because the employee has expressed such opinions. While the hearing decision finds that the agency "has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain discipline and orderly operations,"[21] it is unclear whether any of those non-retaliatory reasons include an agency prohibition against contacting the Governor's office regarding possible matters of public concern (as defined by Section 2.2-2902.1) without first going through the agency's chain of command. Given the language of Section 2.2-2902.1, the question arises whether an agency may so prohibit its employees, and then retaliate against them for such activity through a disciplinary action.

To prevail on her claim of retaliation at hearing, the grievant bears the burden of proving, by a preponderance of the evidence,[22] that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, that management took a materially adverse action because she engaged in the protected activity.[23]

In this case, the grievant suffered a materially adverse action, a Group III Written Notice and demotion.[24] However, questions remain as to (1) whether the grievant engaged in a protected activity through any of her actions related to contacting the Governor's office, and (2) whether a causal link exists between that activity and the Group III Written Notice and demotion issued by the agency. If the hearing officer were to find that the grievant engaged in a protected activity under Section 2.2-2902.1, and that notwithstanding the language used in the Written Notice, the agency issued the discipline in retaliation for a protected activity, such discipline could be found as per se retaliatory. Accordingly, on remand, the hearing officer must determine whether the grievant engaged in protected activity, and if so, whether she was in actuality disciplined for that

[20] The grievant also asserts retaliation by agency management for her having accepted a promotion at another work location. This Department, however, will not substitute its judgment for that of the hearing officer regarding the weight of the evidence, witnesses' credibility, and findings of fact as to this particular issue.
[21] Hearing Decision at 8.
[22] *Grievance Procedure Manual* § 5.8.
[23] *See* EDR Ruling #2007-1729.
[24] As discussed previously in this Ruling, the Group III Written Notice's charges of failure to disclose on July 8th and 9th are the only charges for which the grievant was formally disciplined through the Standards of Conduct, and thus the only charges of *the grievant's alleged misconduct* that are before the hearing officer for determination. However, that does not bar the grievant from asserting and attempting to prove her claim of *the agency's alleged unlawful retaliation* in issuing the Written Notice and demotion, regardless of the express offenses actually listed in that Notice.

conduct. If the answer to both questions is "yes," the hearing officer must determine whether the agency would have issued the same discipline in the absence of the retaliatory motivation.[25]

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 decision (i.e., any matters not previously part of the original decision).[26] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[27]

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.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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Claudia T. Farr
Director

[25] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1998) holding that an employer may avoid liability in a mixed motive case by showing by a preponderance of the evidence that it would have made the same employment decision in the absence of the discriminatory [retaliatory] motivation.
[26] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[27] *See Grievance Procedure Manual* § 7.2(a).
[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).