Issue: Administrative Review of Hearing Officer's Decision in Case No. 9003; Ruling Date: June 29, 2009; Ruling #2009-2296; 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 2009-2296
June 29, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9003.[1] For the reasons set forth below, the decision is remanded for further consideration.

FACTS

The facts set forth in the hearing decision issued in Case Number 9003 are as follows:

> The Department of Corrections employs Grievant as a Power Plant Operations Lead Worker at one of its Facilities. The purpose of his position is to "[s]upervise the operation of the power plant …." Inmate workers report to Grievant for their work assignments and direction. He has been employed by the Agency for approximately 15 years. Grievant had active prior disciplinary action. On October 30, 2007, Grievant received a Group III Written Notice for being away from his assigned duty.
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> The Inmate had been incarcerated for approximately two years. He was a Level I inmate meaning he presented a lower security threat than inmates with higher levels. The Inmate worked at the Power Plant. The Power Plant is located outside of the Facility's fences. There is no fence or other security system preventing individuals from entering or exiting the Power Plant.

[1] While the grievant's Request for Administrative Review was received by this Department more than 15 days beyond date of the original hearing decision, we believe that there is just cause for the delay. This Department moved from 830 East Main Street to 600 East Main Street in November of 2008. The grievant initiated his Grievance on June 29, 2008 on a Grievance Form A which contained the former address of 830 East Main Street. The grievant also noted in a correspondence to this Department that he sent his Request for Review to the address listed in the copy of the grievance manual that he had been provided. Therefore, just cause exists for the grievant's slight delay in delivering his Request to this Department.

> The Inmate and his Wife planned for her to meet him at the Power Plant. They discussed the matter during a telephone call recorded by the Agency. The Wife was to wear clothing consistent with the uniforms worn by maintenance workers and drive a vehicle and park it next to the Power Plant. The Wife was to arrive shortly after 11:30 p.m.
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> Grievant's work shift began at 4 p.m. and was scheduled to end at midnight on February 16, 2008. Grievant worked beyond midnight because his replacement did not appear as scheduled.
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> On February 16, 2008, the Inmate entered an Agency vehicle and was transported to the Power Plant. The Inmate left the vehicle and entered the Power Plant through the front door at approximately 11:35 p.m. As he was entering the Power Plant, other inmates were leaving the Power Plant and getting into the vehicle to be transported elsewhere. Grievant's Wife arrived at the Power Plant sometime after 11:30 p.m. The Inmate located the Wife outside of the Power Plant and brought her in through a side door into the Main Plant area. A restroom is located within a few feet of Grievant's office. Grievant's office has windows to enable him to see outward. The Inmate waited until Grievant was not looking and took his Wife into the restroom. The Inmate and the Wife had sexual intercourse inside the restroom. A few minutes later when Grievant was not looking, the Wife left the restroom and exited through the side door. She then left the Power Plant at approximately 11:45 p.m. The Inmate returned to work. Grievant did not see the Wife enter or leave the Power Plant. The Inmate and his Wife had telephone calls in which the Wife revealed she thought she had become pregnant as a result of her visit to the Power Plant. The Agency later initiated charges against the Inmate.[2]

Based on these facts, the hearing officer reached the following "Conclusions of Policy":

> Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

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[2] Hearing Decision, Case No. 9003, issued April 7, 2009 ("Hearing Decision") at 2-3. (Footnotes from the Decision have been omitted.)

"[I]nadequate or unsatisfactory job performance" is a Group I offense. In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for supervising the Inmate. This would include making sure that the Inmate had begun his work and was engaged in his work. In this case, there is no evidence that Grievant provided any supervision of the Inmate. It is not clear that Grievant knew whether the Inmate had begun his work or where the Inmate was supposed to be working. The evidence suggests Grievant paid little attention to the Inmate. The Inmate planned the time his Wife would appear at the Power Plant to coincide with Grievant's shift rather than the shift of the supervisor following Grievant who was scheduled to begin working at midnight. The Inmate chose Grievant because he was far more predictable than the oncoming supervisor. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

The Agency contends Grievant should receive a Group II Written Notice for failure to follow written policy as expressed in a September 4, 2007 memorandum. This memorandum states, in part, "[p]lease be advised that at no time are offenders to be left without supervision at the Power Plant." Grievant construed this memorandum as preventing him from leaving the Power Plant during his breaks thereby leaving inmates alone. Grievant presented evidence showing that several years ago, maintenance supervisors would leave the Power Plant and the Facility grounds during their meal or other breaks. Offenders were left alone for short periods of time. When the Agency realized this practice was occurring, the Assistant Warden issued the September 4, 2007 memorandum preventing maintenance supervisors from leaving the workplace during breaks. The Agency now argues that the memorandum provided an instruction that maintenance supervisors should provide continuous supervision of offenders. When the evidence is viewed as a whole, it is clear that Grievant's interpretation of the memorandum is correct. Grievant was in compliance with the requirements of the September 4, 2007 memorandum because he was present at the Power Plant while offenders were there. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established written policy.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary

> action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings*, "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.[3]

Based on the foregoing "Conclusions of Policy," the hearing officer reduced the Group II Notice to a Group I Written Notice for inadequate or unsatisfactory job performance.[4] The grievant objects to receiving the Group I Notice, in pertinent part, on the following basis:

> I was given a Group II Written Notice for failure to follow written policy as expressed in a September 4, 2007 memorandum. The decision of the hearing officer states, "Grievant was in compliance with the requirements of the September 4, 2007 memorandum because he was present at the power plant while offenders were there. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow established policy." If I didn't break the rules of the policy why am I still being charged with a Group I.[5]

DISCUSSION

Lack of Due Process Notice and Opportunity to be Heard

While the grievant's objection is not expressly couched in terms of a lack of notice of the Group I "inadequate or unsatisfactory job performance" offense found by the hearing officer, his appeal fairly raises that issue.

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[3] Hearing Decision at 3-5.
[4] *Id.* at 5.
[5] Request for Administrative Review dated April 18, 2009.

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[6] is a legal concept which may be raised with and addressed by the circuit court.[7] However, because the grievance procedure incorporates the concept of due process, we therefore address the issue upon administrative review as a matter of compliance with the grievance procedure. Section VI (B) of the *Rules for Conducting Grievance Hearings (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."[8] 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.[9] In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[10] Under the grievance procedure, charges not set forth on the Written Notice and any attachments thereto cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

In this case, the agency issued a Group II Written Notice charging the grievant with failure to follow a policy that required "continual" supervision of inmates working at the power plant.[11] The hearing officer found that several years ago, maintenance supervisors would leave the power plant and the facility grounds during their meal or other breaks, leaving offenders unattended for short periods of time.[12] In response, the Assistant Warden issued a September 4, 2007 memorandum preventing maintenance

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[6] 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). *See also* Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing to Cleveland Bd. of Educ. vs. Loudermill, 105 S. Ct. 1487, 1495 (1985).

[7] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[8] *Rules* at *§ 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."

[9] *See* EDR Rulings ## 2007-1409; 2006-1193; 2006-1140; 2004-720.

[10] *Rules* at *§ I.*

[11] The charge on the Written Notice is as follows: "On 2/16/08 during the shift at the boiler plant supervised by [the grievant] offender [ ] met with his wife in the restroom of the boiler plant. They engaged in consensual sex. Although he claimed to know nothing of this meeting, [the grievant] knew from Assistant Warden [ ] that policy required continual supervision of the offender. [The grievant] failed to comply with policy." Agency Exhibit 1.

[12] Hearing Decision at 4.

supervisors from leaving the workplace during breaks.[13] The hearing officer found that the grievant was in compliance with the requirements of the September 4, 2007 memorandum because he was present at the power plant while offenders were there, and thus concluded that the agency's Group II Written Notice for failure to follow policy was unsupported by the evidence. Nevertheless, the hearing officer determined that the agency had presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

The problem with that determination is that the Written Notice issued to the grievant did not expressly inform him that he was charged with inadequate or unsatisfactory job performance. Nor does a Group II "failure to follow policy" charge always charge by implication a "lesser" Group I charge of inadequate job performance: the elements of proof needed to establish a charge of inadequate job performance can differ from the elements of proof needed to establish a charge of failure to follow policy.[14]

The agency, which bears the burden of proof at hearing, must provide notice of charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. Here, the agency elected to focus exclusively on its charge of "failure to follow policy" (the September 4th Memo), which the agency asserted -- but

[13] *Id.* The hearing officer's findings regarding the September 4th Memo are supported by record evidence. *See* Hearing beginning at 1 hour 8 minutes.

[14] For example, to prove inadequate job performance, an agency generally must prove by a preponderance of the evidence what a grievant's job responsibilities and performance expectations are, and how the grievant failed to meet those performance expectations. To prove a failure to follow policy, an agency must prove by a preponderance of the evidence the existence of policy, its meaning and application to the grievant, and how the grievant failed to follow the policy. These are different elements of proof that require different factual evidence to sustain the respective charges. Case law on "lesser included offense" principles in context of criminal law can be illustrative. *See, e.g.*, Kauffmann v. Commonwealth, 8 Va. App. 400, 409, 382 S.E.2d 279, 283 (1989)("[a] lesser included offense is an offense which is composed entirely of elements that are also elements of the greater offense"). *See also* Lowe v. Commonwealth, 33 Va. App. 583; 535 S.E.2d 689 (2000), *overruled on other grounds*, Edwards v. Commonwealth, 41 Va. App. 752; 589 S.E.2d 444 (2003). Occasionally, a hearing officer can appropriately hold that an employee committed what is essentially a lesser included offense and uphold an appropriate level of discipline for that offense. For example, under the *Standards of Conduct* (SOC), Department of Human Resource Management (DHRM) Policy 1.60, violation of a safety rule where the threat of bodily harm exists is a Group III offense. On the other hand, violation of a safety rule where no threat of bodily harm exists is treated as any other violation of a written policy and constitutes a Group II offense. DHRM, in promulgating the SOC, added the element of risk of bodily harm to establish the Group III offense. If an agency charges an employee with violation of a safety rule, provides the employee with the facts supporting that charge, and establishes at hearing by a preponderance of evidence that the employee violated that rule, but fails to establish that the violated rule poses a risk of bodily harm, a hearing officer would not err by upholding a Group II Written Notice for the lesser included offense of violation of a safety rule where no threat of harm was involved. The difference between such a case and the instant one is that in the example, the lesser included offense (violation of safety rule where there is no threat of bodily harm) is an offense composed entirely of elements that are also elements of the greater offense (violation of safety rule where threat of bodily harm exists), whereas in the instant case, the charges of poor supervision and failure to follow policy have different elements.

failed to prove -- required continual supervision.[15] The grievant, having effectively rebutted the agency's position that policy required continual supervision, did not address at hearing -- nor did he have notice of any reason to address at hearing -- the basis upon which the hearing officer ruled that a Group I Written Notice for inadequate performance was merited: failure to know if and where the inmate began work.[16]

This ruling should not be read as any sort of an attempt by this Department to curtail an agency's ability to discipline an employee for poor performance for failing to provide adequate supervision. To the contrary, to do so, the agency must merely provide adequate notice of that charge and the supporting facts, sufficient to allow the employee to respond. In other words, the agency would simply need to inform the grievant how his or her supervision was unacceptable and state the facts that illustrate such shortcomings, so that the employee has the opportunity to attempt to rebut the charges and facts, if he or she believes that they are unfounded, erroneous, or otherwise misrepresented. To have such charges sustained, the agency need only establish, by a

[15] The agency's representative, in her opening statement, focused on the purported "continual" supervisory requirement over inmates (Hearing at :02), as did the Written Notice (Agency Exhibit 1). The grievant and his witness, the Power Plant Superintendent, testified that their understanding of the supervision required by the September 4, 2007 Memorandum was significantly different from the view held by the Assistant Warden as to what the September 4th Memo was intended to convey. Compare the testimony of the Assistant Warden who asserted that the September 4th Memo required constant sight supervision at all times (Hearing at 1:23-1:33) with the Power Plant Superintendent's testimony that he thought the memo was intended to correct a former practice of leaving inmates completely unattended at the facility (Hearing beginning at 1:41). In other words, the grievant focused precisely on what he had been charged with: failure to provide continual supervision.

[16] Actually, the hearing decision states "[i]t is *not clear* that Grievant knew whether the inmate had begun his work or where the Inmate was supposed to be working." *Hearing Decision* at 4 (emphasis added). We note, however, that it is *the agency's* burden to prove it more likely than not (not just to establish that it is "not clear") that any charged offense occurred. Moreover, even if the grievant had been charged with and provided adequate notice of inadequate supervision, based upon a review of the exhibits and the hearing recording, the agency presented little, if any evidence, beyond the Assistant Warden's apparently discounted testimony regarding continual supervision, as to what the grievant's supervisory responsibilities were during the transition period between shifts, when the incident with the inmate occurred. The Assistant Warden testified briefly as to the grievant's general supervisory responsibilities, as set forth in the grievant's Employee Work Profile, which simply states that he is required to "Perform and supervise inmates in the assigned duties which will assure proper power plant operation according to state and D.O.C. policies." (Hearing at 1:14, apparently reading from Agency Exhibit 4.) Furthermore, the Assistant Warden testified that the inmate purportedly had sex with his wife during the 30-minute transition window between 11:30 to midnight, when the 4 p.m.-midnight shift is wrapping up and the midnight-8 a.m. shift is arriving. (Hearing at 1:11-1:12.) In response to questioning by the hearing officer, the Assistant Warden testified that although the inmate in question normally arrived about a half hour prior to the beginning of his midnight shift, he was not scheduled to begin work until midnight. (Hearing at 1:13.) Moreover, the grievant testified that normally during the shift change, he was cleaning the office and preparing for change of shift including a last walk-through of the facility. (Hearing at 2:07.) Thus, beyond taking regular head counts, which, according to Agency Exhibit 2, tab 27, the grievant seems to have done, there appears to be no record evidence of any specific supervisory duties the grievant was responsible for during the time of the incident.

preponderance of evidence (that it is more likely than not), that the stated charges were warranted and appropriate under the circumstances.[17]

Accordingly, this decision is remanded to the hearing officer for further consideration consistent with this ruling. The hearing officer must confine his determination of the appropriateness of discipline only to the charge set forth on the Written Notice and the evidence presented at the grievance hearing on that particular charge.

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).[18] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[19]

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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Claudia T. Farr
Director

[17] *Grievance Procedure Manual* § 5.8. In order to determine whether the discipline was warranted and appropriate under the circumstances, the hearing officer would also be required to consider if any potentially mitigating circumstances cited by the grievant warrant a reduction in the discipline. The hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline "exceeds the limits of reasonableness." *Rules* at VI (B)(1).
[18] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[19] *See Grievance Procedure Manual* § 7.2(a).
[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).