Issue: Administrative Review of Hearing Officer's Decision in Case No. 9062; Ruling Date: April 8, 2010; Ruling #2009-2324; Agency: Department of Juvenile Justice; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2009-2324
April 8, 2010

The Department of Juvenile Justice (the "agency") has asked that this Department administratively review the hearing officer's decision in Case Number 9062. For the reasons set forth below, this matter is remanded to the hearing officer for further action consistent with this Ruling.

FACTS

This case involves four grievances, all of which allege retaliation against the grievant for having filed prior grievances. The four grievances at issue here were consolidated for a single hearing by the EDR Director in Ruling Nos. 2008-1968, 2008-1969, 2009-2104, 2009-2205 ("Consolidation Ruling"). The first of these grievances ("Grievance 1") challenges an alleged pattern of retaliation by the agency, evidenced in part, the grievant contends, by the denial of a promotion.[1] The second grievance ("Grievance 2") challenges the denial of an in-band adjustment to his salary, which the grievant contends was also retaliatory.[2] The third grievance ("Grievance 3) challenges a Group II Written Notice for allegedly failing to follow security protocol, which was subsequently rescinded by the third-step respondent.[3] The final grievance ("Grievance 4") asserts that the agency continues to retaliate against the grievant, including moving him to another post.[4]

A hearing was held on the consolidated grievances on April 22, 2009.[5] In a hearing decision dated May 6, 2009, the hearing officer found that the grievant had carried the burden of proof in showing retaliation with respect to all four grievances.[6] The agency has asked this Department to administratively review the hearing decision.

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[1] EDR Ruling Nos. 2008-1968, 2008-1969, 2009-2104, 2009-2205 ("Consolidation Ruling") at 4; Hearing Decision in Case No. 9062, dated May 6, 2009 ("Hearing Decision"), at 1.
[2] *Id.*
[3] *Id.*
[4] Consolidation Ruling at 4, Hearing Decision at 2.
[5] Hearing Decision at 1.
[6] Hearing Decision at 10.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[8]

The agency raises a number of challenges to the hearing officer's decision. The agency's arguments are addressed below.

Grievance 1

In challenging the hearing officer's finding of retaliation with respect to Grievance 1, the agency asserts that the hearing officer erred by considering selection decisions occurring after the initiation of that grievance. The agency also argues that the hearing officer did not give sufficient weight to the agency's proffered reason for its decision not to promote the grievant—an active Group III Written Notice for threatening a resident. Finally, the agency argues that the hearing officer erred in considering previous grievances between the grievant and the agency, including the grievance in Case No. 8460 and selection decisions made prior to September 2005.

Post-Grievance Selection Decisions

While the agency is correct that a hearing officer does not have the authority to grant relief on selection decisions occurring subsequent to the initiation of a grievance, a hearing officer may nevertheless consider post-grievance conduct as evidence of retaliation. Thus, in this case, although the hearing officer could not grant relief with respect to any selection decision after the initiation of Grievance 1, he was free to examine post-grievance agency action as evidence of the agency's motivation with respect to the grieved conduct. Here, it appears that the hearing officer considered the post-grievance denial of promotion, which occurred after the expiration of the Group III Written Notice, to support the grievant's position that the agency's stated reason for the non-selection—the existence of an active Group III Written Notice—was pretextual.[9] Such consideration was within the hearing officer's authority.[10]

Agency's Proffered Reason

The agency further asserts that the hearing officer failed to give adequate weight to its stated reason for the grievant's non-selection. In support of this claim, the agency argues that the

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[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *Grievance Procedure Manual* § 6.4.
[9] *See* Hearing Decision at 8.
[10] The agency also suggests that the hearing officer erred by not finding the Group III Written Notice to be a legitimate non-retaliatory reason for the grievant's non-selection. We note, however, that the hearing officer did not determine that the Written Notice could *not* be a legitimate business reason; he determined only that it was not the *true* reason for the non-selection.

hearing officer presented "no factual basis" for his conclusion that the agency's reason was pretextual, "*other than* his determination that hearsay testimony of a former employee outweighed the direct testimony of Deputy Director []" (emphasis added).

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 grounds in the record for those findings."[12] 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.

Contrary to the agency's assertion, the hearing officer did not rely solely on the testimony of the former employee in reaching his finding. Rather, in finding that it was more likely than not that the Deputy Director had said that the grievant would not be promoted, the hearing officer relied on the testimony and demeanor of the Deputy Director, the grievant, and other witnesses on this issue.[13] This determination regarding the Deputy Director was within the hearing officer's authority to make.

However, it is unclear from the hearing decision whether the hearing officer viewed the Deputy Director's statement as reflecting a retaliatory intent arising from the grievant's prior grievance activity.[14] Addressing the Deputy Director's statement, the hearing officer wrote:

> It is entirely possible that when the [] Deputy Director made [the] statement…he was thinking about the fact that he did not want to promote someone with a Group III Written Notice. However, the Hearing Officer believes that it is entirely likely that statement was made without the necessary explanation.[15]

Arguably, if the Deputy Director merely meant that he would not promote someone with a Group III, the statement would not reflect a retaliatory animus on the part of the Deputy Director for the grievant's prior grievance activity, but would instead be further corroboration of the agency's stated reason for the grievant's non-selection. The hearing officer is therefore directed to clarify whether he finds that the Deputy Director acted from a retaliatory motive in making this statement, and if not, whether the remaining evidence is sufficient to establish that the agency's stated reason for the non-selection is a pretext for retaliation. Further, the hearing officer's clarification must identify the grounds in the record for his conclusions regarding the presence or absence of a retaliatory causal connection between the grievant's protected activity and his nonselection for the promotion at issue.

Previous Grievances

[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] Hearing Decision at 9.
[14] The hearing decision misidentifies this individual as the "Assistant Deputy Director."
[15] Hearing Decision at 9.

The agency also argues that the hearing officer erred in considering previous grievances initiated by the grievant, including EDR Division of Hearings Case No. 8460 and grievances challenging selection decisions made prior to September 2005. In support of this argument, the agency cites the hearing officer's statement on page 8 of the hearing decision that "[i]t is of note that, with the exception of the Group III Written Notice of some years ago, every time this Agency has raised an issue regarding this Grievant, it has subsequently lost."

With respect to the alleged consideration of Case No. 8460, the hearing officer specifically noted that his ruling would not rely on that previous action.[16] As to the hearing officer's consideration of the outcome of past grievances, such consideration would not be improper, so long as it was, as here, simply in the context of describing the parties' long history of conflict.[17]

The hearing officer's characterization of the overall record of the grievant's grievance history is problematic, however. As the agency notes, the hearing officer in Case No. 8164, an earlier grievance involving a failure to promote, found in favor of the agency. In the instant case, it is unclear from the hearing decision whether, and to what extent, the hearing officer's apparent mistaken belief that the agency had only once prevailed in grievances filed by this grievant led to his finding that the agency held a retaliatory animus.[18]

Accordingly, the hearing decision is remanded to the hearing officer to clarify whether his apparent belief that the agency had prevailed only once in grievances filed by the grievant played any part in his finding of a retaliatory motive on the part of the agency. If it did, he is directed to explain what impact, if any, the outcome of Case No. 8164 has on the finding of retaliatory motivation.

Grievance 3

The agency further disputes the hearing officer's finding that the action of issuing and then rescinding a Written Notice was retaliatory. The agency argues that the evidence did not "suggest a conspiracy to retaliate against the grievant, but rather a simple error in the issuance of security protocols."

This challenge is to the weight and credibility that the hearing officer accorded to the testimony of those witnesses at the hearing, the inferences he drew from witness testimony and party exhibits, the characterizations that he made, and the facts he chose to include in his

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[16] *Id.* at 5.

[17] *See* EDR Ruling No. 2009-2224, at 4-5. Here, the hearing officer wrote:

> Testimony in this matter was given for approximately eleven (11) hours. It is clear to the Hearing Officer that the Grievant and this Agency have had multiple disagreements as evidenced by the recitation of historical facts set forth in the Qualification and Consolidation Ruling of the Director dated January 22, 2009. It is of note that, with the exception of the Group III Written Notice of some years ago, every time this Agency has raised an issue regarding this Grievant, it has subsequently lost.

Hearing Decision at 8.

[18] It appears from the hearing decision that the hearing officer's characterization of the grievant's prior grievance history was based on the Consolidation Ruling. Hearing Decision at 8. Although that Ruling notes the existence of the March 2005 grievance at issue in Case No. 8164, it does not identify either the case number for that grievance or its outcome at hearing.

decision. Such determinations are entirely within the hearing officer's authority, where, as here, there was sufficient evidence in the record (such as the apparently conflicting testimony regarding the existence of the security protocols in dispute and the hearing officer's perception of the demeanor of the Chief of Security) to support the hearing officer's determination that the agency's stated reason for issuing the discipline was a pretext for retaliation.

The agency also argues that to find retaliation when a disciplinary action is later rescinded "appears unjust, and undermines the role of the grievance procedure in resolving conflict." As this Department noted in the Consolidation Ruling, the issuance of discipline only to have it later rescinded could be viewed as a "materially adverse" act.[19] While we agree with the agency that the management resolution steps are intended to allow parties to resolve their disputes, we cannot overlook the chilling and punitive nature of discipline that is found by the hearing officer to have been issued without an adequate basis and for retaliatory purposes.

Grievance 4

The agency asserts that the hearing officer "failed to present a factual basis to support his conclusions" that retaliation was the reason the agency had failed to place the grievant at a post with a chair he had requested. As previously explained, this Department will not overturn a hearing officer's findings where there is sufficient evidence in the record to support them. Here, the hearing officer found that despite the agency's assurances to the grievant that it would attempt to accommodate him whenever possible, it had failed to do so for more than six months.[20] What is not clear, however, is why or how that finding evinces retaliatory intent rather than, for example, some other non-retaliatory reason for the agency's failure to provide a post with a seat. The hearing officer is therefore instructed to clarify on remand the basis and record support for the apparent inference of retaliation that he drew from the above fact-finding.[21]

Relief

The agency further asserts that the hearing officer erred in his order of relief to the grievant. Specifically, the agency argues that the hearing officer erred by ordering the grievant to be reassigned to an assignment that allows him to have a chair with back support.[22] The agency also asserts that the hearing officer erred in directing that the "current serving Assistant Deputy Director of the Agency [] be removed from any decision-making process"[23] in the event the grievant applies for promotion again.

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[19] Consolidation Ruling at 5, citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (holding that disciplinary suspension, though ultimately rescinded, was materially adverse act).
[20] Hearing Decision at 8-9.
[21] We do not suggest that the agency's failure to provide the grievant a post with a chair could not be a retaliatory act. Rather, the decision is silent as to whether, for example, the agency proffered a legitimate non-retaliatory reason for the failure to provide such a post and as to whether and how any proffered explanation (or lack thereof) formed the basis for the finding that the post denial was a retaliatory act.
[22] The hearing officer directed that, "provided this Grievant has more seniority than others, his physical situation be accommodated and that he be placed in an assignment that allows him to have a chair with back support." Hearing Decision at 10.
[23] The individual in question is actually a Deputy Director of the agency.

Under the *Rules for Conducting Grievance Hearings (Rules)*, "[i]f the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[24] The *Rules* further state, however, that "[t]he hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices)."[25]

In this case, the hearing officer found that retaliation was the reason the agency had failed to place the grievant at a post with the requested chair,[26] and he directed the agency to provide the grievant with the requested posting as a remedy. While the hearing officer has the authority to order actions necessary to put the grievant in the place he would have been but for retaliation, the problem with the relief here is that it arguably puts the grievant in a *better* place than he would have been in the absence of any retaliation. The hearing officer had the authority to award the grievant a position with a chair to the same extent that the grievant would have had such a position without any retaliation occurring. For example, if without retaliation, the grievant would only have received a post with a chair on a periodic, alternating basis, that would be all he would be entitled to as relief. On the other hand, if the hearing officer concludes that but for the retaliatory motive, the grievant would have received a permanent assignment to a post with a chair, such a reassignment would be an appropriate order of relief.[27]

In this case it is unclear from the hearing decision whether the hearing officer found that, but for the retaliation, the grievant would have been permanently assigned to a position with a chair. Accordingly, (and assuming the hearing officer does not change his finding of retaliation with respect to the failure to provide a chair),[28] he is ordered to reconsider and clarify his decision with respect to this issue of relief.

The agency also challenges the hearing officer's directive regarding the Deputy Director's participation in any future interview panel should the grievant apply for a promotion to Sergeant. To the extent the hearing officer found that the Deputy Director's statement (that the grievant would not be promoted as long as he was Deputy Director) evidenced a retaliatory motive,[29] we find that this directive was consistent with the hearing officer's authority to "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[30] While the relief granted by the hearing officer does limit the agency's ability to assign the Deputy Director to certain selection processes, the relief is narrowly tailored to the retaliation at issue.

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[24] *Rules for Conducting Grievance Hearings,* § VI (C)(3).
[25] *Id.*
[26] Hearing Decision at 8, 9-10.
[27] We note, however, that a hearing officer's order could not restrict the agency from reassigning a grievant on a non-retaliatory basis.
[28] As noted previously in this ruling, the hearing officer is directed on remand to clarify the basis for the apparent inference of retaliation that he drew from his finding of fact that despite the agency's assurances to the grievant that it would attempt to accommodate him whenever possible, it had failed to do so for more than six months.
[29] As noted previously in this ruling, the hearing officer is directed on remand to clarify his finding regarding the Deputy Director's allegedly retaliatory intent in making the claimed statement.
[30] *Rules for Conducting Grievance Hearings* § VI (C)(3).

Retaliation Standard

Finally, the agency argues that the hearing officer used an incorrect standard for determining whether the agency retaliated against the grievant. Citing to Va. Code § 2.2-3004(A), the agency asserts that the hearing officer was required to find that the grievant suffered an "adverse employment action" before he could find that the agency retaliated against the grievant.

Section 2.2-3004(A) states the following:

> A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to ***the following adverse employment actions*** in which the employee is personally involved***, including but not limited to*** (i) formal disciplinary actions, including suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex; (iv) arbitrary or capricious performance evaluations; (v) ***acts of retaliation as the result of the use of or participation in the grievance procedure*** or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for exercising any right otherwise protected by law.[31]

The Code of Virginia does not define the words "adverse employment action," nor are we aware of any Virginia Supreme Court or Court of Appeals case decisions that provide a definition, certainly not in the context of the state grievance statutes. Taken literally, however, the Code language cited above appears to enumerate six categories of agency actions that are deemed to be "adverse employment actions."[32] Indeed, with respect to the instant case, the plain language of the Code appears to provide that *any* "acts of retaliation as the result of the use of or participation in the grievance procedure" are per se "adverse employment actions" that may proceed to a hearing.[33] Thus, under a literal reading of the Code, we could not conclude that the hearing officer abused his authority by considering whether a retaliatory motive was the reason for each of the management actions described in these grievances,[34] namely repeated

[31] Va. Code § 2.2-3004(A) (emphasis added).
[32] Indeed, at least one Virginia circuit court essentially held as much. *See* Grievance Appeal, Case No. CL03-9559 (16th Judicial Circuit 2003).
[33] Moreover, it would appear that this Code section merely lists types of cases that may qualify for a hearing under the Commonwealth's grievance procedure, rather than establishing the elements of any cause of action that must be proved at hearing as the agency appears to argue.
[34] The interpretation of this statutory provision, however, is ultimately a matter for a circuit court to determine. *See* Va. Code § 2.2-3006(B) (providing for appeal to a circuit court on the grounds that a final grievance hearing decision is "contradictory to law").

denials of promotion; a denial of an in-band salary adjustment to align the grievant's salary with comparators; the issuance of an unjustified Group II Written Notice (which was later rescinded by the agency as a result of the grievance); and a reassignment to another post, without a needed chair as described in his doctor's note.

EDR, however, has long declined to interpret the above cited Code provision so literally as to deem all the listed actions as per se "adverse employment actions," regardless of the degree of actual harm to the employee. Instead, and in the absence of a binding definition of "adverse employment action" arising from Virginia law, we attempted to take a reasoned, principled approach by using federal case law as instructive—although not dispositive—authority. Specifically, for qualification rulings issued prior to June 2006, this Department generally used the "adverse employment action" definition applied to Title VII civil rights cases by the United States Court of Appeals for the Fourth Circuit.[35] Thus, for a number of years prior to June 2006, this Department's administrative rulings generally held that to qualify for hearing, a grievance alleging a misapplication or unfair application of policy, discrimination, arbitrary or capricious performance evaluation, or retaliation must challenge a management action that had an adverse effect on the "terms, conditions, or benefits" of employment.[36] Presumably the federally-derived definition used by EDR in retaliation qualification rulings prior to June 2006 is the definition now advanced by the agency in this case.

However, in its June 2006 *Burlington Northern* decision involving a Title VII retaliation case, the United States Supreme Court held that a retaliation plaintiff need only show that the employer took a "materially adverse action" against her for having engaged in the statutorily protected act of filing a discrimination complaint.[37] The Court indicated that this standard was not limited to employer actions that effected the terms, conditions or benefits of employment, but applied to *any* action by an employer that was "harmful to the point that they could well dissuade a reasonable worker"[38] from exercising his or her statutorily protected rights. Importantly, in adopting the "materially adverse" standard, the Court noted that the requirement of "materiality" was critical to separating "significant from trivial harms."[39] The latter, including petty slights,

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[35] *See, e.g.*, EDR Ruling No. 2004-768; *see also Grievance Procedure Manual* § 4.1(b) (grievance "should qualify for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether an adverse employment action has occurred as a result of . . . [r]etaliation."), and § 9 (defining an adverse employment action as "[a]ny employment action resulting in an adverse effect on the terms, conditions, or benefits of employment").

[36] But see EDR Ruling Nos. 2006-1182 and 2006-1197, issued prior to June 2006, which recognize that it is sometimes appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." In this Ruling, this Department qualified a grievance involving a purported violation of the state's military leave policy (DHRM Policy 4.50). The agency had allegedly failed to reinstate an Army National Guard member to his former position upon his return from active military duty. In this Ruling, we noted that the Virginia statute that served as the express underpinning for the state's policy required that an employee be returned to the position he held when ordered to duty unless such position had been abolished or otherwise ceased to exist. Moreover, we noted that there was no "adverse employment action" required in the underlying Virginia statute (or related provisions of federal law). Thus, we concluded that "if there is a state or federal law that forms the basis of the policy at issue and that state or federal law does not require the presence of an 'adverse employment action' for an actionable claim, this Department will defer to the standard set forth by that state or federal law."

[37] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). The "materially adverse standard" has now been adopted by courts for retaliation cases arising under statutes other than Title VII, for example, the Fair Labor Standards Act (*see* Darveau v. Detecon, Inc., 515 F.3d 334, 343 (4th Cir. 2008), and the Family Medical Leave Act, *see* Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th Cir. 2008).

[38] Burlington N., 548 U.S. at 57.

[39] *Id.* at 68.

minor annoyances, personality conflicts, snubbing, and simple lack of good manners, would not deter protected activity and were therefore not actionable.

This Department found the Supreme Court's "materially adverse action" standard in *Burlington Northern* to be sensible, not inconsistent with the language and intent of the grievance statute cited above, and conducive to a principled approach in assuring that the anti-retaliation rights granted by the General Assembly are protected against materially adverse employer reprisal. Since June 2006, the "materially adverse" employer action standard has been consistently applied in this Department's retaliation rulings, which are posted in a searchable format on the Department's website.

In sum, whether an employee suffered an "adverse employment action" is indeed the normal threshold issue in a grievance. However, as reflected above, there are necessarily exceptions to this norm (e.g., military leave cases). We continue to believe that retaliation cases constitute another appropriate exception to the general rule that only grievances involving adverse employment actions will advance to hearing. Thus, for all the above reasons, we cannot conclude that the hearing officer erred by incorporating the "materially adverse" employer action standard in the case at hand.

APPEAL RIGHTS AND OTHER INFORMATION

This matter is remanded to the hearing officer for action consistent with this Ruling. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review and any reconsidered hearing decisions following such review have been decided.[40] 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.[41] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[42] This Department's rulings on matters of procedural compliance are final and nonappealable.[43]

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Claudia T. Farr
Director

[40] *Grievance Procedure Manual* § 7.2(d).
[41] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[42] *Id; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).
[43] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).