Issue: Administrative Review of Hearing Officer's Decision in Case No. 9061; Ruling Date: August 4, 2009; Ruling #2009-2325; Agency: Department of Corrections; Outcome: Hearing Officer In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2009-2325
August 4, 2009

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9061. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The facts of this case, as set forth in the hearing decision in Case Number 9061, are as follows:[1]

> The Grievant worked for the agency and for other agencies as a correctional officer at several different times in the past. In Spring, 2006 he was hired as a correctional officer at the correctional center in this dispute. He remained employed there until he was terminated on December 3, 2008, as a result of the offense named in the Group III Written Notice.
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> An internal investigation of the Grievant was initiated by a former warden in January, 2008. The report from this investigation was submitted to the present warden in June, 2008. The report included many incidents of violations of standards of conduct, and misdemeanor and felony charges against the Grievant. The Warden testified that the information he relied on for the two Written Notices was based entirely on the investigation report. Although there were several founded violations of policies in the investigation report, the Warden only cited the two incidents in the two written notices which are the subject of this grievance[.] Both of the incidents occurred prior to the Warden's tenure.

[1] Footnotes from the original decision have been omitted.

He made no independent investigation, and spoke to no witnesses regarding the facts in either Written Notice. The Warden took no action on the report until December 3, 2008 when he issued the Group II and III Written Notices to the Grievant for two specific incidents from the report. The former warden and former assistant warden who were at the correctional center when the two incidents occurred did not testify.

Group II Written Notice

On February 11, 2007, the Grievant was arrested on a Class 1 Misdemeanor in S**** County for writing two checks with insufficient funds in the checking account.

The agency Procedures Manual in effect at that time includes a procedure section 5-45.6. Notifications. Subsection "B" states:

> "Employees charged with a criminal offense either on or off the job, or a moving traffic violation which occurs on the job or in a state vehicle, shall inform their organizational unit head immediately if received during normal working hours. The organizational unit head shall immediately notify the next management level (Regional Director, Administrator or Deputy Director). The Inspector General's Office will be informed if the criminal offense is a felony charge, a result of actions taken on state property, or in the line of duty."

According to the testimony of the warden, the organizational unit head is the warden, and the employee must inform the warden directly. Because the warden believed that the Grievant had not notified the warden immediately, the warden issued a Group II Written Notice on December 3, 2008, for "failure to comply with procedure 5-45.6.B: Inspector General investigation #2800056COF documents that you did not report 2/11/07 warrant issued for worthless check in S**** County as required by policy."

The present warden has been the warden in this correctional center since March 25, 2008. The prior warden, who was warden in February 2007, did not testify. The Grievant in a written statement and in his testimony stated that he informed his supervisor, the Major on February 11, 2007. When the Major was asked in February of 2008 whether he had

been informed of the bad check charge by the Grievant one year earlier, he signed a written statement that he was never informed. When testifying at the hearing in April, 2009, the Major testified that the Grievant had reported a bad check charge to him, but he did not recall the date. He remembered the Grievant being arrested for a bad check charge in the warden's office on one occasion.

The Major further testified that under the policy, the employees under him would report offenses to him and he would write a report to the warden, after getting the court paperwork. He testified that this happen [sic] often. He testified that, when an employee reported offenses to him, he did not tell the employees that they needed to tell the warden directly. Instead the Major would inform the Warden. The Major testified that he believed this followed the procedure correctly.

Another correctional officer also testified that he understood the policy was followed when his staff reported tickets or other crimes to him and he reported it up the chain of command.

The present Assistant Warden ("AW") testified that he became AW of this correctional center on July 25, 2007. He testified that on September 28, 2007, the Grievant came to his office to report some bad check charges. The same day the AW was informed by a deputy in S**** County of the bad check charges, and later that day, the deputy informed the AW that the checks had been paid. The AW did not tell the Grievant to inform the warden, nor did the AW inform the warden about the bad checks. In January 2008, the AW wrote a letter to the then warden to tell the warden about the bad checks in September 28, 2007. The AW testified that he wrote the letter because the bad check charges had not been paid, as he previously thought, but were being pursued by the Commonwealth Attorney. The Grievant then spoke to the former warden about the bad check charge and other issues. This conversation resulted in an Internal Affairs investigation of the Grievant which was initiated by the former warden in January 2008.

The Special Agent who investigated the Grievant conducted interviews with the Grievant, and several correctional officers, including the major, the now assistant warden who testified at this hearing and two other correctional officers who did not testify. No interviews were conducted of the former warden or the former assistant warden.

In the interview statement of the Grievant, he outlines several bad check charges and other legal charges he received while employed as a correctional officer in the correctional center. He outlines in his statement to whom he notified of these charges. In one case he notified his direct supervisor, who is now the assistant warden. In another case, he notified the then assistant warden. In another case he notified to a captain. In still another case he directly notified the then warden. At no time was he ask [sic] to submit this notification in writing.

In February 2008, as a direct result of the notification problems in this case, a new policy was initiated by the then warden regarding the notification of employees of charges or arrests. The new policy requires the employee to notify their supervisor and the supervisor is to inform the warden. A new form was implemented which the employee was instructed to complete to facilitate notification. This new policy was in effect when the present warden started in his position in March, 2008.

Group III Written Notice

On August 30, 2007, the Grievant received a certified letter from Accurate Foreign Auto Parts at an auto repair business owned by the Grievant. When he was asked in February, 2008, if he had signed for that letter, he said that his son, who on occasion would sign for letters for the Grievant must have signed for it. On February 13, 2008, the Grievant signed a statement prepared by the Special Agent which included the statement, ". . . I was sorting through my mail, which I keep on top of my refridgerator (sic). I noticed a certified letter addressed to me but that had been signed for by my son." After signing the statement, the Special Agent showed the Grievant a copy of the certified letter from the post office. The Grievant identified the signature as his own, and stated that it was his signature. He acknowledged that he must have signed for the letter when it was received six months earlier.

On December 2, 2008, the warden issued a Group III Written Notice to the Grievant for "falsifying any record: you submitted a written statement to SIU Special Agent []. This statement contained a material false statement. This fact was reported in inspector general investigation 2800056COF."

The warden testified that the record to which he was referring was the investigation interview statement prepared by the special agent and

> signed by the Grievant. The false statement was the statement that Grievant's son had signed for the letter, when it discovered in the investigation that the Grievant had signed for the letter. When asked if he thought the Grievant may have forgotten who had signed for the letter six months prior, the Warden testified that it was not credible that a person could receive a notice of a bad check and forget that he had signed for it versus it being placed on the refrigerator by the son. The Warden considered this false statement a breach of public trust. As to the Group II Written Notice, the warden relied entirely on the Major's statement in the investigation report to determine that the Grievant had not reported the charges.[2]

Based on the forgoing "Findings of Fact," the hearing officer reached the following "Applicable Law and Opinion":

> The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia[.] It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).
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> VA Code § 2.2-3000(A) provides:
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> > It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.
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> The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

[2] Decision of Hearing Officer, issued May 7, 2009 ("Hearing Decision") at 2-5.

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Offenses are grouped by levels, from Group I to Group II. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The warden issued a Group II Written Notice to the Grievant for failure to comply with procedure 5-45.6.B. The Agency alleges that the Grievant has failed to report 2/11/07 warrant issued for worthless check in S**** County to the organizational unit head as required by policy.

Although the Warden identified the "organizational unit head" as the warden, he was not the warden when the Grievant had allegedly not notified the organizational unit head of the bad check charge that is the basis for the Group II Written Notice. It is clear from the exhibits and the testimony of the Agency's own witnesses that the correctional officers at the time of the offense did not think that organizational unit head was the warden, but the employee's supervisor.

The only statement to the contrary was the major [sic] statement when asked one year after the alleged offense. The Major's statement that he was not notified of this one incident could be very self-serving if he knew of the charge and had not turned the information over to the then warden. The Warden testified that he relied entirely on the Major's statement a year later to decide that the Grievant had not reported the charges.

The evidence clearly shows that the Grievant did report charges to his supervisor. The policy regarding notification of charges was changed one month after the investigation in this case was begun to include written

notification. It is clear from the evidence that supervisors were notified of charges and the supervisors did not always inform the warden of the charges. I find that the evidence of the one statement by a supervisor made one year after the incident that this was charge was not reported is not sufficient evidence to sustain the Group II Written Notice.

The warden issued a Group III Written Notice to the Grievant for falsifying any record. The Agency alleges that the Grievant submitted a written statement to a Special Agent which contained a material false statement.

Under the Group III Offenses listed in the Standards of Conduct is V.B.3.b., "Falsifying any records, including, but not limited to vouchers, reports, insurance claims, time records, leave records, other official state documents." In this case the false statement was that the Grievant had signed a statement in January, 2008, that his son had signed for a letter that the Grievant had received at his auto shop business in August, 2007.

This statement was proven to be inaccurate. In fact, the Grievant had signed for the letter. When he was shown the post office receipt in January, 2008, he agreed that his signature was on the receipt and he must have signed for the letter. But is an inaccurate statement made about who signed for a letter six months prior a *false* statement?

"Falsify: in the Black's Law Dictionary is defined as "To counterfeit or forge, to make something false, to give a false appearance to anything. To make false by mutilation, alteration, or addition to tamper with, as to falsify a record or document.["]

A false statement, in the opinion of this hearing officer, must include the *intent* to falsify in order to be included under the Group III Offenses, to justify termination.

In this case, the Grievant testified that he was mistaken when he stated that he had signed for a letter. Given that he was not asked about the letter until six months later, that his son did often sign for letters for him, and that he acknowledge his signature when shown the receipt, I find it is more likely than not that he made a mistake, and did not deliberately give a false statement.[3]

[3] *Id.* at 5-7.

Applying the foregoing Applicable Law and Opinion to the previously described "Findings of Fact," the hearing officer reached the following "Decision":

> The Agency has not sustained its burden of proof for the Group II and Group III Written Notices. The Group II and Group III Written Notices given to the Grievant on December 3, 2008 by the agency are hereby rescinded. The Agency is directed to reinstate the Grievant to his former position or to an objectively similar position in another facility within a reasonable distance, to award the Grievant back pay minus any interim earnings or unemployment benefits, and to award the Grievant attorney's fees.[4]

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."[5] 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.[6] The agency has raised several objections in its request for administrative review which are addressed below.

Bias

The agency claims that the hearing officer was biased in favor of the grievant. The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[7] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[8] In this case, the agency has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial [or] pecuniary interest" in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed actionable bias in this case.

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[4] *Id.* at 7.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4.
[7] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E. 2d 451, 460 (1992) (alteration in original).
[8] *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

Appearance of Partiality /Questions Asked

The *Rules for Conducting Grievance Hearings* ("*Hearing Rules*") provide that "the hearing officer may question the witnesses."[9] As the agency notes, however, the *Hearing Rules* further caution that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[10] The manner of questioning witnesses, nonetheless, is within the sound discretion of the hearing officer. Noncompliance with the grievance procedure and *Hearing Rules* on these grounds will only be found if the hearing officer has abused that discretion.[11]

After attempting to review the hearing tapes in this case,[12] this Department finds no indication that the hearing officer abused her discretion in asking questions of witnesses. It was extremely difficult to hear many, if not most, of the questions posed by the hearing officer throughout the full-day hearing. However, the questions objected to by the agency as an affront to management's exclusive right to manage its affairs appeared to be appropriate. For example, the agency asserts that the hearing officer asked both the Warden and Special Investigator "Why do you think that [the grievant's] behavior was deliberate and not a mistake." Few questions could be more relevant in a case such as this where the intent of the grievant is pivotal. As the hearing decision states, for the hearing officer to uphold a falsification claim, she was required to find that the grievant intended to make a false statement. Because the falsification charge turns on whether the grievant's behavior was deliberate, there is no error in posing such a question.

As to the second question cited by the agency as improper, which was posed to the Warden--"Do you think that these actions would justify [grievant] losing his Job?"--such a question relates to potential mitigating circumstances that might warrant a lesser sanction than termination. (One of the Written Notices referenced to potential mitigating circumstances considered, the other did not.). As a general rule, we find no error with posing such a question to an agency witness. Mitigating circumstances come into play after the agency has established by a preponderance of evidence that (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 (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). Once each of these three elements have been established, the hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. Here, the hearing officer was never required to reach the

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[9] *Rules for Conducting Grievance Hearings* § IV(C).
[10] *Id.*
[11] *See* EDR Ruling 2009-2091.
[12] The quality of the hearing tapes in this case is, at best, poor. The sound is muffled and it is very difficult to hear what is transpiring throughout the duration of the hearing. For reasons assumed to be related to the placement of the recording device and the microphone(s), witnesses can intermittently be heard but the hearing officer and agency representative are largely unintelligible.

issue of mitigation because the hearing officer did not find that the agency had met its burden on proving the first three elements. However, the inquiry into potential mitigating factors was, nevertheless, not improper. EDR has remanded decisions for consideration of mitigating circumstances.[13] Therefore, addressing the issue of potential mitigating circumstances at hearing can hardly be viewed as improper.[14]

Deference to the Agency/Findings of Fact

The agency claims that the hearing officer acted as a "super-personnel officer" and failed to give the appropriate level of deference to the agency's actions. There is no evidence to support this contention. The hearing officer simply found that the agency had failed to meet its burden of proving by a preponderance of evidence[15] that the grievant had engaged in misconduct.[16]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and grounds in the record for those findings."[18] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[19] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[20] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In suggesting that the facts and testimony support its issuance of the Written Notice, the agency contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that she drew, the characterizations that she made, and the facts she chose to include in her decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the

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[13] *See*, e.g. Ruling Nos. 2008-1749, 2008-1759; 2006-1290.
[14] *See also* EDR Ruling 2009-2091, in which this Department held that the hearing officer did not err by posing questions to an agency witness to elicit information not produced to support a Written Notice.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] Hearing Decision at 7.
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *Grievance Procedure Manual* § 5.8.

disciplinary action was appropriate.[21] A review of the hearing record demonstrates sufficient evidence to support the hearing officer's fact-findings and decision. While obviously contested by the agency, record evidence supports the hearing officer's key findings that the grievant (i) did not intentionally misstate the facts surrounding his signing for the letter,[22] and (ii) did report the warrant for the worthless check.[23] Accordingly, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. This Department cannot find that the hearing officer exceeded or abused her authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no basis to disturb the hearing officer's findings as they stand.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review and any reconsidered hearing decisions following such review have been decided.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26] This Department's rulings on matters of procedural compliance are final and nonappealable.[27]

Claudia T. Farr
Director

[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] Testimony of grievant at hearing tape 9. *See also* Agency Exhibit A signed by grievant in which he states of the letter in question that "I honestly thought that my son had signed for it."
[23] Testimony of the grievant at hearing tape 8. *See also* Agency Exhibit C, Attachment B, Grievant's Statement dated February 13, 2008.
[24] *Grievance Procedure Manual,* § 7.2(d).
[25] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[26] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319, 322 (2002).
[27] *See* Va. Code § 2.2-1001 (5), 2.2-3003(G).