Issue: Administrative Review of Hearing Officer's Decision in Case No. 9115; Ruling Date: October 23, 2009; Ruling #2010-2376; Agency: Norfolk State University; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Norfolk State University
Ruling No. 2010-2376
October 23, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9115. For the reasons set forth below, the decision is remanded to the hearing officer for further consideration.

FACTS

The facts of this case as set forth in the hearing decision in Case Number 9115 are as follows. [1]

> Norfolk State University (the "agency") employs Grievant as an Administrative Office Specialist II. The purpose of his position is:
>
> > Serves as data entry operator for the Admissions Office. Accurately enters data from numerous types of source documents including but not limited to the non-international and non-degree applicants. Provides professional customer service to all students, prospective students, parents, faculty, staff and the general public via telephone, e-mail, walk-ins, and counter.
>
> Some of Grievant's Core Responsibilities include:
>
> > Process all L-Z non-international transcripts. ***
> >
> > Enter daily, all incoming transcripts, test scores, recommendations and comments into [the Student Information Systems]. ***
> >
> > Scan all incomplete, admitted, and partial applicant transcripts, recommendations, fee waivers, test scores, in all of the documents related to admissions split and match documents with proper folder. ***

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

On March 28, 2007, Grievant received a written counseling from the Supervisor "in an attempt to resolve your input of applications and transcript entry in a timelier manner."

On December 20, 2007, Grievant received a written counseling from the Supervisor stating, in part:

> After close observation of the applications for data entry process, it is clear that you have not met your expected level of completion for entering the applications into the Datatel SIS System. This counseling is intended to correct a deficiency. It is expected that upon receipt of the applications each day, that you complete the necessary data entry in a timely manner.

On January 18, 2008, the Acting Director sent Grievant a counseling memorandum stating, in part:

> During your recent meeting with our Associate Vice President …, you cited that due to equipment concerns you were unable to produce the expected results. Since this occasion, your scanner has been replaced by a model that would allow you to be more productive in processing and scanning documents.
>
> As a result of this counseling session, you will have until January 31, 2008 to complete the entire backlog of applications and supporting documents. You will be relieved of counter and phone duties during this period.

Norfolk State University has a rolling admissions process. Once a student's application is completed and the appropriate information received by the University, the University may admit or deny the student.

On October 6, 2008, the Agency received an official transcript from a high school for the Student. A temporary employee stamped the date on the document. Grievant wrote an identification number on the document. He did not enter receipt of the transcript into the Datatel Student Information System. Because Grievant did not enter receipt of the transcript into the information system, the student's application for admission appeared incomplete and not ready for a determination of the student's admissions to the University.

On November 6, 2008, the Student's transcript was scanned and made a part of the Keyfile. The original transcript, however, remained in Grievant's manual files.

The Student's mother called Grievant regarding the status of her son's application. Grievant told her he had not received the high school transcript. The high school sent a second transcript that was received on December 9, 2008. The Receptionist stamped the date December 9, 2008 on the transcript. Grievant wrote an identification number on that second transcript. He did not enter receipt of that transcript into the Datatel Student Information System. The application was not processed because the Agency's records did not show the application was ready to be processed.

On January 28, 2009, the Student's mother called the President's office to complain about Grievant. She said she wanted all of the money she had paid to the Agency to be returned to her because she did not want her son to attend a university that allowed people like Grievant to work for it. She explained that her son's transcript along with SAT scores and recommendations were sent to the Agency for [sic] times, each time she was told by Grievant that the Agency had not received them. The Assistant Director for Admissions contacted Grievant and asked if he had received any transcripts for the Student. Grievant said he had not received them. The Assistant Director examined the documents that had been scanned into the Keyfile. The Student's transcript appeared in the Keyfile along with all supporting documents. The Assistant Director looked to Grievant's manual files and found the transcript received on October 6, 2008. She also found the transcript received on December 9, 2008.[2]

Based on the above "Findings of Fact," the hearing officer reached the following "Conclusions of Policy":

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Unsatisfactory work performance as a Group I offense. Failure to follow a supervisor's instructions is a Group II offense. On December 20, 2007, Grievant was instructed by a supervisor that "upon receipt of the applications each day, that you complete the necessary data entry in a timely manner". Transcripts are a part of a student's application for admission. Grievant received the transcript stamped October 6, 2008 and the transcript stamped December 9, 2008 but he failed to make the necessary data entry to record those transcripts in the Datatel SIS. His failure to do so was contrary to a supervisor's instructions thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, the Agency may

[2] Decision of Hearing Officer in Case 9115 issued, July 7, 2009 ("Hearing Decision"), pp. 2-4.

suspend an employee for up to 10 workdays. In this case, Grievant was suspended for five work days and, thus, his suspension must be upheld.

Grievant argued that each time the Student's mother called him, he searched his files and could not find the transcript. He indicated that he had given the transcript of Mr. G so that the GPA could be calculated. He argued that some of the items on his desk had been removed and were put back at a later time. This argument fails. If the Hearing Officer assumes for the sake of argument that Grievant's assertions are true, they show how important it was for Grievant to immediately enter his receipt of the transcript into the computer system. Had he done so, whether someone removed the transcript from his desk would become irrelevant.

Grievant argued that his health concerns may have affected his ability to timely process the Student's transcript. The evidence showed, however, Grievant's illness was many months prior to October 2008 and it did not affect his work performance in October 2008 or December 2008.

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.

Grievant argued that the Agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. The evidence is insufficient for the Hearing Officer to conclude that the Agency had inconsistently disciplined its employees. The details of the alleged errors made by other employees were not explained. Several of Grievant's coworkers were not classified employees and thus not subject to receiving Written Notices. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; 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 shows by a preponderance of the evidence that 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.
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> The nature of Grievant's protective activity is unclear. Grievant suffered a materially adverse action because he received a Written Notice. No credible evidence was presented to suggest that the Written Notice was issued as a form of retaliation. The Agency did not discipline Grievant as a pretext for retaliation.[3]

Based on these "Conclusions of Policy," the hearing officer upheld the Group Notice II and suspension.[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]

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges a number of the hearing officer's findings and conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] 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.[9] 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

[3] Hearing Decision at 4-6.
[4] *Id*. at 6.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4.
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).

circumstances.[10] 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.

Based upon a review of the hearing record, sufficient evidence supports the hearing officer's decision regarding: (i) whether the grievant engaged in the behavior described in the Written Notice (failing to follow his supervisor's instruction); (ii) whether that behavior constituted misconduct; and (iii) whether the agency's discipline was consistent with law and policy. A review of the hearing recording revealed testimony to support the agency's position that the grievant failed to follow the instruction to timely enter prospective student application data received by the University.[11] Accordingly, this Department cannot conclude that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no reason to disturb the hearing decision regarding the hearing officer's findings, with the exception of his findings relating to mitigation, addressed below.

Noncompliance – Documents Relating to Potential Mitigation/Mitigating Circumstances

The grievant asserts that the hearing officer failed to allow him to submit mitigating evidence of inconsistencies in discipline. At the outset of the hearing, the grievant raised a concern regarding an apparent request for documents relating to complaints lodged against two supervisors.[12] The agency had apparently refused to provide him with the documents, asserting that such documents were irrelevant.[13] The hearing officer agreed that the documents were irrelevant. He drew a distinction between the inconsistent application of disciplinary actions which he appeared to consider only as formal discipline (e.g., Written Notices) and mere complaints, which he deemed irrelevant.[14] In his decision, the hearing officer held that:

> Grievant argued that the Agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. The evidence is insufficient for the Hearing Officer to conclude that the Agency had inconsistently disciplined its employees. The details of the alleged errors made by other employees were not explained. Several of Grievant's coworkers were not classified employees and thus not subject to receiving Written Notices. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[15]

[10] *Grievance Procedure Manual* § 5.8.
[11] *See,* testimony of the Assistant Director of Admissions, at hearing 9:00-44.00.
[12] Hearing at 2:00-6:00.
[13] *Id.*
[14] *Id.*
[15] Hearing Decision at 5-6.

Under the *Rules for Conducting Grievance Hearings,* inconsistent discipline issued to similarly situated employees can be viewed as a mitigating circumstance."[16] Here, the hearing officer denied the grievant's request for documents relating to complaints lodged against his two immediate supervisors because: (1) unlike the grievant, his supervisors were not classified employees; and (2) only actual discipline (e.g., a Written Notice) issued is relevant; mere complaints without resulting discipline, is not.

The hearing officer is correct in noting that under the Commonwealth's Standards of Conduct ("SOC"),[17] Written Notices cannot be issued to non-classified employees.[18] However, the SOC further states that: "Agencies may use this policy [SOC] as a guide for evaluating the workplace conduct of employees who are not covered by the Virginia Personnel Act, such as wage employees, probationary employees and employees expressly excluded from the Act's coverage." Thus, while an agency may not issue non-classified employees Written Notices, it nevertheless may use the SOC as a guide for evaluating and responding to the conduct of those employees. Thus, without further explanation, a hearing officer cannot conclude that an agency's treatment of non-classified employees is wholly irrelevant.

In addition, the hearing officer erred by concluding that only actual discipline issued to other employees is relevant. To the contrary, complaints of misconduct and, more to the point, all documents (or the lack of documents) relating to how an agency responded to complaints can be relevant. For example, if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance.[19] Even documents pertaining to unfounded complaints could be relevant.[20] Accordingly, the hearing officer is ordered to instruct the agency to produce documents pertaining to the two individuals in question that relate to any alleged acts of failure to follow their supervisor's instructions. To the extent that such documents exist, the hearing officer shall consider the weight to be assigned to them in his reconsidered decision, and whether inconsistent discipline, if any, should be viewed as a mitigating circumstance in this case.

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[16] *Rules* VI(B)(1) describe as a mitigating circumstance: "Inconsistent Application: The discipline is inconsistent with how other similarly situated employees have been treated." The *Rules* do not expressly address what constitutes a similarly situated employee. However, courts have held that in order "[t]o make out a claim of disparate treatment the charges and the circumstances surrounding the charged behavior must be substantially similar." Abaqueta v. U.S.A., 255 F. Supp. 2d 1020 (2003 D. Ariz.) at 20-21 quoting Archuleta v. Department of Air Force, 16 M.S.P.R. 404, 406 (1983).

[17] Department of Human Resource Management ("DHRM") Policy 1.60.

[18] SOC preamble statement regarding "application" ("Official Written Notice forms may not be issued to these [employees who are not covered by the Virginia Personnel Act] employees.").

[19] The key is that the misconduct be of the same character. Thus, for example, in a case such as this where the grievant was issued a Written Notice for failing to follow his supervisor's instruction, only documents that are associated with any alleged failure by comparators to follow their supervisor's instructions are relevant. Documents pertaining to agency responses to other dissimilar alleged incidents of misconduct, such as disruptive behavior or tardiness, are generally irrelevant.

[20] For example, if the agency only followed up on complaints lodged against one employee but not on similar complaints lodged against other employees, that too might be relevant. We are not saying this is the case here—the point is merely illustrative.

The grievant also asserts that the hearing officer failed to take into consideration his experience and background. While otherwise satisfactory work performance is grounds for mitigation by agency management under the Standards of Conduct, under the *Rules*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness.[21] Thus, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[22] The weight of an employee's past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged.[23] The more serious the charges, the less significant otherwise satisfactory work performance becomes.[24]

The burden of raising and establishing any mitigating circumstance is on the grievant.[25] It is not clear from this Department's review of the record whether the grievant attempted to raise the potential mitigation circumstance of his "experience." (The hearing decision is silent as to this potential factor.) Furthermore, it is not clear whether the grievant is asserting that it is his otherwise satisfactory work performance or simply his academic achievements that should have been considered. If the latter, it is far from clear how such achievements and other non-state work experience alone constitute a mitigating factor. Moreover, it is not evident that the factors of "experience and background" were intended by the grievant to serve as mitigating factors or instead were intended to be considered for some other purpose. Because the hearing officer is already addressing mitigation, he is instructed to address the potential factor of "experience" as well.

Inadequate Time to Present Case at Hearing

The grievant asserts that he did not have sufficient time to present his case. Specifically, he asserts that hearing officer did not allow him sufficient opportunity to question a witness. The *Rules for Conducting Grievance Hearings ("Rules")* do not expressly require that the hearing officer to grant a party a particular amount of time to present their case. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.[26]

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[21] EDR Ruling No. 2007-1518. Formerly, the *Standards of Conduct* expressly listed both length of service and otherwise satisfactory performance as mitigating circumstances. Ruling 2007-1518 thus addressed both length of service and otherwise satisfactory performance. Since the issuance of this ruling, the *Standards of Conduct* was modified by eliminating "length of service" as a mitigating circumstance.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See e.g.*, EDR Ruling 2009-2157, 2009-2174. *See also* Bingham v. Dept. of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).
[26] *Rules* at III(B). The *Rules* state that "[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours."

However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[27]

Based on the totality of circumstances in this case, we cannot conclude that the hearing officer did not allow the grievant a fair opportunity to present his case. The grievant was afforded the opportunity to cross-examine the witness in question.[28] While he may have wished for additional time, we cannot conclude that the amount of time he was granted was insufficient or unfairly prejudiced him, or that additional time would have changed the outcome.[29] Thus, we will not disturb the decision on this basis.

Other Arguments

The grievant asserts that employees who receive a "Below Contributor" rating must also receive a substandard performance improvement plan. While this appears to be a correct statement of Policy 1.40,[30] the grievant was not disciplined under this Policy. Instead, he was disciplined under the SOC, which does not appear to require such a plan. The grievant also complains that counseling memoranda and instructions were not always signed. Again, this Department is unaware of any requirement that all instructions from a supervisor to a subordinate be signed. Thus, while we find no reason to disturb the decision on these bases, we recognize that the Department of Human Resource Management is the sole agency charged with the promulgation and interpretation of state policy. Thus, to the extent that the grievant is asserting that the hearing decision is inconsistent with state policy, that is a question of policy and more properly an issue for DHRM.[31] Accordingly, if the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. Since the initial request for review to this Department was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.[32]

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

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

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[27] The *Rules* further state the "hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides." *Id.*

[28] *See* Cross-examination beginning at 1:36.

[29] The grievant asserts that when he spoke to the witness in question after the hearing, she told him that the decision to issue the grievant a Group II Notice was not hers but was the Acting Director's and the Assistant Director's. It is not readily evident how this would have shown that the discipline was not warranted or otherwise improper.

[30] DHRM Policy 1.40 "Performance Planning and Evaluation," ("An employee who receives a rating of 'Below Contributor' must be re-evaluated and have a performance re-evaluation plan developed.")

[31] *See, e.g., Grievance Procedure Manual* § 7.2(a).

[32] This Department does note for the information of the parties and the hearing officer that DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, Sept. 19, 2007.

decision (i.e., any matters not previously part of the original decision).[33] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[34]

Claudia T. Farr
Director

[33] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[34] *See Grievance Procedure Manual* § 7.2(a).