Issue: Administrative Review of Hearing Officer's Reconsideration Decision in Case No. 9028; Ruling Date: October 30, 2009; Ruling #2010-2404; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2010-2404
October 30, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's reconsideration decision in Case Number 9028. For the reasons set forth below, this Department remands the decision to the hearing officer.

FACTS[1]

On August 18, 2008, the grievant challenged her receipt of a Group III Written Notice.[2] The grievance proceeded to a hearing on February 23, 2009 and in a March 5th decision, the hearing officer upheld the disciplinary action taken against the grievant.[3] The grievant subsequently challenged the hearing officer's decision to this Department through the administrative review process. In EDR Ruling No. 2009-2253, issued June 10, 2009, this Department remanded the Hearing Decision to the hearing officer (1) "to clarify whether he upheld the agency's discipline on any basis other than the charges documented in the Written Notice, even if only in part, or upheld the discipline solely upon the charges expressly set forth on the Written Notice;" and (2) to "determine whether the grievant engaged in protected activity, and if so, whether she was in actuality disciplined for that conduct."[4] On August 11, 2009,[5] the hearing officer issued his

[1] This is an abbreviated version of the facts in this case. The full facts and procedural history of this case are set forth in detail in the Hearing Decision and in EDR Ruling No. 2009-2253 and can be found on EDR's website at http://www.edr.virginia.gov/searchhearing/2009-9028%20Decision.pdf and at http://www.edr.virginia.gov/searchedr/2009-2253.pdf respectively.
[2] *See* Decision of Hearing Officer, Case No. 9028, issued March 5, 2009 ("Hearing Decision") at 1.
[3] *Id*. at 11.
[4] EDR Ruling No. 2009-2253.
[5] The grievant challenges the length of time it took the hearing officer to issue his Remand Decision after receipt of this Department's June 10, 2009 ruling. According to *Grievance Procedure Manual* § 7.2 (c), "[i]f the DHRM or EDR Director orders the hearing officer to revise his decision, the hearing officer must do so and should issue a written decision within 15 calendar days of receiving the order." We note that this provision states that decisions *should* be issued within the 15 calendar day time frame, and thus it is not a mandatory rule for which a hearing officer's noncompliance must lead to a remand.

decision in response to EDR Ruling No. 2009-2253.[6] The grievant now seeks an administrative review of the hearing officer's Remand Decision.[7]

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."[8] 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.[9]

The grievant challenges the hearing officer's Remand Decision on the following bases: (1) the hearing officer erred by failing to address the issue of retaliation as instructed by this Department in EDR Ruling No. 2009-2253; (2) the hearing officer failed to address the potential due process violations as set forth in EDR Ruling No. 2009-2253; and (3) the hearing officer's findings of fact and conclusions in his Remand Decision demonstrate bias in favor of the agency. The grievant's arguments will be addressed in turn below.

Retaliation

At hearing, the grievant argued that she was disciplined in retaliation for having engaged in protected activity under Section 2.2-2902.1 of the Code of Virginia. That Section states that it shall not be construed to prohibit or otherwise restrict the right of any state employee to express opinions to state or local elected officials on matters of public concern, and that a state employee shall not be subject to acts of retaliation because the employee has expressed such opinions.

In EDR Ruling No. 2009-2253, this Department found that "while the hearing decision finds that the agency 'has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions necessary to maintain discipline and orderly operations,' it is unclear whether any of those non-retaliatory reasons include an agency prohibition against contacting the Governor's office regarding possible matters of public concern (as defined by Section 2.2-2902.1) without first going through the agency's chain of command."[10] As such, this Department ordered the hearing officer to

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[6] *See* Decision of Hearing Officer, Case No. 9028, issued August 11, 2009 ("Remand Decision").
[7] As demonstrated in EDR Ruling No. 2009-2253, this Department has expressly permitted the parties 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). Accordingly, this ruling will address only challenges to issues that were raised for the first time in the Remand Decision. *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[8] Va. Code § 2.2-1001(2), (3), and (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] EDR Ruling No. 2009-2253 (footnote omitted).

"determine whether the grievant engaged in protected activity, and if so, whether she was in actuality disciplined for that conduct."[11] This Department went on to say that "[i]f the answer to both questions is 'yes,' the hearing officer must determine whether the agency would have issued the same discipline in the absence of the retaliatory motivation."[12]

In response to this Department's directives regarding the grievant's retaliation claim, in his Remand Decision, the hearing officer concludes that he does not have subject matter jurisdiction to consider the grievant's retaliation claim because the issue was not raised on the Form A.[13] In particular, the hearing officer states:

> The hearing officer did mistakenly cover the Grievant's claims concerning retaliation in his Original Decision but this was in error because the hearing officer now decides that he lacks subject matter jurisdiction because the Grievant's Form A does not even mention retaliation let alone specify it as one (1) of her nine (9) issues raised for the hearing. Accordingly, the Agency was not on notice at the legally relevant time of her claims/grounds of retaliation. It is axiomatic that lack of subject matter jurisdiction can be raised by any person, including any hearing officer, EDR, DHRM or any court at any time. Lack of subject matter jurisdiction, of course, also permits of collateral attack at any time.[14]

The grievant asserts that the hearing officer has erred in his conclusions with regard to the grievant's claim of retaliation and accordingly, has failed to follow this Department's directives as set forth in EDR Ruling No. 2009-2253.

The hearing officer is correct that the "issue" of retaliation is not expressly stated on the grievant's Form A or in any attachment thereto. However, while retaliation was not expressly stated on the Form A as filed, the management action being grieved (the

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[11] *Id*. at 15.
[12] *Id.* at 15-16 (footnote omitted).
[13] Remand Decision at 2-4. In making this conclusion, the hearing officer relies in part on EDR Ruling No. 2009-2207 wherein this Department ordered the hearing officer to remove from his decision the discussion of an issue not raised on the Form A and not qualified for hearing. This Department's conclusions in EDR Ruling 2009-2207, however, are distinguishable from the present case. In EDR Ruling 2009-2207, the grievant filed two grievances to challenge two written notices. As such, the management actions at issue and qualified for hearing were the two written notices. At hearing, however, the grievant attempted to challenge an additional alleged management action not at issue in either of his grievances, specifically, the inducement of his subsequent resignation by management's alleged hostile actions against him. As such, this Department concluded that the hearing officer was correct in his determination at the hearing that he could not decide whether management had induced the grievant's resignation through an alleged hostile work environment, because the alleged management action (forced resignation) had not been qualified for a hearing or even grieved. Thus, in contrast to the present case, the grievant in EDR Ruling No. 2009-2207 tried to challenge an entirely new management action at hearing (forced resignation) and was not merely asserting a theory as to why the management actions grieved and qualified (the two written notices) were improper. Accordingly, the hearing officer's reliance upon EDR Ruling No. 2009-2207 in determining that he lacks subject matter jurisdiction to consider the issue of retaliation is in error.
[14] Remand Decision at 3-4.

Group III Written Notice), over which the hearing officer undoubtedly has subject matter jurisdiction, was. In raising the issue of retaliation, the grievant was merely asserting one of the many "theories" as to why the Group III Written Notice was allegedly improper.

This Department has held that any "theories" as to why the management action grieved was improper may be considered, even if not expressly stated on the Form A, so long as the opposing party will not be prejudiced by consideration of the issue.[15] We recognize, however, that when a party is placed in a situation such as this where the issue of retaliation appears to have been raised for the first time *at hearing* the party may not only be surprised, but potentially prejudiced by such an unanticipated disclosure. The party, however, may provide rebuttal evidence to challenge the newly disclosed evidence or testimony, and if necessary, request that the hearing be adjourned to allow the opposing party time to respond.[16]

The agency in this case has not made any requests for administrative review to this Department regarding objections to the grievant's presentation of evidence of retaliation at hearing. Moreover, this Department is unaware of whether such an objection was made at the hearing. If the agency made such an objection at hearing, it shall direct the hearing officer to that portion of the record where such an objection was made. The agency shall have **10 calendar days** from the date of this decision to do so and the hearing officer shall delay issuance of his reconsidered decision until such time has passed.

Based on the foregoing, this Department concludes that the hearing officer erred by finding that he lacked subject matter jurisdiction to consider the issue of retaliation because it was not raised on the grievant's Form A. Accordingly, the decision is remanded to the hearing officer for consideration of the issue of retaliation as previously set forth in EDR Ruling No. 2009-2253.

Due Process Issues

In her request for administrative review, which was the subject of EDR Ruling No. 2009-2253, the grievant (through counsel) asserted that the grievant's due process was violated because the agency attempted to expand the scope of her alleged

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[15] *See e.g.*, EDR Ruling No. 2007-1444 and EDR Ruling No. 2007-1457. This Department would like to note that the Hearing Officer's conclusion that he could not address issues not specifically noted on the Grievance Form A is understandable given this Department's precedent prior to the issuance of EDR Ruling No. 2007-1444. *See, e.g.*, EDR Ruling No. 2006-1248, 1249, 1278; EDR Ruling No. 2006-1116 and EDR Ruling No. 2006-1135. However, as indicated in EDR Ruling No. 2007-1444, addressing and deciding theories not specifically included on the Form A does not conflict with the grievance statutes or the *Grievance Procedure Manual*, and is justified and necessary in cases like this.

[16] *See* EDR Ruling Number 2008-1975. It should be noted that according to the Remand Decision, the agency called the Regional Director as a rebuttal witness to counter the grievant's claims of retaliation. Remand Decision at 11-12.

misconduct beyond that which was listed on the Written Notice. In response to the grievant's claim, this Department concluded:

> The hearing decision is unclear as to whether the hearing officer upheld the discipline against the grievant (even if only in part) because of the grievant's participation in facilitating contact with the Governor's office, her alleged failure to follow agency chain of command, or her failure to report the exoneration efforts…
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> Accordingly, the decision is remanded to the hearing officer to clarify whether he upheld the agency's discipline on any basis other than the charges documented in the Written Notice, even if only in part, or upheld the discipline solely upon the charges expressly set forth on the Written Notice. To the extent that the decision is based, to any degree, on offenses by the grievant other than those listed on the Written Notice and attachment, the hearing officer is ordered to reconsider his decision and confine his consideration to only those charges stated on the Written Notice and attachment.[17]

In his Remand Decision, the hearing officer "corrected the focus of the framework of his analysis regarding the offenses to only deal with each of the two (2) failure to disclose offenses asserted by the Agency within the four (4) corners of the Written Notice."[18] After doing so, the hearing officer made the following conclusion:

> Concerning the two (2) disclosure offenses in the Written Notice, the hearing officer decides based upon his findings of fact, that each offense could in and of itself have constituted a Level III offense. Of course, the Department combined both offenses into a single Group III offense, as reflected in the Written Notice. The hearing officer, for the reasons provided above, decides that such offenses were serious enough to rise to Level III offenses because of their undermining of the effectiveness of the Agency.[19]

In her request for administrative review, the grievant argues that in making the above determination, the hearing officer has failed to follow EDR Ruling No. 2009-2253 and in particular, has failed to "determine whether his initial Hearing Decision…was based even in part on offenses not charged in the Written Notice…or if the discipline was upheld only upon the charges set forth in the Written Notice." The grievant further argues that her failure to follow the chain of command was the motivating factor behind the issuance of the Written Notice, that this fact was conclusively set forth during the

[17] EDR Ruling No. 2009-2253.
[18] Remand Decision at 11.
[19] *Id*. at 12.

hearing and as such, the hearing officer's omission of this fact in his Remand Decision is "fundamental error."[20]

First, although the hearing officer does not specifically state in his Remand Decision whether he considered facts other than those listed on the written notice in making his determination to uphold the discipline in his Hearing Decision, this Department concludes that failure to make such a statement does not violate EDR Ruling No. 2009-2253 as alleged by the grievant. By removing from consideration those issues not specifically outlined on the written notice in rendering his Remand Decision, the hearing officer has complied with EDR Ruling No. 2009-2253.

Moreover, with regard to his conclusion to uphold the discipline yet again in his Remand Decision, this Department notes that hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and grounds in the record for those findings."[22] 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.[23] 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.[24] 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. In particular, the grievant admits that she was not forthright in responding to questions from agency management, the very action for which she was

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[20] As an initial point, in her first request for administrative review to this Department, the grievant challenged the hearing officer's consideration of facts and circumstances not specifically noted on the Written Notice as violative of the grievant's due process rights. Thereafter, this Department, recognizing that it was unclear whether the hearing officer had considered facts and circumstances not specifically outlined on the Written Notice, remanded the decision to the hearing officer for clarification. Now, by arguing that the hearing officer has committed "fundamental error" by removing the chain of command issue from consideration, the grievant appears to challenge that the hearing officer has done exactly what she requested to be done in her first request for administrative review and what this Department ultimately ordered the hearing officer to do, that is, reconsider his decision and confine his consideration to only those charges set forth in the Written Notice.

[21] Va. Code § 2.2-3005.1(C).

[22] *Grievance Procedure Manual* § 5.9.

[23] *Rules for Conducting Grievance Hearings* § VI(B).

[24] *Grievance Procedure Manual* § 5.8.

disciplined.[25] Accordingly, this Department cannot find 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 basis to disturb the hearing officer's decision based on any of the grievant's factual disputes.

Bias

The grievant claims that the hearing officer has demonstrated bias, or at a minimum has created an appearance of bias, in favor of the agency because he "seems to engage in a pattern of *shaping* testimony for the advantage of an agency" by "recasting that testimony into the Hearing Officer's [own] words."

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.[26] 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.[27] In this case, the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance. Rather, the grievant's claim of alleged bias is essentially a challenge to the hearing officer's assessment of the evidence submitted, the facts he chose to include in his decision and his conclusions with regard to such evidence. Although the grievant disagrees with the hearing officer's evidentiary determinations, as noted above, such determinations are for the hearing officer to make and there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record.

CONCLUSION APPEAL RIGHTS AND OTHER INFORMATION

This matter is remanded to the hearing officer for consideration of the grievant's claim of retaliation as outlined above and in EDR Ruling No. 2009-2253. This Department finds no other reason to disturb the hearing officer's decision.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[28] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

[25] AE 3, Attachment D. It should be noted that this Department makes no assessment as to whether such action amounts to a Group III level of offense under the Standards of Conduct as such determinations are not for this Department to address. Rather, this Department merely concludes that the hearing officer's findings of fact are supported by the record evidence and as such, we cannot disturb such findings.
[26] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992) (alteration in original).
[27] *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.
[28] *Grievance Procedure Manual* § 7.2(d).

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

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Claudia T. Farr
Director

[29] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).