Issues: Compliance – Grievance Procedure (Documents) and Administrative Review of Reconsideration Decision in Case No. 9115; Ruling Date: May 13, 2010; Ruling #2010-2584, 2010-2627; Agency: Norfolk State University; Outcome: Agency Not In Compliance; No Ruling on Administrative Review.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Norfolk State University
Ruling No. 2010-2584, 2010-2627
May 13, 2010

The grievant has requested that this Department intervene in a document compliance matter in Case Number 9115. He has also requested that this agency administratively review the hearing officer's Third Reconsideration Decision.

FACTS

The relevant facts of this case are as follows. The grievant had been instructed by a supervisor to timely enter data in the Norfolk State University ("NSU" or "agency") data system. The hearing officer found that he failed to do so "thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor's instructions."

Grievant had argued that the agency inconsistently disciplined its employees. He contends that other employees made mistakes but were not disciplined. In the Hearing Decision, the hearing officer found that the evidence is insufficient to conclude that the agency had inconsistently disciplined its employees. He found that the details of the alleged errors made by other employees were not explained. The hearing officer noted that several of the grievant's coworkers were not classified employees and thus not subject to receiving Written Notices. He concluded that in light of the standard set forth in the Rules for Conducting Grievance Hearings ("Rules"), there were no mitigating circumstances present to reduce the disciplinary action.

The grievant requested an administrative review of the original Hearing Decision from this Department on several bases. With few exceptions, this Department did not disturb the hearing officer's holdings. We, however, ordered the hearing officer to reconsider his decision to reject potential evidence that might show inconsistencies in how the agency disciplined other employees. At the outset of the hearing, the grievant had raised a concern regarding an apparent request for documents relating to complaints lodged against two supervisors.[1] The agency had apparently refused to provide him with the documents, asserting that such documents were irrelevant.[2] The hearing officer agreed that the documents were irrelevant. He drew a distinction

[1] Hearing at 2:00-6:00.
[2] *Id.*

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.[3]

In EDR Administrative Review Ruling No. 2010-2376, this Department held that "without further explanation, a hearing officer cannot conclude that an agency's treatment of non-classified employees is wholly irrelevant."[4] Ruling No. 2010-2376 additionally held that:

> [T]he 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 objection, 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. Even documents pertaining to unfounded complaints could be relevant. 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.[5]

In Response to EDR Ruling 2010-2376, the hearing officer issued his November 23, 2009, Reconsideration Decision in which he held:

> [T]he Agency is **ordered** to produce the documents in accordance with the EDR Director's Ruling. The Agency is **ordered** to redact personal identifying information from those documents. The Agency should produce those documents to the Hearing Officer (with copies to the Grievant) within 30 calendar days of the date of this decision and order.[6]

On December 30, 2009, the hearing officer issued his Second Reconsideration Decision in which he held:

> The Hearing Officer ordered the Agency to produce documents in accordance with the EDR Director's Ruling No. 2010-2376. The Agency, by counsel, informed the Hearing Officer that a review of the personnel files of Mr. S and Ms. J showed that neither of them had been counseled or disciplined for failure to follow a supervisor's instructions. Grievant was disciplined for failure to follow a

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[3] *Id.*
[4] EDR Ruling No. 2010-2376 at 8.
[5] *Id.* (footnotes omitted).
[6] Reconsideration Decision at 2.

> supervisor's instructions. There is no evidence upon which to conclude that Mr. S and Mr. [sic] J failed to follow a supervisor's instructions and then were not disciplined for failing to do so. There is no basis for the Hearing Officer to conclude that Grievant was similarly situated to either Mr. S or Ms. J and then treated differently from them by the Agency. There is no basis to mitigate the disciplinary action against Grievant.[7]

In a footnote to the above quoted passage the hearing officer held that:

> Mr. J [sic] was issued a counseling memorandum for failing to follow a supervisor's instructions. This counseling was issued after the Hearing Officer's reconsideration order. If the Hearing Officer assumes for the sake of argument that such counseling is relevant, it is consistent with the disciplinary pattern the Agency demonstrated with Grievant. Grievant was counseled several times before disciplinary action was taken. Mr. J [sic] had no prior counseling before he was counseled on November 25, 2009.[8]

The grievant asked this Department to administratively review the Hearing Officer's Second Reconsideration decision on several bases including document production. Essentially, the grievant objected that he had not been provided customer complaint logs. In EDR Ruling 2010-2509, this Department held that:

> Documents contained in the personnel files of Mr. S and Ms. J might be relevant but the personnel files of these two employees are not the only potential source of responsive documents. In EDR Ruling No. 2010-2376 we held that:
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> > [C]omplaints 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.[9]
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> In his original request for documents, the grievant asked for "'any and all files, records, e-mails *and/or complaints* and any disciplinary action that have been filed in the Customer Care department or Enrollment Management' on Mr. S and

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[7] Second Reconsideration Decision at 1.
[8] *Id*. By "Mr. J" a close reading of the Second Reconsideration Decision reveals that the hearing officer intended to instead reference "Mr. S" in this footnote.
[9] EDR Ruling No. 2010-2376 at 8. *See also* Fearon v. Dept. of Labor 99 M.S.P.R. 428, 434; 2005 MSPB LEXIS 4785, 12 (2005) (evidence regarding similarly-situated employees who received no discipline after committing similar misconduct would also support the appellant's disparate penalty claim).

> Ms. J."[10] The agency does not appear to have stated whether or not any such complaints exist outside of the personnel files for Mr. S. and Ms. J. To the extent that any such complaints exist, they must be provided to the grievant and hearing officer within 5 workdays of receipt of this ruling. If such complaints do not exist, the agency shall inform the grievant and hearing officer. To the extent that such complaints exist and are relevant,[11] the hearing officer shall consider them as evidence that may support mitigation. The hearing officer may allow the parties to submit briefs in conjunction with the submission and receipt of any such documents and may reopen the hearing if necessary.

On March 30, 2010, this Department received a compliance ruling request from the grievant seeking intervention by this Department. The grievant's request was not entirely clear but he seems to object on the basis that he was not provided the actual complaints but only a summary of them. The grievant further appears to complain that the summary was not timely provided.

On April 2, 2010, prior to this Department responding to the grievant's March 30, 2010 ruling request, the hearing officer issued his Third Reconsideration Decision. In that decision the hearing officer held that:

> The Agency presented a letter dated March 24, 2010 with attachments to the Hearing Officer in accordance with the EDR Ruling. The Hearing Officer has reviewed the Agency's documents and finds that it is not necessary to reopen the hearing or to receive briefs regarding the documents. The Hearing Officer finds that the information provided by the Agency does not change any conclusions in the original hearing decision and reconsideration decisions. The Hearing Office [sic] finds that the Agency did not single out Grievant for disciplinary action. The Agency did not engage in the inconsistent application of disciplinary action. There are no mitigating circumstances whatsoever that would justify the reduction of the disciplinary action against Grievant. Grievant's request for relief is denied.[12]

On April 27, 2010, this Department received a request for administrative review dated April 5, 2010.

DISCUSSION

Compliance

As to the grievant's assertion that the two-day delay in providing him the summary of complaints was intended as a stall tactic, this Department would certainly not condone such

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[10] *See* July 1, 2009, correspondence from agency counsel to the hearing officer (emphasis added).
[11] As we noted in EDR Ruling 2010-2376, any such complaints would have to be of the same character as the charge against the grievant. EDR Ruling 2010-2376 at 8, note 19.
[12] Third Reconsideration Decision in Case 9115 issued April 2, 2010 ("Third Reconsideration Decision").

behavior if that were the case. While we do not reach any conclusion here as to whether the delay was intended to stall the process, we remind the agency that the grievance process is intended to provide the parties with an expeditious way to resolve workplace issues and therefore adherence to the five workday rule is crucial. We further remind the parties that in cases of substantial noncompliance with grievance procedure rules, the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party. While a two-day delay is not the sort of non-compliance that would normally warrant an order of relief in favor of the grievant, repeated disregard of grievance rules or EDR Rulings could result in a decision against a noncompliant party.[13]

As to the grievant's concern that he was provided a summary of complaints instead of the actual complaints (Objection A), we note that the grievance procedure allows parties to mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents.[14] When there is no mutual agreement to substitute a chart or table in lieu of the requested documents, however, the documents (appropriately redacted where necessary) must be provided. To the extent that the parties did not agree on a substitution, as the grievant appears to assert, the agency is ordered to produce the documents within five workdays of the date of this ruling.[15]

As to Objections B-F raised by the grievant in his ruling request, we need not respond. Objections that could not have been raised at hearing or in previous requests for reconsideration (e.g., Objections B and C regarding selected complaints)[16] must be addressed by the hearing officer in his next reconsidered opinion.[17] Objections that could have been raised either at

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[13] *See, e.g.*, EDR Ruling Nos. 2003-049 and 2003-053, 2007-1470, 2007-1420.

[14] *E.g.,* EDR Ruling Nos. 2009-2087; 2006-1312.

[15] To the extent that it is not possible to provide the requested documents (complaints) within the five workday period, the agency must, within five workdays of receiving this ruling, explain to the grievant in writing why such a response is not possible, and produce the documents no later than ten work days from the receipt of this ruling. Any future issues regarding this directive to produce the documents must first be raised with the hearing officer. If a party is not satisfied with the hearing officer's decision relating to any document production issue, the party may seek a ruling from this Department and must do so within 15 calendar days of the issuance of the hearing officer's decision regarding the documents and their production.

[16] Objections regarding the recently provided complaints could not have been raised previously because grievant would have had no way of knowing if the complaints existed and what they might contain.

[17] The hearing officer issued his Third Reconsidered Decision three days after this Department received the instant request for a compliance ruling. Because a compliance ruling request normally results in the grievance process being stayed, the hearing officer should not have issued his Third Reconsideration Decision. Possibly, the hearing officer was not aware of the pending compliance ruling, and thus had no reason to think that he was precluded from issuing a Third Reconsideration Decision. However, if this Reconsideration Decision were deemed valid, the instant compliance ruling request, which was pending, would essentially be made moot and the grievant would never be given the opportunity to review documents to which he was entitled under law. Therefore, once the agency has provided the grievant with the actual complaints, and the hearing officer has allotted the parties sufficient opportunity to explain or refute the evidentiary value of the complaints, the hearing officer shall consider the complaints as potential mitigation evidence. In doing so, the hearing officer shall consider whether other similarly situated employees were treated on a manner different from the grievant. As we stated in previous rulings, any misconduct by similarly situated employees must be of a similar nature, in this case, failure to follow

hearing or the first request for administrative review (e.g., that the agency's actions stemmed from the grievant's objection to his annual performance evaluation), need not be addressed by the hearing officer and will not be addressed further by this Department. Finally, as to the grievant's assertion that "all this is in retaliation to my filing this EEOC complaint," the hearing officer need not respond and this Department will not either except to point out that the Written Notice was issued prior to the filing of the compliant. Thus, the Written Notice could not have been issued in retaliation for filing the complaint.

Grievant's April 27, 2010 Request for Administrative Review

As discussed in the footnote 17 above, the Third Reconsideration Decision was prematurely issued and therefore void. Accordingly, there is no reason to address the grievant's request for administrative review of that Decision.[18] We are compelled to make two final observations. First, the grievant again has asserted that the agency's actions were in retaliation for his EEOC complaint. Because the Written Notice predated the complaint, neither this Department nor the hearing officer need respond if raised again. Secondly, the grievant's request for administrative review was untimely. This Department received the grievant's request on April 27, 2010. Had the April 2, 2010 Third Reconsideration Decision not been prematurely issued, this Department would have no ability to review the grievant's Request for Administrative Review received on April 27, 2010. We clearly stated in the EDR Ruling 2010-2509 that any further requests for administrative review must be received by the administrative reviewer within 15 calendar days of the date of the issuance of the reconsideration decision. Future delinquent ruling requests by either party will not be accepted or addressed.

APPEAL RIGHTS AND OTHER INFORMATION

This case is remanded to the hearing officer for further consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[19] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[20]

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.[21] 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

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policy/supervisor's instructions and poor performance by failing to timely process documents (*see* Agency Exhibit 1). In remanding this case to the hearing officer, we express no opinion as to whether mitigation is appropriate.

[18] The grievant misidentified the April 2, 2010 Third Reconsideration Decision as the Second Reconsideration Decision.

[19] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.

[20] *See Grievance Procedure Manual* § 7.2(a).

[21] *Grievance Procedure Manual* § 7.2(d).

arose.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

Claudia T. Farr
Director

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