Issue: Administrative Review of Hearing Officer's Decision in Case No. 9296; Ruling Date: May 21, 2010; Ruling # 2010-2621; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2010-2621
May 21, 2010

The Department of Corrections (DOC or the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9296. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

The salient facts as set forth in the hearing decision for Case No. 9296 are as follows:

> After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:
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> The Agency employed Grievant as a corrections officer for over four years, with no other active disciplinary actions indicated.
>
> The Grievant was the recipient of a series of telephone calls from her friend, W (a former Agency employee), who had inmate M also on the call from the corrections facility for a three-way call. The Grievant insisted that she did not know that M was an offender, but she insisted she did not converse with them and always demurred from the call. The Grievant testified that she never placed any of these calls. The Grievant admitted she knew M, but that she only interacted with him like she did with any other inmate.
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> The Agency was investigating inmates and other personnel when inmate M informed the investigator that he had made calls to the Grievant and that she had given him prayer oils, food, and took a cell phone out of the institution for him. When the investigator confronted the Grievant with these allegations in an interview, she denied them. However, according to the Grievant, the investigator insisted she was lying. Because she was scared and stunned by these allegations,

she wrote and signed an admission to these allegations under pressure from the investigator. When the warden informed her that he would seek to have her fired, she opted to resign instead. The next day, she rescinded her resignation and recanted her admissions.

The warden, in pursuing the disciplinary process, issued a Group III Written Notice on December 21, 2009, for receiving phone calls from offender M. The Written Notice did not include the other conduct regarding contraband. The Grievant was inconsistent in her response to Agency management, including when she became aware that M, who was on the conference telephone calls her friend W made to her, was actually an offender. The Grievant testified that she essentially refused the calls and told her friend W that she did not want to talk to them. The Grievant testified that she did not carry on any conversation with inmate M and had no non-professional relationship with inmate M.

The Agency witnesses testified to the security basis and rationale for prohibiting such relationships without permission. There is a unique situation for corrections officers and the population of offenders (as opposed to other state employees), and unapproved fraternization is unacceptable and undermines the effectiveness of the Agency's security activities and responsibilities. The Grievant received repeated training on the Agency's fraternization policy, and she admitted she was aware of the policy and understood it.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

As referenced above, the offense of fraternization falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving fraternization. The discipline was based on inmate M's information and the

Grievant's admissions. The Grievant has explained away and recanted her admissions as the result of the pressure she felt from the investigator. She recanted the next day. A corroborating factor for the Grievant's recantation is the Agency's lack of discipline for the more serious fraternization allegations involving contraband. The Agency only charged the Grievant with an inappropriate non-professional relationship with an inmate based on the three-way telephone calls that the friend W made to the Grievant. While admitting the calls were made to her, the Grievant denies any telephone conversation with inmate M.

The Grievant testified that she had no conversations with inmate M despite him being on the three-way phone call when the Grievant's friend W called her. No evidence was presented at the hearing regarding any content of the conversations. I find that the Grievant testified credibly about the limited and involuntary nature of the telephone contact with inmate M. The Grievant asserted that she had a falling out with her friend and former co-worker W and that W was trying to set her up.

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating information to support its conclusions, the weight of such evidence does not overcome the Grievant's testimony. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.

The Hearing Officer can find no language in Operating Procedure 130.1 that requires reporting of contacts, meetings, or phone calls with offenders. The testimony of the Agency witnesses seemed to indicate that the major concern with the Grievant was that she did not report the phone calls. However, the Written Notice did not address reporting. Regardless, I can find no rule in the policy that calls for her to report these contacts. Since reporting is not the issue, then the question is whether the offender's phone calls fall under the definition of fraternization and were inherently prohibited. There is insufficient evidence to find that the phone calls reached a level of fraternization such that they rose to unacceptable, unprofessional, or prohibited behavior. Without more, the Agency has not borne its burden of proving an inappropriate non-professional relationship as charged. The Agency has presented insufficient evidence to support the issuance of the Group III Written Notice.

The evidence preponderates in showing that the Grievant received up to five of these phone calls from her friend W who had inmate M also conferenced on a three-way call. The Agency has the burden to prove it is more likely than not that Grievant created the appearance of fraternization. The Agency has not done

> so in this case. I do not find this to constitute a relationship or the appearance of an inappropriate relationship. Accordingly, the disciplinary action must be reversed.
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> It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions his agency presented to him and the Grievant's inconsistent responses. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation. All that is shown by the evidence is that inmate M attempted, through a surrogate, to reach the Grievant by telephone. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. A policy requiring Agency employees affirmatively to report such attempts by offenders, if the Agency has such a policy, may be reasonable. However, as charged, the Written Notice does not comport with evidence presented at the hearing. For this reason, I find that the Agency's case does not meet its burden of establishing the charged misconduct.[1]

As a result of the foregoing, the hearing officer rescinded the Group III Written Notice with termination and ordered the grievant's reinstatement.[2]

The agency subsequently sought an administrative review from the hearing officer. In a decision dated May 6, 2010, the hearing officer affirmed his April 9th hearing decision.[3] The agency now seeks administrative review by this Department.

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."[4] 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.[5]

Findings of Fact/Witness Credibility

[1] Decision of Hearing Officer, Case No. 9296, issued April 9, 2010 ("Hearing Decision") at 3-5.
[2] *Id.* at 5.
[3] Reconsideration Decision of the Hearing Officer, Case No. 9296, issued May 6, 2010 ("Reconsideration Decision") at 3.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).

The agency challenges the hearing officer's findings of fact and argues that the hearing officer erred by finding the grievant credible. More specifically, the agency does not understand how the hearing officer could find the grievant's recantation at hearing of her earlier admissions to the investigator and agency management credible.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] 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.[8] 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.[9] 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.

The agency essentially 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 he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[10] This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence, i.e., witness testimony, and the material issues in the case. Moreover, while the agency may disagree with the hearing officer's assessment, determinations of credibility are reserved exclusively for the hearing officer and cannot be disturbed by this Department on administrative review.

Failure to Consider Evidence

The agency contends that the hearing officer erred by failing to consider evidence that the grievant violated agency policies by failing to report the inappropriate communications with Inmate M. The hearing officer finds that the Written Notice did not specifically charge the grievant with failure to report and as such, it is not a basis upon which he can uphold the disciplinary action. More specifically, in the hearing decision, the hearing officer states:

> The Hearing Officer can find no language in Operating Procedure 130.1 that requires reporting of contacts, meetings, or phone calls with offenders. The

[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] *Rules for Conducting Grievance Hearings* § VI(B).

> testimony of the Agency witnesses seemed to indicate that the major concern with the Grievant was that she did not report the phone calls. However, the Written Notice did not address reporting. Regardless, I can find no rule in the policy that calls for her to report these contacts. Since reporting is not the issue, then the question is whether the offender's phone calls fall under the definition of fraternization and were inherently prohibited. There is insufficient evidence to find that the phone calls reached a level of fraternization such that they rose to unacceptable, unprofessional, or prohibited behavior. Without more, the Agency has not borne its burden of proving an inappropriate non-professional relationship as charged. The Agency has presented insufficient evidence to support the issuance of the Group III Written Notice.

The agency argues that, contrary to the hearing officer's conclusion, DOC Operating Procedure 130.1 does contain a reporting requirement and the grievant's failure to abide by this reporting requirement was, at least in part, a basis for the disciplinary action. Moreover, the agency asserts that grievant should have known through her extensive in-service training to report the inappropriate calls to management.

Based upon a review of DOC Operating Procedure 130.1, it appears that there may be a requirement to report violations of DOC Operating Procedure 130.1,[11] however, the hearing officer's possible error in this regard is harmless as the real crux of his decision is that because the grievant was not charged on the Written Notice with failure to report the inappropriate calls, he cannot use this as a basis to uphold the discipline. Therefore, the question here is whether the hearing officer erred in his determination that the Written Notice was devoid of any indication that the grievant was being disciplined for her failure to report the inappropriate behavior and therefore he would not address the issue.

Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[12] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[13] In addition, the *Rules* provide that "Any issue not qualified by the agency head, the EDR Director, or the

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[11] Agency DOC Operating Procedure 130.1 contains a provision that reads as follows:

> VII. EMPLOYEE AND SUPERVISORY REPORTING RESPONSIBILITIES
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> A. Employee Responsibilities – In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

[12] *Rules for Conducting Grievance Hearings* § VI(B) citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply."

[13] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

Circuit Court cannot be remedied through a hearing."[14] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

> The Written Notice issued to the grievant states:
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> On 12/18/09, by you [sic] own admission, you admitted to receiving phone calls from [Inmate M], even after you knew that the offender was here at [facility]. Then on 12/20/09, you confirmed your participation in 3 way calling with an offender by voicemail left on my work extension. This was confirmed in your rebuttal this morning. Therefore, you are being cited for a Group III and termination because this is clearly a violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees.

Thus, the only misconduct cited on the grievant's Written Notice to support the conclusion that she had violated DOC Operating Procedure 130.1 were the alleged inappropriate communications with Inmate M – there is no mention of the grievant's failure to report the inappropriate calls from Inmate M. Accordingly, this Department finds no error on the part of the hearing officer for not considering the agency's argument that the grievant violated policy by failing to report the calls with Inmate M.

Policy Interpretation

The agency also asserts that the hearing officer misapplied various provisions of policy in rendering his April 9, 2010 decision. The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[15] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to its appeal to this Department, the agency has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.[16]

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not 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.[17] 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

[14] *Rules for Conducting Grievance Hearings § I.*
[15] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[16] *Grievance Procedure Manual* § 7.2 (a)(2).
[17] *Grievance Procedure Manual* § 7.2(d).

arose.[18] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[19]

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Claudia T. Farr
Director

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