Issue: Administrative Review of Hearing Officer's Decision in Case No. 9305; Ruling Date: August 13, 2010; Ruling #2010-2675, 2011-2728; Agency: Department of Corrections: Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Department of Corrections
Ruling Numbers 2010-2675 and 2011-2728
August 13, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9305. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts of this case, as set forth in the hearing decision in Case 9305, are as follows:

> The Department of Corrections employs Grievant as a Correctional Officer/Canine Handler at one of its Facilities. The purpose of her position is:
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> > Work as a member of a Special Operations Team trained to conduct searches and/or interdictions involving the use of and distribution of illegal drugs on properties owned and/or operated by the Department of Corrections. Train and handle specially trained dogs capable of detecting narcotics. Be able to respond to any departmental emergency on a 24-hour basis. Apprehend individuals wanted by the department to include extradition activities.
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> Sometime in May or early June 2009, two training sessions were held for canine handlers. Corrections officers attending the training were permitted to make videos of the training using their cell phones or other recording devices. Officer C took a video using his cell phone of one of the training sessions. This video is referred to as the "short video". Officer W used his cell phone to make a video recording of one of the sessions. This video is referred to as the "long video". Although the videos were not presented as evidence during the hearing, witnesses who observed the videos testified that the video showed Officer T masturbating a dog used by the Agency to conduct patrols. The training session instructors were Sergeant E and Sergeant B. The instructors actively encouraged Officer T to masturbate the dog in front of the students. Sergeant B used his cell

phone to make a video of Officer T masturbating the dog. Grievant was not present during the training and learned about it later from other canine handlers.

Officer C sent the short video to Grievant and she had it on her cell phone. Officer W talked to Grievant about the long video. He said the video was so long that he was unable to send it to other corrections officers. Grievant told him that he could transfer the video using Bluetooth technology. Grievant had Bluetooth capability on her cell phone. She took Officer W's cell phone and transferred the long video to her cell phone. Grievant later showed the videos to at least two other corrections officers who were also canine handlers.

Once the Agency learned of the videos, it began an investigation. The Investigator met with Grievant and a few other employees and told them that they were subjects of the investigation. The Investigator did not ask Grievant if she had any videos and did not ask Grievant to send her any videos. The Investigator told Grievant that she would meet with Grievant on August 13, 2009 to discuss the incident.

Grievant was concerned about being part of the investigation. She did not believe that the Investigator had both videos. Grievant downloaded the two videos from her cell phone onto a compact disc using her home computer. She gave the compact disc to Mr. H and told him to give the disc to the Investigator without identifying the source of the disc. Mr. H was a manager with the Agency who served as a coordinator for the canine unit. In addition, Mr. H worked in the same office building as did the Investigator.[1]

Based on the preceding *Findings of Fact*, the hearing officer reached the following *Conclusions of Policy*:

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct,* states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

The Agency contends that Grievant engaged in behavior unbecoming a Correctional Officer. There is sufficient evidence to support this assertion. The Officer who masturbated the dog engaged in animal cruelty and abuse. His actions were not consistent with any training offered by the Agency. When Grievant viewed the videos, she recognized that the behavior of Officer T was

[1] Decision of the Hearing Officer in Case 9305, issued May 24, 2010 ("Hearing Decision"), at 2-3. Footnotes from the hearing decision have been omitted here.

inappropriate and should not have occurred. Grievant assisted in the transfer of a long video from Officer W's cell phone to her cell phone. Grievant should not have assisted in the transfer of the video onto her cell phone. Grievant showed the videos to at least two other canine handlers. Grievant should not have displayed the videos to other employees. Grievant failed to immediately report the existence of the videos to Agency managers to enable Agency managers to investigate the inappropriate behavior of Agency employees. Although Grievant attempted to ensure that the Investigator had both videos, Grievant would not have notified any Agency managers of the animal abuse had the Agency not begun an investigation. When these facts are considered as a whole, is clear that Grievant engaged in behavior unbecoming a Correctional Officer. In the absence of mitigating circumstances, the facts of this case would be sufficient to support the issuance of a Group III Written Notice of disciplinary action.

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.

There are both mitigating and aggravating circumstances in this case. The Department of Corrections is a quasi military organization were security employees hold rank and wear uniforms. Subordinate employees are expected to follow the orders and direction of employees holding higher rank with a lesser degree of scrutiny than might otherwise occur between superior and subordinate employees working in other State agencies. Sergeant E and Sergeant B were instructors at the training sessions where the animal abuse occurred. Not only did they observe the abuse, they actively encouraged that abuse. In addition, Sergeant B was one of the individuals who made a video recording of the abuse. Grievant's understanding of the seriousness and harm of Officer T's inappropriate behavior was undermined by her observation that two instructors holding superior rank actively sanctioned that behavior. Grievant's understanding of the seriousness and harm of letting others view videos of the abuse was undermined by her observation that Sergeant B was involved in creating his own video of the abuse. These facts serve as a basis to mitigate the disciplinary action. An aggravating factor is that Grievant also sometimes served

> as an instructor for the training of dogs involved in narcotics detection. Grievant recognized that the videos depicted inappropriate behavior and should have considered whether the behavior of Sergeant E and Sergeant B was appropriate for trainers. When the mitigating and aggravating circumstances are considered as a whole, there exists a basis to reduce the disciplinary action from a Group III Written Notice to a Group II Written Notice. Upon the issuance of a Group II Written Notice an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's suspension is reduced to 10 workdays.[2]

Based on the above *Conclusions of Policy*, the hearing officer reached the following decision:

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 240 hour suspension is up to a Group II Written Notice of disciplinary action with a 10 workdays suspension. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension exceeding ten workdays and credit for leave and seniority that the employee did not otherwise accrue.[3]

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]

Due Process

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[6] is a legal concept which may be raised with the circuit court in the

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[2] *Id.* at 3-5.
[3] *Id.* at 5.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process

jurisdiction where the grievance arose.[7] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. 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."[8] 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.[9] In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[10] 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.

In this case, the Group III Written Notice charged the grievant with sharing a video of a corrections officer masturbating a canine with one or more other canine officers and with failing to report the incident depicted in the video. Thus, the grievant clearly had notice of the charges brought against her. Moreover, the grievant had a full opportunity at the grievance hearing to present her arguments as to why the discipline was allegedly unwarranted and/or inappropriate.[11] Thus, it appears that she was afforded full due process. However, this argument, as well as all other legal arguments, may be raised with the circuit court in the jurisdiction in which the grievance arose.[12]

Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] Where the evidence conflicts or is subject to varying interpretations,

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requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing to Cleveland Bd. of Education v. Loudermill, 105 S. Ct. 1487, 1495; Arnett v. Kennedy, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974).

[7] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[8] *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."

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

[10] *Rules for Conducting Grievance Hearings § I.*

[11] *See* Detweiler v. Commonwealth of Virginia, 705 F.2d 557; 560 (4th Cir. 1983). ("The statute establishing the grievance procedure and the rules promulgated to implement it afforded Detweiler written notice of his disciplinary infractions, an opportunity to discuss the charges against him with his supervisors, and ultimately a hearing before a panel consisting of a person selected by the agency, a person selected by Detweiler, and a third person appointed by a state judge. The statute and the rules accord a grievant the right to present witnesses in his behalf and, with the assistance of counsel, to examine and cross-examine all witnesses. The rules required the panel to adhere to provisions of law and written personnel policies and to explain in writing the reasons for its decision. These procedures satisfied Detweiler's right to due process." (Emphasis added)).

[12] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[13] Va. Code § 2.2-3005.1(C).

[14] *Grievance Procedure Manual* § 5.9.

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 this case, the grievant calls attention to several findings, such as, an alleged misidentification in the decision of the location where the hearing took place and the number of people that the grievant allegedly showed the video. The grievant asserts that these errors reflect the hearing officer's lack of paying attention to details. These facts, even if erroneous, are harmless errors. The most critical facts in this case are apparently not disputed. For example, the grievant admits that she showed the video to another officer (grievant's request for administrative review, page 2); the grievant stated in her investigative interview that "I should not have downloaded a copy of the video to my phone and should have reported the incident to my supervisors and for that I am sorry";[15] and when the grievant was asked what she thought she was seeing when she viewed the video--if she thought that she was witnessing a training opportunity or "the boys having fun"-- she replied that "I didn't take it as a training video."[16] Thus, there appears to have been sufficient record evidence to support the hearing officer's conclusion that the grievant had engaged in the misconduct charged on the Written Notice. The hearing officer found, however, that the misconduct did not rise to the Group III level based on the totality of the circumstances, as further discussed in the "Mitigation" section below.

Mitigation: Motive and Inconsistent Discipline

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("Rules")* provides that an example of mitigating circumstances includes "improper motive, such as retaliation or discrimination." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[17] Here, the grievant asserts that the discipline was not free of improper motive. She asserts that the only reason that she was disciplined is that she had been served a warrant and charged with animal cruelty, charges that could not be sustained. Contrary to her assertions, the grievant was not charged by her agency with animal cruelty. Rather, she was charged with inappropriately sharing a video of improper animal treatment and for not reporting the improper treatment, charges for which she received due process notice and charges that were sustained.

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[15] Agency Exhibit 2, pg. 27, admitted into evidence without any objection by the grievant.

[16] The grievant, who sometimes serves as an instructor for the training of dogs used in narcotic detection, qualified her response that she did not view the tape as a training opportunity by saying that "I don't do patrol." apparently attempting to imply that such behavior might be viewed as appropriate for patrol dogs. Testimony at 2:20:00-2:22:00. The notion that the recording may have been appropriate for patrol dogs appeared to be contradicted by the testimony of the person to whom the grievant provided the recordings who stated that the grievant told him that she thought the behavior depicted on the recordings was "inappropriate." Testimony at 2:26:00-2:29:00.

[17] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 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).

The grievant also alleges that the agency disciplined employees inconsistently in this case. Under the *Rules*, inconsistency in the application of discipline for similar misconduct by other employees can potentially be a mitigating factor.[18] 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.

The first factor that the grievant has the burden of establishing is the existence of appropriate comparators—persons who committed similar infractions—who are "similarly situated" to the grievant. Here, the grievant has not met her burden of establishing that similarly situated employees exist. As to several employees, the Warden testified that he did not attempt to discipline employees who were not in his chain of command.[19] As to others who were in his chain of command but were not charged, the Warden testified that he had referred the matter to the Special Investigations Unit of the Inspector General's Office and that those employees were not considered "subjects of" the investigation and report.[20] Another agency witness, the State Canine Coordinator, testified that yet another individual had denied that he had seen the video and the agency felt that it lacked evidentiary support to discipline him.[21] Thus, we cannot conclude that the grievant has met her burden to showing that similarly situated employees exist.

We note that in this case, the hearing officer reduced the discipline issued to the grievant based on her superior's involvement with the videotaping of the incident. The hearing officer found, however, aggravating circumstances as well, particularly, the fact that the grievant is a canine trainer. Thus, under all the circumstances of this case, we find no evidence that the hearing officer abused his discretion in assessing mitigating (and aggravating) circumstances.

Violation of State Policy

The hearing officer's interpretation of agency policy is not an issue for this Department to address. Rather, the Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.[22] Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state

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[18] *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, 1029 (2003 D. Ariz.) quoting Archuleta v. Department of Air Force, 16 M.S.P.R. 404, 406 (1983).

[19] Testimony at 1:07:00-1:09.00.

[20] *Id.* at 1:18:00-1:22:00. The Warden explained that the matter was turned over to the Special Investigations Unit and decisions regarding who was to be a subject of the investigation were not his. The Warden further testified that two such individuals were also, to his knowledge, not canine instructors. *Id.* In addition to the fact that these two individuals were not trainers, the Warden testified that the decision to not discipline the two was "not totally [his]" and was made "by pay grades far beyond [his]." *Id.*

[21] *Id.* at 1:46:00-1:49:00. This same witness testified that another employee had been removed from the Canine program.

[22] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

or agency policy. In this case, it appears that the grievant has requested administrative review by DHRM with respect to the alleged policy violations. DHRM has ruled and found no reason to disturb the hearing decision.

Decision Inconsistent with Law

The grievant contends that the hearing decision is inconsistent with various laws. Legal appeals are directed to the circuit court in the jurisdiction in which the grievance arose rather than this Department.[23]

Request to Compel the Hearing Officer to Reconsider His Decision

On August 2, 2010, the grievant contacted this Department apparently to essentially request that the hearing officer be required to reconsider his decision. We decline to require any such reconsideration. The salutation on the original timely request for review is directed solely to the EDR and DHRM Directors. The stated bases for review were noncompliance with the grievance procedure and inconsistency with policy, which are addressed by the EDR and DHRM Directors, respectively. There was nothing in the appeal that indicated that review by the hearing officer was desired. Thus, we decline to now require the hearing officer to reconsider the decision, well beyond the expiration of the 15 day appeal timeframe.

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 have been decided.[24] With the issuance of this decision, all timely appeals have now been decided. 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]

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Claudia T. Farr
Director

[23] *See Grievance Procedure Manual* §7.3(a).
[24] *Grievance Procedure Manual* § 7.2(d).
[25] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).