Issue: Administrative Review of Hearing Officer's Decision in Case No. 9326; Ruling Date: September 7, 2010; Ruling #2011-2704; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2704
September 7, 2010

The grievant has requested that this Department administratively review the hearing decision in Case Number 9326. In her grievance, the grievant challenged a Group III Written Notice and the termination of her employment.[1] The hearing officer upheld the discipline in a June 23, 2010 hearing decision. For the reasons set forth below, the decision is remanded to the hearing officer.

FACTS OF THE CASE

The facts and related conclusions of this case, as set forth in the hearing decision in Case Number 9326, are as follows.

> On January 2, 2009, Grievant filed a grievance against the Agency challenging a Group III Written Notice and termination regarding incidences of 9/8/07 and 9/17/07 which discipline was issued to her on 11/6/2007. The Notice states:
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> > On 09-08-07, you allowed an offender who had been placed on probation for threatening to kill a Circuit Court Judge by cutting his personal vehicle's brake line to move to a residence out of our district. This move allowed the offender to reside in closer proximity to the judge's residence. You did not attempt to notify the receiving district until 10-29-07. Your last personal contact with this offender was on 08-03-07.
> >
> > On 9-18-07, you allowed an offender, who is being supervised for Unlawful Wounding and Involuntary Manslaughter and who has serious mental health problems, to change his residence out of our district. This move allowed the offender to return to the town

[1] Decision of the Hearing Officer in Case Number 9326 issued June 23, 2010 ("Hearing Decision") at 1. Footnotes from the original decision have been omitted.

> where the Involuntary Manslaughter occurred. As of this date, you have not notified the receiving district of his presence in their district. You last personal contact with this offender was 08-03-07.

Grievant filed her grievance in a timely fashion after she had exhausted a first resolution step (2-23-10), a second resolution step (3-01-10) and a third resolution step (3-16-10).

The matter qualified for a hearing on April 5, 2010.

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The Grievant challenges a Group III Written Notice and termination issued in November of 2007. On August 30, 2007 Grievant noted on the Officer's Log Sheet that an offender was moving on September 8th and 9th, 2007 from her jurisdiction, Wythe County (District 16), to Pulaski County (District 28). A transfer of offender request to District 28 was not dictated until 9/28/07. The Log shows that the dictation was not given to the transcriptionist until October 25, 2007. This was a period of two months. This offender was found guilty of obstruction of justice by making threats directed toward a Circuit Court Judge. The Transfer Request was mailed to the receiving jurisdiction on October 29, 2007.

On 9/18/2007 Grievant noted on the Officer's Log Sheet that an offender had moved from her jurisdiction, Wythe County, to Pulaski County. No notification of transfer of offender was ever originated or sent to the receiving jurisdiction. In an email dated November 1, 2007, Grievant's supervisor sent an email to the receiving jurisdiction stating, "I have found another case that has moved to your District…I will follow up with a transfer request." This offender had been convicted of involuntary manslaughter and had mental health issues.

Transfer requests that advise a receiving jurisdiction a parolee is coming into their district are to be made in a timely fashion. The receiving district then has forty-five (45) days to process a request once given. *Commonwealth of Virginia Department of Corrections Divisions of Operations Community Corrections Operating Procedures* 4-6.0(3), 4-6.1(1).

APPLICABLE LAW

Unacceptable behavior is divided into three (3) groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two (2) Group II offenses normally should warrant removal." Group III offenses

"include acts and behavior of such a serious nature that a first occurrence normally should warrant removal." Virginia Department of Corrections Operating Procedure 135.1. While the Grievant's conduct does not specifically fit any of the non-inclusive examples of unacceptable Group III offenses, it is still of a serious enough nature to warrant termination.

Va. Code § 2.2-3005.1 authorizes the Hearing Officer 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.

OPINION

Grievant, a Senior Parole Officer for the Virginia Department of Corrections received a Group III Discipline and Dismissal for her failure to advice receiving jurisdictions in two (2) identified cases that parolees were being relocated to their jurisdiction. In one instance, the Notice was finally given two (2) months after transfer, and in the other case, the Notice was never sent by Grievant.

Grievant believes she caused no harm by not making timely notice, and therefore should not be disciplined. There was considerable testimony about the definition of "public safety". While no bright line was defined, Grievant's actions (or lack thereof) were clearly by all measures a significant breach of public safety.

Grievant's history indicates she was self-motivated to attend college, as education as [sic] not particularly valued in her family. She did volunteer work at the local parole office before being hired. After being hired, she eventually attained the level of Senior Parole Officer. She did take extra training in substance abuse counseling and conducted group sessions.

There was evidence at the time of the infractions that Grievant was over-worked and may have had medical problems. She apparently did not discuss this with her supervisor or request assistance. It is regrettable the Agency was not able to work with her on these issues as it appears they lost a well-trained

employee. Nothing, however, mitigates Grievant's abrogation of her basic and important duty to notify supervising personnel that a serious offender has moved to their district.

Protecting the public was clearly a responsibility of Grievant in her position as Senior Parole Officer. Grievant's failure to notify the receiving jurisdiction of a parolee transfer to their location is egregious and clearly a breach of public safety.

DECISION

For the above reasons, the Group III Disciplinary Action, including termination of employment, is **upheld**.[2]

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."[3] 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.[4]

I. Incorrect Legal Standard

The grievant asserts that the hearing officer applied an incorrect burden of proof. We agree and remand the decision to the hearing officer to apply the appropriate standard.

In her hearing decision, the hearing officer stated the burden of proof as follows: "The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances." The hearing decision cites to Section 5.8 of the *Grievance Procedure Manual* as the source for this standard. This is a correct statement of the burden in a grievance hearing involving a disciplinary action. The hearing decision, however, goes on state that: "Grievant has the burden of proof to show that the relief sought should be granted." The decision cites to Section 5.8 of the *Grievance Procedure Manual* as the source for this standard. This is <u>not</u> an accurate statement of the burden in a disciplinary grievance hearing. This language is found nowhere in the *Grievance Procedure Manual.* The burden is on the <u>agency</u> to show by a preponderance of the evidence that its disciplinary actions against the grievant are warranted and appropriate under the circumstances. Accordingly, the hearing officer is ordered to reconsider her decision using the proper burden.

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[2] *Id.* at 1-7.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

II. Due Process and Notice

The grievant asserts that the written notice failed to meet the due process required by the 14th Amendment of the U.S. Constitution and the related requirements of the *Rules for Conducting Grievance Hearings ("Rules").*

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[5] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[6] 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 *Rules*.

A. Insufficient Notice

The first objection raised under "due process" is the assertion that the Written Notice did not provide sufficient notice of the charges brought against the grievant. 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."[7] 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.[8] 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."[9] 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.

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[5] 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 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, 470 U.S. 532, 545-546, 105 S. Ct. 1487, 1495 (1985); 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).

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

[7] *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."

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

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

In this case, the Group III Written Notice charges the grievant with the following:

> On 09-08-07, you allowed an offender who had been placed on probation for threatening to kill a Circuit Court Judge by cutting his personal vehicle's brake line to move to a residence out of our district. This move allowed the offender to reside in closer proximity to the judge's residence. You did not attempt to notify the receiving district until 10-29-07. Your last personal contact with this offender was on 08-03-07.
>
> On 9-18-07, you allowed an offender, who is being supervised for Unlawful Wounding and Involuntary Manslaughter and who has serious mental health problems, to change his residence out of our district. This move allowed the offender to return to the town where the Involuntary Manslaughter occurred. As of this date, you have not notified the receiving district of his presence in their district. You last personal contact with this offender was 08-03-07.
>
> Both of these incidents constitute a neglect of our responsibility to provide for public safety.

Under the particular facts of this case, the Written Notice provides sufficient notice of what the agency considered to be misconduct. While it is true that the agency did not cite to a particular policy when it informed the grievant that it intended to discipline her, the Written Notice describes the act that the grievant failed to take and the grievant had ample time prior to the hearing to prepare her defense against the charge of untimely notification of the movement of a parolee. This Department agrees that the Written Notice could have been more informative had it listed Department of Corrections ("DOC") Procedure 4, which governs transfers, but while the grievant asserts that the charges were "impermissibly vague and overbroad" in terms of defining "public safety," she does not appear to claim that she was unaware of the conduct for which she was disciplined. In other words, she does not seem to assert that she was unclear of the charges. The Written Notice plainly states that the grievant failed to notify the receiving district that a parolee had moved into its jurisdiction. While the grievant may strenuously disagree with the agency's assertion that she had an obligation to timely report the transfer, and, that any such failure threatened public safety, she was nevertheless given sufficient notice of the charges brought against her.

The grievant asserts that this case is similar to a case discussed in EDR Ruling 2007-1409. We disagree. In that case, the only description of the conduct included on the Written Notice form was: "On September 25, 2005, you struck a ward." That original charge, however, was essentially changed by the agency as it moved through the grievance procedure's management resolutions steps and on to hearing. This Department remanded the decision to the hearing officer because, as noted in EDR Ruling No. 2007-1409:

> In this matter, the grievant was denied due process because he never received adequate notice of the charges against him or a summary of the evidence relied upon by the agency. Initially, the grievant was given a Group III Written Notice, which contained the following description of the charges and underlying facts: "On September 25, 2005, you struck a ward." However, during the process of the grievance, the charges against the grievant changed at various times in the agency's opinion. The result was that the grievant was not aware of the charges he would be defending against at the hearing. The agency appears to have contemplated three different theories of the grievant's wrongful conduct in this matter:
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> 1) The grievant intentionally struck a ward (assault).
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> 2) The grievant failed to follow the training techniques for how to engage in physical force (the way in which force was used).
>
> 3) The grievant failed to follow agency procedure in that none of the authorized reasons for using physical force occurred (that the grievant chose to use physical force at all).
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> Though the grievant was aware of the facts surrounding the Written Notice, he was not aware of why or on what theory he was being punished by the agency. The agency was required to tell the grievant what he did wrong and why it was wrong.[10] Without this notice, the grievant had no "meaningful opportunity to respond" to the charges because of the way in which the agency apparently shifted its interpretation of the grievant's conduct throughout the process.

In the instant case, the grievant was given adequate notice of what she did wrong and why it was wrong: she failed to notify a receiving district that a parolee had moved, which resulted in public safety being compromised. In other words, she knew (or should have known) the theory of why she was being punished by the agency.

B. The Files Were In Waiver

The grievant asserts that she should not have been disciplined because the files of the parolees in question were in "waiver" status. This objection is addressed in section III below.

C. The Standard of "Public Safety" is Impermissibly Vague

[10] *See* Loudermill, 470 U.S. at 545-546; *see also* O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) ("Only 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."). This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.

The grievant asserts that the standard used by the agency to discipline the grievant is impermissibly "vague and overbroad." We disagree. First, the Written Notice charges the grievant with not properly notifying a receiving district that a parolee had moved into their district which placed the public at risk. That no one was actually harmed misses the point. There was no need to show that any particular individual was actually harmed as a result of the omission, only that the public was exposed to greater risk. As to the apparent argument that the rule the grievant violated was not sufficiently identified as pertaining to public safety, such an argument fails. This Department is aware of no requirement that an agency affirmatively state in every rule pertaining to safety that the rule is a "safety rule." For example, it would appear unnecessary for an agency to expressly state in a rule that prohibits employees from modifying or removing mechanical guards from equipment, that violation of the rule would be considered a violation of a "safety rule." We accordingly find no merit in the grievant's "vagueness" argument.[11]

III. Hearing Officer's Findings of Fact and Conclusions

The grievant asserts that no evidence in the record supports the hearing officer's conclusion that the grievant engaged in the conduct described in the Written Notice, and that the hearing officer failed to make findings of fact sufficient to support her opinion.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and grounds in the record for those findings."[13] 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 key findings that the grievant failed to provide notice to the receiving district and how failure to provide notice increases risk to the public.[14] However, the hearing decision did not address the issue of the files of the parolees in question allegedly being in "waiver" status and how that status impacted the grievant's obligation to provide notice of the transfer. Accordingly, we direct the hearing officer to address this issue of "waiver" and any impact of such status on the grievant's reporting obligations.

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[11] Arguments Nos. 1 and 2(d)-(g) raised in the grievant's supplemented request for administrative review will not be addressed here as they were not raised within 15 days of the hearing decision. To the extent that any of these objections are properly viewed as due process arguments, they may be raised with the circuit court in the jurisdiction in which the grievance arose.

[12] Va. Code § 2.2-3005.1(C).

[13] *Grievance Procedure Manual* § 5.9.

[14] *See* hearing transcript at 113-125.

Decision is Inconsistent with Law and Policy

The grievant asserts that the decision is inconsistent with policy and law. However, this Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. 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.[15] The grievant has appropriately raised her concerns regarding policy with the DHRM Director and only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy.

As to any inconsistency with law, as reiterated in the "Appeal Rights" section of this ruling, within 30 calendar days of the original decision becoming a final hearing decision,[16] either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose, based on the assertion that the final decision is contradictory to law.[17]

Mitigating Circumstances: Inconsistent Discipline

Finally, the grievant claims that the discipline against her exceeds that limits of reasonableness. At hearing, the grievant proffered evidence of other acts and/or omissions by other employees that potentially impacted public safety but may not have resulted in discipline or discipline as severe as that issued to the grievant.[18]

Under the *Rules*, inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.[19] 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 grievant has the burden to raise and establish any mitigating factors.[20]

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[15] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2); *see also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

[16] A hearing officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when: (1) the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or (2) all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision. *Grievance Procedure Manual* § 7.2(d).

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

[18] This mitigation objection was raised, in part, under the heading of "due process" in the grievant's request for administrative review.

[19] *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).

[20] *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

The hearing decision does not discuss the potential mitigating factors raised by the grievant, including the possibility of inconsistency of discipline, except to state that "nothing, however, mitigates Grievant's abrogation of her basic and important duty to notify supervising personnel that a serious offender has moved to their district." It is not clear whether the hearing officer considered the possibility of inconsistent discipline. Certainly, the "nothing" language of the decision could reasonably be read to mean that all factors, including the possibility of unequal discipline, were considered and rejected. However, because the decision is remanded on other grounds, the hearing officer is instructed to address this potential mitigating circumstance to eliminate any doubt as to whether this potential mitigating factor was considered. By remanding, we express no opinion as to whether mitigation is appropriate in this case.[21]

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 decision (i.e., any matters not previously part of the original decision).[22] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[23]

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] 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

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).

[21] The grievant has objected on the basis that the hearing officer erred in limiting the introduction of additional evidence on the issue of whether the discipline imposed exceeded the limits of reasonableness. However, grievant provides no further details. Thus, we decline to speculate as to what the grievant is referencing in this objection or the appropriateness of any associated limitation.

[22] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056. Any such appeal must be made within 15 calendar days of the date of the reconsidered decision.

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