Issue: Administrative Review of Hearing Officer's Decision in Case No. 9404; Ruling Date: December 15, 2010; Ruling No. 2011-2807; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2011-2807
December 15, 2010

The grievant has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9404. The Department of Corrections ("DOC" or "the agency") issued the grievant a Group III Written Notice with a suspension for failing to provide a duty of care and for lacking due regard for safety, as well as "fail[ing] to assist another officer" in diffusing an assault. In his September 30, 2010 Decision of the Hearing Officer in Case Number 9404 ("hearing decision"), the hearing officer upheld the discipline. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The salient facts of this case as gleaned from the Hearing Decision are set forth below.

> The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. Grievant's Post Order stated, "[e]mployees are permitted to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm." Grievant began working for the Agency on February 23, 2007. Her work performance was otherwise satisfactory to the agency. She had not received prior disciplinary action.
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> On February 19, 2010 at approximately 9:12 p.m., Grievant was working as a floor officer at the Facility. She was standing in the vestibule of a hallway which served to connect three pods. Grievant was standing with her back towards the wall. To her far right was the door to the A1 pod. To her immediate right was the door to the A2 pod. To her far left was the door to the A3 pod. Directly in front of her was the open doorway from the vestibule into the hallway. The doors to the pods were locked and had to be opened by the control room officer who was positioned in a booth above Grievant's location and looking down into the vestibule.
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> Inmate D and Inmate P leave the A1 pod and enter the vestibule where Grievant and several other inmates are located. While in the vestibule, Inmate D walks away from Inmate P three times in an attempt to get away from Inmate P. Inmate P follows Inmate D and continues talking into his ear. On the third time,

> Inmate D stands in front of the secure door for the A2 pod as if waiting for the door to be opened by the control room officer. Inmate P stands directly behind Inmate D. Grievant is within one or two feet of the two inmates. Her right side is towards the inmates' rights sides. While Grievant is watching the two inmates, Inmate P punches Inmate D in the back right side of his head. Inmate D turns to his right and falls backwards onto the floor and lies on his back. Inmate D was stunned by the initial blow from Inmate P. As Inmate D falls to the floor, Inmate P jumps on top of Inmate D and straddles Inmate D's chest. Inmate P punches Inmate D 26 times in the face as Inmate D remains helpless to defend himself.
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> When Inmate P first punches Inmate D, Grievant screams and immediately moves away from them. She takes seven paces from the door at the A2 pod into the open hallway. She grabs her radio and begins calling for emergency assistance on the radio. While Grievant stands approximately 15 to 20 feet away from the inmates and watches, Inmate P continues to beat Inmate D. She does nothing to stop Inmate P.
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> When Officer A first heard the emergency call, he was working in an office down the hallway from the vestibule. He jumps up from his chair and begins moving quickly towards the vestibule. As he enters the vestibule and approaches Inmate P, Inmate P realizes Officer A is approaching and begins getting off of Inmate D. Officer A moves Inmate P out of the vestibule through the hallway.
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> As a result of the beating, Inmate D received a small laceration above his left eye, a busted lip, a loose front tooth, and bruising and swelling to both of his cheeks. When questioned about the incident, Inmate D said he could not remember what had occurred, did not know who assaulted him or what pod or cell he was assigned to.[1]

Based on the forgoing "Findings of Fact," the hearing officer reached the following "Conclusions of Policies."

> Unacceptable behavior is divided into three 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 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."

[1] The hearing decision at 2-3. Footnotes from the original hearing decision are omitted here.

Directive 420 governs Incarcerated Offender Control and Use of Force. This policy provides:

> Employees have the right to protect themselves and the responsibility to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender. *** To this end, employees may use all necessary and suitable means to perform these duties, including the use of physical force. *** The DOC restricts the use of physical force to instances of justifiable self-defense, protection of others, protection of property and prevention of escapes, and then only as a last resort and in accordance with the appropriate statutory authority.

Operating Procedure 420.1 governs Use of Force. Section IV(A)(1) provides that, "employees have a responsibility, consistent with their self-protection, to protect offenders, other employees, and members of the community who are threatened by the actions of any incarcerated offender. Facility employees are also required to prevent escapes, maintain order and control within the facility, and protect state property." Section (IV)(A)(6) states, "all employees have a responsibility, consistent with their self-protection, to come to the aid of another employee or an offender who is in danger."

"Failure to … comply with applicable established written policy" is a Group II offense. Grievant had an obligation to protect Inmate D. She failed to take any action to stop Inmate P from beating Inmate D. By failing to protect Inmate D, Grievant failed to comply with DOC policy thereby justifying the issuance of a Group II Written Notice.

"[I]n certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency." In this case, the Chief of Security at the Facility described the beating as the worst beating without a weapon he had seen in 15 years. The severity of the battery and injury to Inmate D was sufficiently extreme as to justify the elevation of the offense from a Group II to a Group III Written Notice.

Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 work days. Accordingly, Grievant's 57.5 hour suspension must be upheld.

Grievant argued that she did nothing wrong because she was complying with the training she had received from the Agency. Grievant presented evidence that Agency security staff observing a fight between inmates were supposed to (1)

move away from the fight, (2) use the radio to call for backup, and (3) wait until other staff arrived to provide assistance.

Grievant complied with her training. She observed what appeared to be a fight between inmates and moved away from the fight and called for backup. While Grievant was waiting for backup to arrive, however, she failed to recognize that the conflict between the two inmates was not a fight but rather was one inmate beating a helpless inmate. Grievant had adequate time to realize this and make some attempt to rescue the helpless inmate. The videotape of the incident showed that Inmate P's first punch was at 09:11:27. Four seconds later, at 09:11:31, Grievant had moved into the hallway, a safe distance from the two inmates and was watching them. Grievant should have recognized at this time that Inmate D was helpless and unable to defend himself and that his life may be in jeopardy. Grievant took no action. Seven seconds later, at 09:11: 38, Officer A enters the vestibule. His presence is sufficient to end the beating. If Grievant had acted immediately after it should have been clear that Inmate D was helpless, Inmate D would have been able to avoid several punches to his face.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[2]

Based on these "Conclusions of Policy," the hearing officer upheld, in full, the discipline issued by the agency.[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 …

[2] *Id.* at 3-5.
[3] *Id.* at 5.

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]

The grievant objects to the hearing decision on several bases each of which is addressed below.

Findings of Fact

The grievant contests the hearing officer's findings of fact. Specifically, the grievant asserts that she "did not engaged [sic] in the behavior described," and that "she did provide duty of care and there was no lacking of Due Regard for safety on her part."

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 grievant 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.

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

In this case there is record evidence to support the hearing officer's finding that the grievant "failed to recognize that the conflict between the two inmates was not a fight but rather was one inmate beating a helpless inmate," and that she "had adequate time to realize this and make some attempt to rescue the helpless inmate." Witness testimony and other hearing record evidence support these finding.[11] Thus, this Department has no reason to disturb the hearing officer's factual findings.

II. Failure to Conduct a Fair Hearing

Bias:

The grievant asserts that the hearing officer did not conduct a fair hearing and that he was biased in favor of the agency. In support of her claim, the grievant points to the hearing officer's findings of fact. Essentially, the grievant contends that because the hearing officer's factual findings tend to support the agency's position in this case, he was biased against the grievant.

The EDR *Rules for Conducting Grievance Hearings (Rules)* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[12]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[13]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.[14] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[15] We find the Court of Appeals standard instructive and hold that in administrative reviews by the EDR Director of appeals asserting hearing officer bias, the appropriate standard of review is whether the hearing

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[11] Hearing recording at 27:00-30:30; 1:00:00-1:01:00. *See also* video recording of the February 19, 2010 assault.
[12] *Rules* at II.
[13] EDR Policy 2.01, p. 3.
[14] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[15] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).

officer harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[16]

Here, the grievant offers as evidence of bias the hearing officer's findings of fact. The mere fact that findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[17] This is not the extraordinary case where bias can be inferred from decision's findings of fact.[18]

III. Failure to Mitigate

The grievant asserts that the hearing officer erred by not mitigating the discipline issued in this case.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[19] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[20] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[21]

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[16] Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

[17] *C.f.*, Al-Ghani v. Commonwealth, No. 0264-98-4, 1999 Va. App. LEXIS 275 at *12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")

[18] In past rulings, this Department has generally examined bias claims from the relatively limited perspective of whether the hearing officer had a pecuniary interest in the outcome of the case. *See Welsh*, 14 Va. App. at 314 ("As a constitutional matter, due process considerations mandate recusal only where the judge has "a direct, personal, substantial, pecuniary interest" in the outcome of a case.") We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. However, even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.

[19] Va. Code § 2.2-3005(C)(6).

[20] *Rules at* VI(A).

[21] *Rules at* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also*

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management.[22] Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets "exceeds the limits of reasonableness" standard set forth in the *Rules*.[23] This is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate,[24] abusive,[25] or totally unwarranted.[26] This Department will review a hearing officer's mitigation determination for abuse of discretion,[27] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

[22] Indeed, the *Standards of Conduct ("SOC")* gives to agency management greater discretion in assessing mitigating or aggravating factors than the *Rules* gives to hearing officers. An agency is relatively free to decide how it will assess potential mitigating and aggravating circumstances. Thus, as long as such decisions are consistent, based on legitimate agency concerns, and not tainted by improper motives, an agency's weighing of mitigating and/or aggravating circumstances must be given deference by the hearing officer, and the discipline imposed left undisturbed, unless, when viewed as a whole, the discipline exceeds the bounds of reasonableness.

[23] While hearing officers make *de novo* fact-findings under the *Rules*, a hearing officer's power to *mitigate* based on those fact-findings is limited to where his or her fact-findings support the "exceeds the limits of reasonableness" standard established by the *Rules*. Also, where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard.

[24] *See Parker*, 819 F.2d at 1116.

[25] *See Lachance*, 178 F.3d at 1258.

[26] *See Mings*, 813 F.2d at 390.

[27] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*

Section VI(B)(1) of the *Rules* provides that an example of mitigating circumstances includes lack of notice of the rule and how the agency interprets its rule. As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[28]

The grievant appears to essentially argue that the hearing officer erred by not considering evidence that grievant was never instructed to draw a distinction between a situation where two inmates are fighting (in which case the officer is instructed not to physically intervene to separate them) and a situation where one inmate unilaterally assaults another in a surprise attack, rendering the victim defenseless (in which the case the employee is to intervene). This hearing officer implicitly addressed this argument in his decision. He held:

> Grievant argued that she did nothing wrong because she was complying with the training she had received from the Agency. Grievant presented evidence that Agency security staff observing a fight between inmates were supposed to (1) move away from the fight, (2) use the radio to call for backup, and (3) wait until other staff arrived to provide assistance.
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> Grievant complied with her training. She observed what appeared to be a fight between inmates and moved away from the fight and called for backup. While Grievant was waiting for backup to arrive, however, she failed to recognize that the conflict between the two inmates was not a fight but rather was one inmate beating a helpless inmate. Grievant had adequate time to realize this and make some attempt to rescue the helpless inmate.[29]

Without expressly addressing Section VI(B)(1) of the *Rules*, it appears that the hearing officer recognized that in some circumstances "notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable." The hearing officer determined that the grievant initially complied with her training by not intervening in what may have initially appeared to be a fight between two inmates. However, he concludes that it should have quickly become evident that what was taking place was not a fight but a unilateral assault of an individual unable to defend himself. Witness testimony supports that it was not a fight but a unilateral assault.[30] Witness testimony indicates that the threat level to the grievant was "minimal or none," and the threat was not directed at the grievant, rather it was directed at the inmate assault victim.[31] Witness testimony further supports the hearing officer's findings that

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[28] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham 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).

[29] Hearing decision at 4-5.

[30] Hearing testimony at 1:00:00-1:01:00. A video recording of the February 19, 2010 assault further supports the finding that the assault was a unilateral surprise attack which essentially left the victim defenseless.

[31] Hearing testimony at 52:00-54:30; 59:00-1:00:00.

although the grievant's actions were initially appropriate, her subsequent inaction was not.[32] Finally, the grievant offered no explanation as to why she did not attempt to intervene once she saw Officer A coming down the hall in response to her call even after he arrived on the scene.[33] In sum, it would appear that "a reasonable employee should know that such behavior [allowing a defenseless victim to continue to be beaten without taking any direct action to attempt to halt the assault] would not be acceptable," especially given that Officer A testified that the grievant could see him coming down the hall in response to her call for assistance—in other words—when it was evident that the arrival of help was imminent.[34] Accordingly, there is no reason to disturb the hearing officer's decision on the basis of a failure to mitigate.[35]

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[36] 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.[37] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[38]

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Claudia T. Farr
Director

[32] Hearing testimony at 27:00-30:30.
[33] Agency Exhibit 2 Tab D Grievant's Statement in which she states "I can't say why I didn't help Officer [A]." *See also* Hearing testimony at 20:00 (same). Agency Exhibit 2, Incident Investigation Report, at 3 (same).
[34] Hearing testimony at 2:23:00-2:24:00.
[35] The grievant also contends that other officers who arrived at the scene did nothing to come to the aid of the victim. According to the grievant several walked in then walked back out and did not do anything to assist the victim. She asserts that they were not disciplined. While dissimilar discipline for similar misconduct can be a mitigating circumstance, here, the employees are not similarly situated. With the exception of Officer A, who through his presence alone appeared to be able to stop the assault, all officers arrived after the assault had ended. Thus, they did not fail to intervene in the assault. *See* video recording of the February 19, 2010 assault.
[36] *Grievance Procedure Manual* § 7.2(d).
[37] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[38] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).