Issue: Administrative Review of Remand Decision in Case No. 9236; Ruling Date: January 20, 2011; Ruling No. 2011-2823, 2011-2833; Agency: Department of Corrections; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Nos. 2011-2823, 2011-2833
January 20, 2011

The grievant has requested that this Department administratively review the October 19, 2010 Reconsideration Decision in Case 9326 ("Reconsideration"). For the reasons set forth below, the hearing officer is ordered to clarify her Reconsideration.

FACTS OF THE CASE

The facts and related conclusions of this case are set forth in detail in EDR Ruling 2011-2704. For purposes of this ruling, the salient facts are that on two occasions the grievant, a parole officer, failed to inform another district that a parolee was moving into their district. The agency disciplined the grievant for her failure to inform the districts and the hearing officer upheld that discipline. In an earlier request for administrative review the grievant contended, in part, that: (1) the files of the two parolees were in "waiver" status thus allegedly relieving the grievant of any supervisory responsibility; and (2) the assertion that the hearing officer failed to properly consider the potential mitigating factor of inconsistent discipline. In EDR Ruling 2011-2704, this Department remanded both assignments of error back to the hearing officer. In the Reconsideration, the hearing officer held:

> This Hearing Officer did hear evidence regarding the concept of "waiver" as it applied to Grievant. Grievant believed she was not under a duty to report the parolees' location to receiving jurisdiction because the matters were in "waiver". This forty-five (45) day "wavier" [sic] period was described differently by Grievant than the Agency. This Hearing Officer found the Agency's explanation to be the more plausible. That is, as stated by Agency in testimony, "waiver" is the forty-five days <u>after</u> the receiving jurisdiction has been given notice of the parolee's move. To sufficiently provide for the parolee's care during this forty-five day time period, the sending Agency is to assist in the care and control of the parolees. The waiver period is a benefit for the <u>receiving</u> jurisdiction but not intended as a safety net before reporting by the sending Agency. Therefore, the Hearing Officer believed the "waiver" period should not be a defense of Grievant's failure to report even if she was still tracking the parolee.

The Reconsideration also address the grievant's mitigation objection stating that:

> This Hearing Officer heard evidence of other employees' infractions of duty as presented by the Grievant. Grievant believed these were examples that should mitigate Grievant's punishment. In both cases, the person responsible for the alleged transfer delay was not noted on the exhibit presented. In one case, the matter was filed by an unknown person rather than properly being given to the probationary officer. In another, the Agency stated earlier transfer papers had been sent and the papers found in the exhibit as being sent later were simply a follow-up. It would, of course, be impossible to punish an unknown person. In neither case was Grievant able to show a specific named person had received different punishment than Grievant. Therefore, the Hearing Officer did not find any examples that would warrant unfair application of her punishment.

The grievant now reasserts her objections regarding waiver and inconsistent discipline, contending that the Reconsideration is erroneous.

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."[1] 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.[2]

I. Waiver

The grievant suggests that the hearing officer misunderstands her argument regarding the waiver status of the files in question. The grievant's argument is that because the files were in waiver status, the standards of supervision were waived for the two files. The grievant cites to pages 90-92 of the hearing transcript for the premise that the standards of supervision are waived when files are in waiver. While it is correct that a witness did state that the standards of supervision are waived when a file is in waiver, the same witness testified that a file being in waiver does not relieve the assigned officer of the responsibility for the case. On redirect examination the following exchange took place at pp. 100-101:

> Q: [Grievant's counsel] asked you about [C.D.'s] waiver status. If an offender is in waiver status, does that relieve the assigned officer of their responsibility?
>
> A: Absolutely not.

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

> Q: Okay.
>
> A: That's explicitly stated in the manual.
>
> Q: Okay. So on [C.D.], did [the grievant] still have responsibilities to that offender?
>
> A: Until it was officially - - transfer of supervision was completed of the offender, the sending district, which in this case was us and [the grievant], maintains responsibility for it.
>
> Q: Okay. And then [the grievant] still had responsibility to - - to prepare the paperwork to transfer and notify District 28?
>
> A: That waiver of standards has absolutely nothing to do with - - with that, with the processing of the paperwork, processing of the transfer.

In another exchange, a different witness testified as follows during cross-examination by the grievant's counsel at p. 218:

> Q: Meaning- - the waiver meaning standards of supervision are waived?
>
> A: Yeah, but it doesn't waive the policy on transfers being conducted promptly.

Accordingly, we find unpersuasive the grievant's arguments that the hearing officer misunderstood the concept of waiver and that her conclusions relating to waiver were erroneous and not supported by record evidence.

Mitigating Circumstances: Inconsistent Discipline

The grievant claims that the discipline against her exceeds the limits of reasonableness. The grievant had raised the issue of mitigation, specifically the issue of potential inconsistencies in discipline, in her previous request for administrative review. Because it was not clear whether the issue of mitigation had been fully considered by the hearing officer, this Department remanded the issue to the hearing officer for further consideration. As noted above, in her Reconsideration, the hearing officer found no mitigating circumstances that would warrant a reduction in the level of discipline.

The grievant asserts that she was prejudiced by not being able to refer to other employees by name, and that her inability to do so precluded her from establishing that she was treated more harshly than others. The grievant states that the hearing officer used the "inability of Grievant to identify the other employees who received disparate treatment" to opine that "[i]t would, of course, be impossible to punish an unknown person," and that "[i]n neither case was Grievant able to show a specific named person had received different punishment than Grievant."

Based on this Department's review of the hearing record, the hearing officer's preference to refer to individuals by title rather than name did not hamper the grievant in presenting evidence of potentially disparate discipline. The grievant was able to and did proffer potential evidence of disparate treatment.[3] The hearing record contains evidence (testimony) that the individual responsible for mislaying a file could not be identified and, more to the point, that the hearing officer's preference to refrain from using names had nothing to do with either the agency's ability to identify the person who had mislaid the file, or the grievant's ability to identify this individual.[4]

The grievant also introduced evidence to show that a second individual, the Chief, failed to timely notify another jurisdiction of a parolee's transfer. The hearing officer found that the Chief's case was factually distinguishable from the grievant's. The hearing officer found that "the Agency stated that earlier transfer papers had been sent and the papers found in the exhibit as being sent later were simply a follow-up." It appears that the actual record testimony, however, was slightly but nevertheless significantly different from the hearing officer's characterization of the testimony. The witness, the Chief, testified that: "The other thing that goes on with these is reporting instructions. We may have got reporting instructions on this that we notified the other district. I can't tell by this indication here. I can't remember this case. My name is on it but I can't remember."[5] The testimony that the agency may have notified the other district is not equivalent to testimony that the agency notified the other district. Thus, it is not clear how the hearing officer reached her conclusion regarding the dissimilarity of the Chief's case.[6]

In reconsidering the issue of mitigation based on the purported inconsistency in how the Chief was treated, the hearing officer should consider the following. Section VI(B)(1) of the *Rules* provides that an example of mitigating circumstances includes "Inconsistent Application," which is defined as discipline "inconsistent with how other similarly situated employees have been treated." In EDR Ruling No. 2010-2376 this Department explained that 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. As with all mitigating factors, the grievant has the burden to raise and establish

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[3] *See* transcript 158-181.

[4] A witness testified as follows:

> You know, sometimes when you discipline people, you have got to figure on it who did it. In this case you would have had to figure out who put the file in general files which may have been hard to prove. You can't just discipline people for things that you find unless you can prove who did it, and that was probably the case because nobody would - - I could not have found out how that file got in general files. That was an accident. There's no way that I could have proved who put this file in general.

Hearing transcript at 174.

[5] Hearing transcript at 175 (emphasis added).

[6] The Chief testified that he was not disciplined for any acts or omissions associated with his case. Hearing transcript at 177.

any mitigating factors.[7] In considering whether a grievant has met this burden by a preponderance of evidence, the hearing officer should consider all evidence proffered by the grievant and any rebuttal evidence provided by agency.

Here, the grievant cross-examined the Chief regarding a case he handled years earlier. When the Chief was questioned about Grievant's Exhibit A, a Transfer Request for J. J., a case in which the Chief was apparently the supervising officer, he offered potential explanations as to why the agency did not appear to contact the receiving jurisdiction for over six months. For instance, as discussed above and in the Reconsideration, the Chief speculated that the receiving district may have already been informed of the transfer. Furthermore, he repeatedly stated that he would need to review the file to determine what the "hold up" was on the case, which the Chief noted had occurred five years earlier.

The hearing officer must now determine whether, based on all the evidence in the record, the grievant met her burden of establishing that she and the Chief were similarly situated--that is, they engaged in similar misconduct—yet were treated differently. The grievant has proffered evidence that allegedly relates to purported similar misconduct by the Chief. The Chief provided testimony addressing the same. The hearing officer, therefore, must now determine whether given the totality of the evidence on this issue the grievant met her burden of proving by a preponderance of the evidence overall that the Chief committed similar misconduct but was treated more favorably than she.

Reopening the Hearing

The grievant had also requested that the hearing officer reopen the hearing. The hearing officer refused. The grievant asserts that the hearing officer erred when she concluded that she did not have authority to reopen the hearing.

The hearing officer was correct in recognizing that her authority to reopen a hearing is extremely limited. Certainly, when this Department remands a case with the instruction that the case may be reopened, the hearing officer clearly has the authority to open the hearing. However, the remand instruction in Ruling No. 2011-2704 contained no such instruction. Moreover, this did not appear to be a case where, for example, the hearing officer improperly excluded evidence over the objection of a party, which could necessitate a reopening. Further, the reasons advanced by the grievant for reopening would not serve as a proper basis for reopening. For example, the grievant wanted to reopen the hearing in order to question agency witnesses how Operating Procedure 4 relates to public safety. The grievant attempted to raise this concern in the original request for administrative review to this agency. In Ruling No. 2011-2704, this Department pointed out that the request was untimely. It is thus still untimely.

[7] *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).

The time to engage in such questioning was at the hearing and, in fact, the grievant did attempt to question witnesses on this point at the hearing. Therefore, there is no reason to allow additional questioning on this point. The grievant's remaining objections were largely (1) untimely, (2) addressed in EDR Ruling No. 2011-2704, (3) issues that should have been or were raised at hearing, or (4) simply without merit.[8] None of the reasons advanced would have warranted reopening the hearing. Accordingly, this Department finds no error with the hearing officer's decision to refrain from reopening the hearing.

We further note that we are not suggesting that the hearing office reopen the hearing to take further evidence on mitigation. The grievant had an opportunity at hearing to proffer such evidence and the agency to provide rebuttal. Accordingly, the hearing officer is instructed to make her determination on the issue of mitigation based upon evidence currently in the record.

CONCLUSION, 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).[9] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[10]

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.[11] 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

[8] For instance, the grievant asserts that she was not given an adequate opportunity to put on evidence of inconsistent discipline because she could not use names and because the number of examples of alleged inconsistencies in discipline was limited by the hearing officer. The inability to use names at hearing was addressed in EDR Ruling 2011-2704 as untimely. Moreover, neither the objection relating to the use of names or limitation of examples appear to have any merit, based on this Department's review of the record. While the hearing officer held that the grievant could not identify any "specific named person" who had received different treatment from the grievant, as noted above, the inability to use names was not an impediment to the grievant's case. In one case, the identity of the potential comparator was unknown, thus he/she could not be named. In the other case, the identity of the alleged comparator appears to have been entirely clear. Furthermore, although the hearing officer essentially said that she would not allow unbridled exploration into discipline issued to others, the record reveals no attempt by the grievant to introduce further specific evidence pertaining to other disciplinary cases that was then excluded by the hearing officer. Indeed, the hearing officer overruled an agency objection aimed at limiting evidence of how other employees had been treated. *See* hearing transcript at 168-169.

[9] *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.

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

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

arose.[12] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[13]

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Claudia T. Farr
Director

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