Issue: Administrative Review of Hearing Officer's Decision in Case No. 9509; Ruling Date: June 7, 2011; Ruling No. 2011-2928; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2011-2928
June 7, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9509. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The salient facts as set forth in Case Number 9509 are as follows:

FINDINGS OF FACT

1. The Grievant was formerly employed as a Direct Service Associate III by the Agency at a facility (the "Facility") which securely houses and treats civilly committed sex offenders. AE D-3. The residents of the Facility are all sexually violent predators and the Facility's mission is to rehabilitate them and return them to the least restrictive environment (the community or elsewhere).

2. The Grievant was employed by the Agency as a Residential Services Associate ("RSA") and was responsible for monitoring the day-to-day activities of the residents and for enforcing unit rules, policies and procedures, including performing room inspections and documenting behavior of residents. AE D-3.

3. The Grievant was hired in March 2009. In June 2010, the Grievant was counseled by her supervisor at the time, LB, in an Employee Counseling Report dated June 10, 2010 for unsatisfactory job performance concerning violation of facility policy or procedure as follows:

   Summary of Events:

> On June 8, 2010 between the hours of 11:35 a.m. to 12:10 p.m., [Grievant] relieved a staff member for lunch break on Unit 2D. [Grievant] was observed via video keying the 2D slider door and letting the staff member off the unit and walking directly outside to the patio to talk to a resident, these actions resulted in not following Post Order No. 7 which states "Staff maintain accountability of all residents assigned to the unit at all time. Conduct well being checks of residents at a minimum of every 30 minutes throughout your post." [Grievant] also failed to follow Post Order No. 22 which states "Improprieties of the appearance of improprieties, fraternization, or other non-professional association by and between employees and residents o is prohibited and may be treated as a Group III offense under the DHRM Standards of Conduct".
>
> Corrective Action to be Taken:
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> [Grievant] needs to review V.C.B.R. policies and procedures. Also, review post order for Residential Living Area Supervisor. Review D.B.H.D.S. human rights policy.
>
> AE D-1.

4. The Grievant was again warned on June 25, 2010 that she was spending too much time around Resident B in her performance evaluation and was warned that this behavior would continue to be monitored. AE D-8.

5. On September 9, 2010, the Grievant was assigned responsibility for the security and constant monitoring of approximately 23 residents in Unit 2-D. AE G-1.

6. However, from 1327 to 1347, the Grievant was on the Unit 2C/D patio talking to Resident B who was not authorized to be on such patio as he was housed in a different building. From her position on the patio it was not physically possible for the Grievant to maintain constant accountability of all residents within her assigned area of responsibility as the window to Unit 2D did not offer much of a view inside.

7. The Grievant did not follow procedure and redirect Resident B back to his building and permissible areas but instead spent 20 minutes on the patio talking to him.

8. The Grievant maintains that she performed her safety checks for 1330 before she went on the patio but the hearing officer does not find her testimony credible. The video evidence captures her writing on the sheet

on her clipboard (AE G-1) and the Grievant acknowledges in her Form A that "[i]n fact we were actually advised, also on more than one occasion, not to doodle or write anything extra on the sheets." AE A-4.

9. The Grievant falsified the Unit 2D safety checks for 1330 because she was not inside the unit to conduct those visual checks and make the rounds to verify the safety and location of her 20 or so assigned residents who were inside Unit 2D.

10. Similarly, the Grievant, in accordance with Agency policy and procedure, should have documented her 20 minute interaction with Resident B and she intentionally did not do this. AE F-3.

11. The Grievant violated post orders by not redirecting Resident B from the unauthorized area and disobeyed her supervisor's instructions by engaging in close conversation for 20 minutes with Resident B despite the recent warnings from her supervisor regarding the Grievant spending too much time around Resident B and that "[t]his behavior will continue to be monitored." AE D-8.

12. The Grievant put Facility residents and staff at risk by not enforcing Facility policies and procedures and by engaging for a prolonged period with Resident B in a non-therapeutic manner despite the warnings from her supervisors.

13. The Grievant's supervisor at the time, NM, issued a Group III Written Notice ending the Grievant's effective September 21, 2010, for falsifying records, failure to follow policy and procedure and failure to follow supervisor's instructions.

14. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.[1]

As a result of the foregoing findings of fact, the hearing officer made the following conclusions:

> In this instance, the Agency appropriately determined that the Grievant's violations of post orders and supervisor's instructions (despite clear supervisor warnings that the Grievant would continue to be monitored for compliance) constituted a Group III Offense because it put residents and staff at risk in the context of a secure Facility for sexually violent predators where constant accountability of all residents by the RSA in her assigned area of responsibility

[1] Decision of Hearing Officer, Case No. 9509, issued March 1, 2011 ("Hearing Decision") at 2-4.

was reasonably expected and specified in writing by the employer. AE F-3 and F-4.

"Falsifying" is not defined by the SOC, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) which provides in part as follows: "**Falsify**. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document." At the hearing, both the Agency and the Grievant conceded that if the Grievant put down on any report information which she knew to be incorrect, that would constitute falsifying a report. Accordingly, the word "falsify" means being intentionally or knowingly untrue.

The hearing officer finds that the Grievant intentionally or knowingly marked residents in her assigned area of responsibility, Unit 2D, to be in their bedrooms, etc., when she could not establish this because she knew she had not performed her necessary rounds and visual checks. AE G-1. The Grievant was preoccupied with Resident B for 20 minutes and the Grievant had no responsibility for Resident B who should have been promptly redirected to his Building in accordance with written policy and supervisor's instructions. The Grievant was also required to document any and all unusual resident behavior (namely Resident B) and she intentionally did not do this. AE F-3.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency; and

2. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel

officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. Each of the offenses in the Written Notice could itself constitute a Level III Offense. Obviously, the Grievant was only charged and found liable for one Group III Offense.

During the hearing, the Agency also tried to raise fraternization as an alleged offense but the hearing officer would not permit this because the offense of fraternization was not covered in the Written Notice.[2]

[2] Hearing Decision at 6-9.

The grievant subsequently challenged the hearing officer's March 1, 2011 hearing decision by requesting an administrative review from the hearing officer and the Director of EDR. In a reconsideration decision dated March 31, 2011, the hearing officer declined to alter his original hearing decision.[3] This Department will now address the grievant's request for administrative review.

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]

In her request for administrative review to this Department, the grievant argues: (1) her due process rights were violated; (2) the hearing officer failed to consider mitigating circumstances; (3) the agency failed to comply with the grievance process; (4) the agency did not meet its burden of proof; and (5) the hearing officer failed to consider all the facts and/or include important facts in his decision. The grievant's arguments are addressed below.

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 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

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[3] Decision of the Hearing Officer, Case No. 9509, issued March 31, 2011 ("Reconsideration Decision") 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 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.
[7] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

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 "Any 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.

The grievant argues that her due process rights were violated because (1) she was initially told that the agency was considering issuing her a Group II Written Notice for failure to follow policy and a Group III for falsifying documents, but she was later issued a single Group III Written Notice for "Falsifying Records/Failure to follow policy and procedure;" (2) the grievant's 2:00 p.m. round activity was considered in the hearing decision but not mentioned on the Written Notice; and (3) the Written Notice cites the grievant for failure to follow policy and procedure, but fails to identify the policy that she allegedly violated.

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

> On 9 September 2010 [the grievant] was assigned to Unit 2D. From 13:27 to 13:47 [the grievant] was on the Unit 2C/D patio talking to a resident who did not live on Unit 2C or 2D and who was not authorized to be on the Unit 2C/D patio. [The grievant] failed to follow procedure and did not redirect the resident but instead spent 20 minutes on the patio talking to him. Additionally, [the grievant] falsified the Unit 2D safety checks for 13:30 but was not inside the unit to conduct those checks and make rounds to verify the safety and location of her assigned residents. [The grievant] falsified records by filling out the Unit 2D progress reports checks without conducting rounds on the unit and neglected her duties by staying on the patio talking to a resident for an extended period of time when she should have been monitoring activities and resident behaviors taking place on Unit 2D.
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> [The grievant] did not redirect the resident from the Unit 2C/D patio. Failure to redirect residents out of unauthorized areas is a violation of post orders and supervisor's instructions. Post Orders state the following: Enforce all rules and regulations established for the purpose of governing resident's behavior and do not extend or promise special privileges or favors not available to all residents. Day shift supervisors have announced several times during briefings that residents are not authorized to be on patios of units that they are not assigned to. [The grievant] was counseled for a similar incident on 10 June 2010 and was instructed to review [Facility] Policy and Procedure and Residential Living Unit Supervisor

[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.*

> Post Orders. [The grievant] did not improve her work performance and continued to put residents and staff at risk by not enforcing [Facility] policy and procedures and by engaging in a non-therapeutic relationship with a resident.

Based on the record, it appears that on September 14, 2010, the grievant was told that the agency was considering issuing her a Group II and a Group III Written Notice for failure to follow policy and procedure and falsifying records and provided her an opportunity to respond to the charges.[11] Prior to issuance of disciplinary action, the agency apparently determined that it would issue a single Group III Written Notice with termination and ultimately did so on September 21, 2010.[12] However, regardless of what the grievant was told on September 14, 2010 with regard to the level of offense or the number of written notices to be issued, the misconduct she was being charged with did not change between September 14th and September 21st and the September 21st Written Notice provides sufficient notice of the charges. Additionally, the Written Notice describes the misconduct and the grievant had ample time prior to the hearing to prepare her defense against the charges.

With regard to the grievant's argument that the hearing officer wrongly considered her 2:00 p.m. round activity because it was not mentioned in the Written Notice, this Department finds no error. First, the lack of any mention of the 2:00 p.m. round activity on the Written Notice, does not automatically render it irrelevant for consideration at hearing. Further, it appears that the grievant's 2:00 p.m. round activity was explored at hearing in order to prove the allegations contained in the Written Notice, namely, that she falsified records with regard to her 1:30 p.m. round activity.[13] More importantly, the grievant's 2:00 p.m. round activity does not appear to have been used as a basis to uphold the discipline against the grievant.[14]

Findings of Fact/Burden of Proof

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] 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.[17] 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.[18] Where the evidence conflicts or is subject to varying

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[11] *See* Hearing Recording, Testimony of NM, Assistant Program Director; *see also* Reconsideration Decision at 2-3.
[12] *Id.*
[13] *See* Reconsideration Decision at 5.
[14] *Id.*; *see also* Hearing Decision at 7.
[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.

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.

Here, 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.[19]

This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. In particular, there is evidence in the record--specifically, witness testimony and videotape evidence--to support the hearing officer's findings that the grievant was on the patio with Resident A for an extended period of time, she did not redirect Resident A from the patio, she had previously been counseled for her interactions with Resident A, and she indicated that she had performed her 1:30 p.m. round but credible evidence was introduced to the contrary. Accordingly, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to remand the decision.

Mitigation

The grievant argues that the hearing officer failed to consider mitigating circumstances, namely, inconsistent discipline or treatment. Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("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." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[20]

At hearing, two of the grievant's witnesses testified that it is not uncommon for residents to be on the patio of another unit and for agency employees to be talking to residents on the patio.[21] In addition, one of these witnesses also testified that on the same day that the grievant had been talking to Resident B on the patio, he too had been talking to Resident B on the patio and did so for a longer period of time than did the grievant yet he was not disciplined for his interaction with Resident B.[22] Despite the evidence offered by the grievant at hearing regarding inconsistent treatment and/or discipline, the hearing officer finds in his decision that the grievant

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[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *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).
[21] *See* Hearing Recording, Case No. 9509, Testimony of Witnesses SS and NS.
[22] *See* Hearing Recording, Case No. 9509, Testimony of Witness NS.

did not raise mitigation at hearing or in her grievance[23] yet he does assess in detail whether mitigation in this case is appropriate.[24] However, in that assessment, the hearing officer does not specifically state whether or not he considered the mitigating factor of inconsistent treatment and/or discipline.[25] Because this issue appears to have been clearly raised at hearing by the grievant, the hearing officer erred by not specifically addressing this issue in his hearing decision. However, for the following reasons, this Department concludes that his failure to address the grievant's mitigating evidence in this case is harmless error.

During the hearing, one of grievant's witnesses did in fact state that he had talked to Resident B on the patio for a longer period of time than the grievant, but was not disciplined for doing so.[26] However, this particular witness also admitted that he is, and was at the time in question, a security employee and not an RSA like the grievant.[27] Accordingly, this Department concludes that this particular employee is not similarly situated to the grievant and as such, the lack of discipline for his interaction with Resident B is not a basis for mitigation.

Moreover, while the grievant presented testimony at hearing that other similarly situation employees frequently talk to residents on the patio, she provided no evidence that any such employee was treated less harshly than was she. In particular, when questioned at hearing regarding whether or not other similarly situated employees had been disciplined for their time on the patio talking to a resident, at least one witness indicated that they did not know because such information is confidential.[28] Accordingly, while the grievant provided evidence that it is not uncommon for similarly situated employees to talk to residents on the patio, she did not meet her burden of proffering any evidence that other such employees were treated less harshly than she for engaging in similar behavior. Accordingly, we find no error on the part of the hearing officer in failing to mitigate on the basis of inconsistent discipline.[29]

Agency Noncompliance

The grievant also alleges that the agency failed to comply with the grievance procedure during the management resolutions steps of the grievance process. The grievance procedure requires both parties to address procedural noncompliance through a specific process.[30] That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department's

[23] Hearing Decision at 7.
[24] *Id.* at 7-9.
[25] *Id.*
[26] *See* Hearing Recording, Case No. 9509, Testimony of Witness NS.
[27] *Id.*
[28] *See* Hearing Recording, Case No. 9509, Testimony of SS.
[29] We recognize that, in many respects, the agency may be better positioned to produce evidence of consistency in discipline because it holds all records of discipline. However, the burden upon a grievant is not particularly onerous. For example, the grievance procedure permits a grievant to request all documents relating to how others have been disciplined for similar misconduct. *Grievance Procedure Manual* § 8.2. A grievant can use such documents (or the lack thereof) in combination with evidence of similar misconduct to support his or her claim of inconsistent discipline.
[30] *See Grievance Procedure Manual* § 6.

involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct alleged noncompliance, the grievant may request a ruling from this Department.[31]

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.[32] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[33] Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Here, this Department concludes that although the grievant was aware of possible procedural errors during the management resolution steps, she advanced to the hearing, without raising the issue of noncompliance to the Director of this Department until after she had received the hearing officer's decision. As such, the grievant waived her right to challenge the agency's alleged noncompliance.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

Claudia T. Farr
Director

[31] *See Grievance Procedure Manual* § 6.3.
[32] *Id.*
[33] *Id.*
[34] *Grievance Procedure Manual* § 7.2(d).
[35] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).