Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: October 6, 2011; Ruling No. 2012-3113; Agency: Department of Juvenile Justice; Outcome: Not in Compliance - Remanded to Hearing Officer for Reopening.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2012-3113
October 6, 2011

As the agency charged with (1) the establishment of the Commonwealth's grievance process[1] and (2) rendering final compliance rulings on all matters related to the grievance procedure,[2] this Department holds that the hearing decision in Case No. 9618 must be remanded to the hearing officer for reopening of the hearing.

FACTS

The procedural facts of this case, as set forth in the hearing decision in Case No. 9618 are as follows:

> On March 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to provide direct supervision and falsification of an official state document.
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> On March 28, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2011, a hearing was held at the Agency's office.

The substantive facts, associated conclusions, and ultimate decision of Case 9618, as described in Case No. 9618 are as follows:

> The Department of Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its Facilities until his removal effective March 7, 2011. Grievant had prior active disciplinary action. On December 17, 2008, Grievant received a Group III Written Notice with suspension for falling asleep while at an assigned post.

[1] See Va. Code § 2.2-1001(2).
[2] See Va. Code § 2.2-1001(5).

Residents at the Facility reside in rooms with doors that can be secured. The doors have windows enabling Juvenile Correctional Officers to observe residents while they are in their rooms.

On Saturday, January 22, 2011 at approximately 6 p.m., Grievant and Officer L entered the Unit to assume their post duties. Members of the outgoing shift informed Grievant that Sergeant B had observed that the fire alarm in the shower area was damaged. While Officer L was conducting a routine security check at approximately 7 p.m., the Resident showed Officer L a piece of metal. Officer L talked to the Resident and convinced him to give Officer L the piece of metal. After giving Officer L the metal piece, the Resident showed Officer L another piece of metal. The Captain and Officer B began talking to the Resident. The Resident gave them several pieces of contraband and the Captain then exited the Unit. The Captain made a telephone call to one of the officers in the unit with an instruction that an officer stand at the Resident's door and talk to the Resident. Officer L asked Grievant to complete the task because he believed the Grievant had a better rapport with the Resident. At approximately 9 p.m., the Captain entered the Unit and observed that the Resident had several small cuts on his neck. The Captain was concerned that the Resident was engaging in self injurious behavior while refusing to exit his room. The Captain left the Unit and returned at approximately 9:28 p.m. with an extraction team consisting of five employees. The Captain instructed the Resident to lie down on his bed and the Resident complied with the instruction. The Resident was searched and changed into a new smock. The Resident's room was then cleaned and sanitized. Staff found numerous sharp objects hidden in his room. The Captain and the extraction team left the Unit. The Resident then pulled a sharp object out of his mouth and started cutting his neck. Grievant radioed for an emergency response to the Unit. Grievant and Officer L entered the Resident's room and restrained the Resident until a supervisor arrived.

Because of the nature of the incident, the Captain had to complete a Serious Incident Report to inform Agency managers of what had happened with the Resident. Grievant was instructed to submit an incident report describing what had happened. On January 22, 2011 at 11:30 p.m., Grievant completed an Institutional Incident Report. As part of his report, Grievant wrote:

> At approximately 2100 hrs [Captain] was entering the unit and [Resident] covered his window for approximately 2 minutes. When he uncovered his window he had several small cuts on his neck.

The Acting Superintendent viewed the videotape of the incident and observed that the Resident had not covered his window. The Captain also viewed the video and observed that the Resident's window was never covered.

During the Step Process, the video was shown to Grievant and Grievant agreed that the window was not covered.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense. In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

One of Grievant's job duties was to draft accurate incident reports. He received in-service training informing him that he was to write what he knew about an event into his incident report describing the event. He was informed that his incident reports should be accurate. Whether the Resident had covered his window was a significant detail because it could help the Agency determine when and under what circumstances the Resident may have injured himself. Grievant wrote that the Resident covered his window for approximately two minutes when in fact the Resident did not cover his window. Grievant's incident report was inaccurate making his work performance unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant already has an active Group III Written Notice, the issuance of a Group I Written Notice supports the Agency's decision to remove him from employment.

The Agency argued that Grievant should receive a Group III Written Notice for falsification of documents and failure to provide direct supervision of the Resident. No credible evidence was presented to show the Grievant failed to provide direct supervision of the Resident. In order to establish that Grievant falsified his incident report, the Agency must show that the incident report was not accurate and that Grievant knew or should have known at the time he was writing the incident report that the information he provided was not correct. The evidence showed that residents at the Facility often covered their windows in order to gain attention from the Juvenile Correctional Officers. No motive was presented as to why Grievant would falsely report what had happened. The Acting Superintendent testified that the Agency could not prove that Grievant knew what he was writing was false. The

Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.

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 further the disciplinary action.

Agencies may not retaliate against employees for engaging in protective activities. Grievant argued that the Agency retaliated against him because he questioned the competency of Agency supervisors. No credible evidence was presented to support Grievant's assertion that the Agency retaliated against him.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice of disciplinary action. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.[3]

After the issuance of the hearing decision, the grievant raised a timely objection with DHRM regarding the hearing decision's affirmance of his removal from employment. Specifically, the grievant asserted that he had received the December 2008 Group III Written Notice during his probationary period and that therefore it should not have been considered by the hearing officer for accumulation purposes in support of his removal. This same objection had been raised by the grievant during the management step phase of his grievance, and had been addressed by the agency's second step respondent, who asserted that the

[3] Decision of the Hearing Officer in Case No. 9618 issued June 29, 2011 ("Hearing Decision") at 2-5 (footnotes from the original decision are omitted here).

grievant been a non-probationary employee at the time he received the December 2008 Written Notice. Also, record exhibits from the hearing include what appears to be a Probationary Progress Report and a congratulatory letter from the agency's Human Resources Director upon the grievant's completion of a 12-month probationary period. It is unclear whether there were arguments, testimony or other evidence on this issue raised at the grievance hearing because due to a recording error, a verbatim recording of the hearing does not exist.

DHRM responded to the grievant's objection in a September 19, 2011 Policy Ruling, In that Ruling, DHRM concluded that: the Standards of Conduct prohibit the issuance of Written Notices during an employee's probationary period; the 2008 Written Notice had been issued to the grievant during his probationary period; and the appropriate corrective action would be to remove the 2008 Group Notice, which will result in the grievant's reinstatement. As explained further by the DHRM Ruling:

> The grievant's concerns are related to what he feels was improper application of policy when he was issued a Group III Written Notice in December 2008 while he was a probationary employee. Because he was a probationary employee, he did not challenge the disciplinary action through the State Employee Grievance Procedure. The disciplinary action remained on file and was a factor in his termination because of accumulation of written notices. The evidence provided to this Department supports that when the Department of Juvenile Justice issued the Group III Written Notice, he was a probationary employee and he was treated as such during his first 12 months of employment by that agency; i.e., a 4-month Probationary Progress Report and a congratulatory letter from the Human Resources Director upon his completion of the 12-month probationary period. The Probationary Policy clearly communicates that the Written Notice disciplinary process established in the Standards of Conduct policy is to be used as a guide when disciplining employees. It further states that Written Notices may not be issued to probationary employees. As a probationary employee, the grievant was subjected to all conditions and privileges accorded to probationary employees. That being the case, it was improper for the agency to have issued a Group III Written Notice while he was on probation because, among other things, he could not use the grievance procedure to appeal the disciplinary action. In the instant case, the appropriate corrective action is to remove the December 2008 Group III Written Notice. This removal will result in his reinstatement.
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> The main issue that the grievant raised – that he was treated unfairly when he was issued a Group III Written Notice in 2008 by the agency while he was a probationary employee – was not raised as a part of Case No. 9618 and was not considered by the hearing officer. However, this Department addressed this issue only because the grievant was a probationary employee and the improperly issued original Group III Written Notice was a factor in

> his termination. This ruling has no impact on the decision rendered by the hearing officer except that the grievant must be reinstated.[4]

The agency has now asked DHRM to reconsider its directive to reinstate the grievant because, the agency asserts, the grievant had not been probationary at the time he was issued the 2008 Written Notice. The grievant, in turn, has asked this Department to intervene.

DISCUSSION

Procedurally, this is an unusual case. Matters are further complicated by the absence of a hearing recording, which could reveal whether testimonial or other evidence had been proffered and/or admitted into the evidence at hearing on the issue of the grievant's alleged probationary status. Under the grievance procedure, evidence is to be presented to the hearing officer, who serves as the sole fact-finder. Neither this Department nor DHRM, as administrative reviewers under the grievance procedure, may look beyond the record evidence developed at hearing. In fact, normally the only way additional evidence and related arguments can be considered after a grievance hearing has concluded is when "newly discovered" evidence is presented to the hearing officer. Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[5] Further, the fact that a party discovered the evidence after the hearing had ended does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[6]

Requests to reopen the hearing based on newly discovered evidence are directed to the hearing officer, [7] the sole fact finder in the grievance process.[8]

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[4] DHRM Policy Ruling issued September 19, 2011 at 4-5.
[5] Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[6] Boryan, 884 F.2d at 771 (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[7] *Grievance Procedure Manual* 7.2(a).
[8] *See* Barton vs. Va. Dept. of State Police, 39 Va. App. 439, 573 S.E. 2d 319 (2002)(the "circuit court lacks authority to consider the grievance *de novo*, to modify the hearing officer's decision, to substitute the court's view of the facts for those of the hearing officer, or to invoke the broad equitable powers to arrive at a decision that the court may think is fair"). Barton, 573 S.E. 2d at 322(citing to Department of Environmental Quality v. Wright, 256 Va. 236, 241, 504 S.E.2d 862, 864 (1998))(emphasis added). The grievance statutes "clearly provide the hearing officer is to act as fact finder and the Director of the Department of Human Resource Management is to determine whether the hearing officer's decision is consistent with policy." Barton, 573 S.E. 2d at 322.

In this case the hearing decision is silent as to the issue of the grievant's alleged probationary status, except to find that the grievant already had "an active Group III Written Notice."[9] This Department has no means through which to review what transpired at the hearing due to the lack of a verbatim recording of the hearing. Accordingly, we remand the decision to the hearing officer to reopen the hearing and fully address, as discussed further below, the grievant's alleged probationary status at the time he received the December 2008 Group III Written Notice. In addition, due to the absence of a verbatim recording of the hearing, it simply makes sense to reopen the remainder of the case so that the hearing record and any "newly discovered evidence" on the issue of the grievant's March 2011 Group III Written Notice will be complete and reviewable.

On the issue of the December 2008 Group III Written Notice, we are compelled to provide the following additional guidance. We note that hearing officers are precluded from addressing the merits of Written Notices that have not been grieved and qualified for hearing. Under normal circumstances, if an employee receives a Written Notice the employee must grieve the Notice within 30 calendar days of receipt.[10] If not grieved, the Written Notice will stand and its substantive merits (for example, whether the grievant had been asleep on the job as charged) will remain beyond the reach of any hearing officer in any future hearing. That being said, a hearing officer is always free to examine the procedural validity of any Notices relied upon by the agency for accumulation proposes (for example, whether the Notices were active or expired). The hearing officer's role on remand is similar here. The hearing officer must consider all evidence relating to the grievant's employment status in December of 2008 (probationary vs. non-probationary) and make a determination as to that status. (DHRM has already ruled that if he had been probationary, then the 2008 Group III Written Notice cannot be used for accumulation purposes.)

Normally in rehearings, the admissibility of evidence is limited to either (1) that which was accepted as evidence at the previous hearing, or (2) newly discovered evidence as described above. However, in this case, the issue of the procedural validity of the 2008 Group III Written Notice is further complicated by ambiguity in the record and apparent confusion over whether that Written Notice was indeed before the hearing officer. The agency head had denied qualification of the issue of the Notice's validity but the grievant had apparently requested that the issue be qualified for hearing by EDR. It seems that the agency did not forward the grievance to EDR for a qualification ruling but instead requested the appointment of a hearing officer. We make it clear here that the grievant may, as he did on his Grievance Form A, challenge the procedural validity of the 2008 Written Notice for accumulation purposes, as described above. Accordingly, because of the potential confusion regarding whether the validity of 2008 Notice could be considered in any manner by the hearing officer, both parties are free to proffer any evidence they believe is relevant to the question of whether the 2008 Written Notice is procedurally valid, regardless of whether it was proffered at the original hearing or would be considered "newly discovered evidence." As to the remaining issues in the case, specifically the March 2011 Group III Written Notice (which was clearly

[9] *Hearing Decision* at 4.
[10] Importantly, probationary employees have no access to the grievance procedure. *See Grievance Procedure Manual* 2.3.

qualified and before the hearing officer), the admissibility of evidence must be limited at rehearing to either (1) that which was accepted as evidence at the previous hearing or (2) newly discovered evidence.

Remanding the decision to the hearing officer is the appropriate response under the unique circumstances of this case. Nothing in this Ruling is intended to diminish the authority of DHRM to develop, interpret, and ensure full compliance with human resource policies. Remanding the decision, however, returns fact-finding to the hearing officer and still leaves open the possibility of further review on the basis of policy by DHRM, on the record evidence, once the reconsidered opinion is issued. Once the hearing officer has reopened the hearing and issued his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision. Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[11]

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, including the reconsideration decision, have been issued.[12] 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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Claudia T. Farr
Director

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