Issue: Administrative Review of Hearing Officer's Decision in Case No. 9728; Ruling Date: April 4, 2012; Ruling No. 2012-3289; Agency: Department of State Police; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2012-3289
April 4, 2012

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9728. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts and holdings of this case, as set forth in the hearing decision in Case No. 9728, are as follows:

> The Grievant filed a timely appeal from a Group III Written Notice issued on June 6, 2011 for violation of General Order ADM 12.02, paragraph 13.b.(28), namely, for interfering with the disposition of a traffic summons issued to his father and for accessing the Virginia DMV file related to his father on two occasions for personal reasons and not for official criminal justice purposes.
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> The disciplinary action taken was the issuance of a Group III Written Notice without further discipline.
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> Agency Exhibit D included General Order: ADM 1.01 which provides at paragraph 6. "Each employee of the Department shall comply with all General Orders...applicable to them; failure to do so shall be deemed neglect of duty or insubordination and may be grounds for disciplinary action." General Order ADM 12.02, paragraph 13.b.(28) provides as a group III offense the following: "Deviation from established procedures in the disposition of summons or arrest cases or interfering or attempting to interfere with the disposition of a summons issued or an arrest made by any police officer."
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> The Agency alleged that the Grievant utilized the VCIN system in violation of the following sections of the VCIN Operating Manual and the cited General Orders:
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> 1. VCIN Operating Manual, Part 1, Section II (2), Page 5 which states "The VCIN system shall only be used by

authorized criminal justice agencies to transmit and receive criminal justice information for criminal justice purposes."

2. General Order ADM 11.00, paragraph 29 which states "Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department Policies and Procedures, Departmental Training, and Supervisory Recommendations."

3. General Order ADM 12.02, paragraph 12.b.(1) which states "Failure to follow supervisors instructions, perform assigned work or otherwise comply with applicable established written policy."

The Agency also alleged that the Grievant interfered with a traffic summons issued to the Grievant's father by a city police officer.

The Grievant's Captain recommended that the two matters be merged into one Group III offense under the Standards of Conduct for violating General Order ADM 12.02, paragraph 13.b.(28): Deviation from established procedure and the disposition of summons issued or an arrest made by any police officer. The Grievant's Captain also recommended that the Grievant be suspended for three work days (Agency Exhibit E).

The actual Written Notice issued to the Grievant, dated June 6, 2011, noted a Group III violation but did not impose any suspension or other discipline.

The Grievant, in his memo dated February 10, 2011 (Agency Exhibit 11) admitted that after learning that his father had received a traffic summons (offense date January 19, 2010) from a city police officer, the Grievant while in court on another case on February 9, 2010 inquired about the status of his dad's case. As a result of his inquiry, an Assistant Commonwealth's Attorney had his dad summons put on the docket while the Grievant was still in court. The Judge called the case and after a discussion with the Assistant Commonwealth's Attorney took the matter under advisement for six months. The Grievant stated in his memo that he attempted to first contact the city police officer but had not spoken with the city police officer prior to the Grievant's actions which took place on February 9, 2010 (the city police officer's court date not being until April 7, 2010).

In the same memo, the Grievant denies that he utilized the VCIN system to access DMV files related to his father. He explains that on January 31, 2010 he ran his (the Grievant) social security number and the tag EYEROC while in

his state issued vehicle on a non-stars MDT while showing a first sergeant how the MDT system worked. He also pointed out that when a person runs a tag on the computer in a state vehicle it automatically runs the driver's license information of the first registered owner. Although the Grievant explained that he had owned a 1987 Chevrolet Camaro with the tag EYEROC since he was sixteen years old, the registration had been switched to his parents. The Grievant further explained that the other alleged infraction in using the VCIN system was on March 8, 2010. He stated that on that date he had the computer in his state issued vehicle replaced with the stars computer. After the installation, he understood he was to run something to confirm the computer worked with DMV and VCIN. He ran the EYEROC tag he had committed to memory. He further points out that the tag EYEROC was not registered to the vehicle that his father was driving at the time his father received the summons.

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The Virginia Department of State Police General Order ADM 11.00 sets out its Standards of Conduct. (Agency Exhibit D). The Written Notice issued on June 6, 2011 designates the type of offense as Group III. In the brief description of the offense and the evidence the following is set out:

> The employee interfered with the disposition of a traffic summons issued to his father by making arrangements to have the court date changed without consulting with the issuing officer and the employee accessed the Virginia DMV file related to his father on two occasions for personal reasons and not for official criminal justice purposes. The aforementioned actions constitute a violation of General Order ADM 12.02, paragraph 13.b.(28) that is a Group III offense which states "deviation from established procedure and the disposition of summons issued or an arrest made by any police officer." And General Order ADM 12.02, paragraph 12.b.(1) that is a Group II offense which states "failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." Both merged into the Group III offense for violations of ADM 12.02, paragraph 13.b.(28).

The Written Notice further set out at Section IV for circumstances or background information used to mitigate or to support the disciplinary action the following: "The employee knew that his intentional action to alter the outcome of the traffic summons was wrong but he chose to pursue that course of actions. He admitted he interfered with the outcome of the summons issued by a police officer of another agency."

The Grievant's Advocate, at the outset of the hearing during his opening statement represented that the Grievant's evidence would establish inconsistent application of policy, discrimination and retaliation. While the Hearing Officer is of the opinion that no such evidence was presented, the Grievant's Advocate, through the cross examination of the Grievant's First Sergeant, noted that the First Sergeant referred to the Grievant as "Trooper" rather than the Grievant's actual position of "Senior Trooper" and that he recommended that the Grievant be demoted to position of dispatcher which is not a "sworn" position. The Grievant's Advocate suggested that the First Sergeant's decision to "write up" the Grievant was in retaliation for the Grievant complaining about the First Sergeant distributing religious material during the course of their employment. The First Sergeant denied any ill will towards the Grievant and testified that his recommendations regarding demotion were actually to protect the Grievant's family from having to move to another area, noting that the Grievant's spouse was also an employee of the Agency.

The Grievant's Advocate in cross examining the Sergeant who conducted the internal affairs investigation asked the Sergeant if he was allowed to lie to the Trooper during the investigation as part of his investigative techniques. The Sergeant responded that he has never lied to a subject during investigation as part of an investigative technique. The Grievant's Advocate also asked the Sergeant how many cases similar to the Grievant's case had he investigated. The Sergeant responded that in his eighteen years of conducting investigations that charges similar to those against the Grievant are "not uncommon."

Agency Exhibit K set out four summaries of internal investigations of offenses similar to that alleged to have been committed by the Grievant and the disposition in those investigations. The first page summarized an offense which occurred on December 19, 2006 with the offense being described as "interfere with other police officer." The incident summary stated that a subject was being arrested for felony larceny by a Trooper when another Trooper arrived at the scene in civilian clothes, in his personal vehicle and made statements at the scene that caused concern on the part of the arresting officer. The only disposition cited was that the Trooper "resigned or retired." Page two summarized an offense which occurred on December 27, 2007 where the Trooper "interfered with a DUI investigation that was being conducted by the Culpeper County Sheriff's Office." The disposition was Written Notice III, thirty day suspension, transferred. The third page was a summary of the alleged facts of the current Grievance. The fourth page summarized an offense which occurred on July 7, 2011 where an officer stopped a trooper's wife for speeding and issued her a summons. The officer alleged that the Trooper advised her that she needed to void the summons because "That's what we do." The summary of actions taken were: Written Notice I, mitigation.

DECISION

The disciplinary action of the Agency is modified. The Hearing Officer does not find that the Agency proved that Grievant's alleged access of the Virginia DMV system violated any established policies or procedures of the Agency or the Standards of Conduct. The Hearing Officer does find that the Grievant interfered with the disposition of a traffic summons which constituted a Group III offense as alleged. The evidence indicated that mitigation was considered with the Group III Written Notice not including any suspension, demotion or other additional discipline.

The Agency action of Group III Written Notice is upheld.[1]

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."[2] 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.[3]

I. Insufficient Time to Present Case/Request to Reopen the Hearing

The grievant seems to assert that he did not have adequate time to present his case at hearing. The hearing officer has the authority to determine the amount of time necessary to accomplish the full and fair presentation of the evidence. His or her determination will be reversed by this Department on administrative review only upon a showing of abuse of discretion by the hearing officer. EDR Ruling No. 2009-2335 is instructive. In that ruling, the grievant alleged that the hearing officer improperly curtailed his hearing, which lasted just over 6 hours and 17 minutes. The grievant in that case asserted that he was prevented from adequately presenting his case. In that decision we held:

> We fully acknowledge that a hearing officer's task of keeping the hearing moving at an appropriate pace is a difficult task. A hearing officer may be subject to criticism for exhibiting patience with a party who may not be presenting his or her case in the most concise manner. Yet, when he admonishes a party to keep focused, avoid repetition, and so on, he may be charged, as is the case here, with not allowing sufficient time to present the case. In addition, while the *Rules* state that: "[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours," the *Rules* also state the

[1] Hearing Decision in Case Nos. 9728 ("Hearing Decision"), issued February 1, 2012, at 3-7.
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).

> "hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides." Thus, the general one day/8 hour standard is not to be applied in a rigid, absolute manner. Finally, there is no express *Rules* requirement that a hearing officer inform the parties of time constraints that will be imposed upon the parties, although it would be a sound practice for any hearing officer to adopt.[4]

Here, the hearing officer apparently gave the parties fair notice of his expectations regarding the time necessary to present their respective cases. This Department reviewed the entire hearing recording and believes that the grievant had sufficient time to present his case. The issues and facts of this case do not appear to be inordinately complex. The hearing officer found that the grievant admitted to violating policy when he became involved in his father's case. Record evidence supports this finding.[5] Moreover, the grievant was allowed to pursue his theories of retaliation and discrimination at hearing. The grievant was allowed to question at some length the Lt. Colonel regarding how the agency had treated similarly situated employees, and, the hearing officer—having overruled an agency objection—allowed the grievant to pursue, for example, a line of questioning regarding "professional courtesy" and the issuance of traffic tickets.[6] In addition, the grievant was allowed—again, over the objection of the agency—to question the First Sergeant about the grievant's theory that he was disciplined in retaliation for having made statements regarding the distribution of religious materials in the workplace.[7] If more time had been necessary for "a full and fair presentation of the evidence by both sides," then the hearing officer would have been obligated to provide additional time. However, based on the totality of the evidence, this Department finds no error regarding the timeframe afforded to the grievant to present his case.[8]

II. Excluded Evidence

The grievant asserts that the hearing officer erred by not admitting three documents. The first document was a memorandum dated February 16, 2005, from the grievant's representative to a Captain. The second was a response to the February 16, 2005 memorandum from the Captain, dated February 17, 2005. The third document was a motion containing proposed stipulations to which the agency had objections.

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[4] EDR Ruling No. 2009-2335, at 7 (footnotes omitted).
[5] Tape 1, Side B, Tape 2, Side A.
6 Tape 3, Side A.
[7] Tape 1, Side B.
[8] The reasons advanced by the grievant for seeking additional time appear to be twofold. First, the grievant asserts that certain testimony came out at hearing that the grievant could not have anticipated. However, even if this were the case—that unanticipated testimony was provided—the grievant had at least three options and could have elected any or all of them. First, the grievant could have cross-examined the witness on the matter. Secondly, the grievant could have asked for a brief recess to see whether any necessary rebuttal witness could be located to testify by phone or in person. Finally, the grievant himself could have testified. The grievant did not appear to exercise any of these options but instead seeks to reopen the hearing. The time to challenge any testimony was at hearing, not after the hearing concluded. The second reason advanced for reopening the hearing is to allow the grievant an opportunity to explore three documents that were not admitted into evidence. These documents are discussed in the following section and because this Department finds no error by not admitting them, a reopening is not required or appropriate.

As to the February 16, 2005 memorandum and the Captain's February 17, 2005 response, the hearing officer declined to admit these documents finding that they were irrelevant. We cannot conclude that, under the circumstances in which the grievant attempted to introduce these documents, the hearing officer erred by not admitting them. In the alternative, any such error would not appear to be reversible error requiring a remand. The grievant attempted to introduce them while questioning a First Sergeant. The hearing officer ruled that he would allow the grievant to question the First Sergeant about his knowledge of the memorandum. (The First Sergeant was not copied on the memorandum but another First Sergeant was.) Moreover, the grievant never called the Captain to whom the February 16th memorandum was directed as a witness. He did, however, call the Lt. Colonel, who was copied on the Captain's February 17th response, and the grievant questioned him at some length at hearing about discipline imposed regarding similarly situated employees. Based on this Department's review of both the opportunity to question the Lt. Colonel and the hearing as a whole, we cannot conclude that the grievant was not afforded sufficient opportunity to explore any deviations from policy and related inconsistencies in discipline for the same.

The final document appears to be an undated brief/motion that, in part, stipulated that the "conversation with the Assistant Commonwealth's Attorney regarding the summons issued to his father was improper and a violation of a Virginia State Police General Order," and which argued that the agency's discipline was "not consistent with law, policy, and precedent, and is tainted with unlawful discrimination and retaliation." Such a document is not evidence but is properly viewed essentially as a brief which advanced several stipulations and arguments. Hearing officers have the authority to accept such briefs but they are not required to accept them, particularly as evidence.

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.[9] 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.[10] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[11]

Claudia T. Farr
Director

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