Issue: Administrative Review of Hearing Officer's Decision in Case No. 9745; Ruling Date: May 11, 2012; Ruling No. 2012-3290; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3290
May 11, 2012

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 9745. For the reasons set forth below, the decision is remanded for further clarification.

FACTS

The pertinent procedural and substantive facts of this case, as set forth in the hearing decision in Case No. 9745, are as follows:

> 1. Grievant was given a Group II Written Notice for sharing disciplinary information that should "in no way" have been discussed with staff under her supervision and/or others. She also alleged that a particular security supervisor was behind the discipline, thus not supporting the administrative decision but passing blame to one particular employee.
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> 2. Grievant was not permitted to know who made the charges against her.
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> 3. Three employees, including a security supervisor, refused to testify at the hearing, thereby preventing the right of confrontation. Written statements from the three were presented at the hearing.
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> 4. Two security officers said they refused to testify "because they wanted to keep their jobs". This appears to be because of intimidation by a state supervisor.
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> 5. Grievant did not initiate the conversations in question. She was asked why she was upset. She replied that she had learned that two correction officers had been suspended without pay for two weeks for abuse of an inmate. She replied that she and another nurse had thoroughly examined and found no signs of physical abuse to the inmate in question.

6. Grievant's remarks were compassionate because one of the suspended parties had a wife and children who would suffer from the suspension with lack of pay which Grievant believed was unwarranted because she and another nurse examined the inmate in question and found no signs of physical abuse.

7. The security supervisor to whom Grievant had attributed the suspensions appeared at the hearing and belligerently refused to testify in this proceeding.

8. Grievant did not initiate the conversations complained of.

9. Grievant had one other Group II Written Notice within a year from the subject one.

10. From the written statement of the security supervisor without saying what was false in Grievant's accounts, he took umbrage to her comments.

11. Grievant heard a "source" saying the two officers had been given "time on the street". She replied compassionately. When question [sic] about this in the nurse's station, she did not initiate discussion of the matter.

12. From his statement, the security supervisor was intolerant of Grievant's opinion as a nurse who examined the inmate, thus not recognizing her right of freedom of speech after the topic came to her attention.

13. In contrast to the Warden's testimony on the same subject, the security supervisor's written statement, his refusal to testify and his demeanor toward the Grievant and this Hearing Officer, reflect hostility toward the Grievant and a hostile work environment for anyone who expresses an opinion contrary to the security supervisor.

14. The Grievant presented credible evidence.

15. Grievant had a property interest in her job and was denied due process.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

> The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)], and Department of Corrections Procedure 101.5, dated October 1, 2010, as amended.
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> Grievant's due process rights were denied by being denied information as to who complained of her activities. She further did not get to confront and to cross examine her regular supervisor. [Frank I Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services, 705 F2d 557, 4th Cir 1983]
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> **DECISION**
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> From the testimony and exhibits presented the Group II with demotion appears to be to [sic] severe. Upholding the actions of the agency after my observation at the hearing would further create a hostile work environment. The Grievant did not initiate the conversations complained of. She replied to questions about the discipline of two correction officers in a compassionate manner. The matter was already being discussed in the break room by staff.
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> Because of the due process violation, I find the Grievant to be credible in her assertions and hold the Group II with demotion to be excessive. My observation of hostility by the security supervisor both in his written statement and appearance show violation of Grievant's constitutional rights refusing to answer questions. From the evidence and appearance of staff at the hearing the Group II with demotion is not warranted or valid, and it is ORDERED removed from Grievant's file and Grievant shall be reinstated in her old job level with all benefits and salary commiserate [sic] with that position, and reimbursed for any salary or benefits lost.[1]

The agency requested that this Department administratively review the hearing decision on a number of bases which are discussed below.

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]

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[1] Decision of Hearing Officer, Case No. 9745, Feb. 7, 2012 ("Hearing Decision"), at 1-3.
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).

I. Findings of Fact/Lack of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[5] 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.[6] 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.[7]

Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Here, the agency has challenged the hearing officer's findings of fact regarding witness intimidation and asserts that "[n]o evidence was presented by anyone that employees were being intimidated by a state supervisor."

Having reviewed that entire hearing recording, this Department could not identify any evidence in the hearing record that suggested intimidation by a supervisor. The hearing officer held that "[t]hree employees, including a security supervisor, refused to testify at the hearing, thereby preventing the right of confrontation," and that "[t]wo security officers said they refused to testify 'because they wanted to keep their jobs.'"[8] It is possible that such evidence may have been overlooked during this Department's review of the hearing recording, but it could not be located. Accordingly, the decision is remanded to the hearing officer to identify where in the hearing record this evidence—"[t]wo security officers said they refused to testify "because they wanted to keep their jobs"—is found.[9]

II. Due Process Violations

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[10] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[11] However, the due process concerns raised by the agency with this Department are somewhat intertwined with factual findings (or their apparent

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[4] Va. Code § 2.2-3005.1(C).
[5] *Grievance Procedure Manual* § 5.9.
[6] *Rules for Conducting Grievance Hearings* § VI(B).
[7] *Grievance Procedure Manual* § 5.8.
[8] Hearing Decision at 1.
[9] The agency challenged nearly every finding of fact in the hearing decision. Except for Findings No. 3 and 4 which are discussed in this section, and Findings No. 12 and 15 which are discussed in subsequent sections, this Department cannot conclude that the remaining challenged findings are unsupported by record evidence.
[10] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988).
[11] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

absence as described above). Thus, because the matter has been remanded to the hearing officer to explain the factual basis for his finding on witness intimidation, this Department finds it appropriate to address the due process concerns that the agency has raised with this Department in an effort to provide guidance to the hearing officer as he reconsiders and clarifies his original hearing decision. This information is intended for general guidance only; the determination of whether the decision conforms to law is for the circuit court.

Due process in the context of state workplace discipline consists of two components: pre-disciplinary due process and post-disciplinary due process. In Cleveland Board of Education v. Loudermill,[12] the United States Supreme Court explained that prior to certain disciplinary actions, the federal Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[13] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[14]

Post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[15] The grievance statutes provide these basic post-disciplinary procedural safeguards through the establishment of an administrative hearing process.[16] In this case, the hearing officer appears to have focused on post-disciplinary due process, concerns which are addressed below.

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[12] 470 U.S. 532 (1985).

[13] *Id.* at 545-46. State policy requires:

> Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Department of Human Resource Management (DHRM) Policy 1.60. Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence." *Id.*, Written Notice Form Attachment.

[14] Loudermill, 470 U.S. at 545-46.

[15] Reeves v. Thigpen, 879 F. Supp. 1153, 1174 (M.D. Ala. 1995); s*ee also* Garraghty v. Commonwealth of Virginia, Dep't of Corrs., 52 F.3d 1274, 1284 (4th Cir. 1995) (holding that "'[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'") Detweiler v. Va. Dep't of Rehab. Servs., 705 F.2d 557, 559-61 (finding that due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

[16] *See, e.g.,* Va. Code § 2.2-3004(F) (providing that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined). In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance*

1. Right to Know Accuser

The hearing officer's decision appears to be based, at least in part, on his finding that the grievant "was not permitted to know who made the charges against her." The agency asserts that the "person who made the complaint did not want to be identified for fear of retaliation by Grievant."

Often the identity of an individual who brings a concern to the attention of management is critical. If an agency refuses to identify the individual who reports alleged wrongdoing, the accused is effectively denied the right of confrontation (discussed below) which could rise to the level of a due process violation. However, the identity of a person reporting wrongdoing is not always critical or even relevant in every case. If, for example, an employee admits to misconduct and does not challenge that motivation of the observer/reporter of the misconduct but instead challenges only the agency's consistency in discipline, it is possible that no due process violation would occur if the identity of the observer/reporter is withheld. No doubt there are other examples where testimony of the person reporting wrongdoing is not material to determining the merits of a grievance and thus nondisclosure of the person's identity would not violate due process.

In this case, the hearing officer seems to have adopted what appears to be a "per se" rule that the failure to identify the observer/reporter invariably results in a due process violation.[17] While this Department believes that such a withholding of the identity of the observer/reporter in many cases could result in a due process violation, it is not clear that such a violation occurred here. The hearing officer is directed to explain how this denial alone resulted in a due process violation here as it is not self-evident that such a violation occurred.

2. Right of Confrontation

The hearing officer's decision appears to be based, at least in part, on the finding that "[t]hree employees, including a security supervisor, refused to testify at the hearing, thereby preventing the right of confrontation."[18] The agency asserts that "[p]articipation in a grievance hearing is voluntary."

First, this Department concludes that a material witness's participation in a grievance hearing should not be viewed as a discretionary, voluntary process. It is correct that a hearing officer has no specific authority to compel testimony or to hold a witness in contempt. But an agency presumably can, in most cases, compel an employee to provide testimony in a grievance hearing just as it can require an employee to participate in an investigation.[19] This Department

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Procedure Manual §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing, respectively.

[17] This "per se" assumption is based on the absence of any discussion in the decision on how the failure to learn the identity of the observer/reporter denied the grievant of due process in this case.

[18] Hearing Decision at 1.

[19] Clearly an agency could not compel an employee to testify against him or herself in a matter that could potentially result in criminal prosecution, absent a Garrity warning. The Garrity rule comes from the United States Supreme

has held that pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.[20] Furthermore, this Department has held that in the absence of evidence of extenuating circumstances preventing the agency employee from attending the hearing, when an agency fails to require the employee to appear for the hearing, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances.[21] It makes little sense to conclude that an agency must compel the appearance of a witness but not truthful testimony at the hearing.

Moreover, due process requires the accused be granted the opportunity to question and cross-examine witnesses. When a witness who potentially has relevant and material information refuses to answer questions, a grievant is potentially denied due process.[22] The agency is in a position to prevent such a denial by instructing employees to, in good faith, participate in the process. If an agency fails to instruct witnesses to participate in the grievance hearing process we hold that a hearing officer has the authority to draw an adverse inference against an agency on any factual basis that could have been addressed by the absentee witness.

In this case, the agency put on no evidence to show that it instructed its employees to participate in the hearing but to the contrary stated at hearing, as it did in the request for administrative review, that witnesses have no obligation to testify. This Department believes that the agency's assertion is inconsistent with the grievance procedure (and likely the principles of due process) in that the grievance process is rendered ineffective if witnesses do not participate in the hearing. We acknowledge that the foregoing holding regarding the expectation that agencies instruct their employees to participate in the grievance process has not been expressly articulated to date, although we believe such a position can be reasonably inferred from the long-standing requirement that agencies make witnesses available at hearing. Because this holding has not been expressly stated to date, however, this Department believes that the following instruction is appropriate:

(i) The grievant will provide the hearing officer with a description of how any witnesses who did not appear or fully participate in the hearing have relevant and material information relating to the grievance.
(ii) If any witnesses have relevant and material information, then the agency shall be given the opportunity to present those witnesses at a reopened hearing.

Court case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). It is essentially the right of a governmental employee to be free from compulsory self-incrimination. The basic thrust of the Garrity Rule is that an employee may be compelled to give statements under threat of discipline or discharge, but those statements may not be used in the criminal prosecution of the individual.

[20] *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

[21] *Rules for Conducting Grievance Hearings* § V(B) ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered.").

[22] *See Detweiler*, 705 F.2d at 562.

(iii) If the agency declines to make these witnesses available and to instruct them to testify truthfully in a re-opened hearing, the grievant will be instructed to make a proffer of what that witness would have testified.
(iv) The hearing officer shall have the authority to accept such a proffer, if he deems it appropriate (given the totality of the remaining evidence), and is free to draw an adverse inference against the agency on any factual matter that could have been resolved through the absentee witnesses' testimony.
(v) The hearing officer has the authority to reopen the hearing for the limited purpose of allowing testimony by witnesses who were absent or did not fully participate in the original decision.
(vi) The hearing officer shall consider any such testimony and address its impact in his remand decision.

3. Notice of the Charges

The agency argues that the grievant disclosed "medical information of an inmate." Post-disciplinary due process also has a notice requirement similar to the Loudermill pre-disciplinary notice requirement. This notice requirement is incorporated into the *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 charge."[23] 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.[24] In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[25] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified, and thus would not come before a hearing officer.

This Department cannot conclude that the hearing officer erred by not ruling on the issue of whether the grievant disclosed "medical information of an inmate." The Written Notice describes an improper sharing of "disciplinary information." There is nothing in the Written Notice that appears to indicate that the grievant was being disciplined for the improper disclosure of "medical information of an inmate." Accordingly, this Department finds no error with the hearing decision regarding any failure to consider this uncharged offense.

III. First Amendment Rights

The hearing officer asserts that the Security Supervisor "was intolerant of Grievant's opinion as a nurse who examined the inmate, thus not recognizing her right of freedom of speech

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[23] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding 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."))
[24] *See, e.g.,* EDR Rulings No. 2006-1140; EDR Ruling No. 2004-720.
[25] *Rules for Conducting Grievance Hearings* § I.

after the topic came to her attention."[26] The agency contends that the grievant "does not have the right to speak about confidential disciplinary actions of other state employees with subordinate staff."

The law pertaining to the censuring of governmental employees based on their speech is described in United States Supreme Court case of *Garcetti v. Cabellos*. In that decision the Court explains:

> [T]wo inquiries . . . guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no *First Amendment* cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a *First Amendment* claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.
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> To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." The Court's overarching objectives, though, are evident.
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> When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.
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> At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The *First Amendment* limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.
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[26] Hearing Decision at 2.

> The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. Underlying our cases has been the premise that while the *First Amendment* invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."[27]

Here, it is unclear that the grievant's speech was a matter of public concern. The hearing decision seems to conclude that it was, but does not explain how. On remand, the hearing decision must explain how the speech was a matter of public concern and, if so, whether the agency was nevertheless justified in disciplining her for the speech.[28]

IV. Intimidation

The hearing officer held that "[t]wo security officers said they refused to testify 'because they wanted to keep their jobs,'" and that "[t]his appears to be because of intimidation by a state supervisor."[29] The agency responds that "[n]o evidence was presented by anyone that employees were being intimidated by a state supervisor." In the first section of this ruling, the issue of intimidation was addressed from an evidentiary (sufficiency of supporting evidence) perspective. However, this Department believes that intimidation must also be addressed in the context of the hearing officer's authority to take appropriate actions to ensure a fair hearing.

The *Grievance Procedure Manual* states that a hearing officer's authority derives from Va. Code § 2.2-3000 et seq., the *Rules for Conducting Grievance Hearings*, and the *Grievance Procedure Manual.*[30] Expressly granted by Va. Code is the authority to "[t]ake other actions as

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[27] Garcetti v. Ceballos, 547 U.S. 410, 418-420 (2006)(internal citations omitted).

[28] *See also* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493-94 (2011)(internal citations omitted):

> Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the *First Amendment* interest of the employee against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
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> This framework "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. "Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government." Nevertheless, a citizen who accepts public employment "must accept certain limitations on his or her freedom." The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest.

[29] Hearing Decision at 1.

[30] *Grievance Procedure Manual* § 5.7.

necessary or specified in the grievance procedure."[31] This Department would not find that a hearing officer abused his or her authority to "take other actions as necessary" by ruling in favor of a party if, for example, the hearing officer found, by a preponderance of the record evidence, actual intimidation of a potential witness by the opposing party with the intent of impairing a full and fair hearing. In the alternative, a hearing officer has the option of drawing an adverse factual inference against any party that attempts to intimidate a witness.[32]

This decision has been remanded for further explanation regarding the support for the finding that "[t]wo security officers said they refused to testify 'because they wanted to keep their jobs,'" and that "[t]his appears to be because of intimidation by a state supervisor."[33] Upon remand, the hearing officer is further instructed to determine whether any witnesses who had been subjected to intimidation were material witnesses.[34] If the witnesses were material and a finding of intimidation is supported by record evidence, then hearing officer may take whatever action is necessary, consistent with the discussion above, to rectify the intimidation.

V. Bias

The agency asserts that the hearing officer was biased, a charge which appears to stem from the hearing officer's alleged hostility toward the Security Supervisor. The EDR *Rules for Conducting Grievance Hearings* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

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[31] Va. Code § 2.2-3005(C)(7).

[32] *See Rules for Conducting Grievance Hearings* § VI (B), which states that:

> Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor. *Rules for Conducting Grievance Hearings* § V(B).

[33] For instance, such intimidation could also result in denial of due process. *See Detweiler*, 705 F.2d at 562.

[34] In a related vein, the agency asserts that "the security supervisor had no part in the disciplinary action." The hearing officer must consider whether the security supervisor was a material witness. The security supervisor's nonparticipation in the hearing is discussed in Section II of this ruling. If he was not a material witness, any nonparticipation may not have been outcome determinative. This Department recognizes that nonparticipation may make any materiality determination difficult. As a final note, the agency asserts that the hearing officer's finding that the grievant "was subjected to a hostile environment has no basis in law or fact," and that hostile environment is a "form of sexual harassment." The hearing officer does not appear to be using the term "hostile work environment" as a legal term (which, by the way, applies not just to sexual harassment, but also, for example, to racial or retaliatory harassment). Rather, it appears the hearing officer is merely commenting on what he perceives to be the deleterious effect of the security supervisor's actions (and inaction by not participating in the hearing). The overarching point here is that if an agency engages in actions intended to intimidate an employee for the purpose of depriving a full and fair hearing, the effect of any such intimidation does not have to equate to the legal term "hostile work environment" in order for the hearing officer to have authority to act. If such intimidation occurs, the hearing officer, under authority granted by the grievance statues, procedure, and rules, may take whatever action is necessary, consistent with the discussion above, to rectify the intimidation.

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[35]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[36]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.[37] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[38] We find the Court of Appeals standard instructive and hold that in compliance reviews by the EDR Director of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[39]

The agency has offered no evidence to support its charge of bias. Based on this Department's review of the hearing recording, it appeared as though the Security Supervisor was less than cooperative. Any frustration by the hearing officer based on the non-cooperation of this witness can hardly be characterized as bias.

VI. Agency's Inability to Address the Discipline Imposed on Other Employees

The agency asserts that: "[t]he security supervisor could not respond to questions concerning the disciplinary actions of his subordinates and could not defend the action taken," and that "[h]e could not testify with regard to the evidence in those cases; however, he was aware that Grievant was accusing him of inappropriate discipline." To the extent that the agency is asserting that it is never permitted to respond to questions regarding disciplinary actions taken against others, this Department disagrees. To the contrary, there are times where it is entirely appropriate and even necessary. Section VI(B)(1) of the *Rules for Conducting Grievance Hearings* provides that an example of mitigating circumstances includes "Inconsistent

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[35] *Rules for Conducting Grievance Hearings* § II.

[36] EDR Policy 2.01 at 3.

[37] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.

[38] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (finding that "[i]n the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.") Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004).

[39] *See Jackson,* 267 Va. at 229, 590 S.E.2d at 519-20.

Application" of discipline 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.[40] If the grievant has provided evidence suggesting that the agency has engaged in inconsistent discipline, the agency will want to establish that it has been consistent with the discipline of similarly situated employees in order to avoid giving the hearing officer grounds to mitigate the discipline. Thus, the agency necessarily must discuss the discipline of other employees who have engaged in like misconduct. In most cases, this can be done in a manner that does not reveal any personally identifiable information regarding other employees who are not a party to the grievance.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For the reason set forth above, we remand the decision for further clarification and consideration. Once the hearing officer issues his reconsidered decision, 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).[41] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[42]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

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Claudia T. Farr
Director

[40] *See, e.g.,* EDR Ruling Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174, *see also* Bigham v. Dep't. 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 Mgmt., 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)).
[41] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[42] *See Grievance Procedure Manual* § 7.2(a).
[43] *Grievance Procedure Manual* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).