Issue: Administrative Review of Hearing Officer's Decision in Case No. 9745; Ruling Date: June 22, 2012; Ruling No. 2012-3375; 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 2012-3375
June 22, 2012

The agency has requested that this Department administratively review the hearing officer's reconsidered 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.
>
> 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. In EDR Ruling Number 2012-3290 this Department addressed a number of issues and remanded the decision to the hearing officer for further consideration. The hearing officer issued a reconsidered opinion which is set forth below in its entirety:

> The Department of Employment Dispute Resolution, requested this Hearing Officer to reconsider and amend the decision in the above matter. The demeanor of the Security Supervisor when he appeared, he glared at the Grievant and at this Hearings Officer. His appearance and belligerent demeanor were considered significant. I believe his actions would create a hostile work environment after the hearing and it did so at the hearing.

[1] Decision of Hearing Officer, Case No. 9745, Feb. 7, 2012 ("Hearing Decision"), at 1-3.

> From the credible evidence presented, and the demeanor of the witnesses, the decision was proper. I respectfully decline to change my decision.[2]

The agency has appealed the Reconsideration Decision on several grounds. The agency attempts to reargue the facts and introduce new information and quasi-testimony (the agency advocate's characterization of the facts in the request for administrative review) to support its arguments. The agency asserts that the "security supervisor is a victim of grievant's malicious gossip and an AHO's abuse of his authority." The agency asserts that the "security supervisor believes his reputation has been damaged" and "[i]f the matter is not resolved, the security supervisor may pursue his remedies at law." Finally, the agency accuses the hearing officer of bias.

DISCUSSION

This Department will not re-hear facts. The time for presenting evidence and testimony is at hearing and it is the hearing officer who is the fact-finder, not this Department.

As to any damage of the reputation of the security supervisor and the threat of legal action, this Department notes the following. To the extent that the agency is threatening legal action against the hearing officer in an effort to affect the outcome of this matter, such a tactic is ill-advised. To the extent that the security supervisor's reputation has been damaged by the hearing officer's characterization of the security supervisor's testimony at hearing, it is this Department's belief that the supervisor's less than cooperative attitude at hearing was entirely evident. Contrary to the agency's assertion, the hearing officer was well within the scope of his authority in trying to assign a motive to the security supervisor's actions. Finally, hearing officers acting in their official capacity are presumably immune from civil liability.[3]

As to the assertion of bias, this Department addressed this issue in the original administrative review. EDR Ruling Number 2012-3290 held:

> 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.

The agency has advanced no argument or provided any evidence that persuades this Department to alter its ruling on the issue of bias.

In sum, none of the reasons advanced by the agency warrant action by this Department. However, this Department is nevertheless compelled to again remand the decision for the reasons set forth below.

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[2] Reconsideration Decision of Hearing Officer, issued June 6, 2012 ("Reconsideration Decision").

[3] Harlow v. Clatterbuck, 230 Va. 490, 493 339 S.E. 2d 181, 184 (1986) (finding quasi-judicial immunity extends to public officials acting within their jurisdiction, in good faith and while performing judicial functions).

In EDR Ruling Number 2012-3290, one of the grounds for remanding the decision was for further clarification of the grounds in the record for the findings regarding intimidation. The agency had challenged the hearing officer's findings of fact regarding witness intimidation and asserted that "[n]o evidence was presented by anyone that employees were being intimidated by a state supervisor." The hearing officer had 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.'" When this Department could find no evidence in the record to support the finding that the two security officers had made such a statement, it remanded the decision 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. The hearing officer did not identify where this evidence is found. The decision is hereby remanded again with the direction to identify where such evidence is found.

In addition, EDR Ruling Number 2012-3290 held that upon remand, the hearing officer is further instructed to determine whether any witnesses who had been subjected to intimidation were material witnesses. The Ruling held that if the witnesses were material and a finding of intimidation is supported by record evidence, then the hearing officer may take whatever action is necessary, consistent with the discussion above, to rectify the intimidation. The hearing officer does not appear to have addressed the issue of whether any witnesses who may have been subjected to intimidation were material. The hearing officer must do so in his next reconsidered decision.

EDR Ruling Number 2012-3290, noted that the hearing officer seems to have adopted what appears to be a "per se" rule that the failure to identify the observer/reporter of misconduct invariably results in a due process violation. The Ruling went on to observe that 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 by denying the accused the right to face her accuser, it is not clear that such a violation occurred in this case. Accordingly, the hearing officer was directed to explain how the failure to identify alone resulted in a due process violation in this case. The hearing officer has not provided an explanation. Thus, the decision is remanded for that clarification.

In EDR Ruling Number 2012-3290, this Department discussed due process and the requirement that the accused be granted the opportunity to question and cross-examine witnesses. Accordingly, this Department issued the following instruction:

> (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.
> (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.

The hearing officer does not appear to have required the grievant to 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. Again, the decision is being remanded to the hearing officer to follow the above six point instruction.

Finally, the EDR Ruling 2012-3290 held that it was unclear that the grievant's speech was a matter of public concern. The Ruling held that the hearing decision seems to conclude that it was, but does not explain how. Accordingly, the decision was remanded for the hearing officer to 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. The hearing officer did not so explain in his reconsidered decision. He is instructed again to do so.

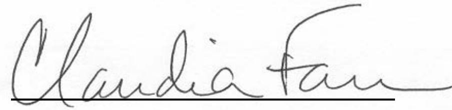
CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For the reason set forth above, we remand, again, the decision for clarification and consideration. The hearing officer is directed to follow the instructions provided in EDR Ruling No. 2012-3290 and reiterated in this ruling. 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).[4] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[5]

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.[6] 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.[7]

[4] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[5] *See Grievance Procedure Manual* § 7.2(a).
[6] *Grievance Procedure Manual* § 7.2(d).
[7] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[8]



Claudia T. Farr
Director

[8] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).