Issue: Administrative Review of Case #8234, 8236, 8241; Ruling Date: May 8, 2006; Ruling #2006-1274, 2006-1275, 2006-1276, 2006-1277; Agency: Virginia Information Technologies Agency; Outcome: hearing officer directed to reconsider decision

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of the Virginia Information Technologies Agency
Ruling Numbers 2006-1274, 1275, 1276, 1277
May 8, 2006

Grievant K has requested that this Department administratively review the hearing officer's decision in Case Number 8234. The Virginia Information Technologies Agency (VITA or the agency) has also requested an administrative review of that decision, as well as his decision in Case Numbers 8236 and 8241.

FACTS

Grievants K, H, and F are each employed by the agency as an Information Specialist III.[1] Prior to September 2004, the grievants worked for the Department of Corrections.[2] On September 15, 2005, Grievant K received Group II Written Notices for alleged inappropriate and unacceptable use of the Internet and e-mail and abuse of state time and resources; Grievant H received a Group II Written Notice for alleged inappropriate and unacceptable use of the Internet and e-mail; and Grievant K received a Group III Written Notice for "the installation, storage, exchange, receipt, sending and distribution of material containing sexually explicit content" and inappropriate and unacceptable use of the Internet and e-mail. The grievants grieved the disciplinary actions.[3] After the parties failed to resolve the grievances during the management resolution steps, the grievances were qualified for hearing. At the grievants' request, this Department subsequently consolidated the grievances for hearing.

The consolidated hearing was held on January 20, 2006, and a written decision was issued on January 26, 2006.[4] In his decision, the hearing officer concluded that the agency lacked jurisdiction to take disciplinary action against Grievants H and F, as the conduct for which they were disciplined occurred while they were employed by DOC.[5] The hearing officer upheld the discipline against Grievant K.[6]

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[1] Hearing Decision at 2, 3.
[2] *Id.*
[3] *Id.* at 1.
[4] *Id.* at 1.
[5] *Id.* at 4.
[6] *Id.* at 6.

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."[7] 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.[8]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.

In this case, Grievant K argues that the hearing officer improperly failed to mitigate the discipline against her. The agency asserts that the hearing officer erred in finding that it did not have jurisdiction to discipline the grievants for conduct occurring while they were employed by DOC. Each of these arguments is addressed below.

Failure to Mitigate

Under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was "warranted and appropriate under the circumstances."[11] Where the hearing officer finds that mitigating circumstances justifying a reduction or removal of the grieved disciplinary action exist, he must then consider whether there are also aggravating circumstances which would "overcome the mitigating circumstances."[12] A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness.[13] Moreover, this Department will find that a hearing officer failed to comply with the grievance procedure with respect to mitigation of disciplinary action only where the hearing officer's action constituted an abuse of discretion.

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[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3005.1(C)(ii).
[10] *Grievance Procedure Manual* § 5.9.
[11] *See Rules for Conducting Grievance Hearings*, § VI.B.
[12] *Id.*
[13] *Id.*

In this case, the hearing officer found that "no mitigating circumstances exist to reduce the disciplinary action" against Grievant K.[14] The grievant asserts that the hearing officer has ignored evidence of inconsistent discipline introduced at hearing. Specifically, she alleges that evidence was introduced showing that another employee, Mr. W., sent an e-mail containing the words "fuck," "fucking", "and "liberal pussies," but that this employee was only counseled for his action.[15] She also points to evidence that the supervisor to whom Grievants K, H, and F reported only received a verbal counseling, despite his failure to discipline the grievants,[16] and that the manager issuing the written notices to the grievants himself had used the word "fuck" in the workplace, without receiving any discipline.[17] In addition, the grievant questions the hearing officer's failure to draw an adverse inference against the agency because it purportedly failed to comply with the hearing officer's order to produce the written counseling given to Mr. W.[18]

The *Rules for Conducting Grievance Hearings* expressly provide that the inconsistent application of a policy is a circumstance warranting mitigation.[19] Because the hearing decision does not mention any of the evidence cited by Grievant K, it is unclear whether the hearing officer considered this evidence and determined that it was insufficient to warrant mitigation (and if so, the reasons for that determination), or whether the hearing officer failed to consider the evidence identified by Grievant K. Accordingly, the hearing officer is directed to reconsider and clarify his decision regarding mitigation.

Reconsideration will also allow the hearing officer to address the record evidence regarding Mr. W's alleged conduct. The manager who issued the Written Notices to the grievants stated at hearing that the e-mail at issue was found in Mr. W's e-mail "box," but that Mr. W did not send it.[20] The agency, however, produced the e-mail in response to an order directing the agency to produce "[a] copy of the image containing the word 'fuck' and the word 'Iraq'" "*sent by*" Mr. W (emphasis added), arguably consistent with the position that Mr. W did in fact send the document in question. Because the agency redacted one or more names from the e-mail prior to producing it to the grievants (although other names were left unredacted), it is difficult to determine who sent or forwarded the document. If the language redacted was the name of Mr. W, it would appear that Mr. W sent or forwarded the image at issue, and thus engaged in conduct arguably comparable or even more unprofessional than that for which Grievant K was disciplined.

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[14] Hearing Decision at 6.
[15] *See* Grievant's Exhibit 7; Hearing Tape 2 at Side 3, Counter Number 382 (manager who issued the Written Notices to the grievants stated that Mr. W received a written counseling).
[16] Hearing Tape 2 at Side 4, Counter Numbers 1137-1140
[17] Hearing Tape 2 at Side 4, Counter Numbers 497-514.
[18] The hearing officer's order directed the agency to produce "[a] copy of the written document that describes the corrective action taken in September of 2005 for the agency . . . against . . . [Mr. W] for violating Policy 1.75 of the Policies and Procedure Manual of DHRM."
[19] *Rules for Conducting Grievance Hearings* at VI.B.1.
[20] *See* Hearing Tape 2, Side 3, at Counter Numbers 367-69, 389-94, 400-405. However, at the beginning of his testimony regarding the image in question, the same manager testified that he did not recall where the picture had been found. Hearing Tape 2, Side 3, at Counter Numbers 559-64.

Had the agency produced the written counseling apparently given to Mr. W, or had it not inappropriately redacted employee names from the email, this ambiguity would likely not exist. As the hearing officer was made aware of the agency's conduct at the hearing, the better course of action would have been for the hearing officer to address these issues during the hearing itself. However, the grievant should not be penalized by the agency's conduct. On reconsideration, the hearing officer may draw an adverse inference against the agency for failing to comply with his order; for example, he may assume that the redacted text was Mr. W's name. In the alternative, the hearing officer may re-open the hearing for the sole purpose of directing the agency to produce the written counseling issued to Mr. W and an unredacted copy of the e-mail thread introduced into evidence as Grievant's Exhibit 7.

Jurisdiction to Discipline for Conduct

The agency also asserts that the hearing officer erred in concluding that it could not discipline the grievants for their conduct while they were employees of another state agency. The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address, however. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[21] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

In this case, the agency has already appealed to the DHRM Director for an administrative review of the hearing officer's decision. In the event DHRM concludes that the hearing officer's interpretation of policy was in error, the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.[22] If the DHRM Director directs the hearing officer to reconsider his decision, the hearing officer is reminded that under the grievance procedure, in determining whether the disciplinary action was warranted and appropriate under the circumstances, he must consider (1) whether the behavior constituted misconduct at the time it occurred and under the policies then in effect and (2) whether the grievants had adequate notice—at the time the alleged misconduct occurred—of the policies under which they are charged with misconduct.[23]

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.[24] Within 30 calendar days of a final hearing

[21] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[22] *See* Grievance Procedure Manual, § 7.2(a)(2).
[23] *Id.* at § 5.9; *see also Rules for Conducting Grievance Hearings* § VI(B).
[24] *Grievance Procedure Manual*, § 7.2(d).

decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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Claudia T. Farr
Director

[25] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).
[26] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).