Issue: Administrative Review of Case #8186-R/hearing decision; Ruling Date: August 11, 2006; Ruling #2006-1348; Agency: Department of Corrections; Outcome: hearing officer exceeded his discretion; ordered to modify reconsideration decision in accordance with the provisions set in ruling.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1348
August 11, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8186-R. The grievant claims that the hearing officer erred and/or abused his discretion by allowing the Department of Corrections (DOC or the agency) to call witnesses and present evidence which was not exchanged prior to hearing.

FACTS

The grievant was employed as a Corrections Officer Senior with DOC.[1] On June 30, 2005, the grievant was issued a Group II Written Notice with removal for violating "the Department's call-in policy for the second time in less than 60 days."[2] Because the grievant also had an active Group III Written Notice, the agency terminated her employment.[3] The grievant challenged the agency's action by initiating a grievance.[4]

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.[5] A hearing was held on October 21, 2005.[6] In his decision dated October 25, 2005, the hearing officer found that the Group II Written Notice was unwarranted, as the grievant had complied with agency policy and the agency had not shown that she had failed to follow a supervisor's instruction.[7] However, the hearing officer concluded that the grievant's conduct constituted inadequate or unsatisfactory job performance and reduced the Group II Written Notice to a Group I.[8] Because the Group I Written Notice, together with the grievant's active Group III Notice was sufficient to warrant termination, the hearing officer upheld the agency's decision to remove the grievant from employment.[9] The grievant subsequently requested an administrative review of the hearing

[1] *See* Reconsideration Decision of Hearing Officer, Case No. 8186-R, issued April 24, 2006.
[2] *See* Decision of Hearing Officer, Case No. 8186, issued October 25, 2005.
[3] *Id.* at 2-3.
[4] *Id.* at 3.
[5] *Id.*
[6] *Id.* at 2.
[7] *Id.* at 5-6.
[8] *Id.*
[9] *Id.*

officer's October 25, 2005 decision from this Department as well as the Department of Human Resource Management (DHRM).[10]

In a December 28, 2005 ruling, this Department ordered the hearing officer to: (1) "reconsider his hearing decision to clarify in his decision the basis for his conclusion that the grievant's conduct constituted inadequate or unsatisfactory performance;"[11] (2) "address whether the agency's discipline was consistent with state and agency leave policies" and in particular, the Family and Medical Leave Act (FMLA), and to "reopen the hearing as necessary to take appropriate evidence from the parties" to address the FMLA issue;[12] and (3) "if the hearing officer determines on reconsideration that the agency has shown by a preponderance of the evidence that the grievant engaged in the misconduct and that the discipline issued comports with law and policy, the hearing officer is ordered to reconsider the issue of mitigation and to state in his decision the specific grounds for his determination."[13]

The hearing officer determined that it was necessary to reopen the hearing in light of this Department's December 28th ruling and as such, on January 10, 2006, he ordered the parties to exchange witness lists and copies of all proposed exhibits on or before February 9, 2006 in anticipation of a February 15, 2006 reopened grievance hearing. At hearing, the grievant's representative objected to the hearing officer's admission of agency evidence, in light of the agency's failure to exchange documents and/or witness lists in accordance with the hearing officer's January 10th pre-hearing order.

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."[14] 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.[15]

Grievant's Rights to Administrative Review

In his reconsideration decision, the hearing officer appears to conclude that his decision is a final hearing decision with no further possibility of administrative review and instructs the grievant that her only appeal rights are through the circuit court in the jurisdiction in which the grievance arose.[16] Conversely, the grievant believes that she can request an administrative review of the hearing officer's reconsideration decision from this Department.

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[10] DHRM declined to consider the grievant's appeal to that Department because the grievant failed to identify a policy with which the hearing decision was inconsistent.
[11] EDR Ruling # 2006-1188, p. 5.
[12] *Id.*at p. 5.
[13] *Id.*at p.6.
[14] Va. Code § 2.2-1001(2), (3), and (5).
[15] *See Grievance Procedure Manual* § 6.4(3).
[16] *See* Reconsideration of Hearing Officer, Case Number 8186-R, issued April 24, 2006.

Therefore, as an initial matter, this Department must address whether the grievant has appropriately requested an administrative review from this Department.

Section 7.2(d) of the *Grievance Procedure Manual* states that a "hearing officer's original decision becomes a final hearing decision with no further possibility of administrative review, when . . . all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision." In accordance with this provision, this Department has previously held, in cases where hearings had not been reopened, that the plain language of the *Grievance Procedure Manual* precludes the issuance of multiple administrative review rulings by the DHRM and EDR Directors.[17] That rule still holds in cases where hearings had not been reopened.

This case, however, is materially different, in that the hearing was reopened, the parties were allowed to present additional testimony, and evidence was admitted that had not been submitted at the first hearing. In such a case, equity dictates that the parties be allowed to request an administrative review challenging the hearing officer's actions, as well as the resulting decision, with respect to the new evidence at the re-hearing. Accordingly, this Department will address the arguments presented in the grievant's May 3, 2006 request for administrative review, as they relate to the new evidence.

Grievant's Objections to Admission of Evidence at Re-hearing

In this case, the grievant argues that the hearing officer failed to comply with the grievance procedure when he allowed the agency to call witnesses and present evidence that were not identified or exchanged prior to the reopened hearing. In particular, the grievant's supervisor, Lieutenant B, who did not testify at the first hearing, testified for the agency at the reopened hearing that she gave the grievant a specific instruction to call and speak with her directly if the grievant were unable to come to work on a particular day.[18] Officer H, the officer who spoke to the grievant when she called to alert the facility that she would not be at work due to illness, and who also did not testify at the first hearing, also testified for the agency at the reopened hearing.[19] Based upon the testimony of these new witnesses, the hearing officer concluded in his reconsideration decision that the grievant had failed to follow her supervisor's instruction and reinstated the Group II Written Notice that had been reduced to a Group I Written Notice in the previous hearing decision.[20]

This Department's December 28th ruling clearly authorized a reopening of the hearing for the sole purpose of taking any needed evidence on the FMLA issue;[21] the other issues to

[17] EDR Rulings Nos. 2004-859 and 2006-1273.
[18] *See* Reconsideration Decision of Hearing Officer, Case No. 8186-R, issued April 24, 2006.
[19] *Id.* at 2.
[20] *Id.* at 3-4.
[21] This Department has previously held that a "hearing officer's authority to reopen a hearing is not without limitation. In particular, where a hearing officer has not previously excluded evidence in error, allowing parties to submit additional evidence on reconsideration would generally be inappropriate." *See* EDR Ruling #2006-1202. Cf. United States v. Bell, 5 F.3d. 64 (4th Cir. 1993) "[A] lower court generally is 'bound to carry the mandate of the upper court into execution and [may] not consider the questions which the mandate laid at rest'."

be reconsidered and clarified (i.e., the basis for the hearing officer's conclusion that the grievant's conduct constituted inadequate or unsatisfactory performance and whether mitigation would be appropriate) were to be decided based upon the record evidence from the first hearing and any evidence regarding the FMLA issue presented at a reopened hearing. The purpose of this Department's December 28th ruling was not to give the agency a second chance to prove that the grievant had failed to follow her supervisor's instruction. As such, any evidence presented at the reopened hearing that was not determinative of the specified FMLA issue, including but not limited to Lieutenant B's testimony regarding her previous instructions to the grievant, as well as Officer H's testimony regarding her conversation with the grievant on June 13, 2005, was outside the scope of the hearing officer's authority to admit pursuant to EDR's December 28th ruling. Thus, the hearing officer exceeded his discretion by allowing the introduction of this evidence at the reopened hearing.

Accordingly, the hearing officer is ordered to modify his reconsideration decision in accordance with the provisions set forth above.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to modify his decision in accordance with this ruling. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and if ordered by EDR or DHRM, the hearing officer issues a revised decision.[22] 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable.[25]

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Claudia T. Farr
Director

Bell at 66 citing to Sprague v. Ticonic National Bank, 307 U.S. 161, 168, 83 L.Ed. 1184, 59 S.Ct. 777 (1939). The trial court retains discretion to reopen matters laid to rest only in certain "extraordinary circumstances," namely, upon a showing "(1) ... that controlling legal authority has changed dramatically; (2) that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in a serious injustice." Bell at 67 citing to United States v. Bell, 988 F.2d 247, 250-251 (1st Cir. 1993). *See also* United States v. Cornelius, 968 F.2d 703, 706 (8th Cir. 1992)(explaining that a remand does not automatically rejuvenate the entire case).

[22] *Grievance Procedure Manual,* § 7.2(d).

[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).

[24] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

[25] Va. Code § 2.2-1001 (5).