Issues: Group III Written Notice (failure to follow policy and falsification), Group III Written Notice (security breach), and Termination; Hearing Date: 06/08/15; Decision Issued: 07/02/15; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10581; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10581
HEARING DATE: June 8, 2015
DECISION ISSUED: July 2, 2015

PROCEDURAL HISTORY

Grievant suffered an employment injury on November 3, 2014 while bring a motorcycle into Agency's facility for repair. Subsequent investigation found the vehicle did not have proper credentials to be brought to the facility. Further investigation found other alleged infractions by Grievant. There were two meetings prior to the meeting when the written notice was issued on February 24, 2015. The discipline was appealed by Grievant. A Hearing Officer was appointed on March 31, 2015. A phone conference of April 16, 2015 was rescheduled at Grievant's request to May 4, 2015. The matter was set for Hearing on June 8, 2015.

APPEARANCES

Agency advocate
Agency representative as witness
Three additional Agency witnesses
Grievant counsel
Grievant as witness

ISSUES

1) Whether Grievant violated Department Policies No. 13 and 74 and Operational Procedure 135.1 and Operational Procedure 601.6?

2) Whether Grievant's discipline was too harsh?

3) Whether Grievant's due process rights were violated by the Pre-Hearing discipline process?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

APPLICABLE LAW and POLICY

The Agency relies on its Operating Procedure 135.1 "Standards of Conduct" 601.6 "Technical Educational Programs, and Department Policies No. 13 "Failure to follow instructions and/or Policy" and No. 74 "falsify records".

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."[1]

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was an instructor at the Facility's Educational Program. Grievant had been an instructor for the Agency for 2 years and with the Agency in other employment for 6 years for a total of 8 years with the Department. Grievant had one previous discipline but no discipline in his instructor capacity.

Grievant instructed inmates in motorcycle repair. Both Agency vehicles and privately owned vehicles were repaired at the Facility Shop. In order to repair a privately owned vehicle, a form needed to be completed and approved by the School Principal. In part the form required that the private individual acknowledge repair was being done by students and acknowledge that the private individual would be required to pay for parts needed in the repair. There was also a $10.00 fee to qualify for the service.[2]

On November 3, 2014, Grievant suffered an accident when a motorcycle fell on him as he was entering the Facility with the bike. In order to review the accident, the appropriate form for the repair of the motorcycle being brought into the Facility was sought. It could not be found. This led to further investigation as to Grievant's compliance with processing proper forms before working on privately owned vehicles. The investigation revealed there were work orders for at least 3 vehicles listed in Grievant's name that were brought into the facility, a Harley Davidson XS175, in date 9-4-2013, a Honda Magna V45, in date 5-16-2014, and a Yamaha YICS four cyl., in date 4-30-2014. No record could be found of submission of the form to be signed by a private owner and signed by the school principal at the time of the work order entry. Grievant did submit a form for the Yamaha in November 2015 with the date of September 16,

[1] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.
[2] Agency Exhibit 1 and 4

2013.[3] Grievant argued he did not know filing a form after the repair had been done (that is predating the form in question) was in violation of any Rule or Operating Procedure. Grievant stated he mixed up his form with another form and was only trying to correct the record by resubmitting the correct form.

During the investigation it was noticed two vehicles were in the workshop with gasoline in their tanks.[4] Grievant had helped set the standard for how gasoline would be dealt with when brought into the facility. Empty bikes were weighed and gasoline in a container was weighed separately before coming into this facility. Only the gasoline necessary to assist in repair was used in the bikes and the remainder taken from the facility. Should any bike have gas in its tank at the end of the day the whole bike was removed from the workshop.

Grievant challenged the opinion that the substance in the tanks was gasoline. He opined it could have been water used to clean tanks which would still smell like gasoline. No witness was able to say with certainty that the liquid was gasoline.

OPINION

In total the evidence regarding the proper forms being submitted by Grievant is very confusing. No dates on the evidence presented are consistent.

Agency exhibit 6 work order shows
- Harley Davidson entered the system 9/4/13
- Honda entered the system 5/16/13
- Unknown entered the system 9/25/13
- Unknown entered they system 2/21/14
- Yamaha entered the system 4/30/14

Agency exhibit 4 and 1 Logs of forms for work being issued show
- Form# 36712 issued on 4/2/14
- Form# 36738 issued on 9/16/13

Agency exhibit 5 & 2 shows the same numbered forms were filled out
- Form# 36712 on 2/22/13
- Form# 36738 on 4/22/14

Grievant claims he had two forms number 36712 and 36738 in his possession and by mistake gave a wrong form to a private consumer. The dates on these two invoices differ by 14 months. Even if Grievant gave the earlier form to the consumer by mistake, why did he hold this earlier invoice for so many months?

[3] Agency Exhibit 1
[4] Agency Exhibit 13

It is unlike Grievant failed to submit the proper form in order to save himself the $10.00 fee. It is more likely attributed to very lax record keeping and a failure to follow policy.

Grievant claims he was not taught the importance of obtaining forms before working on private vehicles. Yet he testified he had completed other forms for other vehicles that had come into his shop. Further, the language in the form itself would indicate that it is important to be signed and approved before work on a private vehicle was commenced by the prison inmates. Grievant clearly did not submit a form, (form# 36738, dated 9/16/2013) until November of 2014. While it may not have been his intention to falsify records, it was certainly not in compliance with established Policy.

Of far more concern is the matter of gasoline left in the Facility. Gasoline being possibly available to convicted, incarnated criminals is a major breach of security. Grievant claims the vehicle tank could have contained water used to lavage the tanks which would still smell of gasoline. No person giving evidence could prove the liquid was gasoline. However, Grievant, as the instructor, oversaw all the work the inmates in his class performed. Therefore, if the liquid was, in fact, water Grievant would have been able to offer evidence as to which inmate did the washing and when the tank was washed. Grievant gave no such evidence. It is more likely than not that Grievant permitted two vehicles to have gasoline in their tanks overnight within the Facility which was an absolute and very significant breach of Policy. While failure to follow policy is normally a Group II infraction,[5] the Agency may increase the punishment considering the gravity of the circumstances. A hearing officer must give deference to an Agency's conclusion unless clearly wrong.[6]

VA. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the Rules for Conducting Grievance Hearings, "[a] hearing office must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances.

Grievant claims his due process rights were breached in the manner in which the discipline meetings were held. Grievant had 3 meetings with Agency including the meeting to issue the Written Notice. At the 2nd meeting, and 1st meeting attended by Grievant's Supervisor, Grievant was asked if he had a response to the allegations. Grievant did not respond. Grievant stated he believed he had time to consider his response and was expecting another meeting for the purpose of his response. The third and final meeting was to issue the Written Notice, not to hear Grievant's responses. Grievant alleges proper procedure was not followed.

[5] Operating Procedure 135.1 V C 2a
[6] Operating Procedure 135.1 V A 2

It is well established by Employment Dispute Ruling #2013-3572 that being afforded a full hearing before a Hearing Officer cures any pre-hearing lack of opportunity to present evidence to convince management to not issue a written notice.

The Division of Employment Dispute Resolution has ruled on pre-discipline meeting in Ruling No. 2013 - 3572

"Pre-Disciplinary Due Process Ruling No. 2013-3572

> The grievant further argues that he was denied pre-disciplinary due process protections. In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that, prior to certain disciplinary actions, the Constitution generally guarantees those with a property interest in continued employment absent cause (i) the right to oral or written notice of the charges, (ii) an explanation of the employer's evidence, and (iii) an opportunity to respond to the charges, appropriate to the nature of the case.[8] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolved 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." [9]
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> In this case, the hearing officer directly addressed the grievant's assertion that he was denied pre-disciplinary due process, stating that "[a]ny defect in due process was cured by the hearing process in which Grievant had the opportunity to know the allegations against him and present any defenses he chose during the hearing."[10] The grievant had a full hearing before an impartial decision-maker, an opportunity to present evidence, and an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker.[11] Based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. We recognize that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions. [12] However, we are persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies. [13] Accordingly, we agree with the hearing officer that, as a matter of the grievance procedure, the grievant suffered no due process violation."[7]

[7] [8]470 U.S. 532,545-46 (1985). State policy requires that Prior to the issuance of Written Notice, 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 charges, and a reasonable opportunity to respond. DHRM Policy 1.60(E)(I). In addition, the Commonwealth's Written Notice Form instructs the individual completing the form to "[b]riefly describe

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DECISION

For the above reasons I believe the Agency has appropriately issued a Group III Written Notice for the specific breach of leaving gasoline in the facility. Further, while it is almost impossible to match the date and the work orders to signed forms it is clear that protocol was not followed. There is evidence that the required forms were not timely submitted by Grievant, the owner of the vehicles in question. I find a Group III notice for failure to follow instruction in completing forms before work commences is an appropriate discipline.

For the reasons stated herein, the Agency's issuance to the Grievant of two Group III Written Notices of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to

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the offense and given an explanation of the evidence." [9] *Loudermill*, 470 U.S. at 545-46. [10] Hearing Decision Case Number 10017 pg 4. [11] See, e.g., Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-61 (4th Cir. 1983) [12] *See* Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation"). [13] See Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 436-37 (4th cir. 2002) (explaining that "to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process by the state . . . a 'due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process,'''' (quoting Fields v. Durham, 909 F.2d 94, 97-98 (4th Cir. 1990)))); Massey v. Shell, 2011 U.S. Dist. LEXIS 31715, at *24 (M.D. Ala. Mar. 24, 2011) ("[T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under § 1982 arise.") (citation omitted); *see also* Stenseth v. Greater Fort Worth & Tarrant County Community Action Agency, 673 F.2d 842, 846 (5th Cir. 1982) (stating that, although pre-termination proceedings may have been inadequate, post-termination proceedings were sufficient to cure the defect); Peterson v. Dakota County, 428 F.Supp 2d 974, 980 (Dist. Minn. 2006) ("Extensive post-termination proceedings may cure inadequate pretermination proceedings." (citations omitted)); *cf.* Koga V. Busalacchi No. 2010 U.S. Dist. LEXIS 8293, at *7 (E.D. Wis. Feb. 1, 2010) (holding that, in the context of the state's removal of commercial driver's license, an adequate post-deprivation remedy can cure any defect in process leading up to the deprivation.

review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the Hearing Officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[8]

Agencies must request and receive prior approval from EDR before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

[8] See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.