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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5521
March 29, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 11882. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11882, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [(the "agency")] employs Grievant as a Business Manager at one of its locations. Regional Administrator P described Grievant as the "hardest working person I have ever met." Grievant regularly worked between 10 and 14 hours per day.
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> In January 2020, several employees met with Regional Administrator M and complained about Grievant. The employees included Ms. S, Mr. B, Mr. W, and Ms. W. These employees were not within Regional Administrator M's chain of command.
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> Superintendent B called the Regional Administrator M to discuss Grievant's telephone conversation with an employee working for Superintendent B. Superintendent B observed his employee crying while talking on the phone with Grievant. Superintendent B initially believed the employee was being told of a death in her family because of how upset the employee was during the telephone conversation. He later learned the employee was speaking to Grievant and Grievant was berating the employee.
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> Regional Administrator M held another meeting with the employees in the spring of 2022. The employees remained upset with Grievant.

[1] Decision of Hearing Officer, Case No. 11882 ("Hearing Decision"), February 14, 2023, at 2-3.

The Agency conducted a "dialogue" where employees met with a senior manager and expressed their concerns. Following this process, the Agency investigated the allegations and concluded that it should take disciplinary action against Grievant.

Grievant supervised a Team of employees. Grievant supervised Ms. B who supervised Mr. B, Mr. W, and Ms. W.

Mr. B. Mr. B observed Grievant display a "hateful tone" towards an Information Technology employee who was providing assistance to the Unit. Mr. B believed that Grievant was a good person but felt she had "no business being anyone's boss." Mr. B described Grievant's management style as "bully and intimidation." Mr. B believed Grievant was "beyond micro-management, to the point of ultra-micro-management."

Mr. W. Vendor invoices were supposed to be paid on a timely basis upon receipt of the invoice. If a vendor sent an invoice to a Team member it could delay payment. Team members were not supposed to receive invoices from vendors. They had no control over whether vendors would send them invoices. If Mr. W received a vendor invoice, Grievant would become upset and explain to him in a coarse and abrasive way that he was not to receive invoices. This happened on several occasions.

In May 2021, Mr. W met with Grievant. She closed the door to her office and "chewed him out" for a mistake he made. She raised her voice during their conversation.

Mr. W went out of his way to avoid talking to Grievant.

Ms. W. Ms. W reported to Ms. B. Ms. W worked with Grievant and believed Grievant did not cultivate a team environment. Ms. W would attempt to avoid Grievant when she could. If Grievant entered the room, Ms. W would leave the room. Ms. W had spoken with staff of other institutions and said they should speak with Grievant. Several staff told Ms. W they did not want to speak with Grievant.

Ms. B. Ms. B reported to Grievant. Ms. B observed Grievant raise her voice to inmates. Ms. B felt that Grievant sometimes spoke to her with a belittling tone. She would sometimes "hide" in her office to avoid encountering Grievant.

On June 2, 2022, the agency issued to the grievant a Group I Written Notice for violations of agency and DHRM policies on workplace civility.[2] The grievant timely grieved this disciplinary action, and a hearing was held on January 25, 2023.[3] In a decision dated February 14, 2023, the

[2] Agency Ex. 1; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.

hearing officer determined that the agency had "presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance."[4] The hearing officer observed that, while the agency "should have provided Grievant with specific examples" of employee complaints that were the basis of the disciplinary action at the time it was issued, the agency ultimately provided such examples so that the grievant was able to present her defenses at the hearing. Moreover, the hearing officer found no basis to reduce the agency's disciplinary action to a lesser penalty.[5]

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant challenges the hearing officer's decision on grounds that (1) she did not timely receive requested documentation related to her grievance; (2) she did not have sufficient time at the hearing to present her defenses; and (3) the disciplinary action was based on a flawed investigation. The grievant argues that these problems deprived her of due process such that she was not able to effectively challenge the agency's disciplinary action.

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] 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.[11] 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.[12] Where the evidence conflicts or is subject to varying interpretations, hearing

[4] *Id.* at 4.
[5] *Id.* at 5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.

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 on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Due Process

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals 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] In pre-disciplinary contexts, the due process requirements of notice and an opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct their behavior. Rather, the pre-disciplinary process 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] Accordingly, state disciplinary policy requires that

> [p]rior to the issuance of Written Notices, [as well as 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.[15]

In addition, the *Rules for Conducting Grievance Hearings* provide that an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[16]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[17] The grievance statutes and procedure provide these basic post-disciplinary

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[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").

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

[15] DHRM Policy 1.60, *Standards of Conduct*, at 10. The Commonwealth's Written Notice form for formal disciplinary actions instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence." DHRM, *Written Notice*.

[16] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. 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.")).

[17] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The 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.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

procedural safeguards through an administrative hearing process.[18] Therefore, EDR has previously held, in accordance with many jurisdictions, that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[19]

Production of Documents

The first issue raised by the grievant in her request for administrative review is that the agency failed to produce relevant documents she requested upon the filing of her grievance, in violation of the requirements of the grievance procedure.[20] According to the grievant, she requested a lengthy list of documents on June 14, 2022. She apparently received a response on July 13, 2022, advising her that most documents were not in the respondent's control and/or were confidential. The grievant argues that, without access to these documents, she was unable to adequately present her position to the second- and third-step management respondents in the initial phase of the grievance process. She further argues that, following further requests for the documents leading up to the hearing, she did not receive them until January 21, 2023 – four days prior to the hearing.

The *Grievance Procedure Manual* provides that, "[a]bsent just cause, all documents relating to the management actions or omissions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[21] Such documents "must be provided within five workdays of receipt of the request," or within 10 workdays with written notice that the five-workday response time is not possible.[22] Failure to comply with these provisions, or any provisions of the grievance procedure, must be addressed in accordance with the noncompliance provisions of the grievance procedure.[23] Under those provisions, the party seeking compliance must notify the other party of the alleged noncompliance and allow five workdays for the other party to correct it. If noncompliance is not corrected, the party seeking compliance may request a ruling from EDR ordering correction. The grievance procedure requires expeditious resolution of compliance issues:

> All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.

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[18] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or a 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. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).
[19] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).
[20] *See Grievance Procedure Manual* § 8.2. The grievant also appears to contend that the agency's failure to produce requested documents violated its obligations under the Virginia Freedom of Information Act (FOIA). Because EDR lacks authority to enforce FOIA requirements, this ruling does not address those claims.
[21] *Grievance Procedure Manual* § 8.2.
[22] *Id.*
[23] *See Grievance Procedure Manual* § 6.3.

> Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer's decision or order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing . . . .[24]

In summary, the grievance procedure provides avenues to compel compliance with its requirements, including those related to document production. For example, the grievant could have pursued her request for documents during the management steps, at the time she believed the agency had failed to comply. Had she requested a compliance ruling from EDR at that time, her request would have paused the proceedings to allow her to obtain all documents to which she was entitled before proceeding. EDR has no record of receiving such a request.

After the appointment of a hearing officer, the grievant appropriately renewed her request and received certain documents in October 2022. The agency noted objections to some requests and also requested more time to review additional responsive documents. The grievant subsequently requested an order for the production of documents, which the hearing officer issued on January 5, 2023. On January 17, 2023, the hearing officer held a pre-hearing conference to discuss the status of the production of documents. The hearing then went forward as scheduled on January 25, 2023. To the extent the grievant believed that she was unable to fairly present her case at the hearing, EDR finds no indication that she presented this claim to the hearing officer for resolution either before or during the hearing. Moreover, although the grievant asserts that certain information could have led her meeting with the second-step respondent to "have gone much differently," she does not identify information that she was unable to present to the hearing officer, or that he may not have given due consideration.

Ultimately, despite pre-hearing issues regarding the production of documents, it appears that the grievant was provided a hearing before an impartial decision-maker, where she was represented by counsel and had an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker, as well as an opportunity to present her own evidence. EDR has not been presented with a basis to find that the grievant was unable to present evidence that may have changed the hearing officer's analysis. As such, we will not disturb the hearing decision on these grounds.

Presentation of Evidence

The grievant additionally argues that the hearing officer did not give her sufficient time to present her evidence at the hearing. She points out that the agency presented its case "from 9am to 4pm," with "no allowances for a fair break." As a result, the grievant claims, her "attorney felt rushed." She contends that the hearing officer "should have adjourned the hearing and restarted the next day to ensure that both sides were given ample time to be heard."

[24] *Id.*

Upon a thorough review of the record, including the audio recording of the hearing, EDR identifies no basis to conclude that the hearing officer denied the grievant sufficient time to present her evidence. Consistent with standard practice, the party with the burden of proof – in this case, the agency – presented its evidence first. Although the agency called at least seven witnesses who testified for a period of several hours as to the grievant's claims, a substantial portion of that time was devoted to cross-examination by the grievant (through counsel). The recording further reflects that the hearing officer ordered multiple breaks during the hearing and never denied a request by either party to pause the proceedings. The hearing officer explicitly offered to grant a lunch break, which the parties both declined.[25]

In addition, the grievant concluded her case without requesting more time or objecting to the hearing officer that the time granted was insufficient. While the grievant asserts that the hearing officer should have continued proceedings into the next day, there is no indication that he was asked to do so. Moreover, in her request for administrative review, the grievant does not specify any evidence that she was unable to present and/or would have presented, had she had more time to put on her case the following day. Because the record does not support the grievant's claim that she was not provided a full and fair hearing in this regard, EDR declines to disturb the hearing decision on this basis.

Pre-Disciplinary Investigation

Finally, the grievant argues that the agency did not properly investigate the employee complaints giving rise to disciplinary action. Essentially, it appears that the grievant objects to the agency's process on grounds that her perspective on the specific events in question was never solicited. Although the grievant's argument is understandable, we cannot find that it is a basis to disturb the hearing officer's decision upon review. As discussed above, even if we assumed for the sake of argument that pre-disciplinary due process was lacking, the grievant ultimately participated in a full and fair hearing, represented by counsel before an impartial decision-maker, where she had opportunities to cross-examine adverse witnesses and to present her own evidence. These rigorous post-disciplinary procedural protections generally cure pre-disciplinary procedural defects, and we find no indication that the post-disciplinary procedure in this case was insufficient to do so. Even if the agency's investigation was flawed, the agency had the burden to prove that discipline was warranted and appropriate. The hearing officer found that the agency satisfied its burden, and the grievant does not appear to challenge any of the specific factual findings articulated in the hearing decision.[26]

In summary, EDR identifies no basis to question the sufficiency of the procedural protections afforded to the grievant to allow her to challenge the agency's disciplinary action against her.

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[25] *See* Hearing Recording at 3:35:20-3:43:58.

[26] To the extent that this ruling does not specifically address any challenge to the hearing decision raised by the grievant, EDR has thoroughly reviewed the hearing record and found that the hearing officer's findings are supported by evidence in the record.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).