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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5436
August 19, 2022

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 11797 concerning her grievance against the Department of Corrections ("the agency"). For the reasons set forth below, EDR declines to disturb the decision.

FACTS

The relevant facts in Case Number 11797, as found by the hearing officer,[1] are as follows:

> The Department of Corrections [(the "agency")] employs Grievant as a Probation Officer at one of its locations. Grievant began working for the Agency on July 10, 2018. She began reporting to the Senior Probation Officer. Her positon status was "Exempt" under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.
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> To learn her job duties, Grievant received an orientation and "shadowed" another probation officer. She learned the CHART format and how to enter CHART notes. She learned about COMPAS scores and how to conduct COMPAS interviews. She learned about major violation reports and how to enter them. Grievant was reminded about timely submitting log notes. Grievant learned how to enter criminal history into VACORIS. Grievant learned about pre-sentence report modules and where to enter the narratives. Grievant observed another probation officer conducting field contacts for elevated cases. Grievant learned how to close out cases. Grievant received training regarding Operating Procedure 920.1, Community Case Opening, Supervision, and Transfer.
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> On January 10, 2019, Grievant received a Probation Progress Review showing her work performance was at a "Contributor" level. The Senior Probation Officer wrote that Grievant "has completed most of her in office training

[1] Decision of Hearing Officer, Case No. 11797 ("Hearing Decision"), July 14, 2022, at 2-4 (footnotes omitted).

requirements, Basic Skills training, and Basic Core Correctional Practices training."

On March 14, 2019, Grievant received an Employee Recognition Award Form.

On July 11, 2019, Grievant received a Probation Progress Review showing her work performance was at a "Contributor" level. The Senior Probation Officer wrote Grievant:

> has completed Basic Skills, Core Correctional Practices, completed VCIN certification, and is engaged in EPIC coaching. She has testified before the Court, written Major Violation Reports, and completed Pre-Sentence Investigation Reports along with Sentencing Guidelines. *** [Grievant] has been utilizing the Compas risk assessment tool to address appropriate supervision levels and moves cases accordingly. *** She works independently in [location] and readily contacts her supervisor if she has any questions or encounters problems.

Grievant began reporting to the Chief Deputy in April 2020.

Grievant received an overall rating of "Exceeds Contributor" on her October 2020 evaluation.

On March 10, 2021, Grievant received a Notice of Improvement Needed/Substandard Performance. The Notice stated, in part, "A discussion was held during these meetings regarding the following improvement needs: *** Ensure all 920.1 contact requirements are met each month." Grievant's Improvement Plan included a recommendation that Grievant "schedule time in between appointments to allow for the log-notes to be entered the same day to avoid a backlog or missing notes."

On April 15, 2021, Grievant received an Interim Employee Evaluation addressing, "Performance Areas Identified for Improvement/Substandard." The Performance Areas Identified section stated, "This plan focuses on three main areas of need: - Documentation, Case Review Follow-up, [and] Adhering to 920.1 requirements and the supervision of High cases."

Grievant met the terms of her Improvement Plan. On June 11, 2021, the Chief Deputy sent Grievant an email, "I have reviewed 59 cases between May 1 and June 10 and every one of them has up to date log-notes …." The Chief Deputy added, "I'm very impressed with your progress."

> The Chief Deputy conducted a full case review of Grievant's assigned cases as of September 3, 2021. The Chief Deputy reviewed 54 cases. Ten of those cases were significantly out of compliance and required immediate action. The problems related to documentations, case review follow-up, 920.1 requirements, and substance abuse screen follow-ups. A Major Violation Report due in June had not been completed. Positive drug screen tests had not been addressed. . . .

On October 18, 2021, the agency issued to the grievant a Group I Written Notice for unsatisfactory performance.[2] The grievant timely grieved this disciplinary action, and a hearing was held on June 24, 2022.[3] In a decision dated July 14, 2022, the hearing officer determined that the agency's discipline must be upheld.[4] The hearing officer further determined that no mitigating circumstances existed to reduce the agency's chosen penalty.[5] The grievant now appeals the hearing officer's decision.

DISCUSSION

By statute, EDR 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."[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 alleges that the hearing officer erred in upholding the Group I Written Notice because state and agency policies recommend progressive discipline. The grievant further appears to argue that certain aspects of the grievance procedure and related appeal rights do not satisfy procedural due process requirements.

Progressive Discipline

DHRM Policy 1.60, *Standards of Conduct*, describes the Commonwealth's system of progressive discipline and corrective action for managing employee performance. Under the policy, "progressive discipline" is defined as a "system of increasingly significant measures that are utilized to provide feedback to employees . . . ."[9] In general, agencies should "follow a course

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[2] *Id.* at 1; Agency Exs. at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5.
[5] *Id.* at 5-6.
[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] DHRM Policy 1.60, *Standards of Conduct* (June 1, 2011), at 20. Since the events underlying this grievance, DHRM revised its Policy 1.60 with an effective date of March 7, 2022. Although neither version of the policy mandates progressive discipline in any particular situation, references to Policy 1.60 hereinafter refer to the previous version of

of progressive discipline that fairly and consistently addresses employee behavior, conduct, or performance that is incompatible with the state's Standards of Conduct for employees and/or related agency policies."[10] Depending on the nature and severity of an employee's misconduct, a Written Notice of formal disciplinary action may be issued at the level of a Group I, II, or III offense and be accompanied by varying levels of additional action, including suspension without pay, demotion or transfer either with or without a disciplinary salary action, or termination.[11]

Although DHRM Policy 1.60 encourages progressive discipline, it is "also designed to enable agencies to fairly and effectively discipline and/or terminate employees whose conduct and/or performance does not improve . . . ."[12] Under the policy, a Group I Written Notice "is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention."[13] DHRM's policy guidance identifies "unsatisfactory work performance" as an example of a Group I offense and explicitly acknowledges agencies' "discretion to issue a Group I Written Notice" for a first offense.[14]

On appeal, the grievant does not appear to challenge the hearing officer's conclusion that the grievant's "job performance was inadequate."[15] Instead, she argues that her performance did not "justify[] the denial of progressive discipline."[16] However, the hearing officer found that the grievant had received a Notice of Improvement Needed/Substandard Performance in March 2021, indicating that the grievant was not meeting expectations as to "920.1 contact requirements" and "log-notes" for her cases.[17] He further found that the grievant's interim performance evaluation, issued approximately one month later, noted the grievant's need to improve documentation, case review follow-up, and "adhering to 920.1 requirements . . . ."[18] The problems alleged in the October 2021 Group I Written Notice appear to reflect the same type of deficiencies.[19] In responding to the grievant's argument about progressive discipline, the hearing officer determined that progressive discipline was not required by the Standards of Conduct policy and noted that the grievant had received a Notice of Improvement Needed/Substandard Performance already.[20] The grievant has identified no policy requirement, and we find none, that would require the agency to impose a lesser penalty for the conduct cited in its Written Notice. As such, we will not disturb the decision on these grounds.

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the policy, which was in effect on the date of the disciplinary action at issue in this grievance. *See also* Agency Exs. at 107 (supporting, but not requiring, the use of progressive discipline as a matter of agency policy).

[10] DHRM Policy 1.60, *Standards of Conduct*, at 1.

[11] *See id.* at 7-9.

[12] *Id.* at 1.

[13] *Id.* at 8.

[14] DHRM Policy 1.60, *Attachment A: Examples of Offenses Grouped by Level* (January 1, 2019), at 1.

[15] Hearing Decision at 5.

[16] Request for Administrative Review at 3.

[17] Hearing Decision at 3.

[18] *Id.*

[19] *Id.* at 4-5.

[20] *Id.* at 5.

Due Process

The grievant further asserts that she is being deprived of due process in her challenge to the Group I Written Notice. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[21] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[22] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those 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.[23] The pre-disciplinary notice and opportunity to be heard 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."[24] 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.[25] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[26]

Here, the grievant raises due process objections on grounds that "current rules forbid the Circuit Court from reviewing the factual conclusions of the hearing officer."[27] The grievant also

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[21] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).

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

[23] 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."). State policy requires that

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

DHRM Policy 1.60, *Standards of Conduct*, § E(1). The Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

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

[25] 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))).

[26] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or 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).

[27] Request for Administrative Review at 3.

asserts that "the limited discovery available to the grievant causes the Virginia employee grievance system to be a systematic violation of the Procedural Due Process rights of the employee and is thus unconstitutional on its face."[28] Upon a thorough review of the grievance record, we find no indication that the hearing officer in this case failed to serve as an impartial factfinder. There is also nothing to suggest that the grievant, who was represented by counsel, lacked opportunities to cross-examine adverse witnesses and to present her own evidence at the hearing. Although the grievant suggests that "limited discovery" was available to her, the grievance procedure sets forth express requirements for parties to produce documents related to a grievance upon request,[29] and EDR has not been made aware of any discovery or evidentiary issues or concerns that the grievant raised with the hearing officer. Finally, to the extent that the grievant asserts that aspects of the grievance procedure as established by the Code of Virginia are facially unconstitutional, EDR lacks authority to grant relief as to such claims, and therefore we decline to address them.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[28] *Id.* at 3.
[29] *See Grievance Procedure Manual* § 8.2.
[30] *Id.* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).