Issue: Administrative Review of Hearing Officer's Decision in Case No. 11127; Ruling Date: April 20, 2018; Ruling No. 2018-4590; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2018-4690
April 20, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11127. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11127 are as follows:[1]

> Grievant was employed by Agency from about June of 1998 until his termination on October 5, 2017. At time of his termination from employment Grievant was employed as a Captain at Facility, a Correctional Unit. Grievant has one active Group II Written Notice issued on November 8, 2016 for failure to comply with policy.
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> On June 24, 2017 two inmates at Facility had an altercation, were removed from their cell, and escorted to Segregation. Correctional Officers then conducted an inventory/search of their property within their cell. During the inventory/search a number of items were discovered, including a white powder substance found in a folded piece of paper in the spine of an offender's Bible .
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> On June 24, 2017 C/O L released custody of the white powder substance to Sgt. who released custody of it to Grievant. No chain of custody or documentation of the time the white powder substance was received or released was made by Grievant or any other employee.
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> Grievant was told by Sgt. the white powder substance was found in the spine of an offender's Bible. After observing and smelling the white powder substance Grievant decided it was baby powder and ordered Sgt. to dispose of it by placing it in a trash can in the Watch Office. The trash can used for disposal was accessible to staff and offenders.

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[1] Decision of Hearing Officer, Case No. 11127 ("Hearing Decision"), February 19, 2018, at 2-4 (citations omitted).

> Prior to ordering its disposal, the white powder was not tested and no request for testing was made.
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> The white powder substance was never placed in an evidence bag and was never secured in an evidence locker. No field tests or any other tests were ever conducted on the white powder substance to determine what it actually was.
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> Grievant did not report the white powder substance up his chain of command and did not complete or file an Incident Report. OLU was not notified concerning the white powder substance.
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> Warden received a report that Suboxen may have been found in a search conducted on 6/24/17 but was thrown away without charges being filed or drug testing being conducted. On June 28, 2017 Warden referred matters to SIU for investigation and SIU Investigator conducted an investigation into matters. During the investigation matters related to Grievant and others were brought to the attention of Agency and ultimately gave rise to Grievant being issued a Group III Written Notice with termination of employment.

The grievant timely grieved his termination from employment and a hearing was held on January 30, 2018.[2] On February 19, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.[3] The grievant has now requested administrative review of the hearing officer's decision.

DISCUSSION

By statute, EEDR 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 . . . ."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[5]

Due Process

The grievant argues in his request for administrative review that the agency did not provide him with appropriate pre-disciplinary due process, failing to notify him in writing of an extension of his pre-disciplinary leave beyond fifteen days. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[6] is a legal concept

[2] Hearing Decision at 1.
[3] *Id.* at 14.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] *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).

appropriately raised with the circuit court and ultimately resolved by judicial review.[7] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EEDR 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.[8] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve 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]

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 the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[10] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[11]

In this case, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice.[12] He had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency

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

[8] 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 any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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). Significantly, 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."

[9] *Loudermill*, 470 U.S. at 546.

[10] 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))).

[11] 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).

[12] *See* Agency Exhibit 1.

witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EEDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[13] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[14] Accordingly, EEDR finds no due process violation under the grievance procedure.

Hearing Officer's Consideration of the Evidence

Further, the grievant's request for administrative review challenges the hearing officer's findings of fact in several areas based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. He challenges whether the item he found should be considered "contraband" or "questionable" under the agency's policies, and argues that the policies cited by the agency were not followed by other employees involved in the incident, including the officer who found the substance. Essentially, he asserts that the agency did not bear its burden of proof to show that the disciplinary action at issue was warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[17] 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.[18] 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where, as here, the evidence conflicts or is subject to

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[13] *See*, *e.g.*, 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.").
[14] *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 (and authorities cited therein).
[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.

varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. EEDR has thoroughly reviewed the testimony at hearing and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the October 5, 2017 Written Notice and that the behavior constituted misconduct.[19] The hearing officer's determinations were based in part on the grievant's own testimony and admissions about his actions.[20] For instance, the grievant admitted in his testimony that he did dispose of the powder and that he felt that there was "no need" to report a substance such as baby powder, which is permitted within the facility.[21] To this, the Warden testified that throwing away an unidentified substance in an open trash can has the potential to directly expose both staff and offenders to a health hazard and constitutes a serious breach of policy.[22] The hearing officer found that the grievant's actions

> denied Agency the ability to further investigate and, if warranted, pursue matters and take appropriate actions once testing determined what the white powder substance actually was.
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> Grievant's actions made it impossible to determine if the white powder substance found was suboxone, elavil, some other drug or substance, baby powder, or mixture of drugs, substances, and/or baby powder. Testimony indicated there are a number of substances with the appearance of a white powder which could cause harm, injury, or even death to individuals upon their being exposed to the substance or having contact with the substance.[23]

Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

The grievant's request for administrative review also asserts that his ability to present his case was compromised by having an incomplete investigative report in the agency's exhibit book. During the hearing, the grievant's advocate objected to the inclusion of this document in the agency's evidence book due to its not having been timely provided.[24] However, rather than request a continuance, the parties agreed to take a break during the hearing while the grievant and his attorney reviewed the information prior to its admission into evidence.[25]

Receiving probative evidence is squarely within the purview of the hearing officer.[26] Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural

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[19] Hearing Decision at 14.
[20] *Id*. at 7-8.
[21] Hearing Record at 2:47:06 - 2:50:56; 2:51:23 – 2:51:55.
[22] Hearing Record at 2:15:20 – 2:16:04.
[23] Hearing Decision at 8.
[24] Hearing Record at 00:22 – 02:26.
[25] *Id*.
[26] *See* Va. Code § 2.2-3005(C).

matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.[27] To this end, the hearing officer has the authority to require the parties to exchange a list of witnesses and documents.[28] An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.[29] Under the *Rules for Conducting Grievance Hearings*, "most probative evidence" should be admitted into the record.[30] Thus, we cannot conclude that the hearing officer exceeded his authority by admitting the agency's investigative report into evidence.

Inconsistency with State Policy

In his request for administrative review, the grievant argues that the hearing officer decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[31] However, upon review of the grievant's submission, EEDR is unable to find any argument, not otherwise addressed herein, that raises any way in which state and/or agency policy was not followed by the hearing officer. As discussed more fully above, the grievant's arguments more properly challenge the hearing officer's factual findings, which EEDR will not disturb. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.

CONCLUSION AND APPEAL RIGHTS

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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

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[27] *Grievance Procedure Manual* § 5.7; *see also* Va. Code § 2.2-3005.
[28] *Id. at* § 5.7(2).
[29] *See, e.g.*, EDR Ruling No. 2005-1037; EDR Ruling No. 2004-742.
[30] *Rules for Conducting Grievance Hearings* § IV(D).
[31] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989). The DHRM Director has directed that EEDR review whether the hearing decision is consistent with state and/or agency policy. *See Grievance Procedure* § 7.2(a).
[32] *Grievance Procedure Manual* § 7.2(d).
[33] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).