Issue: Administrative Review of Hearing Officer's Decision in Case No. 11161; Ruling Date: April 27, 2018; Ruling No. 2018-4706; Agency: Department of Corrections; Outcome: AHO's decision upheld.

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 2018-4706
April 27, 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 11161. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11161, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. He worked as a Corrections Sergeant until he was demoted with a five percent disciplinary pay reduction.
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> Grievant supervised Officer B. Officer B was well-regarded by Grievant. Officer B was a "serious person" when he worked at the Facility. He did not often "joke around" with his co-workers, including Grievant.
>
> On October 3, 2017, Officer B was in the Watch Commander's office talking to Captain B. Captain B was serving as the Watch Commander meaning he was the highest ranking employee at the Facility at that time.
>
> Grievant entered the Watch Commander's office and observed Officer B speaking with Captain B. Grievant said to Officer B, "are you sucking his d—k again?" Grievant's comment was intended to suggest that Officer B was acting in a manner to gain the favor of Captain B. Officer B said, "What are you talking about?"
>
> Officer B was greatly offended by Grievant's comment. He became enraged by Grievant's comments. He continued talking to Captain B but was so

[1] Decision of Hearing Officer, Case No. 11161 ("Hearing Decision"), March 28, 2018, at 2-3.

upset by Grievant's comment that he was unable to comprehend what Captain B was saying.

Captain B asked Officer B to step out of the office. After Officer B left the office, Captain B told Grievant that Grievant should apologize to Officer B.

Grievant asked Officer B to meet in the Sergeant's office. Grievant apologized to Officer B. Grievant said he "was wrong for what he said." Officer B believed Grievant was a good person who cared about staff but used a poor choice of words.

On October 26, 2017, the grievant was issued a Group III Written Notice with a disciplinary pay reduction and demotion for workplace harassment.[2] The grievant timely grieved the disciplinary action and a hearing was held on March 27, 2018.[3] In a decision dated March 28, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show the grievant failed to follow agency policy by "engag[ing] in verbal conduct that denigrated Officer B [and] created an offensive work environment for Officer B,"[4] and that his actions had a unique impact on the agency's operations that justified elevation of the discipline to a Group III offense.[5] Accordingly, the hearing officer upheld the issuance of the Group III Written Notice and the accompanying demotion and disciplinary pay reduction.[6] The grievant now appeals the hearing decision to EEDR.

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."[7] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[8]

Due Process

In his request for administrative review, the grievant alleges that he did not receive adequate pre-disciplinary due process because the charge of workplace harassment was not "made known to [him] to give proper time to formulate a defense" before the Written Notice was issued. At the hearing, the grievant testified that he initially received a due process notice charging him with conduct unbecoming of an officer, but was ultimately charged with workplace

[2] *See id.* at 1.
[3] *See id.*
[4] *Id.* at 4.
[5] *Id.* at 3-5; *see* DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[6] Hearing Decision at 5.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

harassment on the Written Notice itself.[9] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[10] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[11] 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.[12] 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."[13] 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.[14] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[15]

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[9] Hearing Recording at 47:50-49:45 (testimony of grievant).

[10] *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).

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

[12] 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."

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

[14] 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))).

[15] See Va. 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).

In this case, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice.[16] Indeed, the Written Notice clearly describes the conduct for which the grievant was disciplined: "[o]n October 3, 2017 at approximately 6:05am, [the grievant] entered the Watch Office and observed that Officer [B] was speaking to Captain [B]. When [the grievant] entered the office, [he] stated to [Officer B] 'you in here sucking the Captains [sic] d—k again.'"[17] The grievant is correct that the Written Notice describes the charged misconduct as a "[v]iolation of DHRM Policy 2.30, *Workplace Harassment*, and DOC Operating Procedure ("OP") 101.2, *Equal Employment Opportunity*,"[18] rather than conduct unbecoming of an officer. Based on the description of the alleged misconduct set forth on the Written Notice, however, there can be little question that the grievant had adequate notice of the behavior for which he was being disciplined. The hearing officer upheld the Written Notice based on the conduct described on the Written Notice form.[19] Whether characterized as workplace harassment, failure to follow policy, or conduct unbecoming of an officer, the underlying facts relied upon by the agency in support of its decision to issue the discipline were the same.

In addition, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EEDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[20] 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.[21] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure with respect to this claim.

Hearing Officer's Consideration of the Evidence

The grievant appears to further allege that the hearing officer's findings of fact, based on the weight and credibility he accorded to the testimony presented at the hearing, are not supported by the evidence in the record. More specifically, the grievant contends that the disciplinary action was not warranted because the agency did not demonstrate he engaged in workplace harassment. In support of his position, the grievant argues that the agency did not

[16] *See* Agency Exhibit 1.
[17] *Id.*
[18] *Id.* It appears the number of this policy was changed in recent years from OP 101.2 to OP 145.3. *See* Agency Exhibit 4 at 1. This ruling will refer to the agency's policy as OP 145.3.
[19] *See* Hearing Decision at 3-5.
[20] *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.").
[21] *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).

follow the provisions of OP 145.3, *Equal Employment Opportunity*, for addressing incidents of workplace harassment because it did not separate the grievant and Officer B after the incident occurred or report the issue to the agency's Human Resources Office.[22]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[23] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[24] 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.[25] 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.[26] 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.

In the hearing decision, the hearing officer assessed the evidence and concluded that, under DHRM Policy 2.30, *Equal Employment Opportunity*, an employee's offensive conduct must be "**on the basis of** race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability" to constitute workplace harassment.[27] The hearing officer found that the "[g]rievant's comment was not on the basis of any of these protected classes," and thus could not be considered workplace harassment.[28] The agency's OP 145.3, *Equal Employment Opportunity*, further defines workplace harassment to include "unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person" and "[h]as the purpose or effect of creating an intimidating, hostile or offensive work environment." OP 145.3 states that workplace harassment on the basis of a protected class is illegal, and that "[w]orkplace harassment not involving protected areas is in violation of DOC operating procedures."[29]

The hearing officer determined that the grievant had failed to follow agency policy, a Group II offense, because he "engaged in verbal conduct that denigrated Officer B [and] that created an offensive work environment for Officer B" in violation of OP 145.3.[30] The hearing officer went on to conclude that there was "sufficient evidence to elevate the disciplinary action from a Group II offense to a Group III offense" based on the "unique impact" of the misconduct

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[22] *See* Agency Exhibit 4 at 4.
[23] Va. Code § 2.2-3005.1(C).
[24] *Grievance Procedure Manual* § 5.9.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *Grievance Procedure Manual* § 5.8.
[27] Hearing Decision at 4 n.6. Workplace harassment is classified as a Group III offense under DHRM Policy 1.60, *Standards of Conduct*. DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[28] Hearing Decision at 4 n.6.
[29] *Id*. at 4; *see* Agency Exhibit 4 at 2.
[30] Hearing Decision at 4.

on the agency.[31] In particular, the hearing officer noted that the grievant made the comment "to an employee who reported to him," that the "[g]rievant held a position of power over Officer B and was entrusted by the Agency with the responsibility to serve as a good role model and leader," and that the "[g]rievant's comment undermined his credibility of leadership."[32]

The grievant is correct that it appears he and Officer B were not separated from one another in the workplace after the incident occurred,[33] and it is unclear whether the matter was reported to the agency's Human Resources Office.[34] Having reviewed the hearing record, however, EEDR finds that there is evidence in the record to support the hearing officer's conclusion that the grievant made the comment to Officer B as alleged, that his behavior was a violation of OP 145.3, and that his actions had a serious impact on agency operations that justified elevation of the discipline to a Group III offense. At the hearing, for example, Officer B testified that the grievant entered the watch office while he was talking to Captain B and said "are you sucking his d—k again."[35] Officer B stated that he was angered and upset by the grievant's comment.[36] The grievant testified that he made the comment to Officer B.[37] While the grievant asserted that he was attempting to make a joke, he also recognized that the remark was inappropriate when he realized how it impacted Officer B.[38] At the time of the incident, the grievant was employed as Officer B's supervisor,[39] and the agency specifically alleged in the Written Notice that his conduct "undermine[d his] effectiveness as a supervisor and the healing environment."[40] Under these circumstances, the grievant's argument regarding the agency's response to and handling of the incident does not, on its own, demonstrate that the disciplinary action was not warranted and appropriate under the circumstances.

In conclusion, though the grievant may disagree with the hearing officer's assessment of the evidence, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[41] Because the hearing officer's findings of facts with regard to these issues are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its

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[31] *Id.*
[32] *Id.*
[33] *E.g.*, Hearing Recording at 14:06-15:17 (testimony of Officer B).
[34] EEDR has not identified any evidence in the record showing whether the incident was reported to the agency's Human Resources Office.
[35] Hearing Recording at 4:58-5:53 (testimony of Officer B).
[36] *Id.* at 6:05-6:20, 7:22-7:40 (testimony of Officer B).
[37] *Id.* at 46:06-47:03 (testimony of grievant).
[38] *Id.*
[39] *Id.* at 4:45-4:56 (testimony of Officer B).
[40] Agency Exhibit 1.
[41] *See*, *e.g.*, EDR Ruling No. 2014-3884.

judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

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