Issue: Administrative Review of Hearing Officer's Decision in Case No. 11073, 11076; Ruling Date: July 16, 2018; Ruling No. 2018-4743; Agency: Department of Social Services; 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 Virginia Department of Social Services
Ruling Number 2018-4743
July 16, 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 Numbers 11073/11076. 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 Numbers 11073/11076 are as follows:[1]

> The Grievant's Employee Work Profile ("EWP"), indicated that she was a Customer Service Representative Senior. As such, the first duty or essential responsibility that was listed in her EWP was "handle phone calls." Further, her EWP indicates that she is to be logged in and ready to answer phone calls by 8:15a.m. daily. It is clear from the Grievant's EWP that there were other duties. However, I heard significant testimony from the Agency witness that answering the phone was a primary responsibility for this Grievant's position. While at various times during her testimony before me, the Grievant indicated that she did not realize that answering calls was a priority under her EWP, she acknowledged that she knew it was a priority in an email from the Grievant to her supervisor dated April 24, 2017. In that email the Grievant stated in part as follows:
>
> > ...knowing that live calls is the priority of the unit is why I let you know...
>
> This email from the Grievant was in response to her manager questioning whether or not the Grievant had informed a coworker that she would not be available to take live calls on April 21, 2017. This failure is the event that led to the original Group I Written Notice.

[1] Decision of Hearing Officer, Case Nos. 11073/11076 ("Hearing Decision"), June 1, 2018, at 3-4 (citations omitted).

Because the Grievant had an outstanding Group III Written Notice which was now final, the original Group I Written Notice that is before me led to a 30-day suspension.

The Grievant, in her testimony, appeared to testify that her signature on the Group III Written Notice was a forgery. She then seemed to retract that statement[], but it is unclear to me whether or not she actually believed the signature was a forgery. She acknowledged receipt of the Group III Written Notice, and that it was either not grieved or grieved and was now final.

On April 26, 2017, the Grievant's supervisor sent her a screen shot that indicated there were 18 customers in the phone queue, one of whom had been on hold for more than one hour. The Grievant indicated that she had been working on labels for court documents as a justification for not dealing with these agency customers. She indicated that she could have worked on the court documents at a later time. Pursuant to this, the Grievant's supervisor performed a quality assurance check. As a part of that process, documents were produced that indicated when the Grievant logged into her computer every morning, for a period of time. This document showed that, subsequent to April 21, 2017, the offense date for the original Written Notice before me, the Grievant was late in logging in to her station on April 24, 2017 and April 26, 2017.

Testimony was presented before me that, when this Grievant logged into her computer, she had the ability to tell the system by an entry into the computer that she was unavailable to answer phones. The Agency presented evidence that, for the week of April 3, 2017 through April 7, 2017, the Grievant was unavailable for 98.81% of the time that she was logged in to her computer. For the week of April 10, 2017 through April 14, 2017, the Grievant was unavailable 93.78% of the time. For the week of April 17, 2017 through April 21, 2017, the Grievant was unavailable 95.75% of the time. And finally, for the week of April 24, 2017 through April 26, 2017, a time after the first Group I Written Notice, the Grievant was unavailable 93.28% of the time.

The Grievant's own written statement to her supervisor indicated that she knew answering live phone calls was the priority of her job. The Grievant was issued a Group I Written Notice for failure to notify anyone that she was going to be unavailable to answer the phone and, subsequently, pursuant to a quality-assurance check, it was found that the Grievant continued, after the issuance of the Group I Written Notice, to be unavailable to answer phone calls.

On May 6, 2017, the grievant was issued a Group I Written Notice of disciplinary action, with suspension, for unsatisfactory performance.[2] On June 24, 2017, the grievant was issued a Group I Written Notice, with termination, for continued unsatisfactory performance.[3] The grievant timely grieved both disciplinary actions, and a hearing to address both matters was held on May 23, 2018.[4] On June 1, 2018, the hearing officer issued a decision upholding both disciplinary actions and subsequent termination of the grievant.[5] The grievant has now requested administrative review of the hearing officer's decision.[6]

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 a party; the sole remedy is that the action be correctly taken.[8]

Hearing Officer's Consideration of the Evidence

Fairly read, the grievant's request for administrative review challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. 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 grounds in the record for those findings."[10] 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.[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 officers have the sole authority

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[2] Hearing Decision at 1.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 1, 5.
[6] In addition to the issues addressed below, the grievant also states in her appeal that the agency has violated policy by passing along Written Notices in her personnel file to her new employer. She appears to claim that the break in service should mean that the Written Notices are removed from her file entirely. As an initial matter, this is not an issue that would have been the subject of this grievance and is, therefore, not something EEDR can address in this ruling. In addition, policy would appear to state that while Written Notices expire with a break in service, there is no language that requires expired Written Notices to be removed from a personnel file. *See* DHRM Policy 1.60, *Standards of Conduct*; DHRM Policy 6.10, *Personnel Records Management*.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[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.

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 this instance, the grievant essentially argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the May 6, 2017 and June 24, 2017 Written Notices, and that the behavior constituted misconduct.[13] Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Here, the grievant's former supervisor testified that the grievant repeatedly failed to perform an essential job function, specifically, answering phone calls received by the agency, and on the occasion giving rise to the first Group I Written Notice, she left the office without informing her coworker she was doing so in order that the calls could be covered.[14] The supervisor further testified that the grievant continued to ignore phone calls for which she was responsible, at one point leaving eighteen callers in a queue, one for over an hour.[15] The hearing officer considered this evidence, alongside the testimony of the grievant,[16] and concluded that the agency had borne its burden of proof and shown that the disciplinary actions and subsequent termination of the grievant were appropriate.[17] 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, EEDR declines to disturb the decision on this basis.

Due Process

The grievant's request for administrative review could also be viewed as an argument that she was not afforded appropriate due process. The grievant challenges the agency's "discipline and time frames in administering the Standards of Conduct…" throughout the disciplinary process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[18] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[19] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EEDR will also address the issue.

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[13] Hearing Decision at 3-5.
[14] Hearing Record 01:42:43 – 01:45:37.
[15] Hearing Record 01:53:38 – 01:54:22.
[16] Hearing Decision at 4.
[17] *Id.* at 5.
[18] *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).
[19] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

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.[20] 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."[21]

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.[22] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[23]

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice.[24] She 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 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

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[20] 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."

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

[22] 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))).

[23] 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).

[24] *See* Agency Exhibit 1.

that pre-disciplinary violations of due process are cured by post-disciplinary actions.[25] 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.[26] Accordingly, EEDR finds no due process violation under the grievance procedure.

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.[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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[25] *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.").
[26] *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).
[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).