Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: August 16, 2017; Ruling No. 2018-4590; Agency: Virginia Department of Transportation; Outcome: Hearing Officer Not in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution[1]

COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2018-4590
August 16, 2017

The Department of Corrections (the "agency") has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") to challenge the hearing officer's pre-hearing order regarding the admissibility of documents in Case Number 11050.

FACTS

The grievant was issued a Group III Written Notice for falsifying records and terminated from employment with the agency on May 16, 2017. The grievant timely filed a dismissal grievance challenging his termination on June 8, 2017.[2] On June 9, 2017, after the grievant had initiated his grievance, the agency discovered two pages of attachments to the Written Notice that were not given to the grievant at the time he received the Written Notice, and delivered those attachments to him.

The Written Notice that was issued to the grievant on May 16, 2017 identifies an offense date of May 5, 2017, and provides, as a description of the offense, a recitation of the agency's policy that prohibits falsifying records. The Written Notice form also indicates that additional documentation was attached, although no other documents were given to the grievant on that date. The attachments to the Written Notice that were later given to the grievant on June 9, 2017 include a list of "Written Notice Offense Codes" and a narrative of the events that led to the issuance of the Written Notice and the grievant's termination. The attachment further states that the agency had identified multiple days between January 30 and March 31, 2017 on which the grievant had allegedly falsified records.

On July 11, 2017, the agency requested a ruling from the hearing officer on (1) whether the attachments could be admitted into the hearing record and (2) whether it could present evidence of alleged misconduct that occurred on dates other than May 5, 2017. The hearing officer issued an order on July 21, 2017, stating that the agency had not provided the grievant

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.

[2] EEDR has subsequently appointed a hearing officer for the case on June 28, 2017.

with sufficient notice of any charges other than what was presented on the Written Notice form itself, and thus allowing the agency to present evidence about the attachment or other dates on which alleged misconduct occurred would "act to make changes and/or expansions in the scope of the Written Notice." Accordingly, the hearing officer concluded that the agency would not be permitted to admit the attachments into the hearing record or present evidence about alleged misconduct that occurred on dates other than May 5, 2017. The agency requested a compliance ruling from EEDR to overturn the hearing officer's ruling on July 25, 2017.

DISCUSSION

By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.[3] Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding,[4] and the technical rules of evidence do not apply.[5] In addition, EEDR's *Rules for Conducting Grievance Hearings* provide that "[c]hallenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied."[6] By extension, evidence relating to management actions or omissions that have not been qualified for a hearing would not always be relevant to the issues in the case, and thus could be properly excluded from admission into the hearing record in certain circumstances.

In support of its position, the agency contends that the May 5, 2017 offense date on the Written Notice is a clerical error, and that its failure to deliver the attachments to the grievant with the Written Notice was a mistake. The agency claims that, once it discovered the grievant had not received the attachments, it promptly delivered them to him, albeit after he had initiated a dismissal grievance to challenge the disciplinary action. In response, the grievant argues that the agency did not provide adequate pre-disciplinary due process for any alleged misconduct other than what was set forth on the Written Notice form that was issued to him on May 16, 2017, and asserts that the agency should not be permitted to offer evidence about any alleged misconduct for which he did not receive due process.

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.[7] Importantly, the pre-disciplinary notice and

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[3] Va. Code § 2.2-3005(C)(5).
[4] *Rules for Conducting Grievance Hearings* § IV(D).
[5] *Id.*
[6] *Id.* § V(C).
[7] 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

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."[8] 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.[9] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[10]

The agency has provided additional information to EEDR that the grievant met with management and received oral notice of the charges against him on May 4, 2017, had a second meeting on May 5, 2017 to discuss the charges, and was given an opportunity to respond and question witnesses at a third meeting on May 11, 2017. The Written Notice was then ultimately issued to the grievant on May 16, 2017. The agency claims that these meetings included a detailed discussion of the alleged falsification, and that the grievant was given documentation of specific incidents of alleged falsification that occurred between January 30 and March 31, 2017. Other than the agency's notes from these meetings, however, there is no written record of what notice the grievant actually received. For example, it does not appear that he received a written description of the charges. Although DHRM Policy 1.60, *Standards of Conduct*, allows agencies to provide "oral or written notification of the offense" prior to issuing disciplinary action, it may be a better practice for management to give such notice in writing when possible, in order to minimize potential confusion or dispute about the nature of the charged misconduct.

Based on EEDR's review of the parties' arguments, it appears the grievant has identified legitimate issues with the agency's pre-disciplinary due process. There are legitimate questions as to whether the grievant received adequate notice of the charges against him, and an opportunity to respond to those charges, prior to the issuance of the Written Notice. However, EEDR has no basis to find that the agency's failure to give the attachments to the grievant at the time he received the Written Notice was fraudulent or otherwise intentional. It appears instead that the attachments were not included by mistake, which the agency later corrected when the

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> 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."

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

[9] 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))).

[10] See Va. Code § 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).

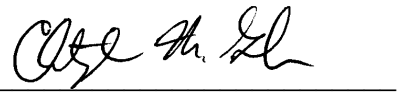
issue was discovered. Likewise, EEDR cannot conclude that the offense date specified on the Written Notice is anything other than a clerical error, as confirmed by the description of the alleged misconduct laid out in the attachments.

Most importantly, EEDR has consistently held that the extensive post-disciplinary due process provided through the grievance procedure will cure a 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.[11] However, EEDR is persuaded the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[12] Therefore, even though there may have been issues with the pre-disciplinary due process afforded to the grievant, the agency has now provided the grievant with a copy of the attachments well in advance of the hearing, and the full post-disciplinary due process (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) will cure any pre-disciplinary due process error. Accordingly, EEDR finds that no due process violation occurred as a matter of the grievance procedure and an evidentiary issue that would prevent the agency from introducing the Written Notice attachments.[13]

CONCLUSION

Based on the foregoing, the hearing officer's order must be vacated. The agency may introduce the attachments to the Written Notice and evidence about offense dates other than May 5, 2017 to show that the discipline was warranted and appropriate under the circumstances.

EEDR's rulings on matters of compliance are final and nonappealable.[14]



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[11] *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.").
[12] *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).
[13] This ruling makes no determination as to the legal merits of the parties' due process arguments, which may be addressed by either or both of the parties through an appeal to the appropriate circuit court, after the hearing decision is final. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).