Issue: Administrative Review of Hearing Officer's Decision in Case No. 9947; Ruling Date: February 1, 2013; Ruling No. 2013-3504; Agency: Virginia Department of Transportation; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2013-3504
February 1, 2013

The agency has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's December 4, 2012 Hearing Decision in Case Number 9947. For the reasons set forth below, the matter is remanded to the hearing officer for further consideration.

FACTS

The findings of fact, as set forth in the hearing decision in Case Number 9947, are as follows:[1]

> The Grievant is employed by the Agency as a Transportation Operations Manager III. The Grievant has been employed with the Agency in this supervisory position since he was promoted to the position approximately five years ago and has been with the Agency for many more years. The Grievant is highly knowledgeable and skilled in his profession. His supervisor considers him reliable and effective in getting his work assignments done. The Grievant has authority to set schedules and assign individual job duties to his crew. The Grievant often works along side his crew and performs the same tasks he asks them to perform.
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> On February 19, 2012, the Grievant and his crew were assembled in the "warming room" pending a shift change for snow operations. The Grievant engaged in conversation with Grievant's second witness (hereafter G2). The conversation was joined by Grievant's third witness (hereafter G3) and Grievant's fourth witness (hereafter G4). Also present in the room were the Agency's first witness (hereafter A1) and the Agency's second witness (hereafter A2). A1 and A2 were able to over hear the conversation even though they were not parties to the conversation.
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> During the conversation the Grievant, G2, G3, and G4 discussed killing rats. A few days before the conversation on February 19, 2012, G4 had discovered torn and chewed toilet paper and rodent feces in his work truck. He

[1] Decision of Hearing Officer, Case No. 9947 ("Hearing Decision"), issued December 4, 2012 at 1-3.

had requested the Grievant give him some "Dcon" to kill the rodents. The Grievant responded that he would have to look into using "Dcon" to kill the rodents because it was a poison and he did not know if it was permitted to use poison to kill the rodents. On February 19, 2012, the Grievant was in the "warming room" reading material on wild rat control he had obtained from a Humane Society website. G2 asked the Grievant what he was reading and the conversation about rats ensued. G2 and G3 both suggested using the "Dcon" and G3 said he had some in his shop. The Grievant, G2, G3 and G4 all stated that the conversation was about the elimination of rodents and had no hidden meaning.

A2 recalls hearing the conversation beginning with a co-worker stating he had mice or rats in his truck eating paper and the Grievant responding that they did have rats and they needed to do something to get rid of them, "smoke them out" or something to that effect. A2 also recalls the Grievant stating that he would go on-line to investigate what to do to properly handle the situation in case the rats were protected. A2 did not think the conversation was simply about mice in the truck but stated he did not feel any threat and was not fearful in any way.

A1 heard the conversation and testified he interpreted the words as a threat against him. A1 stated that he feared for his life and did not move from the scene for fear of attracting attention to himself. A1 reported the incident the next day to a supervisor of equal rank but less seniority than the Grievant, the Agency's third witness (hereafter A3). A3 contacted the human resources department for advice on the situation and was advised to make a full report.

An investigation resulted which was conducted by a representative from human resources and the Maintenance Manager (hereafter A4) who is the supervisor of the Grievant's immediate supervisor (hereafter G1). A4 conducted numerous interviews and issued a report which is the Agency's exhibit number six. A4 concluded there were management problems at the facility and issued a Group II Written Notice to the Grievant for a violation of the workplace violence policy, noting an offense date of 2/19/12 and citing Written Notice Offense Codes #32: Violation of Policy 1.80, Workplace Violence. The Group II Written Notice issued to the Grievant states the allegations of A1 were confirmed and goes on noting various management problems including statements by the Grievant which "could be viewed as retaliatory."

Pending at the time, was a complaint against the Grievant for misuse of state property on February 14, 2012. The Grievant was working with his crew trimming trees which were growing out over the roadway. The Grievant was performing the actual trimming using a pole saw from an elevated position. The saw malfunctioned numerous times and the Grievant became frustrated. He tossed the saw from his elevated position down an embankment to one of the crew to fix. An anonymous complaint was filed against the Grievant. The complaint was investigated concurrently with the matter at issue in this proceeding. The Grievant acknowledged the incident, admitting his frustration with the saw and explaining that he would have had to come down from his

elevated position, go around the truck and down the embankment to hand the saw to the crew member. The Grievant chose to take a short-cut by tossing the saw down. On March 15, 2012, a Group II Written Notice was issued to the Grievant for misuse of state property. The Grievant has accepted the disciplinary action and has not grieved it. The Grievant has this active Group II Written Notice on his personnel record.

During the investigation of this matter it was discovered that several members of the Grievant's crew were disgruntled over the management style of the Grievant and frustrated because they felt G1 would take no action to change the Grievant's methods. The crew's complaints against the Grievant are detailed in Agency exhibit number six. A1 expressed that he felt the Grievant humiliated his subordinates, showed favoritism, had an anger management problem and used bad management techniques. The Grievant frequently gave orders and directions to his crew that were short and not particularly detailed. He would withhold information about assignments to prevent crew members from avoiding some of the unpleasant tasks they were to perform. The Grievant criticized work that was improperly done and held the crew to a high performance standard. He would use photo images to point out jobs that were unsatisfactory and jobs that were done properly. The Grievant gave oral reprimands and informal "write ups" for unsatisfactory work performance. At times the Grievant used curse words on the job. Upon his return from a Winter vacation the Grievant increased discipline on the crew for violations of Agency policies. This was referred to as the "new deal."

The investigation also revealed that the night crew was upset about an incident which occurred during snow removal duty. The crew was told to go home two hours early because they would not be needed as the probability of snow had abated. Subsequently, the night crew was required to turn in two hours of leave. It was also discovered that someone had placed a sign on the Grievant's door which read, "Warden." A1 reported that he felt this was degrading. The sign had been on the Grievant's door for a long time, estimated to be three years by the Grievant. The Grievant considered it a joke which someone had played on him and he found it amusing. The Grievant had laughed with other crew employees about it and never received any prior complaint about the sign.

The Agency issued two separate Group II Written Notices to the Grievant on March 15, 2012, both endorsed by A1. Consideration was given to the Grievant's tenure and performance history with the Agency and he was sanctioned with a ten day suspension rather than employment termination. A4 did not believe this was a situation which rose to a level where employment termination was appropriate.

In a December 4, 2012 hearing decision, the hearing officer removed the March 15, 2012 Group II Written Notice because the agency had not presented sufficient evidence to find the grievant violated Agency Policy 1.80, Workplace Violence, on February 19, 2012.[2] Back pay

[2] *Id.* at 8.

and all associated benefits which would have accrued during the grievant's suspension period were awarded to the grievant.[3] The agency now seeks administrative review from this EDR.

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."[4] 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 action be correctly taken.[5]

Hearing Officer's Consideration of the Evidence

In the agency's request for administrative review, the agency disputes the hearing officer's conclusion that the primary issue of the case was whether the grievant engaged in workplace violence on February 19, 2012 via alleged oral threats made to another employee.[6] Specifically, the agency asserts that the grievant "was not issued the written notice solely for his actions on February 19, 2012, but for the totality of the actions uncovered through the investigation of that incident." Moreover, it alleges its written notice and due process letter "clearly addresses the mismanagement and hostile work environment by [the grievant]" for various dates. Hence, the agency challenges whether the hearing officer was solely limited to testimony and evidence only about the alleged February 19, 2012 workplace violence incident.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Based on his analysis of the Group II Written Notice, the hearing officer concluded that because the agency's Group II Written Notice specified an offense date of February 19, 2012 and an offense code #32 for workplace violence violation, the agency did not properly charge the grievant with additional acts of mismanagement as alleged by the agency.[9] Specifically, the hearing officer stated that the agency "could have cited a larger time frame or multiple dates" for the offense date.[10] In addition, the agency "could have selected numerous other offense codes that would apply to the mismanagement issues but it chose not to do so."[11] As such, the hearing

[3] *Id*.
[4] Va. Code § 2.2-1202.1(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] *See* Hearing Decision at 5.
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] Hearing Decision at 7.
[10] *Id.*
[11] *Id.*

officer concluded that agency was bound to the notice it issued the grievant, and likewise, he was solely limited to testimony and evidence about the February 19, 2012 incident.[12]

Based on a review of the record evidence, there is evidence to support the Group II Written Notice sufficiently detailed several workplace violence violations by the grievant, and not just the February 19, 2012 alleged violation.[13] For example, the Group II Written Notice also describes the grievant's alleged intimidating act of issuing "the new deal" document to his employees.[14] Moreover, the agency's due process letter describes at length an alleged February 14, 2012 misuse of state property incident as well as an alleged hostile work environment situation created by the grievant's "authoritative and dictatorial" management style.[15] The agency's due process letter clearly stated it was disciplining the grievant for violations of the "workplace violence/harassment policy" because of *all of the behaviors and actions noted* in the due process letter.[16]

Based on these allegations included in the Written Notice and the referenced due process letter, it appears the hearing officer has improperly limited the focus of the case to only events that occurred on February 19, 2012. Consequently, EDR remands this matter for further consideration by the hearing officer of all of the alleged violations addressed in the agency's Group II Written Notice and its March 12, 2012 due process letter.

Due Process

In the agency's administrative review request, the agency also raises a due process challenge, alleging that the hearing officer erred in finding the grievant was not given due process for any allegations of misconduct beyond those that occurred on February 19, 2012. Specifically, the agency alleges the grievant was given due process because the "written notice clearly states that the notice is for violation of the workplace violence policy. The written notice goes on to describe the actions that led to this disciplinary action, citing both the threatening comments on February 19, 2012, as well as '[the grievant's] intimidational [sic] actions, covertly retaliating against employees and his authoritative/dictatorial management techniques' and that his 'use of belittling language has instilled fear in his employees.'"

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[17] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[18] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter

[12] *Id.*
[13] Agency Exhibit 1, Page 1.
[14] *Id.*
[15] Agency Exhibit 1, Page 3-4.
[16] *Id.* at 4.
[17] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.").
[18] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

of compliance with the grievance procedure's *Rules*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[19] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[20] In addition, the *Rules* provide that "any challenged management action or omission not qualified cannot be remedied through a hearing."[21] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, the description of the offense in the Group II Written Notice stated:

> Group II for violation of workplace violence policy. On 2/21/12 allegations of [the grievant] making threatening remarks whereas an employee was fearful of harm reported. The agency conducted an investigation and evidence was found confirming the allegations. [The grievant] admitted to having a conversation with an employee regarding research on how to remove rats. The notes provided do not indicate research, instead contains statements such as "we have one or more rats among us!"; "they could be sitting next to you one day!"; "I like to smoke them out"; "Squeeze Play!" Further, evidence was found which revealed management issues existed at [named] area headquarters. The issues stem from [the grievant's] intimidational [sic] actions, covertly retaliating against employees and his authoritative/dictatorial management techniques. [The grievant's] use of belittling language has instilled fear in the employees. [The grievant] read aloud to employees a document be referred to as "the new deal" which contained the statement "nothing to benefit employees." In addition, he made statements that allege possible fraudulent and misuse of state property by the employees. The manner in which these statements were made could be viewed as retaliatory since the actions described are not permissible under agency policies and should never been allowed under any circumstances. For further details, please see attached due process letter and "the new deal" document.

EDR concludes that the above description fully details the grievant of the time period and surrounding circumstances for which he was charged with violating the workplace violence policy. Accordingly, we cannot conclude, for purposes of compliance with the grievance procedure only, that the grievant's due process rights were violated simply because the Group II Written Notice reflects an offense date of February 19, 2012 and an offense code #32. Nor can we conclude that the offense date and code constrained the notice provided to the grievant to that date alone. To find otherwise would ignore the full text of the Written Notice and the attachment.

As such, the hearing officer is directed to reconsider and address the full allegations of the Written Notice and the attachment as discussed in the prior section. Finally, as noted above,

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[19] *Rules for Conducting Grievance Hearings* § VI(B) (citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)), (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.").

[20] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[21] *Rules for Conducting Grievance Hearings § I.*

due process is a legal concept. Thus, once the hearing decision becomes final, either party can raise any due process claims with the circuit court in the jurisdiction where the grievance arose.

CONCLUSION

For the reasons set forth above, we remand the decision for further clarification and consideration. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[22] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[23]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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[22] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[23] *See Grievance Procedure Manual* § 7.2.
[24] *Grievance Procedure Manual* § 7.2(d).
[25] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).