Issue: Administrative Review of Hearing Officer's Decision in Case No. 10017; Ruling Date: April 8, 2013; Ruling No. 2013-3572; Agency: Old Dominion University; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2013-3572
April 8, 2013

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10017. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10017, as found by the Hearing Officer, are as follows:[1]

> Old Dominion University employs Grievant as a Police Sergeant. He has been working for the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> On August 27, 2012, Officer S was working in an intersection near the Campus directing traffic. A bicycle rider cut across a lane with an oncoming vehicle and the vehicle struck the bicycle rider. This caused Officer S to go into what she called "shock". She was able to notify the dispatcher of the accident and other officers arrived at the scene. Officer P told Officer S to sit down in a patrol car to the side of the road and Officer S did so. Officer E had parked his vehicle in the intersection in a manner that blocked traffic. Grievant arrived at the intersection and asked Officer S to move Officer E's vehicle because Officer E was busy attending to the bicyclist. Grievant told Officer S to move Officer E's vehicle out of the intersection. Officer S said, "With all due respect, give me time to get myself together." Officer S said she could not move the vehicle. Grievant told her she had to pull herself together and "be tougher than this." Officer S got out of the vehicle and was trying to walk but had difficulty. Grievant asked her if the needed "PRS" referring to immediate medical attention. Officer S said she did

[1] Decision of Hearing Officer, Case No. 10017 ("Hearing Decision"), March 25, 2013, at 2-3 (footnote omitted).

not need PRS. Grievant asked if she was sure that she did not need PRS. Officer S said she just needed time to get herself together. Officer R said that she would move Officer E's vehicle and Officer R did so. Grievant left the intersection and returned to headquarters to brief the Assistant Chief on the details of the accident. Approximately ten minutes later, Grievant returned to the intersection and observed Officer S still seated in the police vehicle. Grievant believed that Officer S had had sufficient time to compose herself so he asked her to assist Officer P with directing traffic. Instead of doing so, Officer S said she was going to call the Chief to complain about Grievant. Officer S attempted to call the Chief. Grievant said there was no reason for her to involve the Chief and that they could work out their difficulties directly. Grievant was irritated and said, "I know some of your female officers are out to get us sergeants, but we should try to work things out together." Officer S responded, "Sir, I don't know what you are talking about. I have not filed a false report against any officer or Sergeant." Grievant walked away from Officer S. He later returned to her and apologized to her and said that they were both a little bit upset and that he wanted to get traffic moving and to make sure she was all right. Grievant told her to speak with the Lieutenant.

Grievant returned to headquarters and asked Officer R to come to his office. Grievant asked Officer R, "Do you think I was insensitive to Officer [S]?" Officer R replied, "Officer [S] just needed a minute to get herself together and you kept insisting on her returning to her post. We all know that we are police officers and sometimes we may see things that will affect us a little, but if an Officer asks for a few minutes to get themselves together, we would expect a supervisor would grant us that." Grievant replied, "I know what it is, three against one, you female Officers are against me; never mind [Officer R]." Officer R exited Grievant's office without responding.

At the hearing, the grievant argued that he was denied procedural due process because "the Agency did not provide him with the complete nature of the complaints against him when he drafted his statement" during the investigatory process.[2] The grievant also argued that the agency failed to provide him with, and require his completion of, a form advising him of his rights before conducting its investigation.[3] In his March 25, 2013 hearing decision, the hearing officer upheld the agency's issuance of a Group I Written Notice.[4] The grievant now seeks administrative review from 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."[5] If the hearing

[2] Hearing Decision at 4.
[3] *Id.*
[4] *Id.* at 6.
[5] Va. Code § 2.2-1202.1(2), (3), and (5).

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 hearing officer correct the noncompliance.[6]

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy, including certain due process guarantees incorporated therein. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Pre-Disciplinary Due Process

The grievant further argues that he was denied pre-disciplinary due process protections. In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that, prior to certain disciplinary actions, the Constitution generally guarantees those with a property interest in continued employment absent cause (i) the right to oral or written notice of the charges, (ii) an explanation of the employer's evidence, and (iii) 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]

In this case, the hearing officer directly addressed the grievant's assertion that he was denied pre-disciplinary due process, stating that "[a]ny defect in due process was cured by the hearing process in which Grievant had the opportunity to know the allegations against him and present any defenses he chose during the hearing."[10] The grievant had a full hearing before an impartial decision-maker, an opportunity to present evidence, and an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker.[11] Based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. We recognize that not all

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[6] *See Grievance Procedure Manual* § 6.4.
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] 470 U.S. 532, 545-46 (1985). State policy requires that

> Prior 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 the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60 (E)(1). In addition, 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 545-46.
[10] Hearing Decision at 4.
[11] *See, e.g.*, Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-61 (4th Cir. 1983).

jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[12] However, we are persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[13] Accordingly, we agree with the hearing officer that, as a matter of the grievance procedure, the grievant suffered no due process violation.

In addition, the grievant claims that he suffered a pre-disciplinary due process violation because the agency failed to issue him a written notice advising him of his rights while it investigated his conduct. The written notice in question formalizes statutory requirements governing the conduct of an investigation involving a law enforcement officer.[14] The hearing officer addressed this issue as well, stating that the agency's omission was harmless error because the grievant received the notice required by statute.[15] We have reviewed nothing that gives us any reason to dispute the hearing officer's determination. Further, as discussed above, we conclude that the extensive post-disciplinary due process afforded to the grievant cured any lack of pre-disciplinary due process in this case, and decline to disturb the hearing officer's decision on this basis. However, we note that these issues necessarily implicate questions of law. As such, the grievant may seek to appeal the final hearing decision to the appropriate Circuit Court on the basis that the decision is contradictory to law.[16]

Newly Discovered Evidence

In his request for administrative review, the grievant alleges that there is newly-discovered evidence that the agency has dismissed Group Notices against other employees because of pre-disciplinary due process concerns. Before conducting its investigation of the grievant, the agency did not provide him with a form advising him of his rights during the

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[12] *See* 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.").

[13] *See* Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 436-37 (4th Cir. 2002) (explaining that "to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state . . . a 'due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.'" (quoting Fields v. Durham, 909 F.2d 94, 97-98 (4th Cir. 1990))); Massey v. Shell, 2011 U.S. Dist. LEXIS 31715, at *24 (M.D. Ala. Mar. 24, 2011) ("[T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under § 1983 arise.") (citation omitted); *see also* Stenseth v. Greater Fort Worth & Tarrant County Community Action Agency, 673 F.2d 842, 846 (5th Cir. 1982) (stating that, although pre-termination proceedings may have been inadequate, post-termination proceedings were sufficient to cure the defect); Peterson v. Dakota County, 428 F.Supp 2d 974, 980 (Dist. Minn. 2006) ("Extensive post-termination proceedings may cure inadequate pretermination proceedings."(citations omitted)); *cf.* Koga v. Busalacchi, No. 2010 U.S. Dist. LEXIS 8293, at *7 (E.D. Wis. Feb. 1, 2010) (holding that, in the context of the state's removal of commercial driver's license, an adequate post-deprivation remedy can cure any defect in process leading up to the deprivation).

[14] *See* Va. Code § 9.1-501 (enumerating the requirements for conduct of an investigation of a law enforcement officer).

[15] Hearing Decision at 4-5.

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

investigation.[17] The grievant claims that the agency did not provide two other employees with same form, and that, as a result, the agency reduced subsequently-issued Group Notices.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[18] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[19] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[20]

Here, the grievant has not provided sufficient facts to support his contention that the additional information should be considered newly discovered evidence under this standard. The grievant discovered this information after his hearing, although he has not stated precisely when the discovery occurred. He has not provided any information about his exercise of due diligence in discovering this new evidence. The grievant has also not provided any information about the underlying conduct that resulted in these other Group Notices, such as any similarity with the conduct at issue in the grievant's case. Furthermore, there is no evidence that these other grievances contain any acknowledgment by the agency that pre-disciplinary due process concerns resulted in its decision to reduce the Group Notices to oral or written counseling. In the absence of such information, there is no basis to conclude that this evidence is material or that it would result in a new outcome if the case were retried. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

Retaliation

In his appeal, the grievant also appears to claim that he has been the subject of retaliation for engaging in the grievance process. Specifically, he states that, since filing his grievance, he has been transferred from the day shift to a position on the evening and night shift. The grievant did not, however, raise this allegation during the grievance process or during the hearing. If he wishes to pursue this claim, the grievant may seek relief by filing an additional grievance with the agency alleging retaliation for engaging in the grievance process.

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[17] Hearing Decision at 4-5.
[18] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining newly discovered evidence standard in context of grievance procedure).
[19] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989).
[20] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Mitigation

The grievant further contends that the hearing officer did not properly consider potential mitigating factors in this case. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[21] The *Rules for Conducting Grievance Hearings* (the "*Rules*") state "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[22] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[23]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[24] EDR will review a hearing officer's mitigation determination for abuse of discretion,[25] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Based upon a review of the record, there is sufficient evidence to support the hearing officer's mitigation determination. At the hearing, neither the grievant nor the agency presented any evidence regarding mitigation. Indeed, the grievant was initially issued a Group II Notice, which the agency voluntarily reduced to a Group I Notice during the grievance process.[26] As a

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[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules for Conducting Grievance Hearings* § VI(A) (citation omitted).
[23] *Id.* at § VI(B) (citations omitted).
[24] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[25] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . . ." *Id.*
[26] Hearing record at 00:02:35 through 00:03:18 (opening statement by agency counsel).

result, EDR cannot find that the hearing officer's determination was in any way unreasonable or not based on the evidence in the record.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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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[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).