

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10053; Ruling
Date: May 28, 2013; Ruling No. 2013-3601; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2013-3601
May 28, 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 10053. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The Department of Corrections (“agency”) employs the grievant as a Power Plant Lead Worker.¹ On September 12, 2012, the grievant received a Group I Written Notice for disruptive behavior.² He subsequently initiated a grievance challenging the disciplinary action on September 27, 2012.³ At the first step of the grievance process, the grievant apparently notified the agency that the name of the other party involved in the incident giving rise to the discipline was wrong. The agency then issued the grievant an unsigned, undated Written Notice with the correct name. After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.⁴ In his April 23, 2013 hearing decision, the hearing officer upheld the disciplinary action.⁵ 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.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not

¹ Hearing Decision in Case No. 10053 (“Hearing Decision”), April 23, 2013, at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 4.

⁶ Va. Code § 2.2-1202.1(2), (3), (5).

award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer erred in not finding that the Written Notice is invalid under DHRM Policy 1.60, *Standards of Conduct*.⁸ The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Pre-Disciplinary Due Process

Fairly read, the grievant's request for administrative review further argues that he was denied pre-disciplinary due process protections through the agency's failure to issue a correct, complete Written Notice. 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.¹⁰ 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."¹¹

In this case, the grievant received a revised Written Notice identifying the correct individual during the management resolution steps. The grievant then 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.¹² Indeed, there is no indication that the grievant has or could reasonably argue that he was not aware of the

⁷ See *Grievance Procedure Manual* § 6.4.

⁸ The agency asserts that the grievant and his counsel failed to raise the issue of the validity of the Written Notice at the grievance hearing. The agency concedes, however, that evidence regarding the corrected Written Notice was presented. As we find no grounds to overturn the hearing officer's decision on the grounds asserted by the grievant, we will assume, for purposes of this ruling only, that the issue was sufficiently before the hearing officer.

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ 470 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."


¹¹ *Loudermill*, 470 U.S. at 545-46.

¹² See, e.g., *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-61 (4th Cir. 1983).

specifics of the charges against him prior to the hearing. 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. We recognize that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.¹³ However, we have long been persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.¹⁴ Accordingly, we cannot find that the hearing officer failed in not finding the grievant suffered a due process violation. We note, however, 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.¹⁵

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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸



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¹³ 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.”).

¹⁴ See EDR Ruling No. 2013-3572 (and authorities cited therein); EDR Ruling No. 2011-2877.

¹⁵ See Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Grievance Procedure Manual* § 7.2(d).

¹⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁸ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).