

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10247; Ruling
Date: April 17, 2014; Ruling No. 2014-3838; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2014-3838
April 17, 2014

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 10247. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the agency as a Unit Manager.¹ On July 26, 2013, the grievant received a Group III Written Notice of disciplinary action with disciplinary transfer and demotion to a lower pay band “with a ten percent disciplinary pay reduction for physical abuse/maltreatment of an offender.”² The grievant timely grieved the disciplinary action.³ A hearing was subsequently held on February 4, 2014.⁴ On February 24, 2014, the hearing officer issued a decision upholding the disciplinary action.⁵ The grievant has now requested administrative review of the hearing officer’s decision.

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

Due Process

The grievant argues that he has not received adequate due process, “because the allegations upon which the [h]earing [o]fficer based his decision were not specifically included in

¹ Decision of Hearing Officer, Case No. 10247 (“Hearing Decision”), February 24, 2014, at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1, 5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

the Written Notice.”⁸ Constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”⁹ is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.¹⁰ However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure’s *Rules for Conducting Grievance Hearings* (“*Rules*”). Further, as discussed below, we note that the agency has requested an administrative review by the DHRM Director. That review may determine whether the agency’s actions violated DHRM Policy 1.60, *Standards of Conduct*, which contains a section expressly entitled “Due Process.”¹¹

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.¹² 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 her 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.”¹³ 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 an opportunity for the presence of counsel.¹⁴ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁵

⁸ The grievant also argues that the hearing officer failed to comply with the grievance procedure by upholding the discipline on a basis other than that stated by the agency in the Written Notice. As this argument overlaps with the grievant’s due process argument for purposes of analysis under the grievance procedure, we will address both arguments in this section.

⁹ *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) (holding that notice prior to a hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency and held as an actual revocation hearing).

¹⁰ *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹¹ *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

¹² *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). State policy requires:

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, *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.”

¹³ *Loudermill*, 470 U.S. at 545-46.

¹⁴ *Detweiler v. Va. Dep’t of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983).

¹⁵ *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).

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.”¹⁶ 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.¹⁷ In addition, the *Rules* provide that “[a]ny challenged management action or omission not qualified cannot be remedied through a hearing.”¹⁸ 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.

The Written Notice in this case described the charged conduct as:

Physical Abuse/maltreatment of offenders—SIU investigation determined that your action on May 13, 2013 constituted the abuse of [offender]. The evidence revealed that during an interview with [offender] on 5/13/2012 you acted without provocation by aggressively forcing [offender], a mental health offender who was restrained with his hands behind his back face down on the floor causing injuries to the offender.¹⁹

The hearing officer found that the nurse who examined the offender found no injuries, although the offender had complained that he was injured.²⁰ Notwithstanding the apparent lack of injury, the hearing officer concluded that the amount of force used by the grievant was excessive under the agency’s Operating Procedure 420.1, *Use of Force*, and that this excessive force constituted physical abuse/maltreatment warranting a Group III Written Notice under agency Operating Procedure 135.1, *Standards of Conduct*.²¹ The grievant argues that because the agency did not show the existence of an injury and did not charge the grievant with a violation of the Use of Force Policy in the Written Notice, the hearing officer erred by upholding the disciplinary action.

While the Written Notice could arguably have been drafted more carefully, there is no evidence that the grievant did not have adequate notice of the charges against him prior to hearing. The Written Notice identifies the date of the event and the other party involved; it generally describes the conduct for which the grievant is being charged – forcing the offender to the ground after he had been restrained; and it states the basis on which the offense is charged as a Group III offense – physical abuse/maltreatment. Further, although the grievant is correct that the agency did not identify the *Use of Force* policy in the Written Notice, it is clear from the inclusion of the *Use of Force* policy in the grievant’s hearing exhibits that the grievant had notice that a violation of that policy was potentially at issue.²² Under these circumstances, it appears that the grievant had adequate notice of the charge against him prior to hearing, and that the

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B) (citing *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.”)).

¹⁷ *See, e.g.*, EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.

¹⁸ *Rules for Conducting Grievance Hearings* § I.

¹⁹ Agency Exhibit 1; Grievant’s Exhibit 1.

²⁰ Hearing Decision at 3.

²¹ *Id.* at 4-5. In response to the grievant’s arguments that “the Inmate’s injuries were not significant and were overstated by the Inmate,” the hearing officer explained, “[i]t is not necessary for the Agency to show that the Inmate suffered serious injuries to establish physical abuse.” *Id.* at 5.

²² *See* Grievant’s Exhibit 4.


Written Notice provided sufficient information to the grievant.²³ The hearing decision will therefore not be disturbed on this basis.²⁴

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review also challenges the hearing officer's application of state and agency policy. Specifically, the grievant appears to argue that his conduct toward the offender does not constitute a basis for a Group III Written Notice or a violation of policy, particularly in light of the possible lack of physical injury. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.²⁵ The grievant has requested such a review. Accordingly, his policy claims will not be addressed in this review.

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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸



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²³ The grievant also appears to argue that the agency was required to prove an injury because of the inclusion of this allegation on the Written Notice. There is no requirement under the grievance procedure that each allegation contained in a Written Notice be proven: rather the questions for the hearing officer are whether there was sufficient notice given to the grievant to defend himself at hearing, and if so, whether those facts proven by the agency establish a sufficient basis for discipline. As discussed below, this latter determination is a policy question to be decided by DHRM.

²⁴ EDR's review of the due process concerns is limited to the questions raised as matters arising under the grievance procedure. As due process is necessarily a legal concept, the grievant is free to raise these issues as legal questions in an appeal to the circuit court. *See* Va. Code § 2.2-3006(B).

²⁵ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).