Issue: Administrative Review of Hearing Officer's Decision in Case No. 10263; Ruling Date: April 16, 2014; Ruling No. 2014-3844; Agency: Department of Corrections; Outcome: Remanded for Clarification.

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 2014-3844
April 16, 2014

The Department of Corrections (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 decision in Case Number 10263. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The grievant was employed by the agency as a technical educator.[1] On November 22, 2013, the grievant received a corrected Group III Written Notice with termination for alleged violations of the agency's policy on employee relationships with offenders and the facility's policy on perimeter security.[2] The grievant timely grieved the disciplinary action.[3] A hearing was subsequently held on February 21, 2014.[4] On March 10, 2014, the hearing officer issued a decision rescinding the disciplinary action.[5] In explaining the basis for his decision, the hearing officer stated:

> The Grievant's attorney correctly points out that disciplinary actions must be administered promptly under the [*Standards of Conduct*]. The hearing officer agrees with the Grievant's attorney that under the facts and circumstances of this case, where the discipline was on the face of the Written Notice imposed some 7 months after the alleged serious security breaches, based on a highly irregular investigation and concerning an offense date which has no meaning, the Agency's discipline should be voided because it is not prompt and violates the Grievant's rights of due process.[6]

The agency has now requested administrative review of the hearing officer's decision.

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[1] Agency Exhibit 3 at 1.
[2] Agency Exhibit 1.
[3] *Id.*
[4] Decision of Hearing Officer, Case No. 10263 ("Hearing Decision"), March 10, 2014, at 1.
[5] *Id.* at 1, 4.
[6] *Id.* at 4.

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."[7] 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.[8]

Due Process

The agency argues that the hearing officer erred in finding that the grievant had received inadequate due process under the grievance procedure. 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 contain 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

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[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[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."

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]

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.

In this case, the hearing officer found that the April 24, 2013 offense date provided on the Written Notice was incorrect, and that this error, in whole or in part, constituted a basis for reversing the disciplinary action.[19] However, it appears that despite this error, the grievant had notice that this date was erroneous prior to the hearing and understood the conduct for which he was being charged. For example, in his grievance, the grievant stated that he was unaware of any incident occurring on April 24, 2013, the date stated on the Written Notice,[20] but in the same document "provide[d] some context for the events that led to [him] being issued this Group III Written Notice," and correctly identified events occurring on July 22 through 24, 2013 as those giving rise to the charges made by agency.[21] Under these circumstances, it appears that the grievant had adequate notice of the charge against him prior to hearing, and that the Written

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[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).
[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] Hearing Decision at 2, 4. The agency agrees that this date was a "typographical error."
[20] Agency Exhibit 3 at 3-4.
[21] *Id.* Although the hearing officer did not make any finding regarding the correct offense date, it appears from the agency's request for administrative review that it considers the actual offense date to be in the approximate July 22 and 23, 2013 time period.

Notice, though defective, provided sufficient information to the grievant.[22] The hearing decision is therefore remanded to the hearing officer for reconsideration consistent with this ruling.

Inconsistency with State and Agency Policy

The agency also challenges the hearing officer's application of state and agency policy. In particular, the agency argues that the hearing officer erred in apparently finding the erroneous offense date on the Written Notice, the timing of the disciplinary action and its investigation of the grievant's conduct to be inconsistent with policy. In addition, the agency appears to assert that the hearing officer's finding that the grievant's use of medication was not a violation of the facility's Local Operating Procedure 440.2, *Perimeter Security*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[23] The agency has requested such a review. Accordingly, its policy claims will not be addressed in this review.

Failure to Make Required Findings and Determinations

The agency further asserts that the hearing officer failed to make the required findings and determinations regarding the challenged disciplinary action. The *Grievance Procedure Manual* requires a hearing officer to include "findings of fact on the material issues and the grounds in the record for those findings."[24] The *Rules* further charge the hearing officer with determining "whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances."[25] To make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).[26]

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[22] Further, with respect to the hearing officer's conclusion that the agency's investigation process and delay in issuing disciplinary action were additional grounds for reversal on pre-disciplinary due process grounds, *see* Hearing Decision at 4, neither the alleged delay nor the purported shortcomings in the investigation process constitutes a violation of the grievance procedure. However, although the agency's actions do not violate due process to the extent this concept is incorporated into the grievance procedure, this ruling does not address the issue of whether the agency's actions violate constitutional due process as a legal question.

[23] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989). In its request to EDR for administrative review, the agency provided additional information that was not part of the hearing record. For example, the agency offered details regarding the agency's efforts to provide pre-disciplinary due process to the grievant which were not provided by the agency at hearing. To the extent the agency similarly provided DHRM with additional information, EDR notes that any administrative review must be limited to the hearing record and may not include information provided by the agency in its administrative review request that is not also contained in the hearing record.

[24] *Grievance Procedure Manual* § 5.9.

[25] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[26] *Id.*

In this case, the hearing officer rescinded the disciplinary action on the finding that the discipline "was not prompt and violates the Grievant's rights of due process."[27] Having reached this conclusion, however, the hearing officer did not proceed to make factual findings on the remaining material issues of the case, nor did he determine, on the merits, whether the disciplinary action was warranted and appropriate under the standard set forth in the *Rules*. The hearing decision is therefore remanded to the hearing officer to make factual findings regarding the material issues in this case[28] and to determine, based on those findings, whether the agency has shown that the grievant engaged in misconduct warranting a Group III Written Notice with termination.

On remand, the hearing officer should consider, among other issues, whether the agency has shown by a preponderance of the evidence that inappropriate documents were found on the aide's computer, that the grievant was in some way responsible for the aide having those documents, and that this conduct constituted a violation of agency Operating Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders.*[29] In addition, the hearing officer should address more thoroughly whether the agency has met its burden of showing that the grievant violated facility policy in bringing in medication and whether the agency's actions were the result of unlawful discrimination, as alleged by the grievant. If the hearing officer determines on remand that the agency has carried its burden by a preponderance of the evidence, he must then also assess "whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist that would overcome the mitigating circumstances."[30]

Findings of Fact

The agency's request for administrative review also challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[31] and to determine the grievance based "on the material issues and grounds in the record for those findings."[32] Further, as previously explained, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[33] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has

[27] Hearing Decision at 4.
[28] EDR recognizes that the hearing officer's ability to make factual findings will be limited to the evidence presented at hearing. To the extent the hearing officer is unable to reach a necessary finding from the hearing record, he should so note and consider the lack of evidence in assessing whether the burden of proof has been met. Indeed, the record evidence presented by the agency may be lacking in many regards.
[29] *See* Agency Exhibit 1.
[30] *Rules for Conducting Grievance Hearings* § VI(B)(1). Nothing in this ruling is meant to indicate that the hearing record supports findings one way or another. Rather, we are remanding the case back for the hearing officer to make those determinations.
[31] Va. Code § 2.2-3005.1(C).
[32] *Grievance Procedure Manual* § 5.9.
[33] *Rules for Conducting Grievance Hearings* § VI(B).

established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[34] 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.

The agency asserts that the hearing officer "erred in his statement that the Group III Written Notice with a termination was effective November 22, 2013."[35] The agency instead suggests that the hearing officer should have considered October 28, 2013 to be the effective date of the Written Notice, as that was the date the Written Notice was first issued.

A review of the hearing decision indicates that the hearing officer did not find that the Written Notice with termination was effective November 22, 2013, but instead found that "[o]n November 22, 2013, the Agency issued a Group III Written Notice to the Grievant with a termination effective December 1, 2013…."[36] Although the agency may be correct that an original Written Notice was apparently issued on October 28, 2013 and subsequently reissued on November 22, 2013,[37] the hearing record does not support a conclusion that the hearing officer erred. The only Written Notice introduced into evidence at hearing was the corrected November 22, 2013 notice.[38] Consistent with the hearing officer's findings, that document has an issuance date of November 22, 2013, an inactive date of November 22, 2017, and an effective date for the termination of December 1, 2013.[39] At hearing, the agency did not introduce the original October 28, 2013 Written Notice or provide evidence of the agency's reason for reissuing the document.[40] In addition, the grievance in this case was initiated December 17, 2013, more than 30 days after October 28, 2013, the date of the original Written Notice, but within 30 days of the corrected Written Notice, and there is no indication the agency challenged the grievance as untimely. In light of this record evidence, the hearing officer's findings with respect to the date of the Written Notice will not be disturbed.

Many of the other challenges made by the agency appear to be more properly characterized as challenges to the hearing officer's application of state and agency policy, which will be addressed by DHRM. The remainder of the agency's challenges to the hearing officer's findings of fact relate to his limited findings in regard to the substantive charges set forth in the Written Notices. As this ruling remands the hearing decision for further consideration of the merits of the grievant's case, in the interests of efficiency, EDR will wait to review any challenges to the findings of facts on these matters until after the issuance of the remanded

[34] *Grievance Procedure Manual* § 5.8.
[35] *See* Hearing Decision at 2.
[36] *Id.*
[37] *See* Agency Exhibit 1, Grievant Exhibit at 2.
[38] *Id.*
[39] *Id.*
[40] Although the agency has submitted an email showing that it apparently reissued the Written Notice on the advice of DHRM, that document was not presented at hearing and is therefore not part of the record on review.

hearing decision to the extent they are raised by either party in a future request for administrative review of the remand decision.

CONCLUSION

For the foregoing reasons, EDR remands the decision to the hearing officer for further consideration consistent with this ruling. However, because a threshold issue in this case appears to be whether the hearing officer correctly concluded that the agency's actions in investigating and issuing the disciplinary action warranted reversal under state policy, EDR directs the hearing officer to wait to issue his remanded decision until after DHRM has had an opportunity to address the agency's arguments regarding this question.[41] After DHRM issues its determination, the hearing officer should then issue his remanded decision in accordance with this EDR ruling as well as in accordance with any direction contained in the DHRM determination. Following the issuance of the remanded decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[42] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[43]

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.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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[41] As the grievant's alleged violation of Local Operating Procedure 440.2, *Perimeter Security*, will presumably be addressed in more detail in the hearing officer's remanded decision, DHRM may choose to wait to address the agency's arguments regarding that policy. The agency may renew its challenge in a future request for administrative review if it chooses after the hearing officer has issued his remanded decision.
[42] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[43] *See Grievance Procedure Manual* § 7.2(a).
[44] *Grievance Procedure Manual* § 7.2(d).
[45] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[46] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).