Issue: Administrative Review of Hearing Officer's Decision in Case No. 10700; Ruling Date: January 8, 2016; Ruling No. 2016-4282; Agency: University of Virginia; 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 University of Virginia
Ruling Number 2016-4282
January 8, 2015

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 10700. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant was employed as a medical office coordinator for the University of Virginia ("University").[1] On September 8, 2015, the grievant was issued a Group III Written Notice with termination for violation of the University's workplace violence policy, disruptive behavior, and threats or coercion.[2] The grievant grieved the disciplinary action,[3] and a hearing was held on November 18 and 30, 2015.[4] On December 2, 2015, the hearing officer issued a decision reducing the disciplinary action to a Group II but affirming the termination on the basis of accumulation of discipline.[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 a party; the sole remedy is that the action be correctly taken.[7]

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[1] *See* Agency Exhibit 1 at 1.
[2] Agency Exhibit 2 at 1-3; *see* Decision of Hearing Officer, Case No. 10700 ("Hearing Decision"), December 2, 2015, at 1..
[3] Agency Exhibit 1.
[4] *See* Hearing Decision at 1.
[5] Hearing Decision at 1, 7.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Due Process

The grievant argues that the hearing officer erred by upholding the disciplinary action on the ground that the University had failed to provide her with adequate pre-disciplinary due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[8] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[9] 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*").

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.[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 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."[11]

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.[12] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[13]

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[8] *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).

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

[10] 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."

[11] *Loudermill*, 470 U.S. at 545-46.

[12] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).

[13] 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; s*ee 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."[14] In this case, EDR finds that the grievant did have adequate notice of the charge against her and that the charge was sufficiently set forth on the Written Notice. We further note that the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[15] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[16] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure. As such, the December 2, 2015 decision will not be disturbed on this basis.

Findings of Fact

The grievant's request for administrative review also appears to challenge the hearing officer's finding that the grievant engaged in the conduct described in the Written Notice.[17] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[18] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[19] Further, 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.[20] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[21] 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

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[14] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. 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.")).

[15] *See, e.g.*, 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.").

[16] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

[17] *See* Hearing Decision at 4.

[18] Va. Code § 2.2-3005.1(C).

[19] *Grievance Procedure Manual* § 5.9.

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

[21] *Grievance Procedure Manual* § 5.8.

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.

In this case, the grievant disputes, in effect, the hearing officer's finding that she "complained disruptively" about a co-worker's alleged lying and deliberately disobeyed her manager's directive not to come to work.[22] While the grievant may disagree with the hearing officer's decision, determinations of credibility as to disputed facts, such as those cited in the grievant's request for administrative review, are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case,[23] EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision.

Witnesses

The grievant asserts that she was not able to question a main witness in her case, because he was no longer employed by the University and had relocated out of state. The University was not required to produce a witness no longer under its control, and as such, there was no basis for the hearing officer to draw any adverse inferences against the University for his absence.[24] The grievant also challenges the hearing officer's denial of her request to question the University's counsel. Although this ruling seems to have taken place outside the hearing recording, it appears that the hearing officer's determination was based on the assertion of attorney-client privilege by the University. EDR has reviewed nothing that would suggest that the hearing officer erred in his apparent conclusion that the information sought to be obtained by the grievant was protected by the attorney-client privilege. Further, EDR cannot find that the hearing officer's exclusion of the University's counsel as a witness was not in accordance with the grievance procedure. For these reasons, the decision will not be remanded on this basis.

Failure to Mitigate

Fairly read, the grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the Written Notice. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or in aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[25] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "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."[26] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[22] Hearing Decision at 4.
[23] *See, e.g.*, Agency Exhibits 3,4.
[24] *See Rules for Conducting Grievance Hearings* §§ III(E), V(B).
[25] Va. Code § 2.2-3005(C)(6).
[26] *Rules for Conducting Grievance Hearings* § VI(A).

> (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.[27]

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 high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[28] EDR will review a hearing officer's mitigation determination for abuse of discretion,[29] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that mitigation was not warranted.[30] Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

Retaliation Investigation

In her request for administrative review, the grievant appears to ask that EDR conduct a retaliation investigation regarding her claims against the University. As the grievant has already pursued these claims through the grievance procedure, she may not now seek redress for the same management actions through the retaliation investigation process.[31] Accordingly, EDR must deny the grievant's request for a retaliation investigation.

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[27] *Id.* § VI(B)(1).
[28] The Merit Systems Protection Board's approach to mitigation, while not binding on this Office, 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).
[29] "'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.*
[30] Hearing Decision at 5- 7.
[31] *Grievance Procedure Manual* § 1.5.

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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[32] *Grievance Procedure Manual* § 7.2(d). To the extent this ruling does not explicitly address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that the issue is not material, in that it has no impact on the result in this case, or that the issue has previously been adjudicated in another grievance.
[33] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).