

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10746; Ruling  
Date: April 29, 2016; Ruling No. 2016-4331; Agency: Department of Corrections;  
Outcome: AHO's decision affirmed.



**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 2016-4331  
April 29, 2016

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 10746. 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 Corrections Officer by the Department of Corrections (“agency”).<sup>1</sup> On November 9, 2015, the grievant was issued a Group II Written Notice, with termination, for “fail[ing] to report for duty or call as scheduled without proper notice to [his] supervisor.”<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on February 19, 2016.<sup>3</sup> On March 10, 2016, the hearing officer issued a decision upholding the disciplinary action.<sup>4</sup> 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 . . . .”<sup>5</sup> 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.<sup>6</sup>

*Inconsistency with Agency Policy*

In his request for administrative review, the grievant asserts that the hearing officer’s decision is inconsistent with agency policy. He argues that he was not afforded appropriate due process under the agency’s Operating Procedure 135.1, because he was not given twenty-four hours’ notice to respond to pending disciplinary action. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup>

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<sup>1</sup> See Decision of Hearing Officer, Case No. 10746 (“Hearing Decision”), March 10, 2016, at 2.

<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> See Hearing Decision at 1.

<sup>4</sup> *Id.* at 1, 7.

<sup>5</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

The grievant has requested a review by DHRM. Accordingly, the grievant's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

### *Due Process*

The grievant argues that he was not afforded due process throughout the disciplinary procedure. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"<sup>8</sup> is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.<sup>9</sup> Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. Further, as discussed above, the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct*, contains a section expressly entitled "Due Process."<sup>10</sup> The DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

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.<sup>11</sup> 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."<sup>12</sup>

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 the presence of counsel.<sup>13</sup> The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.<sup>14</sup>

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<sup>8</sup> *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).

<sup>9</sup> *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>10</sup> *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

<sup>11</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

[p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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."

<sup>12</sup> *Loudermill*, 470 U.S. at 546.

<sup>13</sup> *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995) ("The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses

In this case, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice.<sup>15</sup> He 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 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. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.<sup>16</sup> 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.<sup>17</sup> Accordingly, we find no due process violation under the grievance procedure.

### *Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>18</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>19</sup> Further, in cases involving discipline, the hearing officer reviews the evidence *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.<sup>20</sup> 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.<sup>21</sup> 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.

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and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985)).

<sup>14</sup> See Va. Code § 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).

<sup>15</sup> See Agency Exhibit 1.

<sup>16</sup> 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.").

<sup>17</sup> 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).

<sup>18</sup> Va. Code § 2.2-3005.1(C).

<sup>19</sup> *Grievance Procedure Manual* § 5.9.

<sup>20</sup> *Rules for Conducting Grievance Hearings* § VI(B).

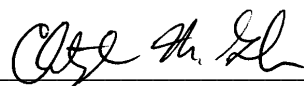
<sup>21</sup> *Grievance Procedure Manual* § 5.8.

In this instance, the grievant argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In support of this assertion, he challenges the credibility of one of the agency's witnesses, the Corrections Captain. The grievant states that if a particular Lieutenant had testified at the hearing, he would have been able to provide more reliable information. Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this matter. Determinations of credibility as to disputed facts 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.

In addition to the Captain's testimony regarding the grievant's pattern of failing to report to work without proper notification,<sup>22</sup> the facility's Assistant Warden also testified that there were three particular days the grievant should have reported to work, failed to do so, and did not notify a supervisor as he was required to do under agency policy.<sup>23</sup> The grievant had the opportunity to call the Lieutenant as his witness at the hearing to refute this evidence and apparently chose not to do so. In his hearing decision, the hearing officer found the testimony of the Captain and Assistant Warden credible<sup>24</sup> and held that the agency appropriately determined that the grievant's "disciplinary infractions on October 21, 2015 justified the Group II Written Notice. . . ."<sup>25</sup> Because 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. Accordingly, we decline to disturb the decision on this basis.

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



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

<sup>22</sup> See Hearing Recording at 16:14-16:41 and 18:24-22:12.

<sup>23</sup> Hearing Recording at 47:47-48:20.

<sup>24</sup> Hearing Decision at 3.

<sup>25</sup> *Id* at 4.

<sup>26</sup> *Grievance Procedure Manual* § 7.2(d).

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

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