

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11055; Ruling Date: January 16, 2018; Ruling No. 2018-4655; Agency: Department of Motor Vehicles; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Motor Vehicles
Ruling Number 2018-4655
January 16, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11055. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11055 are as follows:¹

The Department of Motor Vehicles employed Grievant as a Program Support Technician Senior at one of its facilities. Grievant had been employed by the Agency for approximately 17 years. Grievant had prior active disciplinary action. Grievant received a Group I Written Notice on May 17, 2016 for unsatisfactory work performance. Grievant received a Group II Written Notice with a five workday suspension on September 20, 2016 for unsatisfactory work performance.

Grievant was responsible for receiving telephone calls from customers, listening to their questions, researching the Agency’s records, if necessary, and providing customers with accurate information.

The Agency’s objective was to have customer questions resolved upon their first contact with the Agency so that customers did not have to call a second time. The Agency recorded Grievant’s telephone calls from customers.

Agency managers randomly selected several of Grievant’s telephone calls and then graded those calls based on Greeting, Verification, Identify Customer Needs, Telephone Technique, Meeting Customer Needs, and Closing. Grievant was expected to score at least 89 out of 100 points every month for her work to be considered Contributor.

Grievant scored at a below contributor level for her telephone customer service. The Agency decided to place Grievant on a Corrective Action Plan.

¹ Decision of Hearing Officer, Case No. 11055 (“Hearing Decision”), December 5, 2017 at 2-3.

Beginning on October 6, 2016, the Manager provided Grievant with side by side coaching and passive monitoring of her telephone calls. They met weekly to discuss Grievant's overall performance, review Grievant's telephone calls, and provide Grievant with helpful tools to improve her work performance. Grievant was notified that "if at any point during this three month period (or thereafter) [Grievant's] performance falls below an acceptable level, DMV may use the Standards of Conduct to address any such shortcomings, which could include Written Notices that may result in termination of employment."

Agency managers reviewed Grievant's calls and concluded Grievant's score for February 2017 was 82.33, March 2017 was 79, and April 2017 was 89.

On April 11, 2017, Grievant received a call from Customer 1. Customer 1 wanted to know what he had to do to obtain his license once his revocation time ended. Customer 1 held a learner's permit approximately 14 years earlier. Grievant told Customer 1 that because it had been so long since he held a learner's permit, he would have to "fully test" and hold a learner's permit for 60 days. Customer 1 told Grievant he had been previously advised that since he once held a learner's permit, he would not be required to have a learner's permit. Grievant contacted Ms. F for assistance with the call. Ms. F told Grievant that she would check a separate system only accessible to help desk agents and supervisors. Ms. F told Grievant that if the system showed a license history, then Customer 1 would be required to fully test but the holding period for a learner's permit would be waived. Ms. F located license history in the system and told Grievant that she would note in the record for the Customer Service Center to determine where Customer 1 was to go to test. Grievant spoke with Customer 1 and incorrectly advised him he would have to hold a learner's permit and then noted this requirement in the Agency's record for Customer 1.

On May 3, 2017, Grievant spoke with Customer 2. Customer 2 called to update her customer service address to reflect her Maryland residency and provide information on the insurance monitor on her record. Customer 2 asked if there was an option for payment plan for the fees she owed. Grievant incorrectly told Customer 2 she would have to visit an Agency customer service center to speak with a manager to enter into a payment plan for the fees. Only Virginia residents were eligible to be placed on a payment plan for fees. Grievant should have told Customer 2 that no payment plan was available.

On June 1, 2017, the grievant was issued a Group II Written Notice for unsatisfactory performance and terminated based on her accumulation of disciplinary action.² The grievant timely grieved her termination from employment and a hearing was held on August 30, 2017.³ On December 5, 2017, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.⁴ The grievant has now requested administrative review of the hearing officer's decision.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 5.

DISCUSSION

By statute, EEDR 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 . . .”⁵ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Hearing Officer’s Consideration of the Evidence

The grievant requests an administrative review based upon a “factually incorrect” statement in the hearing decision. Specifically, she challenges the hearing officer’s finding that she received a previous Group II Written Notice with five day suspension in September 2016. She asserts that the agency provided incorrect information to the hearing officer and failed to provide her with appropriate due process. In response, the agency indicates that the grievant is correct that the Written Notice contains erroneous information, and it has issued a correction to her personnel file, which states that the grievant never received a suspension nor did she lose any pay as a result of the September 2016 disciplinary action.

To the extent that the hearing decision contains an error regarding a suspension accompanying a previously-issued Group II Written Notice in this case, such an error is harmless, as it is evident that the hearing officer considered whether the allegations against the grievant supported the Group II Written Notice at issue in this case. For instance, the hearing officer found that the grievant had provided incorrect information to customers on two separate occasions, and received unsatisfactory scores for her telephone service in January and February 2017.⁷ Because the grievant had two prior Written Notices for unsatisfactory performance, the hearing officer determined that the agency’s decision to elevate this third Written Notice to a Group II was appropriate.⁸ Further, whether the grievant was suspended in a prior Written Notice has no bearing on the outcome of this case, as a previous suspension would be irrelevant to the analysis of accumulation of disciplinary actions made by the hearing officer.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹⁰ 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. As described above, the hearing officer’s findings in this instance are based upon evidence in the record and the material issues of the case. Accordingly, we decline to disturb the decision on this basis.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Hearing Decision at 3-4.

⁸ *Id.*

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

Due Process

The grievant argues in her request for administrative review that the agency did not provide her with appropriate due process. Constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”¹¹ is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.¹² Nevertheless, because due process is inextricably intertwined with the grievance procedure, EEDR will also address the issue.

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.¹³ 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.”¹⁴

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.¹⁵ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁶

¹¹ *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).

¹² *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹³ 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.”

¹⁴ *Loudermill*, 470 U.S. at 546.

¹⁵ 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 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))).

¹⁶ 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).

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice.¹⁷ She 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. EEDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.¹⁸ 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.¹⁹ Accordingly, EEDR finds no due process violation under the grievance procedure.

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

¹⁷ See Agency Exhibit 1.

¹⁸ 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.").

¹⁹ 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).

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).