

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11273; Ruling Date: February 11, 2019; Ruling No. 2019-4852; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2019-4852
February 11, 2019

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 11273. 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 the hearing decision in Case Number 11273 are incorporated by reference.¹ On September 11, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.² The grievant timely grieved her termination from employment and a hearing was held on January 23, 2019.³ On January 28, 2019, 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.

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 In her appeal, the grievant has challenged no factual conclusions by the hearing officer. Instead, she has challenged an alleged lack of receipt of due process and the alleged bias of the hearing officer.

Due Process

The grievant argues that she has been denied due process, principally during the pre-disciplinary stage. Constitutional due process, the essence of which is “notice of the charges and

¹ Decision of Hearing Officer, Case No. 11273 (“Hearing Decision”), January 23, 2019.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 5.

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

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

an opportunity to be heard,”⁷ is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.⁸ 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.⁹ 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/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.”¹⁰

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.¹¹ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹² As the hearing officer did in his decision,¹³ we presume that the pre-disciplinary due process provided to the grievant was insufficient. Even with this presumption, we agree with the hearing officer’s analysis and find that there is no basis to find a violation of due process warranting remand.

⁷ 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).

⁸ *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁹ *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.”

¹⁰ *Loudermill*, 470 U.S. at 546.

¹¹ *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))).

¹² *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).

¹³ Hearing Decision at 4-5.

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 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.¹⁴ 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.¹⁵ Accordingly, EEDR finds no due process violation under the grievance procedure.

Alleged Bias of Hearing Officer

The grievant further alleges that the hearing officer was biased in favor of the agency because the hearing officer works for the Commonwealth of Virginia and the agency. The *Rules* provide that a hearing officer is responsible for:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in “Recusal,” § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EEDR Policy No. 2.01, Hearing Officer Program Administration.¹⁶

The applicable standard regarding EEDR’s requirement of a voluntary disqualification when the hearing officer “cannot guarantee a fair and impartial hearing,” is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.¹⁷ The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”¹⁸ EEDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.¹⁹ The party moving for recusal has the burden of proving the hearing officer’s bias or prejudice.²⁰

¹⁴ 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.”).

¹⁵ 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).

¹⁶ *Id.* § II. See also EEDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if “a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself.”

¹⁷ While not always dispositive for purposes of the grievance procedure, EEDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

¹⁸ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

¹⁹ E.g., EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

²⁰ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

In this particular case, there is no such evidence. The hearing officer is not an employee of the Department of Behavioral Health and Developmental Services, but rather, a neutral and independent decision-maker appointed by this Office. The mere fact that the hearing officer is also a state employee does not mean that anything improper occurred with respect to any aspect of the case, and the grievant has provided no evidence to suggest that anything inappropriate took place. EEDR has thoroughly reviewed the hearing record, and finds no indication that any improper influence affected the outcome of the hearing decision. EEDR therefore declines 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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).