Issue: Administrative Review of Hearing Officer's Decision in Case No. 10118; Ruling Date: October 2, 2013; Ruling No. 2014-3704; Agency: Department of Juvenile Justice; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2014-3704
October 2, 2013

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 10118. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10118 are as follows:[1]

> The Department of Juvenile Justice employed Grievant as a Senior Juvenile Correctional Officer at one of its facilities. Grievant had prior active disciplinary action. On March 3, 2011, Grievant received a Group II with a 24 hour suspension for failing to provide proper supervision.
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> Grievant's work shift was from 5:45 a.m. until 6:15 p.m. Employees must receive approval from the Agency in order to take planned leave.
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> The central control room officer is responsible for unlocking secured doors in the Facility. Doors in the unit have an intercom system next to them. When someone wants to enter or exit the unit, he or she must push the button to notify the officer in the control room. A camera automatically turns to focus on the person pushing the button. The control room officer is supposed to use the camera system to determine the identity of the person seeking passage through the door. If the person is authorized to pass through the door, the control room officer can unlock the door.
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> On November 21, 2012, Grievant was working in the central control room. She was responsible for unlocking security doors. Resident 1 pushed the button to exit the unit. Grievant did not use the camera system to identify the person seeking to exit the unit. Grievant unlocked the secured door and Resident

[1] Decision of Hearing Officer, Case No. 10118 ("Hearing Decision"), August 13, 2013, at 2-4.

1 exited the unit. Officer W was working in the unit and recognized that Resident 1 was exiting the unit without being supervised. She used her radio to notify other staff that Resident 1 had exited the unit and was not supervised. The Lieutenant approached Resident 1 and instructed Resident 1 to return to the unit. Grievant said "my bad" to the Lieutenant to indicate that she knew she had made a mistake.

The Facility has a "blackout" period from November 15th of the current year through January 9 of the following year. During the blackout period, employees with excessive leave balances are given priority to take their leave. This enables employees with high leave balances to take leave rather than have the excessive leave expire at the end of the year. Grievant was not an employee with excessive leave balances.

On November 27, 2012, Grievant met with the Major and Lieutenant to discuss Grievant's request to take several days off. Grievant wanted to take leave on November 30, 2012, December 1, 2012, and December 2, 2012. She explained to the Major that none of her requests for leave had been granted in 2012. Grievant was frustrated and angry. She said she had ticket to a game on December 2, 2012 and intended to go. The Major ordered her to report to work on December 2, 2012. Grievant said, "I'm not coming and do what you got to do." Grievant then walked out of the meeting.

On November 30, 2012, Grievant reported to work but became ill and went to the doctor after working most of her shift. Her doctor faxed a note to the Facility on November 30, 2012 at 7:32 p.m. stating:

> Please excuse from work starting 11/30.
> Reason – injury
> Resume regular activity 12/05.

Grievant did not report to work on December 1, 2012 and December 2, 2012 as scheduled.

Grievant began short term disability on December 17, 2012 and did not return to work through January 24, 2013.

On March 12, 2013, Resident 2 went to his room to use the bathroom. Only ten residents were permitted in the pod at a time and another resident had taken Resident 2's place in the pod. Resident 2 asked to return to the pod. Grievant responded that it was not her fault he went to his room. Resident 2 called Grievant a f—king bitch. This angered Grievant and she called Resident 2 a bitch. Later that day, Resident 2 told Grievant that he did not mean it when he called her a f—king bitch. Grievant apologized and said she did not mean it when she called him a bitch.

In an August 13, 2013 hearing decision, the hearing officer upheld the agency's issuance of the Group II Written Notice for failure to comply with policy, but reduced the Group II Written Notice for use of abusive language to a Group I Written Notice, upholding the grievant's removal based on the accumulation of disciplinary action.[2] The grievant now seeks administrative review from EDR.

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."[3] 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.[4]

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The grievant has requested such a review.

Although other claims made by the grievant could be considered as alleging inconsistency with agency policy, we note that principally the grievant has argued that the agency did not follow DHRM Policy 1.60, *Standards of Conduct*, which states that "[m]anagement should issue Written Notices as soon as reasonably possible after becoming aware of misconduct or unacceptable performance."[6] The grievant contends that the agency took an unreasonable amount of time to issue a Written Notice regarding the "door incident" of November 21, 2012, and as such, she argues that the agency has violated policy. The hearing officer considered this argument and in his decision states:[7]

> It is clear that the Agency was slow to issue the first Group II Written Notice. The Agency's delay, however, is not a sufficient basis to reverse the disciplinary action. The delay did not cause the memories of witnesses to become unreliable. Although the delay may have impeded Grievant's ability to obtain a copy of the video of the incident, it is unlikely the video would have contradicted credible witness testimony. The consequence of the Agency's delay is that Grievant remained employed longer than she might otherwise have been employed.

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[2] *Id.* at 6.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[6] DHRM Policy 1.60, *Standards of Conduct*, at § B(2).
[7] Hearing Decision at 6.

We will not address the grievant's argument to the extent that it challenges whether the hearing officer's decision comports with policy; however, as a matter of the grievance procedure, we find nothing arbitrary or capricious in the hearing officer's decision warranting reversal.

Due Process

The grievant asserts that she was not afforded due process because she was not given a reasonable opportunity to respond to the allegations against her prior to the issuance of the Written Notices. To this, the hearing officer found that "[t]he hearing process has cured any defect in the Agency's failure to provide Grievant with appropriate procedural due process."[8] Due process is a legal concept appropriately raised with the circuit court, and ultimately resolved by judicial review. Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.[9] Further, as mentioned above, we note that the grievant has requested administrative review from the DHRM Director. The *Standards of Conduct* contains a section expressly entitled "Due Process," Section E.[10] 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.

In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that, prior to certain disciplinary actions, the Constitution generally guarantees those with a property interest in continued employment absent cause (i) the right to oral or written notice of the charges, (ii) an explanation of the employer's evidence, and (iii) an opportunity to respond to the charges, appropriate to the nature of the case.[11] 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."[12]

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

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[8] *Id*.
[9] *See* 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.").
[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at § E.
[11] 470 U.S. 532, 545-46 (1985). State policy requires that

> 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). In addition, 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."
[12] *Loudermill*, 470 U.S. at 545-46.

presence of counsel.[13] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[14]

The grievant asserts that she should have been provided with a greater opportunity to respond to the agency's evidence against her, in the form of a pre-disciplinary internal hearing of some kind, which may have resulted in no discipline being issued. Although it is not clear whether the grievant had a true reasonable opportunity to respond to the agency's allegations prior to the disciplinary actions being taken, we can find no violation of the grievant's right to pre-disciplinary due process as a matter of the grievance procedure in this case. It is evident that the grievant had ample notice of the charges against her, as set forth on the Written Notices, prior to the grievance hearing.[15] She had a full hearing before an impartial decision-maker, an opportunity to present evidence, and an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker.[16] Based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. We recognize that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[17] However, we are persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[18] Accordingly, we cannot find that the hearing officer erred in not finding the grievant suffered a due process violation as a matter of the grievance procedure.[19]

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the two Written Notices with removal and asserts that terminating her exceeds the limits of reasonableness given all the circumstances of her situation. In his decision, the hearing officer found that "no mitigating circumstances exist to reduce the disciplinary action."[20]

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[13] *See* Garraghty v. Virginia, 52 F.3d 1274, 1284 (4th Cir. 1995) (holding that "'[t]he 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.'"); *see also* Detweiler v. Virginia, 705 F.2d 557, 559-561 (4th Cir. 1983) (discussing due process requirements as they relate to the grievance procedure).

[14] 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).

[15] *See* Agency Exhibit 1.

[16] *See, e.g., Detweiler*, 705 F.2d at 559-61.

[17] *See* 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.").

[18] *See, e.g.*, EDR Ruling No. 2013-3572 (and authorities cited therein).

[19] Whether any alleged due process violation supports a contention that the hearing decision is contrary to law is a question that can be raised in a legal appeal to the appropriate circuit court. *See* Va. Code §2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[20] Hearing Decision at 5.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[21] The *Rules for Conducting Grievance Hearings ("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."[22] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (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.[23]

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.[24] EDR will review a hearing officer's mitigation determination for abuse of discretion,[25] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record.[26] As such, EDR will not disturb the hearing officer's decision on that basis.

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[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules* § VI(A).
[23] *Id.* at § VI(B).
[24] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, 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).
[25] "'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.*
[26] To the extent that the grievant argues that the hearing officer's decision with respect to the agency's delay in issuing the Written Notice(s) violated policy, as mentioned above, the DHRM Director will have the opportunity to respond to such an allegation.

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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).