Issue: Administrative Review of Hearing Officer's Decision in Case No. 10394; Ruling Date: September 11, 2014; Ruling No. 2015-3977; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2015-3977
September 11, 2014

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 10394. 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 10394 are as follows:[1]

> The Department of Juvenile Justice employs Grievant as a Corrections Sergeant at one of its facilities. She was responsible for supervising residents at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.
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> On February 6, 2014, the JCO escorted residents from building 1 to building 2. She escorted six residents into building 2 and then down a hallway towards the unit where the resident's reside. Once inside building 2, the JCO expected to be relieved by another officer who would assume responsibility for the residents so she could return to her post in building 1. Grievant joined the group in the hallway and signaled to the JCO that Grievant would assume responsibility for the residents. Grievant remained with the residents who were lined up to enter the housing unit. Once the door to the unit opened, the residents walked inside but Grievant remained outside. Grievant was no longer able to see or supervise the residents.
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> The Counselor was inside the unit. The Counselor was not a security employee and was supposed to be protected by security staff. Once the residents realized they were unsupervised by any security staff, they began to check which doors inside the unit were locked and unlocked. They entered the Counselor's office and sat down. The Counselor became frightened by the residents. She

[1] Decision of Hearing Officer, Case No. 10394 ("Hearing Decision"), July 29, 2014, at 2.

realized the residents were unsupervised by a security employee. One of the residents began pushing the intercom button.

On March 13, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy.[2] In the July 29, 2014 hearing decision, the hearing officer upheld the agency's issuance of the Group II Written Notice.[3] The grievant now appeals the hearing decision to 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 . . . ."[4] 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.[5]

Inconsistency with Agency Policy

The grievant's request for administrative review appears to assert 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.[6] The grievant has requested such a review. EDR will not address these claims further.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The grievant disputes the hearing officer's finding that she "joined the group in the hallway"[7] before the residents entered the unit. Further, she asserts that a control center officer should have ensured that appropriate security was present inside the unit before the residents entered. Thus, she essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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

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[2] Agency Exhibit 2; *see* Hearing Decision at 1.
[3] Hearing Decision at 1, 4.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[7] Hearing Decision at 2.
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.

mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[10] 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.[11] 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.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant failed to comply with policy by allowing six residents out of her sight and sound supervision. The facility's Major testified that he had reviewed the agency's security video showing the incident, and concluded that a security breach occurred due to the grievant allowing the residents entry into the unit, without first ensuring that other security staff were present in the unit.[12] The facility's Captain testified consistently with the Major, stating that she had also reviewed the security video and observed the grievant failing to follow the residents from the hallway into the unit.[13] The Captain further testified that the grievant should have either followed the residents into the unit or verified by radio that another officer was present in the unit to receive the residents.[14] The hearing officer ultimately found that the grievant's actions in so doing violated agency policy and procedure.[15]

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 his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group II offense for the grievant's conduct.[16] 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.

Due Process

The grievant argues that she was not afforded due process throughout the disciplinary procedure. Constitutional due process, the essence of which is "notice of the charges and an

[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *See* Hearing Record at 35:22-36:03.
[13] *See* Hearing Record at 21:33- 23:43.
[14] *See* Hearing Record at 26:20-26:49.
[15] Hearing Decision at 3.
[16] Hearing Decision at 3-4.

opportunity to be heard,"[17] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[18] 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."[19] 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.[20] 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."[21]

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.[22] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[23]

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[17] *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).

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

[19] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

[20] 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."

[21] *Loudermill*, 470 U.S. at 546.

[22] 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)));

[23] 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

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice.[24] 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. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[25] 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.[26] Accordingly, we find no due process violation under the grievance procedure.

Inconsistent Discipline

The grievant argues that the University did not apply disciplinary action to her consistent with other similarly situated employees. A review of the hearing record indicates that the grievant did not raise the issue of potentially inconsistent discipline at hearing. Therefore, the grievant's evidence of inconsistent discipline can only be considered if it is "newly discovered evidence."[27] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[28] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[29]

Here, the grievant states "I had no knowledge of this before my hearing," but provides no further information to support a contention that her arguments regarding inconsistency of discipline should be considered newly discovered evidence under this standard. The grievant had the ability to request from the agency any documentation regarding inconsistent treatment of

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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).

[24] *See* Agency Exhibit 2.

[25] *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.").

[26] *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).

[27] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining the "newly discovered evidence" rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (discussing the "newly discovered evidence" standard in the context of grievance procedure).

[28] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989).

[29] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

employees prior to the hearing.[30] She had the opportunity at the hearing to submit this evidence in support of her position or question agency witnesses about this issue and did not do so. Consequently, there is no basis to re-open the record or remand the hearing decision for consideration of additional evidence.

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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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[30] *See Grievance Procedure Manual* § 8.2; *Rules for Conducting Grievance Hearings* § III(E).
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).