

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10596; Ruling
Date: July 17, 2015; Ruling No. 2015-4180; Agency: Department of Corrections;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2015-4180
July 17, 2015

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 10596. For the reasons set forth below, EDR has no basis to interfere with the decision in this case.

FACTS

The grievant is employed as a Corrections Officer by the Department of Corrections (“agency”).¹ On January 28, 2015, the grievant was issued a Group III Written Notice with suspension for “[r]efusal to obey instructions that could result in a weakening of security” by hiding tools for which she was responsible to prevent their detection in an audit.² The grievant timely grieved the disciplinary action.³ A hearing was subsequently held on June 8, 2015.⁴ On June 11, 2015, the hearing officer issued a decision upholding the disciplinary action on the basis that the grievant’s deceptive conduct was tantamount to falsification, a Group III level offense.⁵ 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.”⁶ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁷

¹ See Agency Exhibit 1.

² Agency Exhibit 2 at 1-3.

³ Agency Exhibit 1 at 1; *see also* Decision of Hearing Officer, Case No. 10596 (“Hearing Decision”), June 11, 2015, at 1.

⁴ Hearing Decision at 1.

⁵ *Id.* at 1, 3-5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Due Process

The grievant argues that the hearing officer erred by upholding the disciplinary action on the basis that the grievant's deceptive conduct was comparable to the Group III offense of falsification, because the agency did not charge the grievant with falsification, but rather with a refusal to follow policy. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"⁹ is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.¹⁰ However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings* ("Rules"). Further, we note that the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct*, contains a section expressly entitled "Due Process."¹¹

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.¹² 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 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."¹³

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ *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).

¹⁰ *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹¹ *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

¹² *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). State policy requires:

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). 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."

¹³ *Loudermill*, 470 U.S. at 545-46.

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 an opportunity for the presence of counsel.¹⁴ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁵

The grievant argues, in effect, that the hearing officer upheld the discipline issued to her on a basis other than that asserted by the agency. Section VI(B) of the *Rules* provides that in every instance, an “employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.”¹⁶ Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.¹⁷ In addition, the *Rules* provide that “[a]ny challenged management action or omission not qualified cannot be remedied through a hearing.”¹⁸ Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, EDR finds that the grievant did have adequate notice of the charge against her and that the charge was sufficiently set forth on the Written Notice. While the Written Notice does not charge the grievant with falsification, it clearly describes the conduct for which she was disciplined.¹⁹ Moreover, the Written Notice describes with specificity the conduct that the hearing officer found to be analogous to falsification in upholding the disciplinary action--placing tools in a sink cabinet so they would not be found during an audit.²⁰ As such, the grievant had sufficient notice of the charges against her and the hearing officer’s decision with respect to the Group III Written Notice will not be disturbed on this basis.

Findings of Fact

The grievant’s request for administrative review also appears to challenge the hearing officer’s findings of fact. Hearing officers are authorized to make “findings of fact as to the material issues in the case”²¹ and to determine the grievance based “on the material issues and

¹⁴ *Detweiler v. Va. Dep’t of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983).

¹⁵ 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).

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B) (citing *O’Keefe v. U.S. Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that “[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.”)).

¹⁷ See, e.g., EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.

¹⁸ *Rules for Conducting Grievance Hearings* § I.

¹⁹ Agency Exhibit 2 at 1-2.

²⁰ *Id.*; see also Hearing Decision at 3.

²¹ Va. Code § 2.2-3005.1(C).

grounds in the record for those findings.”²² 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 mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.²³ 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.²⁴ 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 record, there is sufficient evidence to support the hearing officer’s conclusions that the grievant “hid tools in order to avoid detection of her unsatisfactory work performance” and “violated the Agency’s tool policy.”²⁵ 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. 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.

APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer’s remand decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸



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²² *Grievance Procedure Manual* § 5.9.

²³ *Rules for Conducting Grievance Hearings* § VI(B).

²⁴ *Grievance Procedure Manual* § 5.8.

²⁵ Hearing Decision at 3-4; *see* Agency Exhibit 4(B); Agency Exhibit 6.

²⁶ *Grievance Procedure Manual* § 7.2(d).

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

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