Issue: Administrative Review of Hearing Officer's Decision in Case No. 10603; Ruling Date: September 16, 2015; Ruling No. 2016-4201; 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 2016-4201
September 16, 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 10584 and Case Number 10603. For the reasons set forth below, EDR will not disturb these hearing decisions.

FACTS

The grievant was employed by the Department of Juvenile Justice ("agency") as a trainer.[1] On September 26, 2014, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy.[2] The grievnat filed a grievance to challenge this disciplinary action, which was subsequently upheld in a hearing decision dated June 3, 2015.[3] The grievant was also issued a Group III Written Notice with termination on April 9, 2015, for failure to follow instructions and/or policy.[4] On July 24, 2015, a hearing decision was issued which reduced the Group III Written Notice to a Group II but upheld the termination on the basis of the accumulation of discipline.[5] The grievant has now requested administrative review of both hearing decisions.

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]

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[1] *See* Decision of Hearing Officer, Case No. 10603 ("Hearing Decision 10603"), July 24, 2015, at 2.
[2] Case No. 10584, Agency Exhibit 1.
[3] *See* Decision of Hearing Officer, Case No. 10584, ("Hearing Decision 10584"), June 3, 2015, at 8.
[4] Case No. 10603, Agency Exhibit 1.
[5] Hearing Decision 10603 at 6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Timeliness of Request for Administrative Review of June 3, 2015 Hearing Decision (Hearing Number 10584)

The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** the reviewer within 15 calendar days of the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in the hands of a delivery service."[8] Further, the June 3, 2015 hearing decision clearly advised the parties that any request they may file for administrative review must be received by the reviewer within 15 calendar days of the date the decision was issued.[9] However, EDR received the grievant's request for administrative review of the hearing decision in Hearing Number 10584 on July 29, 2015, over a month after the 15 calendar day period expired on June 18, 2015.

The grievant asserts that she did not receive her copy of the hearing decision and therefore should be excused from the 15 calendar day requirement. She also alleges that the agency failed to comply with procedural timelines during the grievance process and that her failure to comply with the 15 calendar day requirement should therefore be mitigated. Neither of these arguments is meritorious. As shown by the distribution list attached to the June 3, 2015 hearing decision, a copy of the hearing decision was mailed to the grievant by the hearing officer. EDR has previously recognized that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of correspondence by a party.[10] Even if the grievant did not receive a copy of the decision, her chosen representative, i.e., her attorney, was provided a copy of the decision as well. Therefore, the grievant had at a minimum constructive notice sufficient to trigger her duty either to advise the hearing officer and/or EDR that she had not received a copy of the decision or to submit her request for administrative review in a timely manner. Further, the alleged noncompliance by the agency does not provide a basis on which to excuse the grievant's untimeliness.

For these reasons, the grievant's request for administrative review by EDR is untimely and, therefore, will not be considered. We note, however, that even had the grievant's request for review been timely, the June 3, 2015 decision would have been upheld in an administrative ruling by EDR. For example, the grievant asserts that the hearing officer erred by finding that the grievant violated policy when her supervisor also violated policy by saying that the grievant "is not as smart as she thinks she is'". Applying the mitigation analysis set forth below, however, this assertion is not sufficient to meet the grievant's high burden of showing that the disciplinary action against her exceeded the limits of reasonableness. The grievant also argues that the agency's assertion that her conduct was demeaning is not supported by the evidence. However, EDR's review indicates that the hearing officer's findings regarding her conduct are based on record evidence.[11] With respect to the grievant's argument that she was denied pre-

[8] *Id.* § 7.2.
[9] Hearing Decision 10584 at 9.
[10] *See* EDR Ruling No. 2016-4224.
[11] *See, e.g.*, Case No. 10584, Agency Exhibit 2 at 2 (grievant admitting that "[m]aybe an improper statement was made"), Agency Exhibit 3. The grievant also appears to argue that the agency based its decision on previous conduct which should not have been considered. The hearing officer addressed this issue in his decision, and the

disciplinary due process by the agency, as explained below, any alleged defects in the agency's actions have been cured by the post-disciplinary hearing process. Lastly, in regard to the grievant's claims regarding the agency having failed to produce documents, the grievant has not met her burden of showing that she experienced any material prejudice from any alleged failure. The grievant's submissions do not in any way demonstrate or establish how any allegedly withheld documentation would have affected the hearing result. For these reasons, even had the grievant's request for administrative review been timely, there would have been no basis for EDR to disturb the hearing decision.[12]

Findings of Fact

The grievant's request for administrative review also appears to challenge the hearing officer's findings of fact in the July 24, 2015 hearing decision in Case Number 10603. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and grounds in the record for those findings."[14] 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.[15] 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.[16] 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 factual findings. The hearing officer concluded that the grievant had been "instructed to disengage with students and not to argue with students," but that despite this instruction, on February 4, 2015, the grievant argued with a student and failed to disengage.[17] These findings are

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grievant has not shown that a basis exists for overturning the hearing officer's conclusions in this regard. *See* Hearing Decision 10584 at 2-3.

[12] In her request for administrative review, the grievant requested transcripts of both hearings. As EDR does not generate grievance hearing transcripts, EDR provided the grievant with copies of the audio recordings for her two hearings. EDR also advised the grievant of her window to supplement her request for administrative review following her receipt of the hearing recordings and/or with additional briefing after the 15-day deadline. The grievant was told to provide all grounds on which she challenged both hearing decisions to EDR. Despite these considerations, the grievant did not provide any additional information to EDR after August 6, 2015. All correspondence submitted by the grievant has been reviewed and considered for this ruling.

[13] Va. Code § 2.2-3005.1(C).

[14] *Grievance Procedure Manual* § 5.9.

[15] *Rules for Conducting Grievance Hearings* § VI(B).

[16] *Grievance Procedure Manual* § 5.8.

[17] Hearing Decision 10603 at 4-5.

supported by record evidence and the hearing officer's assessment thereof.[18] 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.

Due Process

The grievant argues that the hearing officer erred by upholding the disciplinary action on the ground that the agency had failed to provide her with adequate pre-disciplinary due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[19] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[20] 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*").

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.[21] 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."[22]

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

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[18] *See, e.g.*, Case No. 10603, Agency Exhibits 3, 4, 12.

[19] *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).

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

[21] 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."

[22] *Loudermill*, 470 U.S. at 545-46.

opportunity for the presence of counsel.[23] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[24]

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."[25] 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. We further note that 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 the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[26] 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.[27] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure. As such, the July 24, 2015 decision will not be disturbed on this basis.

Alleged Failure to Produce Documents

The grievant also appears to assert that the agency improperly failed to produce several documents, including a copy of video of her classroom for February 4 and 10, 2015, as well as copies of "[t]apes for the August 2, 2014 investigation." As an initial matter, it appears that, in response to the grievant's document requests, the agency advised the grievant it would resolve the document issues with the grievant's attorney, and it appears that the agency and the grievant's attorney reached some agreement regarding the majority of the documents. Further, even if we assume for the sake of argument that the agency acted improperly, it does not appear that any of the documents requested by the grievant would affect the result of the hearing decision, or that she was in any way materially prejudiced. The grievant and her attorney were

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[23] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).

[24] 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; s*ee also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[25] *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.")).

[26] *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.").

[27] *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).

apparently provided with video of the grievant's classroom for the time period during which the charged misconduct allegedly occurred on February 4, 2015 and sectionss of that video were presented during the hearing.[28] The grievant asserts that the agency failed to provide her with video for the 45 minute period from the beginning of her class on February 4, 2015 until shortly before the alleged misconduct. It appears that the agency had destroyed this portion of video prior to the grievant's document request, and the grievant's attorney addressed his objections regarding the agency's actions with the hearing officer, both prior to and during the hearing.[29] The grievant does not appear to have been harmed by the agency's failure to produce this portion of video, however, as the grievant was able to present other evidence regarding this period.[30] Further, the grievant has not shown that the agency's failure to provide this portion of video affected the result of the hearing decision. To the extent other documents or video requested by the grievant were not produced by the agency, the grievant has not provided sufficient information for EDR to determine that their production would have changed the hearing result. To the contrary, the only charged misconduct before the hearing officer occurred on February 4, 2015, and therefore documentation relating to other incidents could have little, if any, relevance.[31] Consequently, the grievant has not demonstrated any material harm from the non-disclosure, to the extent it even was inconsistent with the grievance procedure, such that any further remand or other relief is warranted to address the matter under the grievance procedure.

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. By 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]."[32] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[33] 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

[28] *See* Hearing Recording at 3:58:21-3:59:12.
[29] *Id.* at 4:06:58-4:07:23.
[30] *See, e.g.*, Hearing Recording at 3:22:16-3:27:16 (testimony of the grievant). The hearing officer apparently rejected the grievant's claims regarding the earlier conduct, noting that the grievant "argued that the students had been disruptive all morning" and that she had "disengaged on several occasions," but that in "at least one instance," grievant engaged in behavior not "consistent with disengaging from a conflict." Hearing Decision 10603 at 5.
[31] *See* Case No. 10603, Agency Exhibit 1. In a request made prior to the first hearing, the grievant requested, among other documents, investigation reports apparently relating to the February 4, 2015 incident. The written investigation report was apparently provided to the grievant prior to the second hearing. *See* Case No. 10603, Agency Exhibit 3. The remaining documents identified in this request do not appear to relate to February 4, 2015, and therefore appear to lack any significant probative value.
[32] Va. Code § 2.2-3005(C)(6).
[33] *Rules for Conducting Grievance Hearings* § VI(A).

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[34]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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 the 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.[35] EDR will review a hearing officer's mitigation determination for abuse of discretion,[36] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[37]

Here, the grievant appears to argue that she was treated unfairly and unequally. However, the grievant has not presented sufficient evidence to show that she was treated in a manner inconsistent with other similarly-situated employees, such that mitigation was required. While the agency could have chosen to address the grievant's conduct through a less severe form of disciplinary action, its decision to terminate the grievant was not outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.[38] Accordingly, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[39] Within 30 calendar days of a final hearing decision, either party may appeal the

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[34] *Id.* § VI(B)(1).
[35] 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).
[36] "'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.*
[37] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[38] *See* Hearing Decision 10603 at 5.
[39] *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.[40] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[41]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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