Issue: Administrative Review of Hearing Officer's Decision in Case No. 10648; Ruling Date: October 20, 2015; Ruling No. 2016-4237; Agency: Department of Medical Assistance Services; 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 Medical Assistance Services
Ruling Number 2016-4237
October 20, 2015

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10648. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed by the agency as an appeals intake supervisor.[1] On or about March 24, 2015 he was issued a Group II Written Notice for failure to follows instructions and/or policy and insubordination based on the following alleged misconduct:

> On March 2, 2015, you refused to follow the direct instructions of your Division Director, . . . and the guidance of both your direct supervisor, . . . and your Agency's Human Resource Division, by rejecting your Division Director's instructions and proceeding to terminate the employment of a DMAS Appeals Division staff member . . . .[2]

The grievant timely grieved the disciplinary action[3] and a hearing was held on August 27, 2015.[4] In a decision dated September 8, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant's actions constituted insubordination and upheld the issuance of the Group II Written Notice.[5] 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

[1] *See* Decision of Hearing Officer, Case No. 10648 ("Hearing Decision"), September 8, 2015, at 1.
[2] Agency Exhibit 2.
[3] Agency Exhibit 1 at 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 3-6.

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]

Qualified Issues

In his request for administrative review, the grievant asserts that the hearing officer "did not clarify the issues qualified for the hearing." The grievant claims that, at the beginning of the hearing, he and the hearing officer agreed the hearing was related to "an argument on policy," while the agency's advocate stated that "policy had nothing to do with the hearing." The grievant's argument regarding the matters qualified for hearing is not persuasive. In the grievance, that grievant stated that the issue was a Group II Written Notice and listed several policy-related claims in support of his argument that the issuance of the Written Notice was inappropriate and/or unwarranted.[8] For qualified grievances challenging the issuance of disciplinary action, it is the hearing officer's duty to determine whether the grievant "engaged in the behavior described in the Written Notice," "whether the behavior constituted misconduct," and "whether the disciplinary action . . . was consistent with law . . . and policy."[9] The grievant's policy-related claims are more properly considered theories as to why the Written Notice should have been reduced or rescinded, not separate qualified issues. The hearing officer addressed the grievant's arguments as such,[10] and EDR finds no reason to remand the hearing decision on this basis.

Furthermore, although the grievant claims the hearing officer "said that he understood the hearing to be an argument on policy," EDR has not identified any place in the hearing record where hearing officer made such a statement. To the contrary, before the parties offered opening statements, the hearing officer stated that the subject of the hearing was a disciplinary action.[11] Additionally, when the grievant's claim relating to the agency's alleged misapplication of policy was discussed during the hearing, the hearing officer explained that this claim was a theory as to why the disciplinary action might have been improper and did not indicate it was a separate qualified issue.[12]

Due Process

As a result of his alleged confusion about the issues qualified for hearing, the grievant argues that his "due process rights were violated" because he "did not have the opportunity to

[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Agency Exhibit 1 at 1-4.
[9] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[10] *See* Hearing Decision at 4-5. This is consistent with EDR's past rulings, which draw a distinction between the management actions that are the subject of a grievance and a grievant's theories or claims as to why those actions were improper. *See, e.g.*, EDR Ruling No. 2013-3484; EDR Ruling No. 2007-1444 n.1.
[11] Hearing Recording at 2:11-2:21.
[12] *Id.* at 2:07:37-2:08:12.

properly defend [himself] against brand new allegations that were leveled against [him] for the first time at the hearing." Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[13] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[14] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. While the basis of the grievant's due process argument is unclear because he has not specified what "brand new allegations" the agency allegedly presented at the hearing against which he was unable to mount a defense, EDR will assess whether the grievant received due process sufficient to afford him with proper notice of the charges and an opportunity to be heard.

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.[15] 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."[16] 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.[17] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[18]

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[13] *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).

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

[15] 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."

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

[17] 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))).

[18] See Va. 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*

In this case, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice and the agency's notice of intent to issue disciplinary action.[19] Indeed, the Written Notice clearly indicates that the grievant was disciplined for insubordination and failing to follow instructions because he "refused to follow the direct instructions of [his] Division Director" and "terminated the employment of a DMAS Appeals Division staff member."[20] In addition, 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.[21] 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.[22] 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 with respect to this claim.

Evidence of Discrimination

The grievant further argued that he did not receive adequate due process in a request for rehearing submitted to the hearing officer before the hearing decision was issued. Specifically, he argued that the agency "alleged that [he] was a racist and suggested that somehow the Agency's actions were justified due to concerns of [his] being an alleged racist" at the hearing, but had not provided him with any information or notice that discrimination may have been an issue in advance of the hearing.[23] EDR's *Rules for Conduct Grievance Hearings* (the "*Rules*") provide 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."[24] 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.[25] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified cannot be remedied through a

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Grievance Procedure Manual §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[19] *See* Agency Exhibit 2; Grievant's Exhibit 1.

[20] Agency Exhibit 2.

[21] *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.").

[22] *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).

[23] The grievant submitted a request for rehearing to the hearing officer several days after the hearing, and before the hearing decision was issued, in which he raised this argument.

[24] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States 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")).

[25] See EDR Rulings No. 2007-1409; EDR Ruling No. 2006-1140; EDR Ruling No. 2004-720.

hearing."[26] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified, and thus would not come before a hearing officer.

At the hearing, the agency presented evidence to show that discrimination was an area of concern for management when the grievant was instructed not to terminate the employee because other employees had previously filed complaints of discrimination with the Equal Employment Opportunity Commission ("EEOC") that related to the grievant.[27] The grievant was not charged with engaging in discrimination on the Written Notice, nor did agency witnesses testify that the disciplinary action was issued due to any allegedly discriminatory action on the grievant's part. To the contrary, the witness testimony was clear that agency management's concerns about discrimination only represented management's perspective at the time the grievant was instructed not to terminate the employee and that the agency did not determine the grievant's actions were discriminatory.[28] As a result, there is no reason for EDR to conclude that discrimination was a factor that the agency relied on to support the issuance of the discipline in this case.

Most importantly, the hearing officer also addressed the grievant's concerns about the agency's evidence relating to potential discrimination in the hearing decision, stating the following:

> . . . I did not consider the EEOC charges or references by Agency witnesses as any evidence of racial bias or animus on the Grievant's part or as motivation for imposing the discipline. Further, I have not considered such implications or inferences, if any, in my determination of this grievance whatsoever. The motivation or reasons, regardless of merit, for the division director's instruction to the Grievant are nonessential factors for consideration of insubordination in this circumstance.[29]

As the hearing officer explicitly stated that the witness testimony and documents relating to the management's concerns about discrimination had no bearing on his decision in this case, EDR finds no reason to believe the hearing officer considered any such evidence in rendering his decision that could have resulted in prejudice to the grievant. Indeed, the hearing officer's discussion of whether the disciplinary action was warranted and appropriate under the circumstances is based solely on his assessment of the evidence relating to the charged misconducted as listed on the Written Notice and makes no reference to any evidence in the record relating to alleged discrimination.[30] Accordingly, EDR finds that no violation of due

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[26] *Rules for Conducting Grievance Hearings* § I.
[27] *E.g.*, Hearing Recording at 29:26-30:12 (testimony of Division Director), 2:56:04-2:56:54 (testimony of HR Director); *see* Agency Exhibits 20, 21.
[28] *See id.* at 1:22:07-1:24:39 (testimony of Division Director), 1:33:29-1:33:57 (clarification by the hearing officer of his understanding of the Division Director's testimony), 2:23:52-2:24:31 (testimony of Division Director).
[29] Hearing Decision at 5-6.
[30] *Id.* at 3-4.

process occurred as a matter of the grievance procedure with respect to this claim and declines to disturb the hearing decision on this basis.

Alleged Misconduct of Agency Advocate

In addition, the grievant alleges the hearing officer allowed the agency's advocate to "disrupt[] the hearing with repeated objections," which limited his ability to "properly provide all of the relevant information on put on the relevant witness testimony." The *Rules* state that hearings must be conducted in an "orderly, fair, and equitable fashion."[31] Further, the *Grievance Procedure Manual* provides that "[p]arties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications."[32] Allowing a party's representative to disrupt a hearing in the manner alleged could create an appearance of unfairness and partiality on the part of the hearing officer. Here, EDR has thoroughly reviewed the recording of the hearing and we are unable to conclude that the conduct of the agency's advocate conduct was improper to the extent that the grievant may have been prejudiced in presenting his case. Moreover, there is no indication that the grievant objected to the allegedly improper conduct of the agency's advocate at any point during the hearing, which could have allowed the hearing officer to address the issue to the extent there were any concerns to address.[33] While we do not find overly disruptive conduct in this instance, EDR encourages hearing officers to ensure that such situations are promptly addressed so that an appearance of prejudice does not occur.

Agency's Production of Documents

Finally, the grievant asserts that the hearing officer "never ruled on [his] notice of non-compliance" in relation to the production of certain documents. It appears the grievant objects to the introduction of two agency exhibits consisting of complaints of discrimination that were filed with the EEOC by agency employees.[34] The grievant asserts that the agency should have provided him with those documents in response to two earlier requests for documents prior to the appointment of the hearing officer.[35]

In this case, however, there is nothing to indicate that the grievant suffered any material prejudice as a result of the admission of the EEOC complaints into the hearing record. The hearing officer stated in his decision that he did not consider the EEOC complaints in determining that the disciplinary action should be upheld.[36] The documents were, effectively, disregarded by the hearing officer and, thus, it cannot be said that they had any effect on the

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[31] *Rules for Conducting Grievance Hearings* § IV(C).
[32] *Grievance Procedure Manual* § 1.9.
[33] *See id.* § 6.4 (stating that if "noncompliance arises . . . in the conduct of the hearing, . . . [a]n objection should be made to the hearing officer at the time the noncompliance occurs").
[34] *See* Agency Exhibits 20, 21.
[35] Though the grievant appears to argue in his request for administrative review that the EEOC complaints were not disclosed to him before the hearing, it does not appear this is the case. There seems to be no dispute that the agency disclosed its proposed exhibits, including the redacted EEOC complaints, prior to the hearing and in compliance with the hearing officer's order at the pre-hearing conference.
[36] Hearing Decision at 5-6.

hearing officer's assessment of the evidence presented by the agency to support the issuance of the disciplinary action. Accordingly, EDR concludes that that the admission of the EEOC complaints into evidence caused no material prejudice to the grievant and declines to disturb the hearing decision on this basis.[37]

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's 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.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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[37] To the extent the grievant asserts that the admission of the EEOC complaints constituted a violation of due process, this argument is not persuasive for the reasons discussed at greater length above in relation to the grievant's due process claim.
[38] *Grievance Procedure Manual* § 7.2(d).
[39] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[40] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).