Issue: Administrative Review of Hearing Officer's Decision in Case No. 10694/10695; Ruling Date: December 22, 2015; Ruling No. 2016-4279; Agency: Virginia State University; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of Virginia State University
Ruling Number 2016-4279
December 22, 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 Numbers 10694/10695. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant was employed as a Business Manager for Virginia State University ("University").[1] On July 28, 2015, the University issued the grievant a Group III Written Notice for a number of offenses, including racial harassment.[2] The grievant grieved the disciplinary action,[3] and a hearing was held on November 2, 2015.[4] On November 13, 2015, the hearing officer issued a decision upholding the disciplinary action.[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 a party; the sole remedy is that the action be correctly taken.[7]

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 University policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with

[1] *See* Decision of Hearing Officer, Case Nos. 10694/10695 ("Hearing Decision"), November 13, 2015, at 2; Agency Exhibit 2a at 1.
[2] Agency Exhibit 1 at 1; *see* Hearing Decision at 1.
[3] Agency Exhibit 2a.
[4] *See* Hearing Decision at 1.
[5] Hearing Decision at 7.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

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 ground that the University 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,"[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*").

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

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[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] 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."

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

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

[14] 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).

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."[15] 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.[16] 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.[17] 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 November 13, 2015 decision will not be disturbed on this basis.

Freedom of Information Act

The grievant challenges the University's alleged failure to produce documents under the Virginia Freedom of Information Act ("FOIA"). As EDR has no authority to enforce the mandates of FOIA, the grievant must bring any claim regarding FOIA in a court of the appropriate jurisdiction.[18]

Findings of Fact

The grievant's request for administrative review also appears to challenge the hearing officer's finding that the grievant engaged in racial harassment.[19] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[20] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[21] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the

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[15] *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.")).

[16] *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.").

[17] *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).

[18] Separate from FOIA, Section 8.2 of the *Grievance Procedure Manual* provides parties to a grievance with a right to request and receive documents. As such, after initiating the grievance, the grievant could have requested the documents at issue in her FOIA requests through the grievance procedure, requested the hearing officer to order the documents produced, and have sought a noncompliance ruling from this Office in the event she believed the University's response was incomplete or unreasonable. The grievant has presented no indication that these steps were taken and, as such, there is no issue with failure to produce documentation as a matter of the grievance procedure.

[19] *See* Hearing Decision at 5-6.

[20] Va. Code § 2.2-3005.1(C).

[21] *Grievance Procedure Manual* § 5.9.

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.[22] 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.[23] 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.

In this case, the grievant disputes, in effect, the hearing officer's finding that she made "repeated racial insults."[24] EDR does not disagree with the grievant that there was record evidence to support her claim that she did not engage in the conduct charged by the University. However, we also cannot disagree with the hearing officer that record evidence supports his findings.[25] While the grievant may disagree with the hearing officer's decision, determinations of credibility as to disputed facts, such as those cited in the grievant's request for administrative review, 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. Because the hearing officer's findings in this case 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.[26]

Conduct of Hearing

The grievant also asserts that "during the course of the hearing, participants and/or witnesses were not divided." As the grievant does not provide any additional information regarding this claim, she has not shown that the hearing officer failed to comply with the grievance procedure. Further, EDR's review of the hearing recording indicates that the hearing officer's actions were in accordance with the grievance procedure. For these reasons, the decision will not be remanded on this basis.

Failure to Mitigate

Fairly read, the grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the Written Notice. Under statute, hearing officers

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[22] *Rules for Conducting Grievance Hearings* § VI(B).
[23] *Grievance Procedure Manual* § 5.8.
[24] Hearing Decision at 5.
[25] *See* Hearing Recording, Track 2 at 1:18:57-1:19:59, 1:22:32-1:22:38, 1:49:21-1:50:22, 1:50:54-1:51:02,1:53:33-1:54:36 (testimony of witnesses regarding the grievant's conduct).
[26] The grievant also challenges the manner in which the University conducted its investigation of her actions and the findings of that investigation. To the extent the grievant argues that these alleged flaws negatively impacted her due process rights, that argument has been previously addressed in this ruling. With respect to any challenge to the investigation's factual findings, those findings are not relevant here, as the hearing officer reviewed the facts *de novo* and appears to have relied primarily on testimony presented at hearing in reaching his findings of fact. *See* Hearing Decision at 3-4.

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]."[27] The *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."[28] 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.[29]

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.[30] EDR will review a hearing officer's mitigation determination for abuse of discretion,[31] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that no mitigating circumstances exist that would warrant reduction of the disciplinary action.[32] Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

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[27] Va. Code § 2.2-3005(C)(6).
[28] *Rules for Conducting Grievance Hearings* § VI(A).
[29] *Id.* § VI(B)(1). The Merit Systems Protection Board's approach to mitigation, while not binding on this Department, 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).
[30] *E.g., id.*
[31] "'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.*
[32] Hearing Decision at 7.

Newly-Discovered Evidence

In her request for administrative review, the grievant argues that the hearing record should be reopened to allow for the admission of "newly discovered evidence." Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[33] 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.[34] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant 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.[35]

In this case, the grievant appears to assert that during the hearing, she obtained previously unknown information regarding the identity of the management official who decided to terminate her employment, and that the absence of this information adversely impacted her ability to question the decision maker at hearing. She also attempts to submit evidence regarding the credibility of University witnesses and to challenge the decision-making process used in her termination.[36]

As an initial matter, the grievant has not shown that she exercised due diligence to discover this alleged new evidence prior to hearing. However, even if EDR were to assume, for the sake of argument, that this information has only been recently discovered by the grievant despite her own due diligence, the grievant has not met her burden of showing that the evidence is material or that it would likely produce a different outcome. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

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.[37] Within 30 calendar days of a final hearing decision, either party

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

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

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

[36] The grievant's claims regarding the process used for her termination appear to constitute, at least in part, additional arguments, rather than newly-discovered evidence; and as such, are not appropriately raised during the administrative review process.

[37] *Grievance Procedure Manual* § 7.2(d). To the extent this ruling does not explicitly address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that the issue is not material, in that it has no impact on the result in this case.

may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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