Issue: Administrative Review of Hearing Officer's Decision in Case No. 10872; Ruling Date: December 15, 2016; Ruling No. 2017-4448; Agency: Department of Aging and Rehabilitative 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 Aging and Rehabilitative Services
Ruling Number 2017-4448
December 15, 2016

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10872. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10872, as found by the Hearing Officer, as are follows: [1]

> The Department of Aging and Rehabilitative Services employed Grievant as an Adjudicator. She had been employed by the Agency for approximately 15 years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant's husband required surgery in June 2016 and Grievant was unsure how long it would take for him to recover.
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> On May 5, 2016, Grievant asked the Regional Director for an extended leave of absence. On May 6, 2016, the Regional Director approved Grievant's request for leave from June 6, 2016 to June 10, 2016, but denied Grievant's request for June 13, 2016 to August 31, 2016. The Regional Director met with Grievant to tell her of his decision.
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> On May 10, 2016, Grievant sent an email to Benefits Manager, Ms. T, stating:
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> > I have been denied LWOP by my agency administration for 6/10/16- 8/31/16, however, I also qualify for FMLA. Please provide me w/ information regarding FMLA, to cover my upcoming leave while I submit a grievance for denial of LWOP.
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> On May 11, 2016, Ms. T responded with an email explaining the FMLA eligibility and added:

[1] Decision of Hearing Officer, Case No. 10872 ("Hearing Decision"), November 1, 2016, at 2-4 (citations omitted).

> If the request is related to a family member, the Attached Request for Family or Medical Leave and the Certification of Health Care Provider for Family Member's Serious Health Condition must be completed. You may return these forms to me for review. Once the documentation is reviewed, you will be sent a letter regarding the approval status of the request.
>
> In additional to the above forms, I am attaching the FMLA Policy and FMLA Fact Sheet to this email. Both of which can provide additional information for you.
>
> On May 11, 2016, Grievant replied:
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> Thanks for the information. I am requesting the leave for care of my spouse. I will submit the required docs to you asap.

Grievant did not have the forms completed and did not submit any documents to the Agency regarding care of her spouse.

On May 13, 2016, Grievant filed a grievance challenging the Agency's denial of her request for leave without pay.

On June 3, 2016, Ms. J sent Grievant an email stating:

> I just wanted to give you status of your leave request before you leave today. To date, I approved annual leave from June 6 – June 10, 2016. After June 10, 2016, you will be on unapproved LWOP pending your grievance. A few weeks ago, [Regional Director] sent you an email regarding taking FMLA but you decided to take LWOP instead however, I have not received anything regarding approved LWOP. As your supervisor, I'm just a little concern[ed] if you do not return to work after your annual leave the possible consequences of being out on unapproved leave.

On June 14, 2016, the Supervisor called Grievant's personal telephone number and left a message asking about Grievant's work status. The Supervisor told Grievant that Grievant's leave was not approved and asked when Grievant was coming back to work. Grievant called the Supervisor on June 15, 2016. Grievant left a message saying she was in another city taking care of her mother. Grievant did not say she would be reporting for work.

On June 22, 2016, the Office of Employment Dispute Resolution issued Ruling 2016-4370. This Ruling declined to assign a hearing officer to review the grievance and concluded, "the agency's decision to deny her request for LWOP was wholly within management's discretion and does not appear to be a misapplication or unfair application of policy." The Office of Employment Dispute Resolution sent the Ruling to Grievant's correct home address.

> Grievant was scheduled to work on June 13, 2016 and thereafter. Grievant did not report to work.
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> On or about August 22, 2016, the Supervisor spoke with Grievant and told Grievant she had been terminated and could come to get her personal belongings. Grievant did not know she had been removed from employment. The Supervisor told Grievant to contact the Human Resource division. Grievant did so.
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> On August 22, 2016, Grievant signed a Certification of Health Care Provider for Family Member's Serious Health Condition form and submitted to a Medical Doctor. Grievant wrote that she would be providing care for her mother. On August 23, 2016, the Medical Doctor completed the Form. On August 24, 2016, the forms were faxed to the Agency. Grievant called the Supervisor to confirm her receipt of the documents. On September 1, 2016, the Agency received the completed Form by mail.
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> Grievant reported to work on September 1, 2016. She was referred to the Agency's Human Resource Department. Grievant was not reinstated.

The grievant was issued a Group III Written Notice for failure to report to work without notice.[2] The grievant filed a grievance to challenge the disciplinary actions[3] and a hearing was held on October 17, 2016.[4] In a decision dated November 1, 2016, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant was absent in excess of three days without authorization and upheld the disciplinary action.[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 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]

Inconsistency with Agency Policy

In her request for administrative review, the grievant asserts, in effect, that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] Accordingly, the grievant's policy claims will not be discussed in this ruling.

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

Due Process

In her request for administrative review, the grievant appears to dispute the hearing officer's conclusion that any due process violation in this case did not warrant rescission of the Written Notices.[9] In the hearing decision, the hearing officer found that:

> The Agency initially denied Grievant procedural due process to remove her. The Agency sent the Due Process Notice of Failure to Report to Work to the wrong address. Grievant did not reply because she did not receive the document. The Agency drafted a Written Notice and placed it in its files without any attempt to send the Written Notice to Grievant. The Agency's failure to issue the Written Notice was cured when the Agency informed Grievant on August 22, 2016 that she had been removed from employment. The Agency's failure to provide Grievant with pre-termination due process is cured by the hearing process. Grievant could present to the Hearing Officer any defenses she would have raised with the Agency prior to her removal.[10]

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[11] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[12] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

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.[13] 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."[14] 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-

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[9] Hearing Decision at 6.
[10] *Id.*
[11] *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).
[12] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[13] 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."
[14] *Loudermill*, 470 U.S. at 546.

examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[15] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[16]

In this case, 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.[17] 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.[18] Accordingly, EDR finds no error in the hearing officer's consideration of the evidence regarding the pre-disciplinary due process provided to the grievant and declines to remand the decision on this basis.

Hearing Officer's Consideration of Evidence

The grievant further asserts in her request for administrative review that the hearing officer erred in finding that the grievant's failure to return to work was protected by the Family and Medical Leave Act ("FMLA"). In particular, she argues, through counsel, that the agency failed to comply with FMLA notice requirements and "to [i]nquire [r]egarding FMLA [l]eave."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[20] 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.[21] 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

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[15] 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))).

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

[17] *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.").

[18] *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).

[19] Va. Code § 2.2-3005.1(C).

[20] *Grievance Procedure Manual* § 5.9.

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

the facts and circumstances.[22] 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.

Although the grievant argued at hearing that the FMLA protected her absence, she did not raise, with any specificity, the two arguments now advanced by counsel on administrative review.[23] To the contrary, prior to the request for administrative review in this case, the grievant argued that she was entitled to take leave without pay rather than FMLA leave and that she considered the FMLA as only a fallback in the event she was unable to receive unpaid leave through the grievance process.[24] In addition, she argued that because she elected to request leave without pay in lieu of FMLA leave, she was entitled to wait for the outcome of a grievance regarding the denial of leave without pay prior to submitting any FMLA-related medical documentation.[25] The grievant did *not* argue at hearing, as she now does in her request for administrative review, that the agency improperly failed to give her notice of her FMLA rights and obligations and/or failed to inquire sufficiently about her need for leave.[26]

In his decision, the hearing officer found that the grievant was aware that her absence was likely covered by the FMLA, that she was given forms on which she was to provide the agency with medical documentation of her need for FMLA leave, that the grievant's request for leave without pay was denied prior to the requested date for leave, that the grievant nevertheless took the leave, that the grievant challenged the denial of the request for unpaid leave through the grievance process, and that only after attempting to return to work after her termination did she provide the agency with the completed FMLA paperwork.[27] Under these facts, the hearing officer concluded the grievant lacked approval for her leave and was properly terminated. Based on the information provided to the hearing officer at hearing and the arguments presented to the hearing officer at that time, EDR finds that there is sufficient evidence in the record to support the hearing officer's conclusions.[28] 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, EDR declines to disturb the decision on this basis.

Although it appears from the hearing record that the agency may have failed to provide the grievant with the specific notices and information contemplated under the FMLA,[29] the agency's actions were complicated by the grievant's stated intent to take leave without pay in

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[22] *Grievance Procedure Manual* § 5.8.
[23] The grievant represented herself at hearing. Hearing Decision at 1.
[24] *See* Grievant's Exhibit 1 at 1-2, 19-22; *see, e.g.*, Hearing Recording at 3:32-7:16, 1:27:04-1:32:03, 1:36:14-1:38:51, 1:46:34-1:47:17, 1:56:35-1:57:46.
[25] *Id.* In addition, as previously noted, the grievant asserted procedural concerns with the manner in which her termination was handled.
[26] *See, e.g.*, Hearing Recording at 3:32-7:15, 1:27:04-1:32:03, 1:36:14-1:38:51, 1:46:34-1:47:17, 1:56:35-1:57:46.
[27] Hearing Decision at 2-5.
[28] *Id.* at 5. *See also, e.g.*, Agency Exhibits A, E, F; Grievant's Exhibit 1 at 1-2, 19-22; Hearing Recording at 3:32-7:15, 1:27:04-1:32:03, 1:36:14-1:38:51, 1:46:34-1:47:17, 1:56:35-1:57:46.
[29] In particular, there is no evidence in the record that the grievant received either the "Designation Notice" or the "Notice of Eligibility and Rights and Responsibilities" promulgated by the United States Department of Labor or was advised of their content in another format.

lieu of FMLA and her related decision not to provide the requested FMLA medical information prior to her termination. Regardless of any failure on the agency's part, there appears to be no dispute that the grievant consciously chose not to pursue FMLA in a timely manner in favor of another means of obtaining leave. Given these unique facts, EDR finds no basis to conclude the hearing officer failed to comply with the grievance procedure.[30]

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.[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* Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1239, 1244-47 (9th Cir. 2014). The ultimate determination of whether the agency's actions violated the FMLA and related policies lies with the DHRM Director, as discussed previously, and/or subsequent court review on matters of law. *See* Va. Code § 2.2-3006(B).
[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).