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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2020-5030
December 31, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's reconsideration decision in Case Number 11384 concerning his grievance against the Department of Game and Inland Fisheries ("the agency"). For the reasons set forth below, the grievant presents no basis for EDR to disturb the decision further.

FACTS

The relevant facts in Case Number 11384, as found by the hearing officer, are incorporated by reference.[2]

On April 29, 2019, the agency issued to the grievant a Group III Written Notice with removal for Abuse of State Time; Violation of Policy 2.35, *Civility in the Workplace*; Unauthorized Use of State Property or Records; Computer/Internet Misuse; and Falsifying Records.[3] The grievant timely grieved this disciplinary action, and a hearing was held on September 17, 2019.[4] In the original hearing decision dated October 7, 2019, the hearing officer determined that the agency had not presented sufficient evidence to support discipline as a Group III Written Notice and, consequently, reduced the disciplinary action to a Group II, reinstating the grievant with back pay and back benefits.[5] The agency's appeal of the hearing decision was addressed in EDR Ruling Number 2020-5003, which directed the hearing officer to uphold the disciplinary action and the termination.[6] The hearing officer issued a brief reconsideration decision doing so,[7] which the grievant has now appealed.

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[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] Decision of Hearing Officer, Case No. 11384 ("Hearing Decision"), October 7, 2019, at 2-4 (footnotes omitted).
[3] *Id.* at 1; Agency Ex. 1.
[4] Hearing Decision at 1.
[5] *Id.* at 10.
[6] EDR Ruling No. 2020-5003.
[7] Reconsideration Decision of Hearing Officer, Case No. 11384-R ("reconsideration decision"), Dec. 6, 2019.

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."[8] 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 hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant essentially challenges the content of EDR's previous administrative review in EDR Ruling Number 2020-5003. The grievant has not presented any argument that would alter the determinations made in that ruling. As such, the prior ruling already addresses most of the grievant's arguments. However, EDR will address below two aspects raised by the grievant's administrative review request.

Due Process

The grievant asserts that, because the agency did not specifically cite that it was elevating the grievant's misconduct to a Group III in the Written Notice or an attachment, the elevation violated due process.[11] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[12] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[13] 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.[14] Importantly, the pre-disciplinary notice and

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[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] The grievant also asserts that the agency did not present evidence as to its rationale for issuing the single Group III for the grievant's combined misconduct, which is incorrect. *See* Hearing Recording at 2:25:45-2:28:03 (testimony of acting agency head); 3:31:30-3:34:40 (testimony of Human Resource Director).
[12] *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).
[13] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] 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 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.

opportunity to be heard need not be elaborate, nor 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."[15]

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

The grievant argues in his request for administrative review that neither the Written Notice nor an attachment thereto advised the grievant that the agency's discipline was predicated on elevation of an offense based on the particular circumstances of the case. The *Rules for Conducting Grievance Hearings* 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."[18] The agency, which bears the burden of proof at hearing, must provide notice of the charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. While a grievant may be aware of the facts surrounding the Written Notice, he would also need to know why or on what theory he is being disciplined by the agency.[19]

In this instance, we cannot conclude that the grievant did not have notice of the facts constituting the misconduct for which he was disciplined, i.e., repeated violation of the agency's internet use policy, among other charges.[20] While the Written Notice does not explicitly state that the agency was elevating a particular offense or course of misconduct, the documentation given to the grievant clearly provided him a description of the combined misconduct for which he received

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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."

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

[16] 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))).

[17] 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).

[18] *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.")).

[19] *See* EDR Ruling 2007-1409, at 7.

[20] Agency Ex. 1.

pre-disciplinary due process.[21] In reviewing the language used in the Written Notice attachment, EDR finds as a matter of the grievance procedure that the grievant was put on notice of the allegedly inappropriate conduct that ultimately led to his termination being upheld.

Further, 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 based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[22] 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.[23] Accordingly, EDR finds no due process violation under the grievance procedure.

Precedent and Policy Interpretation

The grievant also contends that EDR's ruling departed from prior precedent and that the policy interpretation contained therein "changed" the applicable policy. As identified in the prior ruling, EDR's ruling did depart from a prior DHRM policy review from 2006. However, the prior precedents cited are over 10 years old and were decided based on an older version of the *Standards of Conduct* policy.[24] DHRM Policy 1.60, *Standards of Conduct*, was amended in 2008 to bring in the language that enables agencies to elevate offenses based on the particular facts of the case that, for example, exceed agency norms.[25] As such, to the extent the precedents from 2006 or 2008 were "changed," that was done long ago by policy amendments DHRM put in place in 2008. EDR's interpretation of the current Policy 1.60 must accordingly depart from such prior precedents in light of the changes to the policy in 2008 that permit an agency to consider the particular facts of a given case and determine the appropriate level of misconduct, as occurred in this matter.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration 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

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[21] *Id.*

[22] *See, e.g.*, Cotnoir v. Univ. 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.").

[23] *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, at 5 (and authorities cited therein).

[24] *See* Reconsideration Decision at 1-2.

[25] *See* DHRM Policy 1.60, *Standards of Conduct*, at 8 ("Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.")

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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[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).