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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5243
April 20, 2021

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 reconsideration decision in Case Number 11612. For the reasons set forth below, EDR will not disturb the reconsideration decision.

FACTS

On September 17, 2020, the Department of Corrections ("the agency") issued to the grievant a Group III Written Notice with removal for sleeping during work hours.[1] Following a timely grievance and hearing challenging the agency's disciplinary action, the hearing officer issued a decision reversing the Written Notice, with factual findings reproduced in relevant part in EDR Ruling Number 2021-5220 and incorporated herein by reference.[2] Upon remand, the hearing officer issued a reconsideration decision including the following additional findings of fact:

> Sergeant 1 testified that he knocked on the door and Grievant did not respond. He observed Grievant seated in a chair in a reclined position with his hands behind his head and feet up on one of the counters. Sergeant 1 waited over five minutes without any response from Grievant. [3]

In his reconsideration decision, the hearing officer explained that, while the agency failed to prove that the grievant was sleeping during work hours as alleged, the grievant's "behavior rises to the level of unsatisfactory work performance for failing to timely notice that Sergeant 1 was outside of the building seeking to gain entry."[4] Therefore, the hearing officer reduced the disciplinary action to a Group I Written Notice and upheld removal based on the grievant's accumulation of discipline.[5] The grievant now appeals the reconsideration decision to EDR.

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[1] Agency Ex. 1; *see* Decision of Hearing Officer, Case No. 11612 ("Hearing Decision"), Feb. 9, 2021, at 1.
[2] Hearing Decision at 2-3; EDR Ruling No. 2021-5220.
[3] Reconsideration Decision of Hearing Officer, Case No. 11612-R ("Reconsideration Decision"), Mar. 29, 2021, at 3.
[4] *Id.*
[5] *Id.* at 3-4.

DISCUSSION

By statute, EDR has 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 hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant appears to challenge the disciplinary action upheld on due process grounds. He contends that the original Written Notice was based on the Lieutenant's accusation that the grievant was sleeping at work, not on the account of Sergeant 1. Thus, the grievant asserts, he did not receive due process for the disciplinary action upheld upon reconsideration.[9]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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 on 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 hearing officer initially concluded that the agency failed to prove by a preponderance of the evidence that the grievant was sleeping at his post in a control booth and, accordingly, he rescinded the original Group III Written Notice.[14] Upon administrative review of the hearing decision, EDR noted that the hearing decision did not include findings about the facts of the incident despite undisputed evidence from three accounts of the alleged misconduct – the Lieutenant's contemporaneous written statement, the Lieutenant's testimony, and Sergeant 1's

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[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).
[9] *See* Request for Adminsitrative Review.
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 4.

testimony.[15] Therefore, EDR remanded the matter for reconsideration and clarification as to the grounds for rejecting the agency's evidence.

In his reconsideration decision, the hearing officer articulated grounds for assigning little weight to the Lieutenant's testimony and earlier written statement.[16] Moreover, the hearing officer noted that Sergeant 1 "admitted he could not see the front of Grievant's face and did not see Grievant's eyes closed," and as a result Sergeant 1's testimony in itself was "not sufficient to establish that Grievant was asleep."[17] However, upon reconsideration, the hearing officer credited Sergeant 1's testimony that he unsuccessfully attempted to gain the grievant's attention in the control booth for over five minutes.[18] Based on this testimony, the hearing officer concluded that the agency "presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance."[19] The hearing officer's findings in this regard are supported by evidence in the record.[20]

In his request for administrative review, the grievant appears to argue that the agency's Written Notice did not provide due process for an offense of unsatisfactory performance supported by the account of Sergeant 1.[21] In pre-disciplinary contexts, the due process requirements of notice and an 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, the pre-disciplinary process 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] Accordingly, state disciplinary 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

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[15] EDR Ruling No. 2021-5220 at 4.
[16] Reconsideration Decision at 2-3.
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.*
[20] *See*, *e.g.*, Hearing Recording at 10:15-14:25 (Sergeant 1's testimony).
[21] Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals 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. 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."). Constitutional due process is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *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). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.
[22] *Loudermill*, 470 U.S. at 545-46.

> 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.[23]

In addition, the *Rules for Conducting Grievance Hearings* provide that an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[24]

Here, the agency's Written Notice specifically alleged that both the Lieutenant *and Sergeant 1* observed the grievant "sitting in a chair slightly tilted . . . with your hands over your head asleep . . . ."[25] The Written Notice further alleged that both the Lieutenant *and Sergeant 1* attempted to attract the grievant's attention, including by shining their flashlights into the control room, with "still no movement" by the grievant in response.[26] EDR cannot find that this description of the offense failed to put the grievant on adequate notice of the charge ultimately upheld or of the evidence upon which it was based. To the extent that the grievant challenges Sergeant 1's testimony as the sole evidence to support the disciplinary action, it appears that the grievant participated in a full and fair hearing on the charged misconduct, with ample opportunity to question the adverse witnesses presented by the agency, including Sergeant 1, and to present his own defense.[27] Accordingly, EDR will not disturb the hearing decision on due process grounds.

Finally, to the extent the grievant challenges the hearing officer's reliance on Sergeant 1's testimony, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Upon reconsideration in this case, the hearing officer explained his assessment of the evidence in detail, and the grievant suggests no basis to conclude that the hearing officer abused his discretion in crediting parts of Sergeant 1's testimony as to the material issues of the case. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[28]

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[23] DHRM Policy 1.60, *Standards of Conduct*, § E(1). The Commonwealth's Written Notice form for formal disciplinary actions instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[24] *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.")).

[25] Agency Ex. 1.

[26] *Id.*

[27] *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))). The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process. *See* Va. Code §§ 2.2-3004(E), 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8.

[28] *See*, *e.g.*, EDR Ruling No. 2020-4976.

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.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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[29] *Grievance Procedure Manual* § 7.2(d).
[30] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[31] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).