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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5265
June 8, 2021

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 11640. For the reasons set forth below, EDR remands the matter to the hearing officer for further consideration as described below.

FACTS

On August 31, 2020, the agency issued to the grievant a Group II Written Notice for failure to follow instructions and/or policy.¹ The Written Notice charged the grievant with failing to immediately report an incident involving the use of force on an offender.² The grievant timely filed a grievance challenging the disciplinary action.³ At the second management step, the agency reduced the discipline to a Group I Written Notice for unsatisfactory performance.⁴ The agency subsequently qualified the grievance for a hearing, which took place on April 23, 2021.⁵

In a decision dated May 12, 2021, the hearing officer determined that the agency had “presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.”⁶ The hearing officer reasoned that the grievant “was told of facts showing a use of force and that force was used,” but he “did not report immediately the use of force” as the agency expected.⁷ The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.⁸ The grievant now appeals the decision to EDR.

¹ Agency Ex. 1; *see* Decision of Hearing Officer, Case No. 11640 (“Hearing Decision”), May 12, 2021, at 1.

² Agency Ex. 1.

³ Agency Ex. 9; *see* Hearing Decision at 1.

⁴ Agency Ex. 8; *see* Hearing Decision at 1.

⁵ Hearing Decision at 1.

⁶ *Id.* at 5.

⁷ *Id.* at 4.

⁸ *Id.* at 5.

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”⁹ 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.¹⁰ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the hearing officer failed to address “the major Due Process violation of skipping the Second Step Respondent meeting” during the management steps, which the grievant contends did not occur. The grievant further claims that the agency failed to produce copies of emails sent to the grievant by two of its witnesses, Officer R and Officer G. The grievant alleges that the agency’s failure to produce the emails “puts [the officers’] word in doubt.”

Due Process

The grievant alleges that the agency failed to provide him with adequate post-disciplinary due process during the management steps, prior to the grievance hearing. 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.¹² In this context, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.¹³ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁴

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code §§ 2.2-1201(14), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹² *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.

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.”

¹³ *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))).

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

The hearing officer did not make any factual findings about the second step meeting in his decision. At the hearing, the Warden (the designated second-step respondent in this case) testified that he held a second step meeting with the grievant, though he did not recall the date of the meeting or details about what occurred during the meeting.¹⁵ The grievant, on the other hand, testified that he did not meet with the Warden at the second step.¹⁶ Regardless of the conflicting evidence about this issue, the *Grievance Procedure Manual* states that “[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.”¹⁷ Based on a review of the evidence in the hearing record, it does not appear the grievant notified the agency about the Warden’s alleged failure to hold the second step meeting, requested a ruling from EDR, or otherwise halted the grievance process to correct any matters of alleged noncompliance at the time they occurred.¹⁸ As a result, EDR finds that the agency’s alleged failure to hold the second step meeting, if it occurred as described by the grievant, has been waived at this point based on his continuation of the grievance beyond the agency head’s qualification decision.

More importantly, EDR perceives no procedural impairment to the hearing process based solely on the agency’s alleged noncompliance with the grievance procedure during the management steps. The grievant participated in a hearing before an impartial decision-maker, where he had the opportunity to present evidence relevant to the agency’s accusations against him and to question all witnesses called. Under these circumstances, EDR finds no basis to conclude that the grievant lacked either notice or an opportunity to be heard in connection with the disciplinary action taken against him. Accordingly, we decline to disturb the hearing decision on the due process grounds raised by the grievant.

Production of Documents

In addition, the grievant argues that the agency failed to produce documents as ordered by the hearing officer. At the hearing, Officer R and Officer G both testified that they wrote emails about the incident with the offender.¹⁹ These emails were not included with either party’s exhibits. At the hearing, the hearing officer asked the agency’s advocate to send him and the grievant copies of the emails, explaining that he would admit them into the record after the grievant had an opportunity to review them and provide a response.²⁰ It appears that the agency did not distribute the emails to the hearing officer or the grievant as no such evidence appears in the record. On administrative review, the grievant contends that the agency’s failure to produce the emails undermines the credibility of Officer R’s and Officer G’s 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).

¹⁵ *Id.* at 1:49:28-1:50:52, 1:52:49-1:55:01 (Warden’s testimony). The human resource officer testified that she did not remember whether she was present at the second step meeting. *Id.* at 2:15:31-2:16:11 (human resource officer’s testimony). The Grievance Form A indicates that the second step meeting took place the same day the Warden received the form. Agency Ex. 9, at 15.

¹⁶ Hearing Recording at 2:43:20-2:44:01 (grievant’s testimony).

¹⁷ *Grievance Procedure Manual* § 6.3.

¹⁸ *See id.*

¹⁹ Hearing Recording at 52:01-52:09, 55:48-56:35 (Officer R’s testimony), 1:11:45-1:12:48 (Officer G’s testimony).

²⁰ *Id.* at 2:45:32-2:45:51.

Pursuant to the grievance procedure, hearing officers have the authority to order the production of documents.²¹ EDR's *Rules for Conducting Grievance Hearings* further provide that "[a] party's failure to comply with . . . an order of EDR or the hearing officer regarding documents may result in the hearing officer ordering sanctions against that party."²² In this case, the hearing officer essentially issued a verbal order for the production of documents at the hearing, directing the agency to produce copies of Officer R's and Officer G's emails for admission into the hearing record. The grievant has appealed the agency's apparent failure to comply with the hearing officer's order in his request for administrative review.²³

Having thoroughly reviewed the available evidence in the record on this issue, EDR is unable to determine what impact the emails might have on the outcome of the case. The hearing officer made no factual findings about Officer R's and Officer G's emails; indeed, neither the parties nor the hearing officer appear to have actually reviewed the content of the emails. As such, we find that remanding the matter to the hearing officer for further consideration of this issue is the most appropriate remedy. On remand, the hearing officer may consider whether the agency failed to comply with his verbal order at the hearing and, if so, whether sanctions are warranted. The hearing officer may also allow the agency a further opportunity to produce the emails or other information related thereto. After receiving copies of the emails from the agency and any responsive information from the grievant, the hearing officer must consider the impact, if any, the documents have on the charge against the grievant, the credibility of the witnesses' testimony about the grievant's alleged misconduct, and any other material issue in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to address any noncompliance by the agency in producing Officer R's and Officer G's emails and/or to admit the documents into the record. The hearing officer also has the discretion to accept additional argument or evidence related to the emails in the interest of providing the parties with a full and fair hearing. The hearing officer is directed to issue a remand decision making additional findings of fact and conclusions of policy about the emails as discussed above and consider whether any such additional evidence or argument affects other findings and determinations in the original decision.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁴ 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.²⁵ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

²¹ Va. Code § 2.2-3005(C)(3); *Grievance Procedure Manual* § 5.7(3).

²² *Rules for Conducting Grievance Hearings* § IV(F). Potential sanctions are described in Sections III(E) and V(B) of the *Rules*.

²³ The parties may raise issues of party noncompliance during the hearing phase to EDR through the administrative review process. *See Grievance Procedure Manual* § 6.3.

²⁴ *See Grievance Procedure Manual* § 7.2.

²⁵ *Id.* § 7.2(d).

in which the grievance arose.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷

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²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).