Issue: Compliance-Hearing Decision; Ruling Date: March 26, 2002; Ruling #2001-187; Agency: Old Dominion University; Outcome; grievant out of compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Old Dominion University/ No. 2001-187
March 26, 2002

On October 9, 2001 the grievant requested a compliance ruling from this Department in the August 4, 1998 grievance that he initiated with the agency challenging his termination on July 7, 1998. The grievant claims that the hearing officer's conduct at the October 29, 1998 hearing and his November 9, 1998 written decision do not comply with the grievance procedure and violate his due process rights.

FACTS

The grievant was employed by the agency as a Control Room Operator, monitoring and operating equipment used to broadcast videotaped classes to remote sites. The agency alleged that on at least four or five occasions on June 4, 1998 the grievant violated instructions from his supervisor by leaving his control room while monitoring a broadcast. The grievant was issued with a Group II Written Notice for failure to follow his supervisor's instructions on July 7, 1998, and terminated based on his accumulation of two active Group II Written Notices.[1] The grievant initiated a grievance against the disciplinary action, which advanced to a hearing on October 29, 1998. On November 9, 1998, the hearing officer issued his decision upholding the Group II Written Notice and termination.

The grievant made two challenges to the hearing decision: one to the Department of Human Resource Management (DHRM)[2], and the other to the hearing officer. DHRM responded on December 16, 1998, upholding the decision as being consistent with state policy. The hearing officer does not appear to have responded to the grievant's reconsideration request.[3] EDR records contain a November 23, 1998 letter from the agency asking the hearing officer to deny the grievant's reconsideration request as being untimely under the 5 workday rule then in effect[4] because the hearing decision was

[1] The grievant's prior active Group II Written Notice was issued on February 27, 1997.
[2] DHRM was named the Department of Personnel and Training at that time.
[3] The records of the grievant's reconsideration request to the hearing officer are incomplete: the grievant does not have a copy of the request, nor does the agency; the part-time, private sector hearing officer retired at approximately the time of the hearing and his records are no longer available.
[4] See *Grievance Procedure*, p. 12 (effective July 1, 1995)(providing that a request to reconsider a decision or reopen a hearing is made to the hearing officer "within 5 **workdays** of receipt of the decision")(emphasis in original)).

received on November 12, 1998, and the grievant's reconsideration request was not submitted until November 23, 1998, more than five workdays later.[5] The grievant has not presented any evidence rebutting the agency's motion and claim of untimeliness.

On October 9, 2001, nearly three years after his hearing, the grievant requested this Department to overturn the hearing decision because of the hearing officer's failure to respond to his reconsideration request and based on "new evidence" that the evidence presented by the agency at his grievance hearing conflicted with the evidence it presented at an earlier unemployment hearing. The grievant also raises numerous claims that the disciplinary action was unwarranted and was discriminatory, retaliatory and based on a disability, among others.

DISCUSSION

Whether there is Evidence of Fraud/Extreme Circumstances

The grievance procedure in effect at the time of the grievant's hearing provided that requests for reconsideration or reopening are generally based upon "newly discovered evidence or evidence of incorrect legal conclusions" and that "[t]he hearing officer has sole authority to grant such requests."[6] Further, a request to reopen hearing proceedings must have been made in writing within five workdays of receiving the decision.[7] A hearing decision became final once a hearing took place, the decision was rendered, the five-day time period within which the hearing officer could reopen the hearing had expired, and all timely challenges to the decision had been decided. In such a case, this Department consistently held that a request for a rehearing or reopening could not be granted except in extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process.

As stated, the grievant claims that the agency presented different evidence at his grievance hearing than they had at his earlier unemployment hearing. The grievant also asserts that the evidence was different than that contained on the Written Notice form itself. Specifically, the grievant asserts that the agency presented a "new time chart" at the grievance hearing that gave different times and circumstances to his five absences than had been given on the Written Notice form and at the unemployment hearing. In addition, the grievant argues that there were many mitigating and extenuating circumstances that should have been given greater weight and should have led to a reversal of the disciplinary action. The grievant's assertions, however, even if proven, cannot support a finding of fraud or other extreme circumstances.

Virginia Court opinions are instructive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing

[5] This Department also received the hearing decision on November 12, 1998.
[6] *Grievance Procedure,* p. 12 (effective July 1, 1995).
[7] *Id.*

requests arising after a final judgment.[8] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to trier of fact. Those courts also opined that to allow rehearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. Under the rationale of those courts, the grievant's claims of changed evidence or perjury, coming long after the hearing decision became final, would not warrant reopening. Indeed, the grievant had the opportunity at his hearing to question agency witnesses about the alleged inconsistencies in the timeline chart and their testimony, and to attempt to ferret out any perjury at that time. We conclude that there is no clear evidence of extreme circumstances or fraud such as to warrant a rehearing.

Due Process/Hearing Officer's Failure to Respond

As stated, the grievant claims that the hearing officer's failure to respond to his reconsideration request violated his right to due process. Under the state's *Standards of Conduct*, an employee 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 prior to receiving formal discipline.[9] Based on the undisputed facts, the grievant received these pre-termination due process guarantees. While he argues that he did not receive information about specific witnesses to his leaving the control room, he nevertheless was afforded a "due process meeting" prior to his termination.[10] He again received notice via the Group II Written Notice issued to him on July 7, 1998.[11] Furthermore, he received a full post-disciplinary hearing on October 29, 1998.[12] Thus, the failure on the part of the hearing officer to respond to the grievant's—apparently untimely—reconsideration request is harmless error at most.

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[8] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983); McClung v. Folks, 126 Va. 259 (1919).

[9] The Department of Human Resources Management (DHRM) Policy 1.60 VII (E)(2)(effective 09/16/93). Policy 1.60, the *Standards of Conduct*, tracks the United States Supreme Court's interpretation of the process due a tenured governmental employee prior to a disciplinary action such as a termination. *See* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) in which the U.S. Supreme Court explained that the pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story. *Id*, at 546.

[10] In Gilbert v. Homar, 520 U.S. 924 (1997), the United States Supreme Court explained that a public employee dismissed for cause is entitled to a "*very limited hearing*" prior to his termination, to be followed by a more comprehensive post-termination hearing. 520 U.S. at 929. The "due process meeting" that the grievant recounts in his grievance satisfies the very limited hearing requirement described in Gilbert.

[11] The Written Notice form is designed to ensure pre-disciplinary due process. The form is crafted in a manner that compels the person who issues the notice to state the nature of the offense and an explanation of the evidence. Employees are presumed to have an opportunity to respond when presented with the Written Notice form.

[12] An employee is entitled to the following post-discipline due process protections: (1) adequate notice, (2) specification of the charges against him, (3) an opportunity to confront the witnesses against him, and (4) an opportunity to be heard in his own defense. The grievant clearly received these minimal protections. Grimes v. Nottoway County School Board, 462 F.2d 650 (4th Cir. 1972).

CONCLUSION

Because the grievant has presented no credible evidence of fraud, or other extreme circumstances that would warrant reopening his 1998 hearing at this time, his request for reopening must be denied. This Department's rulings on matters of compliance are final and nonappealable. [13]

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[13] Va. Code § 2.2-1001(5).