Issue: Compliance; Hearing Decision; Ruling Date: June 26, 2002; Ruling #2002-081; Agency: Department of Corrections; Outcome: Hearing officer in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2002-081
June 26, 2002

The Grievant has requested a compliance ruling in the January 28, 2002 grievance that he initiated with the Department of Corrections (DOC or Agency). The Grievant claims that the hearing officer's decision violated the grievance procedure and that his March 15, 2002 hearing should be reopened because: (1) the evidence presented at the March 15th hearing was not the same as presented at an earlier January 23, 2002 Agency pre-disciplinary hearing; (2) Agency employees had no first hand knowledge to support the disciplinary action; (3) he was improperly suspended prior to the January 23rd pre-disciplinary hearing; and (4) the Written Notice failed to document the disciplinary action to be taken. For the reasons set forth below, we conclude that the hearing officer did not violate the grievance procedure.

FACTS

The Grievant was employed as a Corrections Lieutenant with DOC until he was terminated on February 1, 2002 following his arrest for petty larceny.[1] Following a January 23, 2002 pre-disciplinary hearing, the Grievant received a Group III Written Notice with recommendation for termination. On January 28, the Grievant initiated a grievance challenging the disciplinary action. The following day, he received a letter of termination, effective February 1st, based on the January 23rd Written Notice.

On March 15th, the grievance proceeded to hearing before an administrative hearing officer. The hearing officer determined that the disciplinary action, as well as the resulting termination, should be upheld.[2]

DISCUSSION

[1] The Grievant was terminated for "acts and behavior of a serious nature unbecoming a Corrections Lieutenant." *See* January 23, 2002 Written Notice.
[2] *See* Decision of Hearing Officer, April 11, 2002.

By statute, this Department 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."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[5] Accordingly, the technical rules of evidence do not apply.[6] By statute, hearing officers have the duty to "[r]eceive probative evidence" and to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs."[7] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Different Evidence at Grievance Hearing than at Pre-Disciplinary Agency Hearing

The Grievant contends that the Agency presented additional facts or testimony at the March 15th grievance hearing that were not presented at the January 23rd pre-disciplinary hearing. Even assuming that the Grievant is correct, the hearing officer's admission of such evidence at hearing does not violate the grievance procedure. Parties are not limited at a grievance hearing by the evidence that they present at a pre-disciplinary hearing.

The Grievant correctly notes that under state and Agency policy, prior to disciplinary removal, an employee is entitled to: (*i*) oral or written notice of the charges against him; (*ii*) an explanation of the agency's evidence in support of the charge; and (*iii*) a reasonable opportunity to respond.[8] In this case, the Grievant was afforded these basic pre-disciplinary due process protections. He was informed of the charges against him: "Acts and Behavior of a Serious Nature Unbecoming a Correctional Lieutenant," (petty theft).[9] He was provided with an explanation of the agency's evidence in support of the

[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *Grievance Procedure Manual* § 6.4 (3), p. 18.
[5] *Rules for Conducting Grievance Hearings*, IV (D), p. 7.
[6] *Id.*
[7] Va. Code § 2.2-3005 (C)(5).
[8] DHRM Policy 1.60 VII (E)(2); Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 546 (1985).
[9] Group III Written Notice, dated January 23, 2002. In addition, on or about January 15, 2002 the Grievant was presented with a notice of a pre-disciplinary hearing which described the alleged offense as a criminal act: the unlawful theft of a camera which resulted in a Class I Misdemeanor charge.

charge: his arrest by an independent law enforcement body. Finally, he had an opportunity to respond to the charge and the supporting facts at the January 23rd meeting, as evidenced by his signature on the Written Notice form. That the hearing officer allowed the Agency to present more witnesses at the grievance hearing than it had at the pre-disciplinary hearing does not conflict with the grievance procedure. We note that a public employee dismissed for cause is entitled to a *"very limited hearing"* prior to his termination, followed by a more comprehensive post-termination hearing.[10] The January 23rd hearing met the agency's minimal pre-disciplinary due process obligations.[11] Importantly too, the hearing officer had ordered the parties to exchange witness lists and exhibits prior to the grievance hearing.

Non-Agency Witnesses

The Grievant objects to the Agency's lack of first hand knowledge of the alleged petty theft, essentially asserting that the hearing officer did not comply with the grievance procedure by allowing individuals from outside the Agency to supply the evidence against him. However, neither state policy, agency policy, or the grievance procedure requires that evidence be provided exclusively by Agency personnel. The crime allegedly took place at a discount department store, thus witnesses included store employees and the law enforcement personnel called to the scene. The fact that these persons were not Agency personnel does not diminish the value of their testimony.

The Grievant cites to Attachment #2 of DOC Policy 5-10 for the premise that because there was no first-hand knowledge within the Department, an indefinite suspension may have been preferable to termination. The cited attachment indeed states that in a case where there is no first hand knowledge, indefinite suspension "might be preferable." The cited policy clearly indicates, however, through its discretionary "might be preferable" language, that the decision to terminate lies exclusively within the authority of management.

Suspension Prior to the Pre-Disciplinary Hearing

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[10] Gilbert v. Homar, 520 U.S. 924, 929 (1997) citing Loudermill. *See also* Linton v. Frederick County Board of County Commissioners, 964 F.2d 1436 (4th Cir. 1992). "Due process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit [the employee] to identify the conduct giving rise to the dismissal and thereby enable him to make a response." Linton at 1440.

[11] The hearing that is the subject of this ruling request satisfied the post-termination due process requirements. To the state's post-termination due process obligations, an employee must be afforded: (1) adequate notice; (2) specification of charges against him; (3) an opportunity to confront the witnesses against him; and (4) an opportunity to be heard in his own defense. Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567, 576 (4th Cir. 1975).

The Grievant claims that he was improperly suspended by being placed on administrative leave on January 17, 2002, prior to his January 23rd pre-disciplinary hearing. As an initial point, this objection challenges a pre-grievance Agency action, not an alleged violation of the grievance procedure by the hearing officer. And in any event, administrative leave is not a form of disciplinary suspension. Under the Standards of Conduct, all suspensions are without pay, whereas under administrative leave, as in this instance, the employee is compensated and his personal and annual leave balances are not depleted.

Documentation of Disciplinary Action in the Written Notice

The Grievant also appears to claim that the hearing officer's decision violates the grievance procedure because the Agency had failed to properly document the disciplinary termination in the Written Notice. Any claim on that basis against the Agency, however, does not challenge an issue of compliance with the grievance procedure that can be remedied through a ruling by this Department; indeed, the alleged failure by the Agency occurred before the Grievant initiated the grievance process.

Moreover, the undisputed evidence would suggest that the disciplinary termination was properly documented. The Written Notice describes the proposed disciplinary action as: "Five (5) Day Suspension pending approval by the Regional Director for Termination." On January 28, 2002, five days after the January 23rd pre-disciplinary hearing, the Agency sent, via certified mail, notice that the Regional Director had approved the Grievant's termination. Furthermore, the Grievant had adequate prior notice that the propriety of his termination would be adjudicated at the March 15th grievance hearing. The Grievant's awareness that termination would be at issue during the March 15th hearing is evidenced by his pre-hearing objection to the adjudication of his discharge, which the hearing officer overruled. Under these undisputed facts, we cannot conclude that the hearing officer violated the grievance procedure by adjudicating the issue of termination.

For all the reasons discussed above, we conclude that neither the hearing officer or his decision violated the grievance procedure in this case. Nevertheless, we wish to correct an erroneous statement contained in his reconsidered decision. In responding to what he characterized as the Grievant's objections -- that the Agency failed to conduct an internal investigation and the Warden lacked sufficient evidence at the pre-termination hearing to justify the termination -- the hearing officer's reconsidered decision stated the following: "[a]ssuming for the sake of argument that Grievant's allegations are correct, he should have addressed the concerns by notifying the Agency of its non-compliance and pursuing remedies from the Department of Employment Dispute Resolution [EDR]." This statement is incorrect. Neither of these objections challenge issues of compliance with the

grievance procedure (issues which could be addressed and remedied by EDR). Indeed, the alleged actions occurred *prior* to the initiation of the grievance.

APPEAL RIGHTS

For the reasons discussed above, this Department cannot find that the hearing officer abused his discretion or exceeded his authority under the grievance procedure in conducting or deciding this case.

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[12] 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14] This Department's rulings on matters of procedural compliance are final and nonappealable. [15]

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Claudia T. Farr
Director

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William G. Anderson, Jr.
Senior Employment Relations Consultant

[12] *Grievance Procedure Manual*, § 7.2(d), page 20.
[13] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.
[14] *Id.*
[15] Va. Code § 2.2-1001 (5).