

Issue: Compliance/Administrative Review of Hearing Officer; Ruling Date: July 25, 2003; Ruling #2003-105; Agency: Virginia Polytechnic Institute and State University; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Norfolk State University
Ruling Number 2003-105
July 25, 2003

The grievant has requested that this Department administratively review the May 16th hearing decision and the hearing officer's conduct during her April 23rd grievance hearing.¹ The grievant asserts that the hearing decision violated the grievance procedure, state policy, and her due process rights. For the reasons set forth below, this Department finds that neither the hearing officer's decision nor his conduct prior to or during the hearing violated any provision of the grievance procedure.²

FACTS

Until her termination, the grievant was employed as an Education Specialist III. On January 9, 2001, she was issued a letter by her supervisor stating that her involvement in an altercation in the vicinity of her office was "considered a Group III offense" under Standards of Conduct policy.³ A Written Notice form did not accompany the letter.

On December 13, 2002, the grievant was issued a Group II Written Notice with termination for failure to follow her supervisor's instruction or otherwise comply with established written policy. The grievant's termination was based on a purported accumulation of disciplinary actions (the January 9, 2001 letter referencing the Group III violation and the December 13, 2002 Group II Written Notice with termination).

On January 9, 2003, the grievant initiated a grievance challenging her termination and the December 13th Group II Written Notice. On January 22, 2003, she initiated a second grievance, which again challenged her termination, but more specifically, by contesting the status of the January 9, 2001 letter as accumulated formal discipline that could support the termination.

¹ See Case Number 5691.

² While not every objection raised in the grievant's request for administrative appeal will be addressed in this ruling, all have been carefully considered and this Department has found no reason to disturb the decision of the hearing officer. This ruling does not address policy-based objections, which are properly raised with the Department of Human Resources Management (DHRM). Furthermore, objections that have a legal basis may be raised with circuit court in the jurisdiction in which the grievance arose. See *Grievance Procedure Manual*, § 7.3(a), page 20.

³ See the Department of Human Resources Management, (DHRM) Policy 1.60.

On January 30, 2003, the parties conducted a second-step meeting. Subsequently on February 7, 2003, both grievances were advanced to the agency head for qualification. When she failed to receive a qualification determination within the five workday time period mandated by the grievance procedure,⁴ the grievant forwarded a written notification of noncompliance to the agency head on February 20, 2003.⁵

On February 28, 2003, the agency notified the grievant that the December 13, 2002 Group II Written Notice with termination had been rescinded, and in its place, a Group III Written Notice with termination had been issued on February 27, 2003, for the same alleged offense,⁶ retroactive to the original termination date of January 10, 2003. On March 7, 2003, the grievant initiated a grievance to challenge her Group III Written Notice with termination.

The agency's February 27, 2003 issuance of a Group III Written Notice with termination for the same alleged offenses requires that the grievant restart the grievance process, which she did by filing her grievance of March 7, 2003. This Department qualified the grievance for hearing in order to expedite the process following a series of delays caused by the agency. The grievance proceeded to hearing on April 23, 2003, and the hearing officer rendered a decision on May 16, 2003, in which he upheld the agency's termination of the grievant's employment.

DISCUSSION

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."⁷ "In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR."⁸ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

⁴ *Grievance Procedure Manual*, § 4.2, page 11.

⁵ *Grievance Procedure Manual*, § 6.3, page 17.

⁶ The offense was re-characterized in the February 27, 2003 Group III Written Notice. In the original December 13, 2002 Group II Notice, the grievant was charged with "failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy." In the February 27th Group III Notice, the offense was characterized as "abuse of her position and role within the University, and conspiring to violate University policy for personal gain." However, both notices were based on the same alleged conduct set forth in the January 13, 2003 termination letter sent to the grievant: (1) registering with an outstanding account balance, (2) obtaining a transcript with an outstanding balance; (3) obtaining a diploma with an outstanding balance, and (4) non-compliance with University degree clearance and diploma issuance policies.

⁷ See Va. Code § 2.2-1001(2), (3), and (5).

⁸ See *Grievance Procedure Manual* § 6.4, page 18.

does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.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 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. 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.¹²

Due Process

The grievant’s primary claim appears to be that her due process rights were violated. To the extent that this assertion is based on purported non-compliance with the grievance procedure, the claim fails.

Pre-termination Due Process

As an initial point, it should be noted that questions of the adequacy of pre-termination due process are legal and, therefore, appropriately addressed by the circuit court in the jurisdiction in which the grievance arose.¹³ That being said, it would appear that a brief discussion of the pre-termination due process issues in this case, while dicta, would nevertheless be instructive.

Where a state creates a property right in continued employment, it may not constitutionally authorize the deprivation of such an interest without “appropriate procedural safeguards.”¹⁴ Prior to termination, the United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt¹⁵ employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity to respond, appropriate to the nature of the case.¹⁶ A more comprehensive post-termination hearing follows termination. Importantly, the pre-termination notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discharge, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an “initial check against mistaken decisions --

⁹ See *Grievance Procedure Manual* § 6.4(3), page 18.

¹⁰ Va. Code § 2.2-3005(D)(ii).

¹¹ *Grievance Procedure Manual* § 5.9, page 15.

¹² *Grievance Procedure Manual* § 5.8(2), page 14.

¹³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* §§ 7.2(d) and 7.3(a), page 20.

¹⁴ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

¹⁵ See *Grievance Procedure Manual* § 2.3(1), page 5.

¹⁶ *Loudermill*, at 546.

essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."¹⁷

In this case, it appears that the grievant was afforded sufficient pre-termination due process.¹⁸ She received notice in both the January 13, 2003 termination letter and the February 27, 2003 Group III Written Notice that she was being disciplined for: (1) registering with an outstanding account balance, (2) obtaining a transcript with an outstanding balance; (3) obtaining a diploma with an outstanding balance, and (4) non-compliance with University degree clearance and diploma issuance policies.¹⁹ She was given an opportunity to respond to those charges and did so in conjunction with an investigation conducted by the human resources department. She was afforded additional opportunity to respond to those charges through the grievance process.

Post-Termination Due Process

Like pre-termination due process, post-termination due process is a legal concept and appropriately raised with the circuit court. Nevertheless, because post-termination due process is inextricably intertwined with the grievance procedure, this Department will address the issue of post-termination due process. As a general rule, post-termination due process requires that the terminated employee be provided with the following: 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.²⁰ The grievance statutes and procedure

¹⁷ Id. at 545-546.

¹⁸ In opining that the grievant appears to have been afforded adequate process, this Department does not presume to address the issue of whether the agency's actions and hearing officer's decision comport with state policy. That determination is left solely to DHRM and must be raised with that department. Furthermore, because due process is a legal principle, the grievant can presumably raise the issue with the circuit court once the hearing decision becomes a final hearing decision, which will be when all administrative decisions have been issued. *See Grievance Procedure Manual*, §§ 7.2(d) and 7.3(a), page 20.

¹⁹ The reasons stated on the Group III Notice for the disciplinary action were: abuse of position and role within the University and conspiring to violate University policy for personal gain. It is clear, however, that the alleged actions that formed the basis of the Group II were also those that formed the basis of the Group III. For instance, the attachment to the Group III references the HR investigation into the four charges set forth in the January 13th termination letter. This attachment states that the investigation revealed that the infractions were committed by the grievant. Moreover, in her May 23rd ruling request to this Department, the grievant concedes that charges were the same. She states that "[o]n February 27, 2003 Norfolk State University rescinded my Group II written notice and reissued a Group III, which included the same 4 charges of the initial group II that resulted in my employment termination dated January 10, 2003.")

²⁰ *Reeves v. Thigpen*, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995). *See also*, *Garraghty v. Commonwealth of Virginia*, 52 F.3d 1274, (4th Cir. 1995), holding that "[t]he 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." *Garraghty* at 1284.

provide these basic post-termination procedural safeguards through an administrative hearing process.²¹

Formal discipline such as that issued to the grievant automatically qualifies for such a hearing. Furthermore, a review of the hearing record indicates that counsel represented the grievant at her hearing and that eight witnesses testified. The grievant's counsel had the opportunity to cross-examine any adverse witnesses and to call witnesses who could provide testimony favorable to the grievant. Thus, it appears that the grievant was afforded sufficient post-termination due process.²²

APPEAL RIGHTS

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵ This Department's rulings on matters of procedural compliance are final and nonappealable.²⁶

Claudia T. Farr
Director

²¹ See Va. Code §2.2-3004(F) which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee 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 the hearing. See Va. Code §§2.2-3005 & 3006. See also, *Grievance Procedure Manual*, §§ 5.7 & 5.8 pages 14-15, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

²² The grievant claims that she was "wrongfully terminated" and that her due process rights were violated because when the agency rescinded the written notice they should have also rescinded the charges against her. This assertion appears meritless. First, while the agency's first attempt to terminate the grievant was ultimately deemed in violation of the state's Standards of Conduct, the agency corrected its misapplication of that policy by re-issuing the disciplinary action. The grievant's claim that she was denied the opportunity to defend the charges that led to her termination is simply not accurate. As discussed above, the grievant recognizes that the alleged conduct upon which the second written notice (Group III) was based is the same as that upon which the first written notice (Group II) was based. She was provided notice of those charges, the supporting facts, was given an opportunity to respond, and was ultimately allowed to challenge her termination at a full administrative grievance hearing. Again, if the grievant desires to challenge the adequacy of her post-termination process, she must do so with the circuit court in the jurisdiction in which the grievance arose in accordance with Va. Code § 2.2-3006(B) and *Grievance Procedure Manual*, § 7.3(a), page 20.

²³ *Grievance Procedure Manual*, § 7.2(d), page 20.

²⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

²⁵ *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

²⁶ Va. Code § 2.2-1001 (5).

July 25, 2003
Ruling #2003-105
Page 7