Issue: Administrative review/grievant claims hearing officer erred by not issuing decision within 35 days; Ruling Date: December 20, 2005; Ruling #2006-1135; Agency: Virginia Community College System; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINSTRATIVE REVIEW OF THE DIRECTOR

In the matter of the Wytheville Community College
Ruling Number 2006-1135
December 20, 2005

The grievant has requested an administrative review of the hearing decision in Case No. 8119. For the following reasons this Department will not disturb the decision of the hearing officer.

FACTS

The Wytheville Community College (agency) has employed the grievant in administrative office support positions, and she currently works as a Secretary Senior. On March 21, 2005, the grievant was issued a Group I Written Notice for disruptive behavior and unsatisfactory work performance. The agency asserted the grievant failed to participate in a meaningful, positive manner at two meetings she was instructed to attend. In addition, the agency asserted that the grievant failed to socialize at a work-related open house.

The grievant challenged the Written Notice by initiating a grievance on April 18, 2005. She listed the issues of her grievance on the Grievance Form A as: "No due process; Misapplication of the Standards of Conduct, Policy 1.6 [sic]; [and] Group 1 Written Notice." The grievance advanced through the management resolution steps and proceeded to hearing on August 17, 2005. On August 25, 2005, the hearing officer issued his decision upholding the Written Notice, finding that the grievant failed to cooperate in the planning for the administration of grant programs by refusing to contribute in a meaningful, positive manner at two meetings that the grievant had been instructed to attend. As to the charge of failing to socialize at the open house, the hearing officer found the event was not an integral part of her job responsibilities.

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."[1] If the hearing officer's exercise of authority is not in compliance with the

[1] Va. Code § 2.2-1001(2), (3), and (5).

grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[2]

The First Step Respondent's Attendance at the Hearing

The grievant challenges the first-step respondent's attendance at her grievance hearing.[3] The agency designated the first step respondent as its party designee. Under this Department's *Rules for Conducting a Grievance Hearing*, "[an] agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify."[4] As the agency was entitled to designate the first step respondent as its party, this Department finds that the hearing officer did not violate the grievance procedure or otherwise abuse his discretion by allowing the first step respondent to attend the hearing.

Failure to Issue a Timely Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within 35 days of the appointment of the hearing officer. According to the grievance procedure rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of their appointment.[5] In this case, the hearing officer was appointed on June 23, 2005, and the hearing held August 17, 2005. The hearing decision was issued approximately a week later, on August 25, 2005. The hearing officer explained in his decision that the agency representative was unavailable for the originally scheduled prehearing conference on June 29, 2005, but called an hour after the scheduled time for the conference to apologize for missing the conference. The hearing officer set the matter for hearing on July 19, 2005 and established a deadline for the exchange of witness names and documents. The grievant complied with the deadline, but because the hearing officer's directive never reached the appropriate individual, the agency failed to comply with exchange. The agency requested that the hearing officer reschedule the hearing which he did, finding good cause. A second attempt to hold the prehearing conference on July 19, 2005 proved unsuccessful because the agency representative required medical treatment. The prehearing conference finally occurred on August 1, 2005.

Preferably, hearings take place and decisions are written within the 35 day timeframe set forth in the grievance procedure. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing. Such is the case here.

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[2] *See Grievance Procedure Manual* § 6.4(3).
[3] The first step respondent served as the grievant's immediate supervisor at the time the Written Notice was issued on March 21, 2005.
[4] *Rules for Conducting Grievance Hearings*, IV.
[5] *Grievance Procedure Manual* § 5.1.

The grievant couched her objection to the timeliness of the hearing decision in terms of due process. Due process is a legal concept appropriately raised with the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address the issue of due process. Due process entitles a non-probationary, non-exempt employee of the Commonwealth 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), prior to issuance of discipline.[6] A more comprehensive post-disciplinary hearing follows and must provide 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.[7] The grievant has provided no evidence that she was not provided these basic due process protections. Instead, her due process objection is based entirely on the length of time that it took to bring her case to hearing and render a decision in her case. Based on the facts here, this Department cannot conclude that the delay deprived the grievant of due process. The process appears to have been delayed by approximately one month because of the above listed complications. Given that the grievant had not lost her job or been suspended for any period of time, this Department cannot conclude that a delay of this duration constitutes a violation of due process.[8]

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[6] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). While Loudermill discusses the due process afforded employees in termination cases, the same principles apply in a case such as this, where an employee receives a disciplinary action without termination. State policy requires:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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.

Department of Human Resource Management (DHRM) Policy 1.60 VII (E)(2). In addition, the Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[7] 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, 52 F.3d at 1284. *See also* Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-561 (4th Cir. 1983)(Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

[8] *See* FDIC v. Mallen, 486 U.S. 230, at 243 (1988) (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation.) *See also* Loudermill, 470 U.S. 532, at 547 (holding that "a 9-month adjudication is not, of course, unconstitutionally lengthy per se.")

The September 23, 2004 e-mail

The grievant also objects to the introduction of a September 23, 2004 e-mail at hearing.[9] The grievant asserts that the hearing officer advised that he would not consider the e-mail "because it was outside of the timeline the Hearing Officer considered relevant to this matter, specifically November 2004 to March 2005." As explained below, the hearing officer's allowing and considering evidence that predated November 2004 did not constitute error.

The hearing officer recognized that he was required to confine his decision regarding the appropriateness of the discipline to conduct occurring between November 2004 and March 2005, the "offense date(s)" listed on the Written Notice Form. He further noted, however, that evidence predating November 2004 was relevant to the grievant's intent. Acts occurring prior to a disciplinary timeframe can be relevant for a variety of reasons. For example, in cases involving repeated acts of the same type of misconduct, an agency may wish to introduce evidence of the prior misconduct and discipline to establish that the employee had notice that the behavior in question was considered misconduct by the agency and thus employees could expect to be disciplined for engaging in that behavior. Here, the hearing officer believed that the September e-mail reflected the grievant's attitude towards the Dean and Vice-President and was therefore relevant to his determinations regarding the grievant's alleged disruptive behavior and unsatisfactory work performance, specifically failing to participate in two meetings after being instructed to do so. This Department cannot conclude that the hearing officer abused his discretion by essentially considering the September e-mail as background information.

Retaliation

The grievant objects to the lack of any discussion in the hearing decision regarding her claim that the Written Notice was retaliation for a conversation that she had with the Human Resource Manager. As an initial point, the issue of retaliation is not raised on the Grievance Form A.[10] However, assuming that it was raised in one of the 96 pages that the grievant attached to her Grievance Form A as "supporting facts," this Department's review of the hearing tapes did not reveal that the grievant presented any evidence to support a claim of retaliation. When the grievant questioned her supervisor at hearing if the discipline issued by the Dean was retaliatory, he strongly denied it.[11] Presumably, the hearing officer found the testimony credible. Thus, in light of the grievant's failure to put on any evidence in support of her claim, this Department concludes that the hearing officer's failure to address the retaliation claim in the hearing decision was harmless error, if error at all.

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[9] According to the hearing decision, the e-mail in question referred to the dean and vice president as "f___ing cowards."

[10] The only mention of retaliation on the Form A is in the relief section where the grievant requests that she not be retaliated against for filing her April 18, 2005 grievance.

[11] Hearing tape 2, side 1 at counter number 500.

Employee Work Profile

The grievant claims that the hearing officer did not address her lack of a valid Employee Work Profile (EWP) from November 2004 to April 2005. As with the issue of retaliation, the EWP was not mentioned on the Grievance Form A. Again, it may have been mentioned in one of the 96 pages of "supporting facts." Assuming that it was, this Department's review of the hearing tapes found no evidence presented that linked the lack of the EWP to the issues raised on the Form A (no due process; misapplication of the Standards of Conduct; and the Written Notice). Nor did the grievant present evidence linking the lack of an EWP to the behavior for which the Written Notice was upheld -- failing to participate in two meetings after being asked by her supervisor. Accordingly, this Department concludes that the hearing officer's failure to address the EWP in the hearing decision was harmless error, if indeed error at all.[12]

APPEAL RIGHTS AND OTHER INFORMATION

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 and any reconsidered hearing decisions following such review have been decided.[13] 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.[14] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[15] This Department's rulings on matters of procedural compliance are final and nonappealable.[16]

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Claudia T. Farr
Director

[12] A hearing officer is not required to expressly address every point that a party attempts to make during the course of a grievance, whether in an attachment to the grievance or at hearing. Thus the hearing officer did not err by not expressly addressing the grievant's claims that she feels intimidated by her supervisor. Likewise, the hearing officer's failure to mention that the grievance "states factually I never walked out of any of [her supervisor's] 'impromptu' meetings" does not constitute error.
[13] *Grievance Procedure Manual*, § 7.2(d).
[14] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[15] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[16] Va. Code § 2.2-1001 (5).