

Issue: Administrative Review/grievant claims hearing officer's written decision and conduct do not comply with the grievance procedure; Ruling Date: December 28, 2005; Ruling #2006-1180; Agency: Department of Transportation; Outcome: this Department finds the hearing officer neither erred nor abused his discretion in upholding the disciplinary action

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2006-1180
December 28, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8151. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure. Specifically, the grievant maintains that: (1) the hearing officer relied upon a factor not set forth in the written notice in upholding the disciplinary action; (2) the agency failed to demonstrate by a preponderance of the evidence that its disciplinary action was warranted and appropriate; (3) the hearing officer failed to consider certain evidence and the decision contains incorrect factual findings and (4) the hearing officer improperly interpreted state and/or agency policy in rendering his decision.

FACTS

The grievant is employed as a Facilities Manager with the Virginia Department of Transportation (VDOT or the agency). On November 10, 2004, the grievant received a Group II Written Notice with 15 days suspension for failure to comply with established written policy, misuse of state property and abuse of state time.

The grievant challenged the written notice by initiating a grievance on December 10, 2004. The grievance proceeded to hearing on August 23, 2005. In his September 22, 2005 decision, the hearing officer upheld the Group II Written Notice and suspension.¹ The hearing officer further upheld his determination in a reconsideration decision dated October 19, 2005.²

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."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

¹ See Decision of Hearing Officer, Case No. 8151, issued September 22, 2005.

² See Reconsideration Decision of Hearing Officer, Case No. 8151-R, issued October 19, 2005.

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

Basis for Upholding Disciplinary Action/Due Process

The grievant claims that the amount of time required to back up the grievant's files was not mentioned in the written notice as a factor in its issuance and as such, the grievant did not address this issue in his grievance or at hearing. In essence, the grievant is arguing that by considering the amount of time required to back up the grievant's files in determining whether to uphold the disciplinary action, the hearing officer exceeded his authority and violated the grievant's due process rights.⁵

Prior to receiving discipline, the United States Constitution and state and agency policy generally entitle 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, appropriate to the nature of the case.⁶ A more comprehensive post-disciplinary hearing would follow discipline.⁷ Post-disciplinary due process requires that the 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.⁸ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.⁹ Thus, based on these principles, where an employee is challenging a disciplinary action, "only the misconduct cited on the Written Notice and attachments are subject to adjudication."¹⁰

⁵ Due process is legal concept and 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.

⁶ 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.

⁷ Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 546.

⁸ 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.

⁹ 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 and agency 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 hearing. See Va. Code §§ 2.2-3005 and 3006. See also *Grievance Procedure Manual* §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

¹⁰ See Hearing Decision, Case No. 551, page 6, issued March 12, 2004. In this hearing decision, the hearing officer cites to *O'Keefe v. United States Postal Service*, 318 F.3d 1310 (U.S. Ct. App. 2002), which states that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply." *O'Keefe*, 318 F.3d at 1315. Moreover, under the rules of the grievance procedure, "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings*, I.

The hearing officer supports his September 22, 2005 decision, in part, on the basis that “the amount of personal information [g]rievant held on his computer affected the efficient operation of the computer system because the size of his personal files contributed to the disruption of the [a]gency’s process of backing up data.”¹¹ The hearing officer’s conclusion appears to be based on the following findings of fact: each night when a VDOT employee logs off his computer, the main VDOT computer system backs up the employee’s files (including each employee’s PST folder which holds information related to each employee and contains both personal and business-related files);¹² the amount of time necessary to complete the backup process varies with the size of the files;¹³ and “[o]n May 25, 2004, the grievant’s PST folder disconnected from the server because of the volume of information contained in the PST folder.”¹⁴ In response to the grievant’s claim that backup times should not have been considered because it was not included in the written notice, the hearing officer states in his reconsideration decision that: “[i]t is not necessary for the Agency to include in the written notice every fact upon which it relied to take disciplinary action. The [attachment to the written notice] provides adequate notice to Grievant of the material facts upon which it based Grievant’s disciplinary action.”¹⁵

This Department agrees that while the written notice and its attachments do not specifically mention the amount of time it took to backup the grievant’s PST folder as a factor in its issuance, it is clear from the written notice and its attachments that the grievant was notified that the amount of data stored on his computer adversely affected the efficient operation of the grievant’s computer as well as the VDOT network. Importantly, as stated above, the hearing officer finds that the size of the grievant’s personal files contributed to the disruption of the process of backing up data because the grievant’s PST folder disconnected from the server on the May 25th.¹⁶ The May 25th incident is specifically mentioned on page one of the attachments to the written notice. Moreover, during the management resolution steps, the grievant was informed that two employees of VDOT’s IT Applications Divisions found the grievant’s PST files so large that it interfered with the automatic backup process. Accordingly, this Department concludes that the grievant was not denied due process when the hearing officer upheld the disciplinary action, in part, upon the amount of time it took to back up the grievant’s files.

*Preponderance of the Evidence/Findings of Fact/Failure to Consider Evidence*¹⁷

¹¹ Decision of Hearing Officer, case No. 8151, issued September 22, 2005.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at note 8. The grievant challenges the hearing officer’s finding that his PST file disconnected due to the size of that file. The grievant’s challenges to the hearing officer’s findings will be discussed later in this ruling.

¹⁵ See Reconsideration of Hearing Officer, Case No. 8151-R, issued October 19, 2005.

¹⁶ See Decision of Hearing Officer, Case No. 8151, issued September 22, 2005.

¹⁷ The grievant lists a host of challenges to the hearing officer’s findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. While this ruling does not discuss with particularity each of the specific pieces of evidence or information that the hearing officer allegedly failed to consider, failed to include in the decision, or wrongly stated in the findings of fact, all of the grievant’s

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁸ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹⁹ Further, “[i]n 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.²⁰ 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.²¹

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.²² 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.

In the present case, the hearing officer determined that the grievant failed to comply with Department of Human Resource Management (DHRM) Policy 1.75 because the amount of personal information he stored on his state-owned computer “exceeded what could be considered incidental and occasional use” and “affected the efficient operation of the computer system.”²³ The hearing officer’s conclusion appears to be based upon evidence in the record, namely Agency Exhibit #1 which contains, in part, two documents: “Response to [grievant’s] Concerns – March 29, 2005” and “Technical Assessment on Materials Collected” (the documents).²⁴ The documents, submitted by two members of VDOT’s IT Applications Division, state that the grievant’s PST files contained primarily personal information and that the size of these files caused “numerous problems with the operation of the desktop” as well as adding to backup execution times.²⁵ The documents further state that the large PST files contributed to the grievant’s problems with shutting down his computer.²⁶ Accordingly, it appears there was evidence in the record to support the hearing officer’s findings that the grievant stored an excessive amount of personal data on his computer which contributed to the disruption of the operation of the computer system. Therefore, this Department finds the hearing officer neither erred nor abused his discretion in upholding the disciplinary action.

assertions on this matter have been reviewed and considered in light of this Department’s responsibility to assure that the hearing officer’s conduct of the hearing and written decision comply with the grievance procedure.

¹⁸ Va. Code § 2.2-3005.1(c)(ii).

¹⁹ *Grievance Procedure Manual* § 5.9.

²⁰ *See Rules for Conducting Grievance Hearings*.

²¹ *Grievance Procedure Manual* § 5.8(2).

²² Va. Code § 2.2-3005(C)(5).

²³ *See* Decision of Hearing Officer, Case No. 8151, issued September 22, 2005.

²⁴ *See* Agency Exhibit #1, pp. 12 – 16.

²⁵ *See* Agency Exhibit #1, page 15.

²⁶ *See* Agency Exhibit #1, page 12.

Policy Interpretation

The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.²⁷ Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to his appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.²⁸

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 have been decided.²⁹ 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.³⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³¹ This Department's rulings on matters of procedural compliance are final and nonappealable.³²

Claudia T. Farr
Director

²⁷ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

²⁸ *Grievance Procedure Manual* § 7.2 (a)(2).

²⁹ *Grievance Procedure Manual*, § 7.2(d).

³⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

³¹ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

³² Va. Code § 2.2-1001 (5).