Issue: Administrative Review/grievant claims agency produced no evidence to support charge; Ruling Date: January 4, 2006; Ruling #2006-1193; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINSTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling No. 2006-1193
January 4, 2006

The grievant, through his representative, has requested that this Department administratively review the hearing officer's decision in Case Number 8183. The grievant contends that the hearing officer erred by upholding the discipline issued by the agency. Specifically, the grievant asserts that the Written Notice alleged that the grievant engaged in inappropriate behavior on July 7, 2005 but produced no evidence at hearing to support that charge. In addition, the grievant asserts the hearing decision contains an inherent conflict as a matter of law. For the reasons set forth below, this Department will not disturb the hearing officer's decision.

FACTS

The Department of Mental Health Mental Retardation and Substance Abuse Services (agency) employed the grievant as a Charge Aide at one of its facilities. He had been employed by the agency for approximately 20 years until his removal effective August 15, 2005. On or about July 7, 2005, an employee reported that the grievant had grabbed her buttocks and inquired as to what kind of underwear she was wearing. The agency conducted an investigation into the allegation and, having found the allegation credible, issued the grievant a Group III Written Notice with termination on August 15, 2005.

The grievant challenged the discipline through the grievance procedure and, on October 25, 2005, his grievance advanced to hearing. In an October 31, 2005 hearing decision, the hearing officer upheld the agency imposed discipline.

DISCUSSION

Due Process

The grievant asserts that the hearing officer erred by upholding the discipline because the Written Notice lists July 7, 2005 as the date of the alleged offense and the agency did not prove nor did the hearing officer find that sexual harassment occurred on that date. This objection, while not couched in terms of due process, squarely raises the issue. 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 this issue of due process as it relates to compliance with the grievance procedure.

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 to the charges, appropriate to the nature of the case.[1] A more comprehensive post-disciplinary hearing follows once the discipline has been issued. 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."[2]

On the other hand, post-disciplinary due process requires that the employee be provided 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.[3] The grievance statutes and procedure provide these basic post-disciplinary

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[1] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). 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."

[2] Loudermill, 470 U.S. at 546.

[3] 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.)

procedural safeguards through an administrative hearing process.[4] Based on these principles of notice and due process, where an employee is challenging a disciplinary action, "only the misconduct cited on the Written Notice and attachments are subject to adjudication."[5]

In this case, the grievant asserts that the hearing decision upheld his discipline and termination for conduct that was not cited in the Written Notice. The grievant also asserts that state policy and procedure require that evidence supporting discipline must be set forth on the Written Notice form. As stated above, the Written Notice stated that the date of the offense was July 7, 2005, and that the alleged misconduct was "sexual and workplace harassment and creating a sexually hostile environment for 3 female staff members in subordinate roles." The Written Notice also references a "Report of [facility] internal investigator dated 08-05-05" in the "Circumstances considered" section of the Written Notice. That report notes that the conduct for which the grievant was disciplined, grabbing the buttocks of another employee and asking her what kind of underwear she was wearing, occurred "around the end of May 2005." The report indicates that the employee reported the conduct on July 7, 2005. Thus, it would appear that the agency erroneously listed the date that the employee reported the incident as the date that the offense occurred.

The grievant raised his objection over the July 7th date on the Written Notice and the agency's failure to present evidence of misconduct on that date with the hearing officer. The hearing officer held that although the grievant did not engage in any inappropriate behavior on July 7, 2005, the agency presented sufficient evidence of the grievant's inappropriate behavior and gave the grievant adequate notice of the facts upon which it alleged he should be disciplined. Accordingly, the hearing officer found the incorrect date shown in the Written Notice was harmless error. Under the facts of this case, this Department cannot conclude that the hearing officer erred in reaching this conclusion.

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[4] *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.

[5] *See* Hearing 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.

First, as stated above, the Written Notice referenced an August 5, 2005 report of the facility's internal investigator stating that the alleged misconduct occurred around the end of May 2005 but was not reported until July 7, 2005. The grievant requested a copy of the facility investigator's report when he initiated his grievance on August 18, 2005, and agency documents indicate that the grievant was provided with a copy of the report on that same day. In addition, the grievant requested copies of the written statements of the employees interviewed in conjunction with the facility investigator's inquiry into the alleged harassment. The grievant was provided with copies of those statements including the statement of the individual who claimed that she was grabbed by the grievant. Her statement indicates that she was grabbed "at the end of May."[6] Thus, despite the error in date on the Written Notice, it is evident that grievant was on notice that he was being disciplined for his alleged inappropriate comments and grabbing of another employee. The grievant has identified nothing pertaining to the date error that precluded him from mounting a defense to the allegation of harassment. Therefore, this Department will not disturb the hearing officer's decision.

The grievant's objection relating the apparent date error could also be viewed as a policy objection. Indeed, the grievant asserts that state policy and procedure require that evidence supporting discipline must be set forth on the Written Notice form. Under the grievance procedure, a request for an administrative review based on inconsistency with state policy must be made to the DHRM Director, with a copy also going to the agency. If the grievant wishes to request that the hearing decision be reviewed by the DHRM Director on the basis that the decision does not conform to policy, the grievant must make a written request to the DHRM Director, which must be **received within 15 calendar days of this decision**. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

Hostile Workplace Harassment

The grievant claims that the hearing decision contains an inherent conflict of law. The grievant notes that two of the three complainants were deemed not credible and the third was found to have continued a "friendly relationship" with the grievant after he allegedly grabbed her. As with the due process claim, the grievant couched this objection in terms of legal objection. Appeals that assert that the hearing decision is "contradictory to law" are properly raised with the circuit court in the jurisdiction in which the grievance arose.[7]

The grievant also asserts that the "[t]he hearing officer's determination that the 'Agency's perception of the harm Grievant's behavior caused to the

[6] Agency Exhibit No. 3.
[7] *See Grievance Procedure Manual* §§ 7.2(d) and 7.3(a).

workplace' is inconsistent with the written notice and policy and procedure upon with the sexually hostile work environment charge was based." As stated above, a request for an administrative review based on inconsistency with state policy must be made to the DHRM Director, with a copy also going to the agency. If the grievant wishes to request that the hearing decision be reviewed by the DHRM Director on the basis that the decision does not conform to policy, the grievant must make a written request to the DHRM Director, which must be **received within 15 calendar days of this decision**.

APPEAL RIGHTS, AND OTHER INFORMATION

For this reasons set forth above, this Department will not disturb the hearing officer's decision.

The Hearing Officer's original decision will become a final decision within 15 calendar days of the date of this decision *if* the grievant does not request an administrative review from the DHRM Director. If the grievant appeals to DHRM, the decision becomes final when the DHRM Director issues her decision, *and* the hearing officer has issued any revised decision that may be ordered by the DHRM Director. The date of the last of these decisions shall be considered the date upon which the hearing decision becomes final. 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.[8] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[9]

Claudia T. Farr
Director

[8] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[9] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).