

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8738; Ruling  
Date: April 7, 2009; Ruling #2009-2231; Agency: Department of Corrections;  
Outcome: Hearing Decision in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2009-2231  
April 7, 2009

The grievant, through his representative, has requested that this Department (EDR) administratively review the hearing officer's February 4, 2009 decision in Case Number 8738.

FACTS

On August 17, 2007, the grievant received a Group III Written Notice with demotion and transfer for engaging in conduct (an alleged racial remark) "which undermines [his] ability and effectiveness to perform the duties of the Assistant Warden position at [his facility]." The grievant challenged the Written Notice through the grievance process and a hearing was held on November 21, 2007.<sup>1</sup> In a November 28, 2007 decision, the hearing officer upheld the disciplinary action and demotion.<sup>2</sup> The grievant subsequently challenged the hearing decision through the administrative review process. On administrative review, the hearing officer denied the grievant's request for reconsideration<sup>3</sup> and this Department found no grievance procedure violations.<sup>4</sup>

Thereafter, the grievant filed a notice of appeal with the circuit court and claimed that his due process rights had been violated as a result of the agency's failure to produce relevant documents.<sup>5</sup> The circuit court found that the grievant's procedural due process rights had been violated by the agency's failure to provide the grievant with relevant investigation notes and remanded the case to the hearing officer for a re-hearing.<sup>6</sup> On January 22, 2009, a re-hearing was held and testimony was taken from three witnesses.<sup>7</sup> In a reconsideration decision dated

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<sup>1</sup> Decision of Hearing Officer, Case No. 8738, issued November 28, 2007 ("Hearing Decision"), at 1.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> Reconsideration of Decision of Hearing Officer, Case No. 8738, issued December 20, 2007 ("December 20, 2007 Reconsideration Decision"), at 1.

<sup>4</sup> See EDR Ruling # 2008-1917.

<sup>5</sup> Case No.: CL08-47, August 7, 2008.

<sup>6</sup> *Id.*

<sup>7</sup> Decision of Hearing Officer, Case No. 9738, issued February 4, 2009 ("Reconsidered Decision"), at 1.

February 4, 2009, the hearing officer once more upheld the disciplinary action.<sup>8</sup> On February 13, 2009, the grievant, through his attorney, requested an administrative review from this Department of the February 4, 2009 reconsidered decision.

### DISCUSSION

The Grievance Procedure Manual provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.”<sup>9</sup> As held by this Department in prior rulings, however, a request for administrative review received within 15 calendar days of a hearing officer’s reconsideration decision will be considered to the extent it challenges new findings and/or conclusions contained in that reconsideration decision, which were not part of the original hearing decision.<sup>10</sup>

In this case, the grievant requested administrative review following the hearing officer’s reconsideration decision on remand from the circuit court. Based on this Department’s past precedent, the only issues that can be considered on review at this time are new issues raised during the January 22, 2009 re-hearing or any new findings and/or conclusions contained in the February 4, 2009 reconsidered decision.

In his request for administrative review to this Department, the grievant argues in part that: (1) the agency improperly amended the offense date on the Written Notice; and; (2) the Written Notice was not issued “as soon as practical” in violation of policy. The agency’s amendment of and alleged delay in issuing the Written Notice are not new issues created as a result of the re-hearing and/or reconsidered decision and have, at least in part, been addressed by the hearing officer in his December 20, 2007 reconsideration decision and by this Department in its original administrative review.<sup>11</sup> Accordingly, the grievant’s request for administrative review by this Department as to the alleged improper amendment and belated issuance of the Written Notice are not new and will not be considered.<sup>12</sup>

The grievant also alleges that his due process rights have been violated because, according to witness testimony at the January 22, 2009 rehearing, the Group III Written Notice with demotion was based, at least in part, on conduct that was not specifically included on that Written Notice. More specifically, the grievant asserts that Mr. R and Mr. H, both either current or former members of upper management at DOC, testified at the rehearing that in deciding on

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Grievance Procedure Manual* § 7.2(a).

<sup>10</sup> *See, e.g.*, EDR Ruling #2007-1563, 2007-1637, 2007-1691.

<sup>11</sup> *See* EDR Ruling #2008-1917; December 20, 2007 Reconsideration Decision at 1.

<sup>12</sup> This Department would like to note that although the grievant’s request for administrative review is untimely, he may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

the appropriate discipline, they not only considered the alleged racially biased statement by the grievant, but also: (1) the “effect of that alleged statement on [the grievant’s] ability to effectively serve as Assistant Warden at that facility after the alleged statement was made known to others at the [facility];” (2) allegations that the grievant was engaged in an inappropriate relationship with a co-worker at the facility; and (3) “[the grievant’s] alleged involvement in improper lateral transfers of sergeants from other correctional institutions.” Because this is an issue which appears to have been generated as a result of witness testimony presented during the January 22, 2009 re-hearing, it is a new issue which could not have been raised until now. As such, the grievant’s argument -- that his due process rights were violated because the Written Notice did not specifically identify all of the alleged improper conduct taken into consideration in issuing that Written Notice -- is addressed below.

Due process is a legal concept appropriately raised with the circuit court, and ultimately resolved by judicial review. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will also address the issue.<sup>13</sup> Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right 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.<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> The grievance statutes and procedure provide these basic post-

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<sup>13</sup> See *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (“Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person’s rights to liberty or property.”).

<sup>14</sup> *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.

Significantly, the Commonwealth’s Written Notice form instructs the individual completing the form to “[b]riefly describe the offense and give an explanation of the evidence.” See Department of Human Resource Management (DHRM) Policy 1.60.

<sup>15</sup> *Loudermill*, 470 U.S. at 546.

<sup>16</sup> *Reeves v. Thigpen*, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995). See also *Garraghty v. Commonwealth of Virginia*, 52 F.3d 1274 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1983)(Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii)

disciplinary procedural safeguards through an administrative hearing process.<sup>17</sup> Based on these principles of due process, where an employee is challenging a disciplinary action, “only the misconduct cited on the Written Notice and attachments are subject to adjudication.”<sup>18</sup>

In this case, the grievant was issued a Group III Written Notice with demotion and transferred for engaging in:

[c]onduct which undermines your ability and effectiveness to perform the duties of the Assistant Warden position at [facility]. Specifically, you referred to the assignment of the Intelligence Officer’s Office as a “brother helping a brother”. [sic] This racial characterization of the awarding of office space is contrary to the values we have taught our staff. It also undermines your ability and the ability of the Chief of Security to implement and carry out the responsibilities of protecting the public safety, the safety of our staff and the safety of the offenders that we are supervising at the facility.

Thus, the only misconduct cited on the grievant’s Written Notice to support the conclusion that he had engaged in “conduct which undermines his ability and effectiveness to perform [his] duties” was the alleged statement about a “brother helping a brother” – there is no mention of the alleged inappropriate relationship with a co-worker or the alleged improper lateral transfers.<sup>19</sup> Accordingly, it appears that the grievant had no notice that these alleged acts were possibly at issue until the re-hearing. The grievant must have notice of the charges against him to be able to participate meaningfully in the grievance process. For purposes of this hearing, the agency only provided the grievant adequate notice that he was charged with a Group III offense for making a racial remark that undermined his (and the Chief of Security’s) abilities to carry out their job duties.

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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.)

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> With regard to the grievant’s contention that the Written Notice did not include the effect of the “alleged statement on [the grievant’s] ability to effectively serve as Assistant Warden at that facility after the alleged statement was made known to others at the [facility],” this Department concludes that the Written Notice was sufficient to put the grievant on notice that his ability to effectively serve as Assistant Warden was at issue as the Written Notice was issued precisely for this reason.

However, despite the potential due process problem, this Department finds no reason to disturb the hearing officer's decision and/or to order that the hearing be reopened in this case. The reconsidered decision makes no mention whatsoever of the alleged inappropriate relationship or improper lateral transfers and upholds the disciplinary action based only upon the behavior actually cited on the Written Notice. As such, there is no reason to believe that the witness testimony regarding these alleged events was taken into consideration by the hearing officer in rendering his reconsidered decision. More importantly, in the original hearing decision, the hearing officer upheld the disciplinary action based upon the misconduct cited on the Written Notice, prior to his knowledge of any alleged inappropriate relationships and/or improper lateral transfers. Based on the foregoing, it appears that the testimony regarding these acts had no real bearing on the hearing officer's decision in this case. The hearing officer originally held, and continues to hold in his reconsidered decision, that the grievant engaged in the conduct cited on the Written Notice. The hearing officer has consistently and repeatedly upheld the disciplinary action based only on that conduct and not on any other ground not specifically identified on the Written Notice. Accordingly, based upon the facts of this case, this Department will not order any further action by the hearing officer.

#### CONCLUSION AND 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.<sup>20</sup> 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.<sup>21</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>22</sup>

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Claudia T. Farr  
Director

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<sup>20</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>21</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>22</sup> *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).