

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8955;
Ruling Date: November 5, 2009; Ruling #2010-2412; Agency: Department of
Alcoholic Beverage Control; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Alcoholic and Beverage Control
Ruling Number 2010-2412
November 5, 2009

The grievant has requested that this Department (EDR) reconsider its August 13, 2009 administrative review decision in Case No. 8955.

FACTS

By letter dated August 28, 2009, the grievant, through his representative, asserts that, like his original request for administrative review (“original request”), his amended request for administrative review (“amended request”) was timely received by this Department and as such, this Department erred in failing to consider and address those arguments set forth in the amended request that were not part of the grievant’s original request.

The hearing decision in this case was issued on April 15, 2009.¹ As such, the parties had 15 calendar days from that date, or until April 30, 2009, to submit requests for administrative review.² Any such requests had to be received by the administrative reviewer on or before April 30, 2009 to be considered timely.³ This Department received the grievant’s original request for an administrative review on April 30, 2009.⁴ The grievant argues that on that same day it also sent EDR the amended request. In EDR Ruling Number 2009-2310, this Department acknowledged receiving the grievant’s amended request however, because the amended request was not received by this Department until May 7, 2009, it was rendered untimely.⁵ As such, this Department

¹ See Decision of Hearing Officer, Case No. 8955, issued April 15, 2009 (“Hearing Decision”) at 1.

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

³ *Id.*

⁴ In his original request, the grievant challenged the hearing officer’s findings of facts and conclusions, asserted that the agency had not met its burden of proof and claimed that the hearing officer had erred in refusing to grant the grievant’s request for adverse inferences against the agency.

⁵ EDR Ruling No. 2009-2310.

refused to consider and address any issues raised in the amended request that were not part of the original request, namely that the grievant's due process rights were violated.⁶

In support of his request for reconsideration, the grievant has presented confirmation that the amended request was faxed to, and apparently received by, this Department after business hours on April 30, 2009. This Department has no record of receiving such a fax on April 30, 2009 at the time indicated, however, in light of the grievant's evidence in support of his assertion that the amended request was in fact sent and received by this Department, this Department will now consider those arguments contained in the amended request and not previously addressed in EDR Ruling Number 2009-2310.

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 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.⁸

The only argument not previously considered in EDR Ruling Number 2009-2310 and at issue now is the grievant's claim that the hearing officer erred by upholding the discipline based on an offense, abuse of leave, not specifically included on the written notice and as such, the grievant claims that his due process rights have been violated.

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"⁹ is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.¹⁰ However, the grievance procedure

⁶ *Id.*

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

⁸ *Grievance Procedure Manual* § 6.4.

⁹ *Davis v. Pak*, 856 F.2d 648, 651 (4th Cir. 1988); *see also* *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); *Bowens v. N.C. Dep't of Human Res.*, 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* *Huntley v. N.C. State Bd. Of Educ.*, 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* *Garraghty v. Jordon*, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.") (citing to *Cleveland Bd. of Education v. Loudermill*, 105 S. Ct. 1487, 1495; *Arnett v. Kennedy*, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974)).

¹⁰ *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."¹¹ Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.¹² In addition, the *Rules* provide that "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."¹³ Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

In this case, the Group I Written Notice charges the grievant with failure to follow his supervisor's instructions, falsifying state reports, abuse of state time and unsatisfactory performance. In his April 15, 2009 decision, the hearing officer found that the grievant had failed to follow a supervisor's instructions, falsified state reports and performed unsatisfactorily and as such, upheld the disciplinary action taken against the grievant. The hearing officer found that the agency did not meet its burden with regard to the charge of abuse of state time.¹⁴ However, the hearing officer further concludes that:

Although not specifically identified in the Written Notice, Grievant abused leave. DHRM Policy number 4.55, Traditional Sick Leave defines "Abuse of Leave" as:

"A misrepresentation of the reason for requesting sick leave. It is an abuse of sick leave to claim qualifying reasons for an absence when such reasons do not exist."

Grievant abused leave because he claimed to qualify for sick leave when he was not actually sick.¹⁵

In this case, while the exact phrase "abuse of leave" was not specifically mentioned on the Written Notice form, it is difficult to comprehend how the grievant was not on notice of the agency's accusation that he had misrepresented the reason for requesting sick leave, i.e., he had abused leave. More specifically, according to the attachments to the Written Notice, the grievant was disciplined based upon his utilizing sick leave when he was not actually sick, which, by policy definition, would appear to

¹¹ *Rules for Conducting Grievance Hearings* § VI(B) citing to *O'Keefe v. United States Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds 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."

¹² See EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

¹³ *Rules for Conducting Grievance Hearings* § I.

¹⁴ Hearing Decision at 6-7.

¹⁵ Hearing Decision at 8.

constitute abuse of leave. For example, in the attachments to the written notice, the agency writes: “[d]uring the September 1, 2004 through May 31, 2006 time period [the grievant] used sick leave on 93 days or twenty percent (20%) of his work schedule. In actuality, [the grievant], by his own admission, was not sick.” As such, while the Written Notice did not specifically say “abuse of leave,” the attachments to the Written Notice do appear to inform the grievant that he was being charged with such an offense. Moreover, as discussed in EDR Ruling Number 2009-2310, the evidence reflects, and the grievant admits, that on occasion, he charged his time away from work to sick leave when he was not actually ill.¹⁶ In addition, the record evidence includes a memorandum from management to the grievant approving the grievant’s use of annual leave to pursue further education.¹⁷ The hearing officer determined that this memorandum amounted to an instruction from his supervisor and concluded that the grievant violated the instruction, generally a Group II offense,¹⁸ when he charged his time away from work to attend educational classes to sick leave rather than annual leave.¹⁹ This offense alone is sufficient to uphold the Group I Written Notice. Thus, we cannot conclude that the grievant’s due process rights were violated. However, as noted above because due process is a legal concept, the grievant is free to raise this issue with the circuit court in the jurisdiction where the grievance arose once the hearing decision becomes final.²⁰

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³

Claudia T. Farr
Director

¹⁶ Transcript of Hearing in Case No. 8955, at page 207; lines 6-17 (testimony of Grievant).

¹⁷ See Agency Exhibit 4

¹⁸ See DHRM Policy 1.60.

¹⁹ Hearing Decision at 7; Reconsideration Decision at 2.

²⁰ In EDR Ruling Number 2009-2310, this Department upheld the hearing officer’s determination that the Group I Written Notice was warranted, however, the decision was remanded to the hearing officer for clarification and/or consideration of whether an adverse inference should have been drawn against the agency for failure to produce documents relevant to the grievant’s claim of retaliation. The hearing officer has not yet issued his decision in response to EDR Ruling Number 2009-2310.

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).