Issue: Administrative Review of Hearing Officer's Decision in Case No. 9351; Ruling Date: October 19, 2010; Ruling #2011-2726; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Department of Agriculture and Consumer Services
Ruling Number 2011-2726
October 19, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9351. For the reasons set forth below, the decision is remanded for further consideration.

FACTS

The pertinent procedural and substantive facts of this case, as set forth in the hearing decision in Case No. 9351, are as follows:

> The Grievant was issued a Group II Written Notice on April 9, 2010 for:
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> > On 12/9/09 you received a written notice due to your performance. Since that time, I have counseled with you regarding your attention to detail, meeting deadlines, attendance and excessive personal phone calls. Your performance has continued to be unsatisfactory and I am issuing you another Written Notice with a 5 day suspension.
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> Pursuant to the Group II Written Notice, the Grievant was suspended from April 12, 2010 through April 16, 2010. On April 21, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. On June 1, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 16, 2010, a hearing was held at the Agency's location. Pursuant to the Hearing Officer's previously scheduled vacation, both the Agency and the Grievant agreed to this Decision be issued outside of the ordinary time frame.
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> The Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

> The Grievant provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.
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> The issue before the Hearing Officer in this matter is not whether or not the Grievant made mistakes, was on the phone excessively with personal phone calls at the office, used the office phone to make long distance phone calls, or was away from the office too much. The Grievant, in her testimony, admitted that she had done all of the things that the Agency alleged that she had done and that the Agency included in the Written Notice that prompted this hearing. The issue before the Hearing Officer is whether or not the Agency provided the Grievant with proper due process.
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> On March 24, 2010, a meeting took place between the Grievant, her immediate superior and the Director of Finance. The Grievant's immediate superior testified that, during the course of this meeting, the Director of Finance told the Grievant that this was a meeting pursuant to a disciplinary matter. The Director of Finance testified that she told the Grievant that this was a disciplinary meeting and that a Written Notice was going to be issued. The Grievant's testimony was that she could not remember the Director of Finance making those statements.
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> The Standards of Conduct require that a Grievant be given oral or written notification of an offense and an explanation of an Agency's evidence in support of a charge and a reasonable opportunity to respond. It appears to this Hearing Officer that the Agency gave the Grievant sufficient notice to comply with its due process requirements.
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> The reason it took from March 24, 2010, which was the date of the meeting, until April 9, 2010, which was the date the Written Notice was issued, was that the various management parties were discussing it amongst themselves and discussing it with Human Resources. It was determined if the Agency waited until that date, it would only effect one (1) pay period and that would be beneficial to the Grievant. The benefit comes in that one does not accrue leave in a pay period when one has been suspended. By waiting until that date, it only effected [sic] a single pay period and not two (2).[1]

Based on the preceding *Findings of Fact*, and the purported lack of any mitigation factors, the hearing officer upheld the discipline issued by the agency.[2]

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[1] Decision of the Hearing Officer in Case No. 9351 ("Hearing Decision"), issued July 21, 2010, at 1-3. Footnotes from the original decision are omitted here.
[2] *Id. a*t 4.

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]

Due Process

The grievant asserts that she was not afforded due process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[5] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[6] However, both state policy and the grievance procedure reflect the concept of due process. Accordingly, administrative appeals regarding the state policy provision that appears to incorporate pre-disciplinary due process—DHRM Policy 1.60 § E (the Standards of Conduct (SOC))—would appear to be appealable to the DRHM Director as a matter of policy.[7] Similarly, concerns regarding the grievance procedure's post-disciplinary due process provision—the *Rules for Conducting Grievance Hearings ("Rules")* VI (B)—may be raised with the EDR Director as a grievance procedure matter.[8] Furthermore, "where a party asserts that a final hearing decision is contradictory to law due to the impact of a DHRM administrative review ruling on policy (or due to the impact of an EDR administrative review ruling on compliance with the grievance process), that party can appeal the final hearing decision to the circuit court on the basis that it contradicts law."[9]

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[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988).
[6] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[7] On its face, it appears that DHRM policy relates to pre-disciplinary due process. Section E of the SOC states that: "Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations 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." This SOC provision seems to track and codify, in policy, the well-established principles of pre-disciplinary due process set forth in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546, (1985) which requires that employees be given (1) oral or written notice of the charges against them, (2) an explanation of the employer's evidence, and (3) an opportunity to present their side of the story prior to taking any action that would deprive them of a property interest (such as "the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations)." *See* SOC 1.60(E).
[8] While the SOC appears to address pre-disciplinary due process, the grievance process, through the *Rules*, addresses post-disciplinary due process, that is, the process that is due once the discipline has been issued. Both pre-disciplinary and post-disciplinary due process share the common elements of the necessity of providing notice of the charges, facts supporting the charges, and a meaningful opportunity to respond to the charges. The post-disciplinary due process provided by the grievance procedure adds to these elements (1) the opportunity to present witnesses and evidence on one's own behalf, (2) the right to cross-examine the other party's witnesses, and (3) the right to present one's case to a neutral hearing officer who must issue a decision explaining the reasons underpinning the hearing decision. *See* Detweiler v. Commonwealth of Va. Dept. of Rehab. Services, 705 F.2d 557, 560 (4th Cir. 1983).
[9] *See* EDR Ruling No. 2011-2720.

Post-disciplinary Due Process

Turning to the grievant's due process objection under the *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."[10] 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.[11] In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."[12] Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified, and thus would not come before a hearing officer.

In this case, the Group II Written Notice charges the grievant with the following:

> On 12/9/09 you received a written notice due to your performance. Since that time, I have counseled with you regarding your attention to detail, meeting deadlines, attendance and excessive personal phone calls. Your performance has continued to be unsatisfactory and I am issuing you another Written Notice with a 5 day suspension.

Under the particular facts of this case, the Written Notice provides sufficient notice of what the agency considered to be substandard performance. The Written Notice describes the acts and/or omissions that the agency found objectionable, and the grievant had ample time prior to the hearing to prepare her defense against the charges of not meeting deadlines, poor attendance, and excessive personal phone calls. Accordingly, this Department finds no violation of the due process provisions in the *Rules.*

Pre-disciplinary Due Process

We note that the grievant requested an administrative review from the DHRM Director. According to the DHRM Ruling, the grievant asserted that she was "not told that the meeting [she] w[as] called to was a pre-disciplinary meeting."[13] Despite the provisions of SOC §(E), which appear to expressly address and incorporate pre-disciplinary due process, the DHRM Administrative Review Ruling states that "this represents a due process issue, not a policy issue, and that was addressed in the hearing officer's decision."[14] Based on the determination that

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[10] *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."
[11] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.
[12] *Rules for Conducting Grievance Hearings § I.*
[13] DHRM Administrative Review Ruling, issued August 19, 2010, (DHRM Ruling) at 2.
[14] *Id.*

"this is not a policy issue," we must assume that DHRM's Ruling is an affirmation that the hearing decision is not inconsistent with policy.

Family Medical Leave Act

The grievant contends that the agency should have granted her leave under the Family and Medical Leave Act (FMLA).[15] The grievant raised this issue of the FMLA in both her grievance and at hearing. Accordingly, the hearing decision should have addressed the grievant's FMLA argument but it is silent as to the issue. Thus, the decision is remanded to the hearing officer to address the grievant's FMLA concerns.

In remanding the decision, we note that there are several FMLA issues the hearing officer could consider.[16] First, it is not clear whether the grievant's health issues (or those of family members) met the FMLA threshold.[17] Second, even if the grievant or a family member had been eligible for FMLA leave, there appear to be remaining questions of law and fact as to whether the grievant gave the agency sufficient notice of her need for FMLA leave.[18] In addition, there

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[15] 29. U.S.C. § 2601 et seq.; see also DHRM Policy 4.20 Family and Medical Leave (incorporating by reference the Family and Medical Leave Act).

[16] This is not necessarily intended as an exhaustive list of unresolved issues. Rather, these are observations of what appear to be potential issues that may need to be explored by the hearing officer in making the ultimate determination of whether the grievant was entitled to any protections by the FMLA.

[17] According to 29 CFR 825.113 (a) "For purposes of FMLA, 'serious health condition' entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115."

[18] 29 CFR 825.302 (c) states that:

> An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. . . . When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.

For instance, in Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398, 402-403 (3rd Cir. 2007) the court explains that:

> The issue is whether the employee has "state[d] a qualifying reason for the needed leave." 29 C.F.R. § 825.208(a)(2) . . . . Other courts have interpreted this notice requirement with the liberal construction that is suggested by the text. The Sixth Circuit Court of Appeals has held that "[t]he right to actually take twelve weeks of leave pursuant to the FMLA includes the right to declare an intention to take such leave in the future." Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 314 (6th Cir. 2001). To determine when an employee's intention to take leave has been sufficiently conveyed to his employer so as to constitute requisite notice under the FMLA, the court found it useful to employ the following test:
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> > [T]he critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered him unable to perform his job.
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> Brenneman v. MedCentral Health Sys., 366 F.3d 412, 421 (6th Cir. 2004), cert. denied, 543 U.S. 1146, 125 S. Ct. 1300, 161 L. Ed. 2d 107 (2005). This test is nearly identical to one adopted by the Fifth Circuit Court of Appeals:

remain questions regarding the adequacy of the agency's response to any notice that may have been provided to the agency.[19] In remanding this decision, this Department expresses no opinion as to whether the agency violated the FMLA in any manner, only that the issue, having been raised in the grievance and at hearing, must be addressed.

New Evidence

The grievant asserts that "I can recapture a note from all doctor and dentist appts," and "I also have recently obtained even more evidence of being at court on most of the absent days." Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[20] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[21] The party claiming evidence was "newly discovered" must show that

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> The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.
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> [Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).]
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> In providing notice, the employee need not use any magic words. The critical question is how the information conveyed to the employer is reasonably interpreted. An employee who does not cite to the FMLA or provide the exact dates or duration of the leave requested nonetheless may have provided his employer with reasonably adequate information under the circumstances to understand that the employee seeks leave under the FMLA. The Eighth Circuit Court of Appeals implicitly adopted this position when it stated that "[i]n order to benefit from the protections of the statute, an employee must provide his employer with enough information to show that he may need FMLA leave." Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005) (emphasis added) . . . . Indeed, where courts have found notice to be deficient, it has been because the employee failed to convey the reason for needing leave. See, e.g., Seaman v. CSPH, Inc., 179 F.3d 297, 302 (5th Cir. 1999) (finding inadequate notice where employee never informed his supervisor of a serious medical condition); Brenneman, 366 F.3d at 423-24 (finding inadequate notice where employee did not explain that his absence had been due to a serious medical condition until after the fact); Woods, 409 F.3d at 992-93 (finding inadequate notice where employee expressed that he was stressed and felt his health was at risk but never provided any information to indicate that his absence from work was due to a serious health condition).

[19] According to 29 CFR 825.300 (b)(1) : "When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances." The grievant asserts that she was never explained any FMLA rights. The grievant's supervisor, however, asserts that she sent the grievant to the human resources department. *See* Hearing at 1:41:00 and 2:21:00-2:22:00. Assuming that to be true, it is not clear that such a directive alone would have met the agency's responsibilities under the FMLA.
It should also be noted that the grievant's supervisor asserts that she suggested to the grievant "if you need time off, take some time off." Hearing at 1:06:00. The supervisor added that when she suggested taking time off, the grievant responded by saying that if she took time off she "would be at home with nothing to do and [she] preferred being at work," (*Id.*) and that she "had to stay busy." *Id.* at 2:22:00. The grievant's alleged statement, if believed, would appear to counter any argument that leave was indeed sought.

[20] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also, e.g.,* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[21] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[22]

To the extent that these documents were not offered as evidence prior to now, it would appear that they are not newly discovered because this potential evidence was in existence at the time of the hearing and presumably could have been obtained by the grievant before the hearing. Consequently, there is no basis to re-open the hearing for consideration of this evidence.

APPEAL RIGHTS AND OTHER INFORMATION

This case is remanded to the hearing officer for further consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[23] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[24]

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, including the reconsideration decision, have been issued.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27] Thus, the grievant may still appeal to the circuit court her due process objections, along with any other claims that the final hearing decision is contradictory to law.[28]

Claudia T. Farr
Director

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[22] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[23] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[24] *See Grievance Procedure Manual* § 7.2(a).
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).
[28] *See* EDR Ruling No. 2011-2720.