Issue: Administrative Review of Hearing Officer's Decision in Case No. 9391; Ruling Date: April 29, 2011; Ruling No. 2011-2877; Agency: Department of Mines, Minerals and Energy; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Mines, Minerals and Energy
Ruling Number 2011-2877
April 29, 2011

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 9391. For the reasons set forth below, the decision is remanded for further clarification.

FACTS

The pertinent procedural and substantive facts of this case, as set forth in the hearing decision in Case No. 9391, are as follows:

> Grievant was issued a Group III Written Notice. Although the Notice was not dated, it was signed by Grievant on June 16, 2010. Grievant was disciplined for not following accident notification policy, willingly and recklessly damaging state property and violating safety rules. This Group III Written Notice included a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class. The incident in question occurred March 15, 2010. There was an investigation conducted on June 2, 2010 and a recommendation issued on June 12, 2010.
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> After reviewing the evidence presented and observing the demeanor or each witness, the Hearing Officer makes the following findings of fact:
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> Grievant is a gas and oil inspector for the Department of Mines, Minerals and Energy. He has held this particular position for approximately twenty (20) years. He estimated he has traveled over one-half (1/2) million miles in this capacity of inspecting gas and oil systems.
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> Gas wells in Virginia are rated for their urgency to be inspected according to State guidelines. After initial start-up is completed and monitored, it is not uncommon for an established well to be inspected once a year. Inspectors have schedules to follow to view the sites within their district. The locations are often

remote with only service road access. Fording streams where no bridge exists is not uncommon. The particular two (2) sites in question (March 15, 2020) [sic] were scheduled to be inspected within one year of December 18, 2008. Grievant made an attempt in both December 2009 and January 2010 to access the location of the wells but, due to weather, he was unable to reach them. No attempt was made in February. On March 15, 2010, Grievant again revisited the road to the well locations. There were three (3) locations on the service road where streams covered the road. Grievant stated he inspected the first stream, using his expertise of twenty (20) years and determined he could ford it. He stated he applied the same determination to the second and third crossings. Grievant misjudged the depth of the water near the exit point of the third stream and his state owned vehicle stalled and became entrapped in the stream. Water did wash into the vehicle and the lower parts of the engine. The water height was higher than the bottom of the door of the vehicle.

Grievant left the vehicle by climbing out the passenger side window and onto the bank. Grievant's cell phone had no service. Grievant determined to walk uphill hoping to get cell service. He did pass both wells sites on his journey uphill. When he was still unable to get service, he turned to travel back to the highway. He forded all three (3) streams on foot in mid-March to arrive back to "civilization". He convinced an occupant of a home to allow him to use her phone to call for help. The incident occurred approximately 1:30 pm and Grievant's call from the lady's home was at approximately 4:00 pm. The vehicle was not pulled from the water until after dark. By this time, there was considerable water damage. Agency estimated the loss of the vehicle at $9,050.00 and replacement cost at $26,800.00 or a total economic loss of approximately $36,000.00.

Agency conducted an investigation of the incident. Grievant was called upon to give factual information. At the conclusion of the investigation, it was determined to issue a Group III Disciplinary Notice to Grievant with a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class.

DISCUSSION

Agency presented evidence to show Grievant had not been truthful about the event by filing his inspection report twenty-four (24) hours later (March 16) and moving the inspection frequency up to six (6) months. Agency believed that Grievant had stated to the investigator that he had inspected the wells when he had passed them on his climb uphill seeking phone service. Grievant stated he did view the wells but did not inspect them and that since the December 2009 inspection date had not been accomplished, the well should be revisited no later than June of 2011.

Agency stated Grievant was to have reported the incident to the State Police for investigation. Office of Fleet Management Service Policies and Procedures Manual, Section IV(A) clearly states any accident is to be reported. Grievant stated he did not realize that there would be damage to the vehicle, such that a report would need to be filed and, further, Grievant checked with his superior and they both did not recognize a need to contact the police. The written policy was clear and Grievant was expected to have read it.

Agency also found that Grievant had violated safety rules by endangering himself and the vehicle. However, it was admitted by Agency's witnesses that there were no written safety rules. This would make it very difficult for Grievant to fail to follow a policy if there was not one.

Agency believed Grievant had willfully and recklessly driven the state owned vehicle into a dangerous stream. Grievant had a very long history of visual evaluation of streams and had proven himself not accident prone, having had very few incidences in his twenty (20) years of service. The Agency gave no evidence of a standard policy for evaluating streams. Surely, Grievant was not expected to walk through icy waters in bare feet to check the depth. Grievant stated he visually checked the route and he determined it was safe based on his twenty (20) years experience of fording streams. There is no preponderance of evidence to believe this is not true. Further, there is no reason to believe Grievant's survey of the stream was a reckless or willful intent to damage state property.

The Agency's case is motivated by the extraordinary cost of the accident and hindsight knowledge. Grievant would certainly not have crossed the stream if he had had "after the fact" knowledge "before the fact". If Agency cannot trust employee's judgment then to reduce the possibility of this sort of accident and to hold employees responsible, inspectors should be provided with waders and a yardstick and a safe water level established. All stream crossings should have a walk-through check. Holding Grievant responsible for the cause based solely on the evidence of the effect does not meet the Agency's burden of proof.

Grievant contends the Agency did not follow written policy or afford him his due process rights by not permitting him an opportunity to discuss a forthcoming discipline before it was issued. There is no lack of due process by not permitting a defense before being charged. Grievant's opportunity to defend himself would not be necessary until <u>after</u> he was aware that he needed to defend himself. Grievant had ample opportunity to do this in the grievance steps provided by law. However, as a breach of policy, Agency makes it clear Grievant was expected to follow the policies of DHRM Policy 1.60. There is no reason why Agency should not also follow the policies as clearly written.

OPINION

I find Agency has failed to prove Grievant's actions were willful and reckless. I find Grievant did not violate a non-existent safety policy. I do find Grievant failed to follow the accident reporting policy. I find a Group III Disciplinary Action excessive for a first offense of failure to report an accident.

Further, I find Grievant's due process rights were not violated as Grievant had ample opportunity to defend himself through the grievance process. DHRM Policy clearly states Grievant should have an opportunity to discuss a written notice (not just appear at the investigative stage) prior to its being issued.

DECISION

For the reasons stated above, I find that Agency's discipline of Grievant with a Group III discipline too harsh and would reduce it to a Group I for failure to follow an accident reporting policy.

However, I find that Agency did not follow policy in the manner in which Agency issued the Written Notice. Grievant's Motion is granted. The matter is **dismissed**. Grievant shall be awarded back pay and the Group III Disciplinary Action removed. Grievant did not make a request for attorney fees and they are not granted.[1]

The agency requested reconsideration by the hearing officer and review by both the EDR and Department of Human Resource Management ("DHRM") Directors. The Hearing Officer issued a Reconsideration Decision in which she upheld her original Hearing Decision.[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] The agency argues that the hearing officer mischaracterized facts, misapplied controlling

[1] Decision of the Hearing Officer in Case No. 9391 issued December 30, 2010 ("Hearing Decision"), at 1-6. Footnotes from the Hearing Decision have been omitted here.
[2] Reconsideration Decision in Case No. 9391 issued March 15, 2011 ("Reconsideration Decision"), at 5.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

law and policy, incorrectly distinguished between due process and state policy, and acted as a "super-personnel officer."

I. Mischaracterization of Facts and Misapplication of Controlling Law

The hearing officer has addressed the agency's contention that she mischaracterized the facts. In the Reconsideration Decision, the hearing officer explained that while some dates were incorrect, those errors were harmless. This Department agrees. One of the main objections regarding the hearing officer's characterization of the facts is the agency's claim that the hearing officer incorrectly assumed that the agency disciplined the grievant for his negligent survey of the stream. The hearing officer explained in the reconsideration decision that:

> Grievant stated his "survey of the stream" the day of the incident was the same criteria he consistently applied. It appears that over twenty years his "survey of streams" bode well for him. While there was no way available for Grievant at the time to definitely know that conditions were safe, there was also no way for him to know conditions were unsafe. He stated he applied the standard he was accustomed to applying. This standard had never been rejected or modified by the Agency.[5]

The agency asserts that the grievant was not disciplined for his survey of the stream but his "reckless decision to proceed into the water when there was no urgency or requirement that he do so and there was no possible way he could reasonably determine that the conditions were safe enough to proceed." The hearing officer held that:

> Grievant sufficiently described his job to convince the Hearing Officer that many of his travels were dangerous and that he exercised consistent caution.
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> As stated earlier, Agency is using hindsight to bootstrap its case. There were no eye witnesses, no admissions from Grievant, no consistent bad behavior of Grievant brought to light, no grudges that Grievant had against the Agency or any other evidence that would cause the Hearing Officer to believe anything other than Grievant's statement that he exercised habitual caution. The Agency's best evidence was what other people thought, after the fact, that Grievant should have been thinking.[6]

Based on a review of the hearing record, we find no error with the hearing officer's characterization of the facts or her conclusions based on those facts. The hearing officer found that the grievant's actions were not reckless. Citing to testimony of the first agency witness, the hearing decision found that the agency had no written safety rules. The hearing officer found that the grievant did not violate a non-existent safety rule. Based on this Department's review of

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[5] Reconsideration Decision at 3, footnote omitted.
[6] *Id*.

the hearing record, this Department cannot hold that the hearing officer erred in reaching these conclusions.

In terms of identifying a safety rule, the first agency witness offered only that employees are expected to operate vehicles safely.[7] The hearing officer further found that the agency offered no evidence of a standard policy for evaluating streams. The agency has not rebutted this finding but instead argues that it was not the evaluation of the stream that was negligent but the decision to try to cross in the absence of certainty that it was safe. The grievant testified that he has never been presented with any sort of safety policy (other than the Standards of Conduct ("SOC")) that would guide him in determining how to assess that with any degree of certainty that a given stream was safe to cross.[8] Other than the general directive to operate vehicles safely, the agency did not appear to offer any evidence of safety rules that pertain to off-road driving and stream crossings to guide those who are expected to cross steams. Based on the totality of the evidence presented, this Department cannot conclude that the hearing officer's findings regarding the charge of reckless destruction of property are unsupported by record evidence.

II. Due Process

The agency asserts that the hearing officer incorrectly distinguished due process and state policy. 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 and, it would appear,[11] state policy reflect the concept of due process. Accordingly, administrative appeals regarding the state policy provision that incorporate pre-disciplinary due process—DHRM Policy 1.60 § E (the SOC)—are appealable to the DRHM Director as a matter of policy.[12] 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.[13] Furthermore, "where a party asserts that a

[7] Testimony beginning at 1:15:00.
[8] Testimony beginning at 4:12:00
[9] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988).
[10] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[11] We use the term "appears" here because this Department does not want to be viewed as encroaching upon the dominion of DHRM, the sole entity charged with interpretation of state policy. Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[12] 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).
[13] 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-

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."[14]

The grievant asserted that he was not afforded due process. The hearing officer disagreed and found that he was. However, she found that the agency did not follow the state's due process policy--DHRM Policy 1.60 (E)(1)--the SOC. On that basis, the hearing officer determined that the established misconduct (failure to follow the accident reporting policy) should not be sustained. This Department agrees with the hearing officer's determination that the grievant's due process rights were not violated. However, as explained below, we reach this conclusion for different reasons from those cited by the hearing officer. This Department believes that an explanation of its reasoning may be instructive.

Pre-disciplinary Due Process

In Cleveland Board of Education v. Loudermill, the United States Supreme Court explained that prior to certain disciplinary actions, the federal 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.[15] 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."[16]

The hearing decision squarely addressed the grievant's assertion that he was denied due process. The hearing decision held that:

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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).

[14] EDR Ruling No. 2011-2720.

[15] Loudermill, 470 U.S. at 545-46 (1985). State policy requires:

> Prior to the issuance of Written Notices, any 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.

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.

[16] Loudermill, 470 U.S. at 545-46.

> There is no lack of due process by not permitting a defense before being charged. Grievant's opportunity to defend himself would not be necessary until after he was aware that he needed to defend himself. Grievant had ample opportunity to do this in the grievance steps provided by law. However, as a breach of policy, Agency makes it clear Grievant was expected to follow the policies of DHRM Policy 1.60.

The statement that "[t]here is no lack of due process by not permitting a defense before being charged," is in conflict with well-settled legal precedent. Law and, it would appear, the SOC both require that an employee receive the essential elements of pre-disciplinary due process set forth in the Loudermill decision prior to the issuance of discipline. The hearing officer's conclusion that the grievant's due process rights were not violated appears to be based on the misconception that due process protections do not attach until after an employee is charged. Notwithstanding the hearing officer's erroneous statement of law, it is not evident that the grievant's pre-disciplinary due process rights were violated.[17] However, assuming without deciding that such pre-disciplinary process was withheld, because the grievant was the afforded full post-disciplinary due process explained below, we believe that any potential violation would have been adequately cured by the full post-disciplinary grievance hearing.

Post-disciplinary Due Process

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.[18] The grievance statutes provide these basic post-disciplinary procedural safeguards through the establishment of an administrative hearing process.[19] Post-disciplinary due process

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[17] The hearing decision noted that the agency argued that "the investigation meeting met policy requirements for a discussion before the Written Notice." The hearing officer found that it did not because "at the time Grievant did not know he would be issued a Written Notice." The question of whether interviewing an employee as part of an investigation satisfies pre-disciplinary due process is a valid one. Merely interviewing an employee as part of an investigation may not, by itself, provide sufficient notice. However, the investigatory process could potentially meet the notice requirement if the Loudermill requirements are met. What is imperative is that the employee is made aware "of the nature of the charges and general evidence against him" (Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1439 (4th Cir. 1992)) and is given a meaningful "opportunity to present his side of the story" (Loudermill, 470 U.S. at 546).

[18] 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, 705 F.2d at 559-561 (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.)

[19] *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*

also has a notice requirement similar to the Loudermill pre-disciplinary notice requirement. This notice requirement is woven into 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."[20] 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.[21] 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."[22] 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, it is evident that the grievant had ample notice of the charges against him, as set forth on the Written Notice. He had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the presence of counsel. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. This Department recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[23] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[24] Accordingly, we agree with the hearing officer that the grievant suffered no due process violation.

Procedure Manual §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

[20] *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."

[21] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[22] *Rules for Conducting Grievance Hearings § I.*

[23] *See* Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[24] *See* Massey v. Shell, No. 2:09-CV-772-WKW[WO] 2011 U.S. Dist. LEXIS 31715, at *24 (N. Dist Ala. March 24, 2011)("In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under § 1983 arise."). *See also* Peterson v. Dakota County, 428 F.Supp 2d 974, 980 (Dist. Minn 2006). "Extensive post-termination proceedings may cure inadequate pretermination proceedings.") (internal citations omitted); Stenseth v. Greater Fort Worth & Tarrant County Community Action Agency, 673 F.2d 842, 846 (5th Cir. 1982) (though pre-termination proceedings may have been inadequate because of lack of formality, post-termination proceedings were sufficient to cure the defect since plaintiff had not demonstrated any prejudice resulting from the failure to provide pretermination due process). *C.f.* Koga v. Busalacchi, No. 09-C-410 2010 U.S. Dist. LEXIS 8293, at *7 (E.D. Wis. Feb. 1, 2010). (in the context of the state's removal of commercial driver's license, an adequate post-deprivation remedy can cure any defect in process leading up to the deprivation); Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 436 (4th Cir. 2002)(in a denial of building permit case, the court explained that "to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state . . . a 'due process violation actionable under *§ 1983* is not complete when the deprivation occurs; it is not complete unless and until the State fails to

Due Process Policy

We note that the agency has requested administrative review from the DHRM Director. The SOC contains a section expressly entitled "Due Process" -- Section E. The DHRM Director will have the opportunity to respond to any objections based on the allegations that the agency failed to follow the due process provisions of state policy.[25] DHRM is the sole entity charged with the promulgation and interpretation of state policy.

III. Failure to Give Appropriate Deference to Agency Actions

The agency asserts that the hearing officer erred by not giving appropriate deference to agency actions. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[26] The *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[27] As discussed in the first section of this ruling, the hearing officer held that the grievant was not reckless. As explained, based on this Department's review of the hearing record, this Department cannot conclude that the hearing officer erred in reaching these conclusions.

We note, however, that the hearing officer found that the grievant failed to follow written policy by not reporting the accident. The hearing officer held that a Group III was "too harsh," reducing it to a Group I. Failure to follow written policy is normally a Group II offense. The hearing decision is not clear as to why the hearing officer found the sustained offense to be a Group I instead of a Group II. (The hearing officer went on to remove the Written Notice in its entirety, based on the agency's failure to follow the SOC.) Because it is not clear as to why the hearing officer concluded that the sustained misconduct was appropriately designated as a Group I Written Notice instead of a Group II Written Notice, the decision is remanded for further clarification. The hearing officer may wait to issue her remanded decision until after the DHRM Director issues her administrative review ruling.

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provide due process.'" Tri-County Paving, 281 F.3d at 436-437, quoting Fields v. Durham, 909 F.2d 94, 97-98 (4th Cir. 1990).

[25] We note that in an earlier administrative review DHRM declined to address whether policy was violated when an employee complained in, Case Number 9351, that she was "not told that the meeting [she] w[as] called to was a pre-disciplinary meeting." DRHM held "this represents a due process issue, not a policy issue." DHRM did not explain why an appeal challenging the pre-disciplinary actions of an agency were not also a policy matter given that the SOC policy appears to expressly incorporate the Loudermill pre-disciplinary requirements. This case presents DHRM with a further opportunity to explain the relationship between law and state policy.

[26] Va. Code § 2.2-3005(C)(6).

[27] *Rules at* VI(A).

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 issued, and if required, any remanded decision has been issued by the hearing officer.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30] Thus, the parties may appeal to the circuit court any due process objections, along with any other claims that the final hearing decision is contradictory to law.[31]

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Claudia T. Farr
Director

[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).
[31] *See* EDR Ruling No. 2011-2720.