Issue: Administrative Review of Hearing Officer's Decision in Case No. 9499; Ruling Date: March 31, 2011; Ruling No. 2011-2912; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2011-2912
March 31, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9499. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9499 are as follows:

> The Virginia Department of Transportation employs Grievant as a Roadway Designer at one of its Facilities. She has been employed by the Agency for approximately 8 years. Grievant had prior active disciplinary action. She received a Group II Written Notice on January 27, 2010 for failure to comply with written policy.[1]
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> Grievant works in an office cubical without a door. The opening to her cubicle is approximately 6 feet wide. Ms. P works in a cubicle next to Grievant. The opening to Ms. P's cubicle faces the opening of Grievant's cubicle. When facing in the appropriate direction, Grievant and Ms. P can see into each others cubicle.[2]
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> On February 17, 2010, Grievant underwent surgery on to [sic] remove ingrown toenails from both of her big toes. On April 29, 2010, she began taking a prescription drug to treat a fungus on her feet and toenails. As the medicine began to work, the skin on her feet started cracking and hardening, making it painful to wear shoes for an extended period of time. On May 4, 2010, Grievant's feet were bothering her because of the medical treatment. Her discomfort was to so great that at the 3 p.m. break, she sat in her office cubical with her feet under her desk and over a trashcan and peeled away dead skin from her feet and let it drop into the trashcan. She took a dull pocket knife blade to exfoliate a few remaining uneven spots on her feet. Some of the dead skin fell outside of the trashcan and onto the floor. Ms. P noticed Grievant's actions and concluded that

[1] Decision of Hearing Officer, Case No. 9499, issued February 11, 2011 ("Hearing Decision") at 2.
[2] *Id*.

> Grievant was "shaving" her feet of dead skin. Ms. P complained to her supervisor, Ms. G. Ms. G called Grievant's supervisor, Mr. S, at home that evening. When Mr. S reported to work the following morning he went to Grievant's cubicle and observed skin scrapings covering an area of approximately 2' x 3'. The scrapings were plainly visible to Mr. S. Mr. S spoke with Grievant approximately one hour later when she reported to work and told her to clean up the skin. Grievant said that she had already done so. Mr. S instructed Grievant not to repeat that behavior.[3]

On August 5, 2010, Grievant was issued a Group I Written Notice of disciplinary action for the above described personal grooming in the workplace that occurred on May 4, 2010.[4] On August 18, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 24, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 2011, a hearing was held at the Agency's office.[5] In a February 11, 2011 hearing decision, the hearing officer upheld the Group I Written Notice.[6] The hearing officer denied the grievant's request for reconsideration on February 28, 2011.[7] The grievant now seeks administrative review from this Department.

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."[8] 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.[9]

Findings of Fact

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[12] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has

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[3] *Id*. at 2-3.
[4] *Id*. at 1.
[5] *Id*.
[6] *Id*. at 5
[7] *See* Decision of Hearing Officer, Case No. 9499-R ("Reconsideration Decision") issued February 28, 2011 at 3.
[8] Va. Code § 2.2-1001(2), (3), and (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).

established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[13] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the grievant simply contests the hearing officer's findings of fact, and whether they justify the grievant's Group I Written Notice. Whether the hearing officer's findings of fact justify a Group I Written Notice under the Standards of Conduct is a matter of policy for the Department of Human Resource Management (DHRM) to address on administrative review. Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

However, as to this Department's review of the hearing officer's findings that the grievant's act was "disruptive" in nature,[14] we cannot find that the hearing officer exceeded or abused his authority under the grievance procedure where, as here, his findings were supported by the record evidence and pertain to a material issue in the case. Specifically, the grievant's admission that she left some skin on the floor of her cubicle was consistent with the agency's assertion on the Group I Written Notice.[15] Likewise, one of the grievant's colleagues found the act to be "offensive" and complained to upper management.[16] Similarly, the grievant's supervisor testified that he found the grievant's act to be "inappropriate" and he cautioned the grievant not to repeat it.[17] This record evidence pertains to the material issue of whether the grievant's behavior was "disruptive" as stated in the Written Notice, and as found by the hearing officer.[18]

Mitigating Factors

The grievant contends her disciplinary action should be mitigated. The hearing officer has the sole authority to weigh all of the evidence and to consider whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the 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."[19] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a

[13] *Grievance Procedure Manual* § 5.8.
[14] *See* Hearing Decision at 3; *See Rules for Conducting Grievance Hearings* § VI(B).
[15] *Id*.
[16] *Id*. at 2.
[17] *See* Hearing Recording at 28:35 through 28:42 (testimony of supervisor).
[18] The Written Notice also described the act as unsanitary and unhealthy, which was supported by the testimony of an agency witness. See Hearing Recording at 44:43 through 45:27 and 49:50 through 52:00.
[19] Va. Code § 2.2-3005(C)(6).

> reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.[20]

The *Rules* further state that:

> Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[21]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[22] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

The grievant contends her disciplinary action should be mitigated because she was suffering from a medical condition, she performed the act within her own cubicle, and the agency did not expressly state this conduct was prohibited during a break. The hearing officer found the grievant's arguments failed.[23] Although there was no dispute the grievant had a legitimate medical need to remove skin from her feet, the hearing officer found no credible evidence to show that she needed to do this at her 3 p.m. break in her cubicle.[24] Additionally, the hearing officer found no reason why the grievant could not wait until after work to remove the skin.[25] Additionally, the hearing officer found that the "simply because the Agency has not established specific rules limiting an employee's behavior during his or her breaks it does not mean that an employee is free to engage in any behavior."[26] In light of the above, this Department cannot find that the hearing officer abused his discretion in determining there were no mitigating circumstances in this case.

Due Process

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[20] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[21] *Id.*
[22] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id. See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d 389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).
[23] Hearing Decision at 5.
[24] *Id.* at 4.
[25] *Id.*
[26] *Id.*

Because the Written Notice was issued over three months after the offending conduct occurred and the Written Notice was coded as 99 "Other (describe)", the grievant asserts her due process rights were violated. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[27] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[28] However, the grievance procedure 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."[29] 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.[30] 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."[31] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, the description of the offense in the Written Notice stated:

> Personal Grooming in the workplace – Using a pocket knife to groom your feet in the workplace. Engaging in unsanitary, unhealthy, and disruptive act. On May 4, 2010, employee used a knife to publicly remove dead skin from her feet in an open office area at work.

While the Written Notice code did not specifically describe the offense, this Department concludes that the description above fully informs the grievant of the inappropriate behavior with which she was charged. Accordingly, we cannot conclude, for purposes of compliance with the grievance procedure only, that the grievant's due process rights were violated simply because the offense code "99" was used on the Written Notice.

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[27] 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 (1985); 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).

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

[29] *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."

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

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

The grievant's claim that the agency was untimely in issuing the Written Notice may be raised as a policy issue under the Standards of Conduct with the Department of Human Resource Management (DHRM) Director, who has the sole authority to make a final determination on whether the hearing decision comports with policy.[32] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review from Sara Wilson, Director of the Department of Human Resource Management at: 101 North 14th St., 12th Floor, Richmond, VA 23219.

Finally, as noted above, due process is a legal concept. Thus, once the hearing decision becomes final, the grievant is free to raise any due process claims with the circuit court in the jurisdiction where the grievance arose.

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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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Claudia T. Farr
Director

[32] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[33] *Grievance Procedure Manual* § 7.2(d).
[34] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[35] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).