Issue: Administrative Review of Hearing Officer's Decision in Case No. 9665; Ruling Date: December 12, 2011; Ruling No. 2012-3122; Agency: Christopher Newport University; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Christopher Newport University
Ruling Number 2012-3122
December 12, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9665. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9665 are as follows:[1]

> Christopher Newport University employed Grievant as an Assistant Dining Operations Manager. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. With the exception of the facts giving rise to these grievances, Grievant's work performance was satisfactory to the Agency.
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> Grievant reported to the Supervisor, the Dining Operations Manager. On weekends, Grievant served in the place of the Supervisor. He was responsible for supervising employees located in five restaurants in the Student Union Center. On weekends only three of the restaurants were open, Restaurant R, Restaurant C, and Restaurant G. The posted closing time for Restaurant R was 8 p.m., Restaurant C was 10 p.m., and Restaurant G was 10 p.m.
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> Although Restaurant R had a sign posted at the restaurant entrance indicating that the restaurant closed at 8 p.m., the Agency had an informal practice of allowing a 15 minute grace period. This meant that if a student appeared at Restaurant R after 8 p.m. but before 8:15 p.m., staff of Restaurant R would provide food to the student from Restaurant's R full menu. The Agency considered 8:15 p.m. to be Restaurant R's actual closing time.

[1] Decision of Hearing Officer, Case No. 9665 ("Hearing Decision"), issued September 15, 2011 at 1-4. (Footnotes from the Hearing Decision have been omitted here)

Employees working at Restaurant R had several duties in order to close down the restaurant after the grace period. These duties included cleaning the dining area. Employees required approximately one half hour to 45 minutes in order to close the restaurant and leave.

The Agency's practice was not to reduce the number of items available on its menu under any circumstances while the restaurant was open and operating with electric power. If the restaurant lost power, the restaurant would remain open and provide food that did not require heat in order to be served. The restaurant would continue to operate until its usual closing time.

On April 16, 2011, between 30 and 40 employees were working at Restaurant R and were under Grievant's chain of command. Restaurant C and Restaurant G had approximately six employees working and reporting to a supervisor who reported to Grievant.

Grievant called the Supervisor and left a message on her cell phone. At 6:53 p.m., the Supervisor called Grievant. Grievant asked if he could close Restaurant R early. The Supervisor asked why it was necessary to close the restaurant. Grievant replied that the University had sent out a Tornado Warning alert and the lights had flickered in the facility. The Supervisor asked if Grievant had lost power and Grievant said only in the back receiving area. The Supervisor asked Grievant to confirm that the restaurant had power in the dining room and kitchen and Grievant said "yes". The Supervisor said that "we would not be able to close early." She explained that the restaurant needed to operate as normal because the students needed to be fed. Grievant responded "okay".

At 7:32 p.m., the Agency sent an emergency alert to students and staff stating, "National Weather Service has issued a tornado warning for Newport News until 8 p.m." Grievant did not learn of the alert until 7:50 p.m. He decided to close Restaurant R at 8 p.m., the time posted on a sign located outside of the restaurant and to eliminate the 15 minute grace period. Grievant reduced the number of food items available to students so that employees could begin their clean up and close down process early. Restaurant R began serving only pizza, salad/soup, and ice cream to students.

On April 18, 2011, the Supervisor was approached by an employee who worked at either Restaurant C or Restaurant G who complained that employees at Restaurant R were permitted to leave early on April 16, 2011 while employees at Restaurant C and Restaurant G remained at work until their restaurants closed at 10 p.m. The Supervisor began an investigation. She spoke with Grievant and asked him how he came to the decision to close Restaurant R on April 16, 2011. As part of Grievant's explanation, he told the Supervisor that he gauged the volume of operations prior to making his decision. He told the Supervisor that

> "there was no business between" 7:40 p.m. and 8 p.m. The Supervisor reviewed the patron reports from the register at Restaurant R and concluded that the restaurant had 20 customers during the last 17 minutes the doors were open. She described this as a "consistent flow of customers" and concluded that Grievant had lied to her when he said that there was no business between 7:40 p.m. and 8 p.m.
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> On June 3, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On June 3, 2011, Grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions. On June 3, 2011, Grievant was issued a Group III Written Notice with removal for providing a false statement to a supervisor.
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> On June 9, 2011, 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 he requested a hearing. On August 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On September 9, 2011, a hearing was held at the Agency's office.

In a September 15, 2011 hearing decision, the hearing officer upheld the Group I Written Notice for unsatisfactory work performance, the Group II Written Notice for failure to follow a supervisor's instructions, and the Group III Written Notice for providing false statements to a supervisor.[2] The hearing officer granted the grievant's request for reconsideration on November 23, 2011, and reversed the Group I Written Notice for unsatisfactory work performance, but upheld the Group II Written Notice for failure to follow a supervisor's instructions and the Group III Written Notice for providing false statements to a supervisor.[3] 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."[4] 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.[5]

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[2] *Id*. at 7.
[3] *See* Decision of Hearing Officer, Case No. 9665-R ("Reconsideration Decision") issued November 23, 2011 at 3.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact in support of his affirmance of the agency's Group III Written Notice for providing false statements to a supervisor.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] 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.[8] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[9] 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.

This Department 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 the material issue in the case. For example, the grievant's supervisor testified that when she asked the grievant to explain why he made the decision to close the restaurant early, he told her that he did it because he did not have any business during the last forty-five minutes of operations and that the student union was practically empty.[10] The grievant's supervisor further testified that after the grievant gave this explanation, she pulled the restaurant patron report to determine exactly how many customers went through the food line during the last hour of operations, and that the report showed a steady flow of customers.[11] During cross-examination, when asked why she did not ask the grievant for the specific number of customers actually in the dining hall during the last hour of operations, the grievant's supervisor testified that she assumed when the grievant told her there was no business that he literally meant zero business.[12] Furthermore, while the grievant said he was "speaking in relative terms," he admitted that he told his supervisor there was no business between 7:40 p.m. and 8 p.m.[13] The hearing officer found that the grievant's statement to his supervisor that "there was

[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] *See* Hearing Recording at 54:05 through 55:12 (testimony of grievant's supervisor). *See also* Hearing Recording at 33:08 through 33:25 (testimony of grievant's supervisor).
[11] *See* Hearing Recording at 33:25 through 34:40 (testimony of grievant's supervisor).
[12] *See* Hearing Recording at 55:23 through 55:51 (testimony of grievant's supervisor).
[13] *See* Hearing Recording at 1:32:00 through 1:33:13 (testimony of grievant).

no business between 7:40 p.m. and 8 p.m." was false.[14] Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to disturb them.

Inconsistency with Agency Policy

The grievant's request for administrative review alleges that the hearing officer erred in holding that the Group I Written Notice for unsatisfactory work performance and the Group II Written Notice for failure to follow a supervisor's instructions were not duplicative and thus did not violate policy. Given the hearing officer's November 23, 2011 reconsideration decision, and in particular, his decision to reverse the Group I Written Notice for unsatisfactory work performance,[15] the grievant's request that this Department administratively review the September 15, 2011 decision for this issue is moot, and need not be addressed.

Due Process

The grievant alleges that the hearing officer redefined "the relevant timeframe" in his hearing decision when he based his decision upon the number of students who were served in a last fourteen minutes of operation rather than the number of students served in the last forty-five minutes of operation as noted in the Group III Written Notice. Specifically, he asserts "the Hearing Officer has effectively rewritten the substantive nature of the allegation against the Grievant without the appropriate due process guaranteed by the Standards of Conduct Policy 1.60."

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[16] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[17] 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*. 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

[14] Decision of Hearing Officer, Case No. 9665 ("Hearing Decision"), issued September 15, 2011 at 5.
[15] *See* Decision of Hearing Officer, Case No. 9665-R ("Reconsideration Decision") issued November 23, 2011 at 3.
[16] 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).
[17] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

employee to provide an informed response to the charge."[18] 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.[19] 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."[20] 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 Group III Written Notice stated:

> You have violated DHRM Policy No. 1.60, Standards of Conduct, "providing false statements to a supervisor." You misrepresented the facts of the events on April 16, 2011, stating there had not been a customer in the last 45 minutes of your deciding to close early. When [named individual] (Director of Dining Services) and I pulled the patron reports from the register, we found a consistent flow of customers which was twenty customers during the last seventeen (17) minutes, with the last customer being at 7:54:19 p.m.

In his hearing decision, the hearing officer found the "grievant said there was no business between 7:40 p.m. and 8 p.m." to his supervisor, which the hearing officer held was false.[21] This Department concludes that the description above of the offense in the Group Notice fully informs the grievant of the specific date, time period, and surrounding circumstances for which he was charged with providing a false statement to his supervisor. 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 hearing decision focused on the number of restaurant patrons during the last fourteen minutes of operation instead of the last forty-five minutes.

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.[22] 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

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[18] *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."
[19] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.
[20] *Rules for Conducting Grievance Hearings § I.*
[21] Hearing Decision at 5.
[22] *Grievance Procedure Manual* § 7.2(d).

arose.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

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Claudia T. Farr
Director

[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).