Issue: Administrative Review of Hearing Officer's decision in Case No. 9714; Ruling Date: February 17, 2012; Ruling No. 2012-3216; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3216
February 17, 2012

The agency has requested that this Department ("EDR") administratively review the hearing officer's Decision in Case Number 9714. For the reasons set forth below, this Department finds no reason to disturb the decision.

FACTS

The pertinent facts (procedural and substantive) of this case and related conclusions of the hearing officer as set forth in the Hearing Decision in Case Number 9714 are as follows:

> Grievant was removed from employment on May 23, 2011 for absence in excess of three workdays without prior authorization or satisfactory reason.
>
> On June 13, 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 she [sic] requested a hearing. On October 11, 2011, the EDR Director issued Ruling No. 2012-3119 qualifying the grievance for a hearing. On November 8, 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 December 12, 2011, a hearing was held at the Agency's office.
>
> * * *
>
> The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until his removal effective May 23, 2011. He had been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
>
> Grievant was charged with criminal conduct in another state. On December 29, 2010, the Agency received a letter from Grievant's Attorney indicating that criminal charges were pending against Grievant. The Human Resource Officer determined that Grievant had been charged with two felonies.

She called Grievant and asked about the charges. Grievant stated that the charges would be dismissed.

On January 3, 2011, the Warden Senior sent Grievant a letter stating:

> We have been informed that you have felony charges pending in [State] court system. As a result you are being suspended effective December 30, 2010, pending the outcome of the Court's action. If you would like to use your leave balances to cover the suspension, notify [Human Resource Officer] in Human Resources Department. Your charges are of such a nature that to continue you in your assigned position could constitute negligence in regards to this agency's duties to the public and to other state employees.
>
> ***
>
> Please keep me apprised of all court dates, as well as, all pertinent matters concerning your status at [telephone number].

The criminal charges were scheduled to be heard in January 2011. Grievant called the Facility to report that the trial date have [sic] been changed to February 14, 2011. On February 15, 2011, Grievant called the Facility to report that the trial date has [sic] been rescheduled for March 14, 2011. Although Grievant's court date had been continued until April 11, 2011, Grievant did not call the Facility and report the new court date. Because the Agency had not heard from Grievant, the Human Resource Officer sent Grievant a letter dated May 17, 2011 stating:

> You were placed on suspension effective December 29, 2010 pending the outcome of your charges in the [State] court system. The last court date that you provided us with has passed. We are requiring updated documentation regarding your case. As you are aware, an absence in excess of three days without prior authorization or satisfactory reason is a violation of the Standards of Conduct; a Group III offense.
>
> If you intend to continue employment with [Facility] please contact me at [telephone number] within 24 hours following receipt of this letter to arrange a disciplinary meeting to discuss your situation. If we do not hear from you by May 23, 2011 we will consider your failure to respond to be an indication of your resigning from state service.[1]

[1] Agency Exhibit 1.

The letter was sent to Grievant at the address he had provided the Facility. In July 2010, Grievant had moved to another address. Grievant did not inform the Facility of the new address. Grievant did not receive the letter until May 25, 2011. He contacted the Facility and was informed that because he had failed to respond to the letter within the time frame permitted, he was removed from employment.

Grievant's Attorney drafted a letter dated December 7, 2011 stating:

> I represent [Grievant] who was charged with the misdemeanor of larceny before the [District Court]. We were able to resolve the matter by the Court entering a prayer for judgment. A prayer for judgment is not a conviction but means that the case will be dismissed after a year.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Although the Agency did not issue Grievant a Written Notice, the Hearing officer construes the Agency's action to be the issuance of a Group III Written Notice with removal.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. On January 3, 2011, the Warden Senior sent Grievant a letter instructing Grievant to "keep me apprised of all court dates, as well as, all pertinent matters concerning your status". Grievant was aware of the instruction and provided the Facility with updates regarding his scheduled court dates through March 15, 2011. Grievant failed to inform the Facility of changes in his court dates after that date thereby acting contrary to the instruction of the Warden Senior. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Hearing Officer will authorize suspension of Grievant for 10 workdays as part of the disciplinary action.

The Agency contends that Grievant engaged in a Group III offense. Under the Agency's Standards of Conduct, Group III offenses include "[a]bsence in excess of three days without proper authorization or a satisfactory reason." In order to establish that an employee is absent from work in excess of three days, an agency must show that the employee was scheduled to work for at least four work days and then failed to report to work. In this case, the Agency suspended Grievant effective December 30, 2010, but never removed the suspension. The Agency did not instruct Grievant to report to work. The Agency has not established that Grievant was absent in excess of three workdays because Grievant was never instructed him to report to work. The only instruction given to Grievant was to communicate his status with the Facility. Failure to follow a supervisor's instruction is a Group II offense, not a Group III offense. Nothing about this case would justify elevation of the Group II offense to a Group III offense.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings,* "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant was suspended without pay in accordance with Operating Procedure 135.1(XVII)(C) (April 15, 2008) which authorized the Agency to suspend without pay an employee charged with a criminal offense for a period of not to exceed 90 calendar days. The Human Resource Officer testified that the 90 day period ended on March 30, 2011. On April 1, 2011, the Agency issued a revised Operating Procedure 135.1. Section VI(D)(5) addresses removal from the work place for alleged criminal conduct and states that "[i]f the nature of the charges allow, and at the conclusion of the 90 day period there has been no resolution of the criminal charge, the employee will be placed on or returned to Pre-Disciplinary Leave with Pay (for a maximum of 15 days total for this action). The policy further provides that at, "the conclusion of the Pre-Disciplinary Leave period, a decision regarding employment status must be made pending resolution of the charge.

> Based on the Agency's Standards of Conduct, the Agency was authorized to suspend Grievant without pay from December 30, 2010 until March 30, 2011. Thereafter the Agency was obligated to begin paying Grievant even while he remained on Pre-Disciplinary Leave with Pay for a maximum of 15 days.
>
> Although the disposition of Grievant's case in the District Court may provide a basis for disciplinary action, that matter has not been addressed by the Agency and was not a basis for the Agency to take disciplinary action in this case. The issue is not ripe for the Hearing Officer to review until the matter is properly before a Hearing Officer following the Agency's consideration. [2]

Based on the above facts and conclusions, the hearing officer reinstated the grievant reducing the Group III Written Notice with removal to a Group II Notice with a 10 workday suspension. He further ordered that:

> The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency need not provide Grievant with back pay during the period of suspension from December 30, 2010 until March 30, 2011. The Agency may also reduce the amount of back pay to account for an additional 10 workdays of disciplinary suspension authorized under the Group II Written Notice.[3]

The agency challenges the hearing decision on several bases discussed below.

DISCUSSION

The agency asserts that the hearing officer "exceeded his authority in construing that the Agency has issued a Group III Written Notice, which should be reduced to a Group II." From a grievance procedure perspective, we find no error with the hearing officer construing that the agency issued the Group III Written Notice. First, the hearing decision states, and a review of the record evidence appears to confirm, that the agency never issued the grievant a Written Notice.[4] Instead, the agency attempted to terminate the grievant's employment via a letter containing an implied resignation—a method of removal found nowhere in state policy—which essentially forced the hearing officer to construe the charges against the grievant.[5] Moreover, the

[2] Decision of the Hearing Officer, issued December 13, 2011, ("Hearing Decision") pp. 1-6.
[3] Hearing Decision at 6.
[4] Section VIII (C) of the agency's Standards of Conduct explains that prior to any disciplinary removal action employees shall be provided with minimal due process—notice of the charges, explanation of the evidence in support of the charges, and a reasonable opportunity to respond—and that "[t]he *Written Notice Form* confirming the cause and nature of the disciplinary . . . removal action shall be provided to the employee." (Emphasis added).
[5] In conjunction with past rulings, the Department of Human Resource Management ("DHRM") has held that a letter of termination is not an appropriate substitute for a Written Notice. *See* EDR Ruling No. 2003-052. One of the potential problems with not using the Written Notice form is that letters can, as was the case here, omit critical

letter sent to the grievant stated that "[a]s you are aware, an absence in excess of three days without prior authorization or satisfactory reason is a violation of the Standards of Conduct; a Group III offense."[6] In addition, the second resolution response states that "[y]ou were terminated from [the facility] on May 23, 2011 for "absence in excess of three" and for "failure to keep the facility abreast of your pending felony charges."[7] A plain reading of the state's Standards of Conduct, DHRM Policy 1.60, indicates that (i) absences in excess of 3 days, and (ii) failure to follow policies or instructions, are Group III and II Notice offenses, respectively. In sum, this Department finds as wholly without merit the argument that the hearing officer erred in construing the dismissal as tantamount to a Group III Notice.

As to the objection that the hearing officer erred when he reduced the Group III Notice to a Group II, we again find no error from a grievance procedure perspective. Given the absence of a Written Notice, the hearing officer decided the case under the justifications for termination advanced by the second step respondent in his second step response: "absence in excess of three" and for "failure to keep the facility breast of your pending felony charges." The hearing officer upheld the charge of failing to inform of pending felony charges. However, he did not sustain the charge of failing to report to work because, as he explained, in order to show that one is absent in excess of three days with proper authorization, the agency must first show that the employee was scheduled for work for at least four days and did not show up. The hearing officer found that the grievant was not scheduled to work because he was on suspension, which remained unaltered by any revocation of that suspension. In essence, the hearing officer found that the grievant had no duty to show up to work while under an unrevoked suspension. Therefore, the hearing officer concluded that the grievant was not absent without proper authorization. Thus, from a grievance perspective, this Department finds no error regarding the hearing officer's findings and holdings regarding unapproved absence from work.

In its request for administrative review, the agency restates the charges against the grievant as including that: (i) he was removed from employment "because he failed to respond to the [May 17] letter within the time frame permitted" and (ii) he had failed "to inform the agency that his address had changed." However, as discussed above, the only charges leveled against the grievant prior to his hearing were the "absence in excess of three" and the "failure to keep the agency abreast of your pending felony charges." Accordingly, from the standpoint of the grievance procedure, this Department cannot conclude that hearing officer erred by dismissing any charges of "failure to respond to the letter" or "failure to inform the agency that his address had changed."

More precisely, the critical point from an evidentiary and procedural perspective is that, in the absence of a Written Notice from the agency, the hearing officer concluded that the agency had charged the grievant with an "absence in excess" of three days and a "failure to keep the facility abreast of [his] pending felony charges." When an employee is not charged with an offense, he is not put on notice that he needs to mount a defense to the uncharged offense.

---

information such as the right to grieve. *See* Agency's Standards of Conduct (Operating Procedure 135.1 Section VIII (D) which states that: "[a]ll written notices shall include a reference to the employee's right to grieve."

[6] Emphasis added.

[7] Agency Exhibit 2 (emphasis added).

Without a charge, an employee does not know the nature of the offense or the purported facts that support the charge.[8] The employee is unable to call witnesses who may provide relevant testimony or to seek pertinent documents, for example, documents that might be used to mitigate the discipline, such as, how other employees who have failed to inform of address changes have been treated. As a matter of due process, this Department declines to direct the hearing officer to revise his decision to uphold a termination for after-the-fact, uncharged offenses.

A final objection raised by the agency relates to which version of policy was effective in this case. This Department notes that the agency also appealed to DHRM. DHRM can address this issue as it addresses other policy issues raised in the administrative review request directed to the DHRM Director.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[9] Within 30 calendar days of the date of a final decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[10] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[11]

_____

Claudia T. Farr
Director

---

[8] The 14th Amendment to the U.S. Constitution requires the pre-disciplinary due process set forth in the Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546, (1985) which was codified in state policy:

> 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. (Department of Human Resource Management (DHRM) Policy 1.60.)

The Commonwealth's Written Notice form accordingly instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence." Furthermore, post-disciplinary due process (and the *Rules for Conducting Grievance Hearings ("Rules")*) require 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." *Rules* § 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."

[9] *Grievance Procedure Manual* § 7.2(d).

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

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