Issue: Administrative Review of Hearing Officer's Decision in Case No. 9758; Ruling Date: June 4, 2012; Ruling No. 2012-3318; 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 2012-3318
June 4, 2012

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9758. For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

The pertinent facts of this case are as follows. The grievant was demoted through a Group III Written Notice. He challenged the discipline through the grievance process and on January 18, 2012, a hearing officer was appointed to hear the case. The case advanced to hearing on February 16, 2012. On March 1, 2012, the grievant was informed by the hearing officer's assistant that a portion of the hearing had not been recorded and thus the hearing would need to be reconvened, which ultimately occurred on March 16, 2012. The hearing officer issued his decision on March 23, 2012, upholding the discipline. The grievant appeals here on the basis of the timeliness of the hearing decision.

DISCUSSION

Administrative Review

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."[1] 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.[2]

Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within thirty-five days of the appointment of the hearing officer. According to the

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *See Grievance Procedure Manual* § 6.4(3).

grievance procedure and rules established by this Department, absent just cause, hearing officers are instructed to attempt to hold the hearing and issue a written decision within 35 calendar days of appointment.[3] Preferably, hearings take place and decisions are written within this 35-day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.[4]

In this case there was apparently a malfunction with the recording equipment which appears to have at least contributed to the delay in this case. The grievant argues that his Constitutional due process rights have been violated by the length of time it took the hearing officer to issue a decision in this matter—an argument that he may raise with the circuit court in the jurisdiction where the grievance arose.[5] Because the grievance procedure incorporates the concept of due process, we will also address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. The essence of Constitutional due process is "notice of the charges and an opportunity to be heard."[6] However, the opportunity to be heard must be provided "at a meaningful time and in a meaningful manner."[7] Accordingly, there "is a point at which an unjustified delay in completing a post-deprivation proceeding would become a constitutional violation."[8] "In determining how long a delay is justified in affording a [post-deprivation] hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken."[9]

In this case, the hearing officer was appointed on January 18, 2012. Accordingly, under the *Rules* a decision should normally have been issued no later than 35 days beyond the appointment. However, as noted above, there was apparently a malfunction with the recording

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[3] *Grievance Procedure Manual* § 5.1. ("The hearing *should* be held and a written decision issued within 35 calendar days of the hearing officer's appointment.") (Emphasis added).

[4] *See, e.g.*, EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135. This Department views the 35-day language of the Rules as directive rather than mandatory. Standing alone, failure to issue a decision within the 35-day timeframe does not serve as grounds for a rehearing or favorable decision. *Cf.* Va. Dep't of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19, at *8 (Jan. 15, 2008) (unpublished decision).

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

[6] 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)); 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 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71, (1974)); 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."); 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).

[7] City of Los Angeles v. David, 538 U.S. 715, 717 (2003)(quoting *Mathews*, 424 U.S. at 333).

[8] *Id.* (internal quotations omitted); *See also* FDIC v. Mallen, 486 U.S. 230, 242 (1988).

[9] *Mallen*, 486 U.S. at 242.

equipment that caused some delay. While this Department recognizes that the grievant's interest in contesting his demotion is substantial, and that any length of delay in a hearing and/or decision could cause some level of harm to this interest, this Department cannot conclude that the delay was of such duration to be unreasonable.[10] Moreover, the grievant has offered no evidence, other than the *Rules*' nonmandatory provision that a decision "should" be issued within 35 calendar days of appointment of a hearing officer, to support a conclusion that the delay in issuing the hearing decision was unjustified. Based on the foregoing, this Department cannot find that the delay of the duration at issue in this case deprived the grievant of due process as a matter of compliance under the *Rules*. However, as noted above, Constitutional due process is a legal concept that the grievant may raise with the circuit court once all administrative review decisions have been issued in this matter.[11]

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.[12] 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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Claudia T. Farr
Director

[10] *See, e.g. Loudermill***,** 470 U.S. at 547 ("A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*. Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.")(emphasis added); *see also Mallen*, 486 U.S. at 243 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation.)
[11] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[12] *Grievance Procedure Manual* § 7.2(d).
[13] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).