Issue: Administrative Review of Hearing Officer's Decision in Case No. 9906; Ruling Date: November 28, 2012; Ruling No. 2013-3468; Agency: Department of Alcoholic Beverage Control; Outcome: AHO's Decision Affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2013-3468
November 28, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9906. In addition, the grievant alleges that the Department of Alcoholic Beverage Control (ABC or the agency) failed to comply with the grievance procedure. For the reasons set forth below, EDR will not disturb the decision of the hearing officer. Moreover, we conclude that the grievant has waived his right to challenge the agency's alleged noncompliance at the second and third management resolution steps of the grievance process.

FACTS

The relevant facts as set forth in Case Number 9906 are as follows:[1]

> Grievant was a project manager for the Department of Alcoholic Beverage Control ("the Agency"), and he challenges the Group I Written Notice and Group II Written Notice and termination, both issued on April 20, 2012. The Grievant had a prior active Group II Written Notice, for failure to follow supervisor's instructions and a prior Group I Written Notice, for abuse of state time.
>
> The Group I Written Notice, issued by the Grievant's immediate supervisor on April 20, 2012, stated:
>
> > The offense in question is for the management of two separate initiatives that involved consulting services with IBM. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team

[1] Decision of Hearing Officer, Case No. 9906 ("Hearing Decision"), October 17, 2012 at 1-5 (page citations refer to actual page number, which are incorrectly numbered in original). (Some references to exhibits from the Hearing Decision have been omitted here.)

> members. Over the course of a month, [the Grievant] displayed several instances of poor job performance.
>
> On March 9, 2012, a letter was transmitted by [the Grievant] to answer some environmental questions for IBM. The letter was very unprofessional in that it contained inaccurate information, spelling and grammatical errors and was not presented in a professional format. After being notified of the poor quality of the letter, [the Grievant] corrected the spelling mistakes and sent it to me for re-submittal. On the evening of March 12, I had to re-write the majority of the letter for accuracy and professional content…

The Group II Written Notice, issued the same day by the Grievant's immediate supervisor, stated:

> The offense in question is for failure to follow supervisory instructions. [The Grievant] was assigned as the Project Manager to ensure the successful implementation of our Rational Tools for our Agile methodology to include adoption of the tool amongst all team members. Over the course of the engagement with the consultant from March 19, 2012, through April 2, 2012, [the Grievant] failed to follow the instructions he was given to successfully complete his tasks.
>
> Due to the fact that I was out of the office for training offsite from March 20 through March 22, I gave [the Grievant] specific instructions that he was to monitor the IBM consultant's progress and keep the schedule on target for deliverables. On March 20, at 10:57 am I sent a note to [the Grievant] that the meetings for the week needed to get on the calendar due to telecommute schedules and the short duration of the engagement. Upon returning to work on March 23, I inquired about the wrap up meeting for the engagement and was then told that an additional 10 hours would be needed to complete the engagement. The communication I received was from the consultant on March 22, at 8:10 am. [The Grievant] did not follow up with this communication. The IBM consultant returned on March 28 for an additional 10 hours. By the late morning of March 29, I inquired about the final meeting. At this time, I was told that the consultant would not be able to finish on this day. I was not informed by [the Grievant] that the consultant had agreed to stay another day. I later spoke to the consultant directly who was surprised that I was not told he would remain an extra day to complete the engagement. A final meeting was scheduled for March 30 at 3:00 pm. When asked, I told [the Grievant] specifically that <u>all</u> people who are under me should be

> invited to the meeting along with others who are directly or indirectly involved with Agile projects. Again, more than half of the required attendees were omitted.
>
> When [the grievant] arrived at 1:30 pm on March 30, I was told that the consultant would be leaving for the day at 3:00 pm and no meeting would occur. [The Grievant] gave incorrect information.
>
> On April 2, I talked to all the participants of the engagement to find out if [the Grievant] had followed up with them to ensure that they were able to use the tool for their teams on the following week. No one had spoken to [the Grievant] and many of the teams still had substantial work effort required to get started.

In an October 17, 2012 hearing decision, the hearing officer upheld the agency's issuance of the Group I and Group II Written Notices with removal (based on the accumulation of active Written Notices).[2] The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, EDR 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, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The grievant has requested such a review. EDR will not address these claims further.

Noncompliance with Grievance Process

The grievant claims that the grievance was "not ripe" because the agency did not comply with the grievance procedure during the management resolution steps. He asserts that the second step-respondent failed to address the issues and relief requested, that the agency improperly refused to substitute another second-step respondent in response to grievant's request for such, and that he was not provided an opportunity to have a third resolution step.

---

[2] *Id.* at 10.
[3] Va. Code § 2.2-1202.1(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

The grievance procedure requires that all claims of party noncompliance be raised immediately.[6] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[7] Here, the grievant claims alleged procedural violations that occurred at the second and third resolution steps of the grievance process. Although the grievant was aware of the possible procedural errors during these steps, nevertheless, he advanced through the resolution steps and ultimately to hearing. As such, the grievant waived his right to challenge the agency's alleged noncompliance at the second and third resolution steps. The hearing officer correctly advised the grievant's counsel that procedural issues of this nature are appropriately addressed prior to hearing and were not matters that were properly before him.[8]

Due Process

The grievant asserts that he was not afforded due process because he was given 48 hours to respond to the Group I and Group II notices once received on April 4, 2012, and he was placed on medical leave April 9, 2012, then terminated on April 23, 2012. Due process is a legal concept appropriately raised with the circuit court, and ultimately resolved by judicial review. Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.[9] Further, as mentioned above, we note that the grievant has requested administrative review from the DHRM Director. The Standards of Conduct contain a section expressly entitled "Due Process" -- Section E.[10] The DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

Prior to certain disciplinary actions, the United States 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.[11] 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

---

[6] *Grievance Procedure Manual* § 6.3.
[7] *Id*.
[8] *See* Hearing Record at 16:24 through 17:33 (opening statement of grievant's attorney).
[9] *See* McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").
[10] *See* Department of Human Resource Management (DHRM) Policy 1.60.
[11] Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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.

reasonable grounds to believe that the charges against the employee are true and support the proposed action."[12]

On the other hand, 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.[13] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[14]

In this case, it is evident that the grievant had ample notice of the charges against him, as set forth on the Written Notices.[15] 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. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[16] 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.[17] Accordingly, we find no due process violation under the grievance procedure.

Retaliation

The grievant contends that the agency acted in retaliation when it issued the discipline, as he had recently filed a complaint with the EEOC regarding a prior disciplinary action. To this, the hearing officer found that:[18]

---

[12] Loudermill, 470 U.S. at 546.

[13] Reeves v. Thigpen, 879 F. Supp. 1153, 1174 (M.D. Ala. 1995). *See also* Garraghty v. Comm. 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 v. Commonwealth of Virginia, 705 F.2d 557, 559-561 (4th Cir. 1983) (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.)

[14] *See* Va. Code § 2.2-3004(E) 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 Procedure Manual* §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

[15] *See* Agency Exhibit 1.

[16] *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.").

[17] *See* EDR Ruling No. 2011-2877(and authorities cited therein).

[18] Hearing Decision at 9.

> There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual job performance, all of which was solely within the control of the Grievant.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and grounds in the record for those findings."[20] 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.[21] 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.[22] 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

With respect to his allegation of retaliation, the grievant's request for administrative review appears to contest issues such as the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority. While the grievant may not agree with the hearing officer's determination that he did not satisfy the burden of proof to show that the agency's actions were retaliatory, the hearing officer's findings are based on record evidence (such as the testimony of the grievant's supervisor, the contents of the two Written Notices, and e-mail exchanges between the grievant and his supervisor)[23] and will not be overturned.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate the two Written Notices with termination and asserts that terminating him exceeded the limits of reasonableness.

As to the grievant's claim of mitigation, the hearing officer states:[24]

---

[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.
[23] *See* Hearing Record at 22:52 through 23:13 (testimony of grievant's supervisor), Agency Exhibits 1, 11.
[24] Hearing Decision at 8-9.

> I find that the Agency has acted reasonably in its discipline of the Grievant. The prior, active Written Notices weigh against mitigation. While the Grievant had exhibited a good work record prior to 2010, the evidence was presented of diminished performance since 2010. The Agency demonstrated a legitimate business reason to issue the Written Notices. While the Agency could have justified or exercised lesser discipline than termination, a record of four active Written Notices (two Group II's and two Group I's) is sufficient for termination based on accumulation. (Even two Group II's, alone, normally should result in termination under the Standards of Conduct.) Accordingly, I find no mitigating circumstances that permit a finding that the Agency's action is outside the bounds of reasonableness.

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 [EDR]."[25] The *Rules for Conducting Grievance Hearings ("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."[26] More specifically, the *Rules* provide that in disciplinary grievances, 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.[27]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[28] EDR will review a hearing officer's mitigation determination for abuse of

---

[25] Va. Code § 2.2-3005(C)(6).
[26] *Rules* § VI(A).
[27] *Rules* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).
[28] *E.g., Id*.

discretion,[29] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[29] "'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.*
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).