JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5818
February 19, 2025

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12195. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12195, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as operations manager, without other active formal disciplinary actions.
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> The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. Testimony provided by Warden [1] and Warden [2] confirmed the facts alleged in the Written Notice regarding the error that led to a circuit court show cause hearing against the Agency. While the conduct was not intentional, it falls within the scope of unsatisfactory job performance. The Grievant was unable to refute this occurrence and emphasized that it was a mistake that should be weighed against his long job tenure otherwise without such errors.
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> Certification Analysist [1] credibly testified to her observations regarding the Grievant's lax recordkeeping regarding the facility's audits for American Correctional Association (ACA) and Prison Rape Elimination Act (PREA). The Grievant's Employee Work Profile (EWP) includes significant percentages of core responsibilities for audit management and maintaining the recordkeeping to satisfy periodic audits. Agency Exh. 5, pp. 13-17. Certification Analyst [1] testified that she and her team had to do significant extraordinary work to make up for the recordkeeping insufficiency in preparation for the ACA audit. The Grievant testified that these responsibilities, for at least part of the time covered, were shared

[1] Decision of Hearing Officer, Case No. 12195 ("Hearing Decision"), Jan. 6, 2025, at 4-5.

by another operations manager, and the other manager was responsible for the recordkeeping lapses. While I find there was some awkward overlap with the other operations manager (and there was tension between the two), such situation does not absolve or excuse the Grievant's failure to meet his core job responsibilities.

Warden [1] testified to the incident of the lost check in the mailroom. The warden credibly testified that he directed the Grievant to file an incident report—a responsibility that the Grievant should have known to do and how to do it, pursuant to OP 038.1. Warden [1] summed up his opinion that the Grievant's skills and abilities were "not up to par." Warden [1] testified to the Grievant was not sufficiently keeping him abreast of operations and changes in his area of control. Warden [1] explained that this concern included the Grievant's oversight of inmate grievance and disciplinary appeals and the severe backlog of cases under his supervision—a specific part of the Grievant's core responsibilities outlined in his EWP. The Grievant testified that all of these circumstances were either out of his control or otherwise minimal offenses that should not have an effect on his character or career.

Warden [1] testified that mitigation was considered, recognizing the Grievant's long work record weighing in favor of mitigating a Group II offense down to a Group I Written Notice.

The Department of Corrections ("the agency") issued to the grievant a Group I Written Notice.[2] The grievant timely grieved the disciplinary action, and a hearing was held on January 3, 2025.[3] In a decision dated January 6, 2025, the hearing officer determined that the agency presented sufficient evidence to support the agency's disciplinary action.[4] The hearing officer further found no mitigating circumstances to rescind the written notice.[5] The grievant now appeals the decision to EDR.

DISCUSSION

By statute, EDR has 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."[6] 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 hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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[2] Hearing Decision at 1; Agency Exs. at 1-2. The Written Notice was originally issued at the Group II level but was reduced during the resolution steps of the grievance process. *See* Hearing Decision at 1.
[3] *See id*.
[4] *Id.* at 7-8. Despite upholding the overall disciplinary action, the hearing officer ordered the agency to remove one of the allegations contained therein. *Id.* at 8.
[5] *Id.* at 7-8.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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 on 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.

In his request for administrative review, the grievant argues that the written notice should have been rescinded based on alleged due process violations. In addition, the grievant appears to dispute the hearing officer's consideration of the evidence as to the sustained charges, and he contends that the written notice cannot be sustained at the Group I level.[13]

Due Process Challenges

In his request for administrative review, the grievant argues that the agency's disciplinary action should be rescinded because it "took too much time" to offer post-disciplinary due process. Specifically, the grievant alleges that agency procedural delays caused his hearing to occur more than ten months after the issuance of discipline. The grievant also claims that the disciplinary charges did not provide sufficient notice of the allegation that he failed "to keep the Unit Head abreast of operations and changes in [the grievant's] area of control."

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[14] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[15] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals 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

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[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] EDR received the agency's rebuttal to the grievant's request for administrative review on February 5, 2025. Per section 7.2(a) of the *Grievance Procedure Manual*, "[i]f the opposing party chooses to submit a rebuttal, it must be **received by** EDR within 10 calendar days of the conclusion of the original 15-day appeal period." In this case, the hearing decision was issued on January 6, 2025. Therefore, the grievant would have had until January 21, 2025 to request his administrative review, and the agency then had until January 31, 2025 to submit its rebuttal. Because EDR did not receive the rebuttal until February 5, 2025, it is untimely and will not be considered.
[14] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[15] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

respond to the charges, appropriate to the nature of the case.[16] The pre-disciplinary notice and opportunity to be heard need not be elaborate, nor 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 reasonable grounds to believe that the charges against the employee are true and support the proposed action."[17]

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 adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[18] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[19]

Here, the record would appear to support the grievant's claim that the grievance process ultimately leading to the administrative hearing on January 6, 2025 was extraordinarily lengthy. Particularly notable from the grievance record is the third-step respondent's approximately four-month delay in providing his written response, followed by the agency's head's qualification decision approximately one month later. However, EDR is unable to identify evidence in the record that the grievant attempted to address any agency non-compliance via the steps provided in section 6.3 of the *Grievance Procedure Manual*, and we find no indication that the delay ultimately prevented the grievant from adequately responding to the disciplinary charges and participating in his hearing. In addition, EDR is unaware of any provision of law or policy that would have authorized the hearing officer to rescind discipline on this basis alone under these facts.

The grievant further argues that he was not provided sufficient notice to defend against the charge in the written notice that he failed to keep his facility warden "abreast of operations and changes in [the grievant's] area of control." EDR notes that the warden's written submission as the first-step respondent does not elaborate on this charge. However, the hearing officer accepted the warden's hearing testimony to the effect that

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[16] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); 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."). State policy requires that

> [p]rior to the issuance of Written Notices, 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.

DHRM Policy 1.60, *Standards of Conduct*, at 11. The version of this policy cited in this ruling is the version that expired on December 31, 2024, but would have been in effect for the events giving rise to this grievance.

[17] *Loudermill*, 470 U.S. at 545-46.

[18] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The 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.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[19] See Virginia Code Section 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, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

> the Grievant was not sufficiently keeping him abreast of operations and changes in his area of control. [The warden] explained that this concern included the Grievant's oversight of inmate grievance and disciplinary appeals and the severe backlog of cases under his supervision – a specific part of the Grievant's core responsibilities outlined in his [employee work profile].[20]

Upon our review of the grievance record, we agree with the grievant that this characterization of the allegation is not necessarily consistent with agency clarifications provided to the grievant during grievance phase. In the grievant's pre-disciplinary due process records and in the warden's first-step response, he expressed concerns about his need to intervene in the grievant's mailroom management duties.[21] Neither the written notice nor the management resolution steps indicate that the warden's concerns included a backlog in grievance and disciplinary appeals. Because these concerns are not reflected in the record of the agency's extensive due process discussions, and also are not necessarily evident from the agency's documentary exhibits, it is not clear whether the grievant had adequate notice that the agency intended them to be within the scope of the agency's disciplinary action – and to prove them at the hearing.

That said, neither the written notice nor the hearing decision hinges on a precise interpretation of the warden's charge that the grievant was not keeping him sufficiently informed. The written notice cites a variety of conduct that the agency ultimately chose to discipline collectively. The hearing officer appears to have interpreted the various allegations in the written notice to charge the grievant essentially with unsatisfactory performance, noting that the agency was "entitled to expect good judgment and performance from its employees."[22] The warden's general expectations regarding communication, even if not expressed consistently during the disciplinary process, were only one aspect of the unsatisfactory performance charged on the written notice and ultimately upheld by the hearing officer.

Accordingly, EDR finds no due process violation that ultimately warrants a remand to the hearing officer.

Consideration of Evidence & Level of Discipline

In his request for administrative review, the grievant also appears to challenge the hearing officer's findings of fact as to three additional allegations in the written notice. Specifically, the written notice included the following charges:

- [O]n January 8, 2024, incomplete and incorrect information was sent by [the grievant] to an attorney as needed to represent the [agency] in court.
- [The grievant] acknowledged he had not added any documentation to [the SXI ACA and PREA folders] since he assumed the role of Operations Manager.
- Failure to follow [the agency's incident reporting policy] regarding an incident where a check was lost by a Postal Assistant.[23]

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[20] Hearing Decision at 5.
[21] *See* Agency Exs. at 6-8.
[22] Hearing Decision at 6. For example, Warden 1 testified to his impression that if he did not get involved in the responsibilities he delegated to the grievant, they may not be "taken care of." Hearing Recording at 2:08:20-2:09:08.
[23] Agency Exs. at 1-2.

As to these charges, the hearing officer found as follows:

> Testimony provided by [two facility wardens] confirmed the facts alleged in the Written Notice regarding the error that led to a circuit court show cause hearing against the Agency. . . . The Grievant was unable to refute this occurrence and emphasized that it was a mistake . . . .
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> [Another agency witness] credibly testified to her observations regarding the Grievant's lax recordkeeping regarding the facility's audits for American Correctional Association (ACA) and Prison Rape Elimination Act (PREA). . . . [She] testified that she and her team had to do significant extraordinary work to make up for the recordkeeping insufficiency in preparation for the ACA audit. The Grievant testified that these responsibilities, for at least part of the time covered, were shared by another operations manager, and the other manager was responsible for the recordkeeping lapses. While I find there was some awkward overlap with the other operations manager . . ., such situation does not absolve or excuse the Grievant's failure to meet his core job responsibilities.
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> . . . . The warden credibly testified that he directed the Grievant to file an incident report . . . . [24]

As to the latter allegation, EDR notes that neither the written notice nor the hearing decision describes with any specificity the charges related to filing an incident report. Because there are no findings of fact as to this particular allegation, EDR is unable to review this aspect of the discipline. Had the written notice hinged on this allegation, it is unlikely that we would be able to uphold the hearing officer's decision sustaining it. However, as with the allegation related to communicating with his warden, we conclude that the charge regarding incident reports is also not essential to the ultimate determination that a Group I Written Notice was warranted and appropriate in this case, for the reasons below.

Evidence in the record supports the hearing officer's findings that the grievant's performance was not satisfactory with respect to providing information to an attorney and maintaining audit-related records.[25] As to the misconduct allegedly related to the show-cause hearing, we again note that the written notice does not contain clear allegations, and the hearing officer's findings do not elucidate the specific misconduct sustained. Nevertheless, EDR infers from the evidentiary record that the offense essentially was that the grievant failed to ensure that an inmate was available for a phone call with the inmate's attorney and, in his explanation to the attorney, attributed the inmate's unavailability to various factors that, according to both testifying wardens, should not have been obstacles.[26] This evidence is sufficient to support the hearing officer's overall finding of unsatisfactory performance.

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[24] Hearing Decision at 5.

[25] *See, e.g.*, Agency Exs. at 23, 25-26; Hearing Recording at 46:30-48:00, 58:25-59:05, 1:07:15-1:08:45 (certification analyst testimony); *id.* at 1:17:00-1:21:10, 1:28:03-1:30:10 (Warden 2's testimony); *id.* at 1:39:15-1:42:48, 2:48:25-2:50:20 (Warden 1's testimony).

[26] Hearing Recording at 1:17:00-1:21:10, 1:28:03-1:30:10 (Warden 2's testimony); *id.* at 1:39:15-1:42:48 (Warden 1's testimony).

In addition, the hearing officer found that, despite some overlap between the grievant's responsibilities during a time when two operations managers were working at the facility, the grievant demonstrated unsatisfactory performance by failing to ensure adequate recordkeeping for audit purposes.[27] The grievant disagrees, maintaining in his appeal that the other operations manager was responsible for that aspect of their shared duties. However, it does not appear that the grievant offered evidence other than his own testimony to support his claim. In any event, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[28] Accordingly, the charges related to recordkeeping also are supported by the record and are consistent with an overall finding of unsatisfactory performance.

Under DHRM Policy 1.60, *Standards of Conduct*, formal discipline may be issued at the Group I level for "acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention."[29] The associated policy guide lists "unsatisfactory work performance" as an example of an offense that would normally merit discipline at the Group I level.[30] Because the hearing officer sustained at least some of the charges in the Group I Written Notice, and his findings are supported by evidence in the record, EDR finds no error in his ultimate conclusion that the agency's disciplinary action was consistent with applicable law and policy.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[27] Hearing Decision at 5.
[28] *See, e.g.*, EDR Ruling No. 2020-4976.
[29] DHRM Policy 1.60, *Standards of Conduct*, at 9.
[30] DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped by Level," at 1.
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).