Issue: Compliance-Conduct of Hearing, Hearing Decision; Ruling Date: December 27, 2001; Ruling #2001-206; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Systems; Outcome: Hearing officer in compliance

*COMMONWEALTH of VIRGINIA*
***Department of Employment Dispute Resolution***

**RECONSIDERED COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Mental Health, Mental Retardation, and Substance Abuse Services
Ruling Number 2001-206
December 27, 2001

The grievant has requested reconsideration of EDR Ruling No. 2001-151, which was issued on September 21, 2001 in response to his appeal of the August 8, 2001 hearing decision in Case No. 5191. Ruling No. 2001-151 held that the hearing officer had complied with the grievance procedure by deciding the single issue qualified for hearing: whether the written notice was arbitrary or capricious. The grievant asserts that EDR Ruling No. 2001-151 should have also addressed whether: (1) the hearing officer improperly failed to decide if the agency misapplied policy by refusing to provide specific information about the charges against him; (2) the hearing officer improperly failed to act on the agency's refusal to provide requested documents; (3) the hearing officer improperly refused to allow the introduction of evidence regarding the agency's allegation of misuse of state property; (4) the hearing officer improperly accepted recorded statements into evidence without an offer of proof; (5) findings of fact were complete and supported the hearing decision; (6) the hearing officer improperly failed to decide if disciplinary policy was consistently applied; and (7) the hearing officer's decision on relief was based upon the facts. We agree and will address these issues now.[1]

## FACTS

The grievant was employed in a management position at an agency facility. On October 19, 2000, the facility director and other managers met with the grievant and notified him that the agency intended to take disciplinary action against him for behavior constituting "unacceptable management practices." The facility director explained the charges and advised the grievant that he would be afforded an opportunity to respond at a later meeting. The grievant was then immediately removed from the work area and remained away from work for a period of 110 days, after which, on February 7, 2001, the

[1] This Department grants reconsideration requests sparingly, where, as here, a compelling reason exists. In this case, it appears that the original September 21, 2001 ruling did not determine the precise policy misapplication claim that the grievant sought to assert, a claim that was supported in his Form A and qualified without exception by the agency head. Because they are somewhat related to the policy misapplication claim, we will also address the additional issues raised by the grievant in his reconsideration request.

agency issued him a Group III Written Notice with 30-day suspension. On February 13, 2001, the grievant initiated a grievance challenging the disciplinary action and suspension based, in part, on the grounds that the discipline was untimely and that the agency had failed to provide specific information regarding the charges that led to his discipline. Subsequently, on March 9, 2001, the grievant resigned his employment with the agency.

The grievance advanced through the grievance procedure without resolution, and on April 16, 2001, was qualified for hearing. The hearing officer conducted an administrative hearing on July 26 and 27, 2001, and rendered his decision on August 8, 2001. In his decision, the hearing officer concluded that the disciplinary action should be reduced to a Group II Written Notice with a ten-day suspension.

## 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 in all matters related to procedural compliance with the grievance procedure."[2] 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.[3] The Department of Human Resource Management has the authority to determine whether the hearing decision is consistent with policy.[4] Further, a circuit court has appellate jurisdiction to determine whether the hearing decision is consistent with law.[5]

**Whether the Hearing Officer Improperly Failed to Decide if the Agency Misapplied Policy by Refusing to Give the Grievant Sufficient Information about the Charges Lodged Against Him**

The grievant asserts that the hearing officer failed to determine an issue qualified for hearing: whether the agency misapplied policy by refusing to provide him with specific information about the charges lodged against him. Along with challenging his written notice, suspension and transfer, the grievant's Form A also raises this specific misapplication of policy issue. The grievance was qualified for hearing, without exception, by the agency head. Thus, the hearing officer should have addressed whether the agency misapplied the applicable policy, the Standards of Conduct. For the reasons set forth below, however, the fact that this policy issue was never addressed at hearing does not warrant a reopening of the hearing or suggest that any modification to the hearing decision is necessary.

[2] Va. Code § 2.2-1001(2),(3), and (5).
[3] *Grievance Procedure Manual* § 6.4(3), page 18.
[4] Va. Code § 2.2-3006 (A).
[5] Va. Code § 2.2-3006 (B).

Under the Standards of Conduct, an employee 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 prior to receiving formal discipline.[6] Based on the undisputed facts, the grievant received these due process guarantees. He concedes in his grievance that he was afforded a "due process meeting" prior to his original suspension.[7] He again received notice via the written group notice issued to him on February 7, 2001.[8] Furthermore, he received a full post-disciplinary hearing that resulted in the hearing officer reducing the Group III Written Notice to a Group II. Thus, any failure on the part of the hearing officer to address this precise policy argument is harmless error.

**Whether the Hearing Officer Improperly Failed to Act on the Agency's Alleged Refusal to Provide Requested Documents**

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[9] This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

The grievant asserts that he did not receive certain requested documents, specifically, letters of support and "documents read from at the October 19 due process meeting." During the document exchange in preparation for hearing, the grievant's attorney submitted a document request on July 17, 2001, containing a list of 29 sets of documents relating to the investigation and subsequent charges. The agency's representative forwarded documents on July 24, 2001. There is no evidence that grievant objected to the hearing officer that any documents were not provided either prior to or during the hearing. Any such objection should have been raised with the hearing officer either before or during the hearing, not after the hearing is concluded.

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[6] The Department of Human Resources Management (DHRM) Policy 1.60 VII (E)(2). Policy 1.60, the Standards of Conduct, tracks the United States Supreme Court's interpretation of the process due a tenured governmental employee prior to a disciplinary action such as a termination. *See* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) in which the U.S. Supreme Court explained that the pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, *Id.*, at 546.

[7] In Gilbert v. Homar, 520 U.S. 924 (1997), the United States Supreme Court explained that a public employee dismissed for cause is entitled to a *"very limited hearing"* prior to his termination, to be followed by a more comprehensive post-termination hearing." 520 U.S. at 929. The "due process meeting" that the grievant recounts his grievance satisfies the very limited hearing requirement described in Gilbert.

[8] The Written Notice form is designed to ensure pre-disciplinary action due process. The form is crafted in a manner that compels the person who issues the notice to state the nature of the offense and an explanation of the evidence. Employees are presumed to have an opportunity to respond when presented with the Written Notice form.

[9] Va.Code § 2.2-3003 (E).

**Whether the Hearing Officer Improperly Refused to Allow the Introduction of Evidence Regarding the Agency's Allegation of Misuse of State Property**

The grievant asserts that the hearing officer refused to allow testimony relating to the agency's allegation that he misused state property.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based upon the evidence. This Department does not substitute its judgement for that of the hearing officer regarding the admissibility, materiality and weight of the evidence, the credibility of the witnesses, or any related factual findings, as long as the hearing decision is based upon the record evidence and the material issues in the case.

As to the hearing officer's refusal to allow the introduction of evidence pertaining to the misuse of state property, the hearing officer determined that he had received sufficient evidence to make a finding that the event in question occurred but that disciplinary action was unwarranted. Therefore, the introduction of additional evidence on this issue would be unnecessary.

**Whether the Hearing Officer Improperly Accepted Recorded Statements Into Evidence Without an Offer of Proof, and Whether Findings of Fact were Complete and Supported the Hearing Decision**

The grievant asserts that the hearing officer improperly allowed recorded statements made by persons not present at the hearing -- hearsay -- to be presented as evidence at the hearing without offers of proof and that findings of fact, based upon this evidence, did not support the hearing decision.

The grievance statute and procedure authorize hearing officers to rule upon offers of proof; receive probative evidence; exclude irrelevant, immaterial, insubstantial, privileged or repetitive proofs, rebuttals, or cross-examination; make findings of fact as to the material issues in the case; and determine the grievance based on the record evidence.[11] Further, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[12] Accordingly, the technical rules of evidence do not apply, and hearsay evidence, if probative,[13] may be admitted and considered by the hearing officer. Where the evidence presented at hearing 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 the record evidence and the material issues of

[10] Va. Code § 2.2-3005 (D).
[11] *Grievance Procedure Manual* § 5.7, page 14.
[12] *Rules for Conducting Grievance Hearings*, p. 7.
[13] Probative evidence is that which "affects the probability that a fact is as a party claims it to be. " Edward W. Cleary, McCormick on Evidence § 16, p. 52(1984).

the case, this Department cannot substitute its judgement for that of the hearing officer with respect to those findings. In this case, hearsay evidence, including the investigative report, was probative, and the hearing officer did not exceed or abuse his authority by considering it.

**Whether the Hearing Officer Improperly Failed to Decide if Disciplinary Policy was Consistently Applied**

The grievant asserts that no disciplinary action was taken against the facility director although he engaged in the same behaviors for which the grievant was disciplined.

The Standards of Conduct allows agencies to reduce disciplinary action if there are mitigating circumstances.[14] Likewise, the hearing officer may consider mitigating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct. In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operation should be given due consideration when the contested management action is consistent with law and policy. Examples of mitigating circumstances could include the "consistent application of corrective action." Under the Standards of Conduct, "[m]anagement should apply corrective actions consistently, while taking into consideration the specifics of each individual case."[15] In this case, the hearing officer determined that there was no evidence that the facility director's behavior or actions were as egregious as that of the grievant. Therefore, without a showing of similar conduct, the grievant's argument for consistency fails.

**Whether the Decision on Relief is Based Upon the Facts**

The grievant asserts that the hearing officer's determination that he had voluntarily resigned his former position was not based upon the facts.

A hearing decision must resolve the grievance on the merits of the substantive issue(s) qualified.[16] Issues that have not been qualified in the grievance assigned to the hearing officer are not before the hearing officer, and may not be resolved or remedied.[17] In this case, the issue of involuntary resignation was not a qualified issue in the grievance initiated on February 13, 2001. Because the hearing officer could not resolve an issue

[14] Circumstances warranting mitigation include "(a) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (b) an employee's long service, or otherwise satisfactory work performance." DHRM Policy 1.60 VII (C) (1).
[15] DHRM Policy 1.60.VI (C).
[16] *Rules for Conducting Grievance Hearings*, pages 1-4.
[17] *Rules for Conducting Grievance Hearings*, page 9.

that was not before him, he did not err in concluding that he had no authority to rescind the grievant's resignation.

## CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer neither abused his discretion in the conduct of the hearing nor exceeded his authority under the grievance procedure in deciding this case.

## APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's decision becomes a final hearing decision once all timely requests for review have been decided. Therefore, the August 8, 2001 hearing decision becomes a final hearing decision today with the issuance of this Ruling. The grievant now has 30 calendar days from today's date to appeal the decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must be that the final hearing decision is contradictory to law. In noting the further right of appeal to the circuit court, this Department expresses no opinion as to the decision's conformance to law.

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