

Issue: Compliance/administrative review of hearing decision #5693; Ruling Date: October 28, 2003; Ruling #2003-420; Agency: Department of Alcoholic Beverage Control; Outcome: final decision, as clarified, meets the basic procedural requirements of the grievance procedure



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Alcoholic Beverage Control/ No. 2003-420
October 28, 2003

The grievant has requested that this Department administratively review the hearing officer's clarification decision in Case Number 5693. The grievant contends that the hearing officer's decision does not comply with the EDR Director's order in EDR Ruling 2003-129.

FACTS

The grievant was the Lead Mechanic with the Department of Alcoholic Beverage Control (ABC) until his removal on January 9, 2003. On December 20, 2002, the grievant received a Group III Written Notice with suspension for not responding to a fire alarm on November 22 and for violating safety procedures.¹ On January 9, 2003, the grievant received a Group II Written Notice for failure to follow a supervisor's instructions and for insubordinate attitude during a December 6, 2002 meeting.² Based

¹ On November 22, an alarm sounded at approximately 4:45 p.m. The grievant silenced the alarm and went to investigate. He saw a technician working in the area on Riser #12, and believing that the technician was handling the situation, the grievant left for the day. The agency and the grievant disagree about whether the grievant spoke with the technician about the alarm. The hearing officer concluded that the grievant did not speak with the technician. The Group III Written Notices states that the grievant should have investigated the situation more thoroughly, informed the technician about the alarm, and determined the nature of the alarm. *See* Group III Written Notice, dated December 20, 2002.

² In this Written Notice, the grievant's supervisor claims that the grievant spent 3.5 hours responding to a call on November 30, 2002 that should have only taken 1.5 hours. It further notes that in a December 6

on an accumulation of Written Notices, ABC terminated the grievant's employment on January 9. The grievant filed grievances on January 8 and February 6, 2003 challenging the Written Notices and claiming retaliation, arbitrary and capricious performance evaluation, and wrongful discharge.³

The hearing took place on April 28, 2003 and the hearing officer issued his decision on June 2, 2003. In his decision, the hearing officer concluded that the grievant failed to respond to "an alarm" on November 22 and upheld the Group III Written Notice. In addition, the hearing officer reduced the Group II Written Notice, stating that the grievant's actions on November 30, at most, amounted to unsatisfactory job performance, which is a Group I offense. However, because of the accumulation of Written Notices, the hearing officer upheld the grievant's termination of employment. Finally, the hearing officer determined that retaliation was not a factor in the disciplinary actions against the grievant.⁴

The grievant requested that EDR administratively review the hearing officer's June 2, 2003 hearing decision. In her August 12, 2003 administrative review, the EDR Director stated that the hearing officer's decision left "unanswered questions of fact [that] could materially affect the outcome of the grievant's case" and ordered the hearing officer "to modify his written decision by including an explanation of the *findings of fact on the material issues and the grounds in the record for those findings* that justified the issuance of the Group III Written Notice and resulting termination."⁵ Specifically, the EDR Director directed the hearing officer to clarify the following:

- (1) whether the grievant's disciplinary action concerned the alarm on Riser #5 or Riser #12;
- (2) whether there are differences between high-air alarms and fire alarms;
- (3) whether a high-air alarm or a fire alarm occurred on the grievant's shift; and
- (4) whether failure to respond to a high-air alarm is a safety violation.⁶

The hearing officer issued his clarification decision on October 10, 2003. The hearing officer's decision stated, in pertinent part, that:

- (a) the grievant was disciplined for events surrounding Riser #12;

meeting about the grievant's performance, the grievant was "very rude, disrespectful, and . . . argumentative." See Group II Written Notice, dated January 9, 2003.

³ See Grievance Form A, dated January 8, 2003 and Grievance Form A, dated February 6, 2003.

⁴ The hearing officer also found that the grievant's claim of arbitrary and capricious performance evaluation was moot because the agency had removed his evaluation and replaced it with a "Notice of Improvement Needed." The agency decided that it was not appropriate to complete a performance evaluation for the grievant for the 2001-2002 performance cycle because he was out for much of the year on disability.

⁵ EDR Ruling 2003-129, page 4, issued August 12, 2003 (emphasis in original).

⁶ *Id.* at page 3. If failure to respond to a high-air alarm was not a safety violation, such a failure may not have merited a Group III Written Notice, but rather a Group I or II.

- (b) “the distinction between a high air alarm and a fire alarm is not so crystal clear,” stating that a high-air alarm and a fire alarm are not mutually exclusive;⁷ and
- (c) the alarm that occurred during the grievant’s shift was “a fire alarm that could also be described as a high air alarm . . . [that] was a safety concern for the Agency.”⁸

Neither the hearing officer’s original decision nor his first reconsideration decision had discussed these factual distinctions.⁹ On October 20, 2003, the grievant requested that the EDR Director administratively review the hearing officer’s October 10, 2003 clarification decision. The grievant claims that the hearing officer failed to provide “findings of fact on the material issues and the grounds in the record for those findings,” as directed in EDR Ruling 2003-129. Specifically, the grievant asserts that the hearing officer’s responses to the Director’s questions (2) through (4) were insufficient.

DISCUSSION

Under the grievance procedure, a hearing officer’s decision becomes “a final hearing decision, *with no further possibility of administrative review*, when . . . all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.”¹⁰ Moreover, EDR Ruling 2003-129 stated that “[t]he hearing officer’s modified written decision, once issued, will be a final hearing decision.”¹¹ Here, the hearing officer’s October 10, 2003 clarification decision answered the questions set forth in the Director’s August 12 administrative review. Moreover, in that decision, the hearing officer cited to evidence in the record upon which he relied.¹² Thus, we conclude that the final decision, as clarified, meets the basic procedural requirements of the grievance procedure.

The grievant asserts that the hearing decision’s treatment of the facts in his case violates basic due process principles. Post-termination due process is a legal concept and appropriately raised with the circuit court, not this Department. As a general rule, post-termination due process requires that the terminated employee be provided with the

⁷ Clarification Decision, Case No. 5693-R2, pages 3 and 4, issued October 10, 2003.

⁸ *Id.* at page 4.

⁹ *See* Hearing Decision, Case No. 5693, issued June 2, 2003 and Reconsideration Decision, Case No. 5693, issued June 26, 2003.

¹⁰ *Grievance Procedure Manual* § 7.2(d), page 20 (emphasis added).

¹¹ EDR Ruling 2003-129, page 5, issued August 12, 2003.

¹² In discussing his conclusion that a high-air alarm could also be referred to as a fire alarm, the hearing officer noted that “[w]hen discussing what happened regarding riser #12, the Supervisor described a fire alarm occurring. The Technician testified that he was working on riser #12” and may have sent a fire alarm. Clarification Decision, Case No. 5693-R2, pages 3-4, issued October 10, 2003. The hearing officer also cited to the Grievant’s Group III Written Notice which “refers to a fire alarm.” *Id.* at page 3. Moreover, the hearing officer appears to rely on agency testimony in concluding that the alarm on Riser #12, whether described as a high-air or fire alarm, “was a safety concern for the Agency,” because the alarm could have signaled a high air problem *or* a fire. *Id.* at page 4.

following: 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 a representative.¹³ The administrative hearing process established by the grievance statutes provides these basic post-termination procedural safeguards.¹⁴ However, if the grievant desires to challenge the legal adequacy of his post-termination hearing, including any related findings, he must do so with the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁷

Claudia T. Farr
Director

¹³ *Reeves v. Thigpen*, 879 F.Supp. 1153, 1174 (Mid. Dist. Ala. 1995). *See also Garraghty v. Commonwealth of Virginia*, 52 F.3d 1274, 1284 (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.”).

¹⁴ *See* Va. Code § 2.2-3004(F) 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 the hearing. *See* Va. Code §§ 2.2-3005 and 3005. *See also Grievance Procedure Manual* §§ 5.7 and 5.8, pages 14-15, which discuss the authority of the hearing officer and the rules for the hearing, respectively. *See also Detweiler v. Dept. of Rehabilitations Services*, 705 F.2d 557, 560 (4th Cir. 1983) (holding that “the Virginia grievance procedure [affords employees] due process by assuring . . . a post-discharge hearing with an adequate remedy.”).

¹⁵ *See* Va. Code § 2.2-3006(B) and *Grievance Procedure Manual* § 7.3(a), page 20.

¹⁶ *Id.*

¹⁷ Va. Code § 2.2-1001(5).