

Issues: Retaliation, misapplication of policy, workplace harassment, unfair treatment and practices; Hearing Date: 06/26/08; Decision Issued: 07/07/08; Agency: DOC; AHO: John R. Hooe, III, Esq.; Case No. 8854; Outcome: No Relief – Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of : Case No. 8854

Hearing Date: June 26, 2008
Decision Issued: July 7, 2008

PROCEDURAL ISSUE

A pre-hearing conference was conducted by telephone on May 29, 2008 at 10:00 a.m. with the Grievant, the Agency's Advocate and the Hearing Officer participating. At that time, it was agreed that the hearing would be conducted on June 26, 2008 commencing at 10:30 a.m. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and to the other party no later than June 18, 2008. A letter notice was sent by the Hearing Officer dated May 29, 2008 reciting the above, with the letter being mailed to the Agency's Advocate and to the Grievant at the address confirmed to be correct by the Grievant.

The Hearing Officer received from the Grievant a fax on June 18, 2008 with two pages attached, the first titled "List of Evidence" and the other titled "List of Witnesses for the Hearing". The Grievant's faxed pages did not indicate that the Grievant had provided a copy to the Agency's Advocate and did not request the Hearing Officer to issue any orders.

On June 18, 2008 the Agency's Advocate provided the Hearing Officer with a letter indicating the witnesses the Agency would call and the document they intended to introduce as evidence, a copy of which was already in the possession of the Grievant. The Agency's Advocate's letter to the Hearing Officer indicated that a copy of the correspondence was provided to the Grievant.

The Grievant telephoned the Hearing Officer during the week of June 23, 2008 and advised that the Grievant had not received the evidence she had requested by her fax on June 18, 2008. She also inquired if the Hearing Officer had ordered her witnesses to appear at the hearing. The Hearing Officer at that time advised the Grievant that the Grievant had not requested the Hearing Officer to order any witnesses to appear or to order that any documents be produced. The Hearing Officer further advised the Grievant that he could not further discuss the matter with the Grievant and that the Grievant should appear at the hearing with her witnesses and any evidence she intended to introduce.

On the hearing date the Grievant did not appear at the agreed upon commencement

time of 10:30 a.m. The Agency Representative and Advocate and a number of potential Agency witnesses were present at 10:30 a.m. The Hearing Officer delayed commencing the hearing until 10:40 a.m. when the Grievant arrived.

Upon the Grievant's arrival, the Hearing Officer commenced the hearing. Upon commencing the hearing, the Hearing Officer confirmed that the Grievant had not provided the Agency a copy of any exhibits the Grievant intended to introduce or with the list of witnesses the Grievant intended to call. Upon the Agency's motion to dismiss the grievance, the Hearing Officer asked the Grievant if the Grievant wished to proceed with the hearing with her testimony for the Hearing Officer to consider but without the other witnesses and documentary evidence being available. At that time the Grievant declined to go forward with the hearing.

APPEARANCES

Grievant
Advocate for Grievant
Representative for Agency
Agency Advocate

ISSUE

1. Was the Grievant's failure to comply with the requirements agreed upon during the pre-hearing conference and as set out in the Hearing Officer's letter dated May 29, 2008 and her failure to go forward with her testimony grounds to dismiss her grievance?
2. If the grievance was not dismissed on the procedural issues set out above, was the Grievant entitled to the relief sought in the grievance of June 19, 2007 which was qualified for hearing?

FINDINGS OF FACT

The grievance filed on June 19, 2007 was timely filed and qualified for a hearing. The grievance alleging a "violation of due process" because of a delay in an investigation regarding an allegation of misconduct by the Grievant. The Grievant asserted claims of misapplication of policy, unfair treatment and practices, workplace harassment and retaliation for a grievance the Grievant had filed in December 2005.

During the pre-hearing telephone conference, the hearing date, time and location were agreed upon and the procedures to be followed were discussed and agreed upon. The Hearing Officer's letter dated May 29, 2008 was mailed to the Agency's Advocate and to the Grievant.

The Grievant's mailing address was confirmed by the Hearing Officer during the pre-hearing conference. The Hearing Officer's letter mailed to the Grievant was not returned to the Hearing Officer.

Upon arriving at the hearing, the Grievant denied that she had received the Hearing Officer's letter but confirmed again that her mailing address used by the Hearing Officer was correct. The Grievant further denied that the procedures to be followed were discussed during the pre-hearing telephone conference. The Grievant asserted that the Hearing Officer told her that he would order the evidence to be produced as set out in the Grievant's "List of Evidence" and that he would order the witnesses to appear as set out in the Grievant's "List of Witnesses for the Hearing".

The Grievant further stated at the commencement of the hearing that because the Grievant was not provided with the evidence set out on the Grievant's list and because the witnesses she listed had not been ordered by the Hearing Officer to attend the hearing, she chose not to go forward with her testimony at the hearing.

APPLICABLE LAW AND OPINION

In disciplinary actions and dismissals from unsatisfactory performance, the Agency must present its evidence first and must show by preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the Grievant must present evidence first and must prove the Grievant's claim by a preponderance of the evidence. Rules for Conducting Grievance Hearings, IV. The Hearing, C. (Department of Employee Dispute Resolution).

In the matter before the Hearing Officer, the Grievant had the burden of presenting evidence first and proving the Grievant's claim by a preponderance of the evidence. The Grievant at hearing elected not to go forward with the hearing.

DECISION

The grievance is hereby **DISMISSED** in that the Grievant did not present evidence to be considered by the Hearing Officer.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

John R. Hooe, III
Hearing Officer