

Issue: Misapplication of Policy (compensation and ADA); Hearing Date: 08/11/08; Decision Issued: 08/12/08; Agency: VITA; AHO: William S. Davidson, Esq.; Case No. 8910; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **AHO Reconsideration Request received 09/12/08; Reconsideration Decisions issued 09/15/08 and 09/23/08; Outcome: Untimely – Original decision affirmed;** **Administrative Review:** **EDR Admin Review request received 08/28/08; Outcome pending;** **Administrative Review:** **DHRM Admin Review request received 08/28/08; Outcome pending.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8910

Hearing Date: August 11, 2008
Decision Issued: August 12, 2008

PROCEDURAL HISTORY

The Grievant, on February 9, 2007, initiated an Employee Grievance Procedure for denial of a pay increase and for failure to comply with ADA. The Grievant alleged that the denial of a monetary increase was based on the results of her Performance Evaluation where guidelines issued by the Department of Human Resource Management (“DHRM”) for such evaluation were not followed.

Pursuant to the Grievant’s initiation of this grievance procedure, on July 11, 2008, the Department of Employment Dispute Resolution (“EDR”) assigned this Appeal to a Hearing Officer. On August 11, 2008, a hearing was held at the Agency’s location.

APPEARANCES

Grievant
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether the Grievant was improperly denied a pay increase based on a Performance Evaluation that did not follow the guidelines issued by DHRM.
2. Whether the Agency failed to comply with ADA.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency’s disciplinary action. Implicit in the Hearing Officer’s statutory authority is the ability to

independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and should give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

Inasmuch as this grievance did not involve a disciplinary action or a dismissal for unsatisfactory performance, the burden of proof is on the Grievant to show by a preponderance of the evidence that the actions taken by the Agency were not warranted or appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections, only eight (8) of which contained documents, and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing ten (10) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

The Grievant testified on her own behalf and called no other witnesses. The Grievant complained of the Agency's failure to provide her with a pay increase which was based on a finding on her Performance Evaluation that she was "below contributor."¹ The Grievant offered no concrete evidence, other than her personal opinion, that the findings in the Performance Evaluation were inaccurate. The Grievant testified at some length that she had considerable problems with a Manager at the Agency and the Agency's testimony was that they moved the Grievant away from that Manager and placed her under a new Manager. The Grievant

¹ Agency Exhibit 1, Tab 4, Pages 5-7

acknowledged that, in the time frame of the Performance Evaluation, she received two (2) Group I Written Notices for Unsatisfactory Performance.² The Grievant grieved each of them and the Agency's position was sustained in each of those grievances. Clearly, pursuant to the receipt of the Group I Written Notices, the Grievant was on Notice that the Agency felt that her job performance was unsatisfactory.

The Grievant testified that she did not receive a timely notice of her Performance Evaluation. The Performance Evaluation was for the time frame of November 1, 2005 through October 31, 2006. From November 1, 2005 through December 9, 2005, and from July 27, 2006 to date, the Grievant was and continues to be on either short term disability or long term disability. Accordingly, the Grievant was not at the Agency when the Performance Evaluation was performed during the month of September, 2006. While it might have been the best practice to mail the Performance Evaluation to the Grievant in September, 2006, the Agency witness testified that this was not done as the Grievant was on short term and long term disability for stress and depression at work and it was felt best to deliver that by hand when she returned to work.

DHRM Policy 1.40- Performance Planning and Evaluation defines a "below contributor" rating.³ To receive a "below contributor" rating, an employee must have received at least one (1) documented Notice of Improvement Needed/Substandard Performance form within the performance cycle. A Written Notice that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "below contributor." Not only was the Grievant provided with two (2) Written Notices but the Agency met with her and established a plan of performance to help her in no longer being a "below contributor" employee.⁴

The Grievant did not meet her burden of proof to show by a preponderance of the evidence that the Agency's actions were inappropriate or unwarranted. Indeed, the Grievant's own testimony, the evidence contained in Grievant's Exhibit 1, the Agency's testimony and the evidence contained in Agency's Exhibit 1 clearly established that the Agency did all that it possibly could to assist this Grievant and her work performance clearly continued to be substandard.

The Grievant offered no evidence at all regarding a failure to comply with ADA. Accordingly, the Hearing Officer finds that the Grievant has not borne her burden of proof on that issue.

DECISION

² Agency Exhibit 1, Tab 7, Pages 1-2

³ Agency Exhibit 1, Tab 5, Page 1

⁴ Agency Exhibit 1, Tab 4, Pages 1-5

For reasons stated herein, the Hearing Officer finds that the Grievant did not meet the burden of proof to establish that the Agency's actions were inappropriate or unwarranted and, accordingly, the Agency's action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main Street, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁵ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶

⁵An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

William S. Davidson
Hearing Officer

judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8910

Hearing Date:	August 11, 2008
Decision Issued:	August 12, 2008
Reconsideration Request Received:	September 12, 2008
Response to Reconsideration:	September 15, 2008

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request 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**. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. 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. ⁷ (Emphasis added)

OPINION

The Grievant seeks reconsideration of the Hearing Officer's decision based on new evidence and that the Decision is inconsistent with [DHRM] Policy.

AUTHORITY OF HEARING OFFICER

As stated in the original Decision by the Hearing Officer, Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall

⁷ §7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

DECISION

The Hearing Officer's Decision in this matter was issued on August 12, 2008 and was mailed to the Grievant on that date. The Grievant's Appeal for Reconsideration was received by the Hearing Officer on Friday, September 12, 2008, which is thirty-one (31) days after the Hearing Officer's Decision was issued. Pursuant to VII(A) of the Rules for Conducting Grievance Hearings and Section 7.2(a) of the Grievance Procedure Manual, the Grievant must request a review by the Hearing Officer within fifteen (15) calendar days of the date of the original hearing Decision. In the Hearing Officer's original Decision which was issued on August 12, 2008, at page four (4), under Appeal Rights, the Grievant was put on Notice that any Administrative Review Request had to be filed within fifteen (15) calendar days from the date that the Decision was issued.

Accordingly, the Grievant is out of compliance and the Hearing Officer is not empowered nor required to review his Decision.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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101 North 14th Street, 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁸ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

William S. Davidson
Hearing Officer

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⁹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8910

Hearing Date:	August 11, 2008
Decision Issued:	August 12, 2008
Reconsideration Request Received:	September 12, 2008
Response to Reconsideration Request:	September 15, 2008
Second Reconsideration Request Received:	September 22, 2008
Response to Reconsideration Request:	September 23, 2008

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request 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**. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.¹⁰ (Emphasis added)

OPINION

The Grievant seeks a second reconsideration of the Hearing Officer's decision based on new evidence and that the Decision is inconsistent with [DHRM] Policy.

AUTHORITY OF HEARING OFFICER

As stated in the original Decision by the Hearing Officer, Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified

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termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

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DECISION

The Hearing Officer’s Decision in this matter was issued on August 12, 2008 and was mailed to the Grievant on that date. The Grievant’s Appeal for Reconsideration was received by the Hearing Officer on Friday, September 12, 2008, which is thirty-one (31) days after the Hearing Officer’s Decision was issued. Pursuant to VII(A) of the Rules for Conducting Grievance Hearings and Section 7.2(a) of the Grievance Procedure Manual, the Grievant must request a review by the Hearing Officer within fifteen (15) calendar days of the date of the original hearing Decision. In the Hearing Officer’s original Decision which was issued on August 12, 2008, at page four (4), under Appeal Rights, the Grievant was put on Notice that any Administrative Review Request had to be filed within fifteen (15) calendar days from the date that the Decision was issued.

Upon receipt of the Hearing Officer’s first denial of the Grievant’s first request for reconsideration in this matter, the Grievant informed EDR that she had faxed her request for reconsideration to the Hearing Officer on the same date that she had faxed that document to EDR. Pursuant to the Hearing Officer’s request, the Grievant provided the Hearing Officer with the fax confirmation page for the fax that she had sent to the Hearing Officer. That document clearly indicates under “result,” that the “document jammed.” In looking at her own fax confirmation page, it should have been clear to the Grievant that the fax did not go through and was not received by the Hearing Officer. It should be noted; that the Grievant waited until 4:48 p.m. on the last available date to ask for reconsideration, that her own fax machine indicated that the “document jammed”; that she did not call the Hearing Officer to find out if, in fact, he had received the document, that she did not re-send the document, and that she never followed up with a hard copy of her request for reconsideration.

The rules are quite clear in this matter. The Hearing Officer must receive the request for reconsideration within fifteen (15) calendar days of the date of the original Decision. That clock does not stop because a “jammed” fax was sent, it only stops when in fact the Hearing Officer receives the request for reconsideration. The Grievant could have phoned the Hearing Officer’s office to inquire as to whether or not the fax had been received, the Grievant could have delivered a hard copy to the Hearing Officer, the Grievant could have e-mailed a copy to the Hearing Officer or the Grievant could have mailed a hard copy of the request with sufficient time for it to have reached the Hearing Officer on a timely basis. The Grievant availed herself of none of these remedies and, instead, waited until the last moment to send her request for reconsideration and failed to observe her own fax machine’s confirmation indicating that the

document had “jammed.” The Grievant has failed to comply with the requirement of providing the Hearing Officer with a written request for reconsideration within fifteen (15) calendar days of the date of the original hearing Decision.

Accordingly, the Grievant is out of compliance and the Hearing Officer is not empowered nor required to review his Decision.

APPEAL RIGHTS

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Hearing Officer

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