

Issues: Group II Written Notice (disruptive behavior), Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions), Termination, Arbitrary/Capricious Performance Evaluation, Retaliation (grievance activity); Hearing Date: 04/15/11; Decision Issued: 07/11/11; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9537, 9538, 9539; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 07/25/11; EDR Ruling No. 2012-3050 issued 09/08/11; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 07/25/11; DHRM letter issued 09/16/11 declining to review; **Judicial Review**: Appealed to Richmond Circuit Court; Outcome: Hearing Officer's decision affirmed (12/13/11).



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9537 / 9538 / 9539**

Hearing Date: April 15, 2011  
Decision Issued: July 11, 2011

**PROCEDURAL HISTORY**

On November 17, 2010, Grievant filed a grievance alleging that the Agency's evaluation of her work performance was arbitrary or capricious. On November 29, 2010, Grievant received a Group II Written Notice for failure to follow instructions, disruptive behavior, and unsatisfactory work performance. On December 7, 2010, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions. On December 7, 2010, Grievant received another Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 2, 2011, the EDR Director issued Ruling Numbers 2011-2883, 2011-2884, and 2011-2885 consolidating the grievances for one hearing. On March 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for April 7, 2011. The Hearing Officer found just cause to extend the timeframe for issuing a decision the hearing had to be rescheduled for April 15, 2011.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate

Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Grievant's performance evaluation was arbitrary or capricious?
6. Whether the Agency retaliated against Grievant.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievant has the burden of proving that the Agency's evaluation of her was arbitrary or capricious, and that the Agency retaliated against her. 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:

Virginia Commonwealth University employed Grievant as an Administrative Assistant until her removal effective December 7, 2010. She had been employed by the Agency for approximately 19 years.

Grievant reported to the Supervisor who reported to the Director. In July 2010, Grievant continued to report to the Supervisor but received her daily assignments from the Assistant Professor.

Grievant had prior active disciplinary action. On March 23, 2010, Grievant received a Group I Written Notice for disruptive behavior. Grievant was instructed by the Supervisor:

My expectations are that you will consistently display good relations with our external and internal associates and your coworkers and that you will convey and demonstrate a positive attitude. In addition, you are expected to follow the competencies and measures listed in your EWP, such as:

- Communicates respectfully to internal and external customers.
- Responds to and resolves day to day issues in a professional manner. Acts as first contact for the department; maintains professional and friendly attitudes in interactions.
- Works well with staff through the university and school districts.<sup>1</sup>

The Supervisor believed that Grievant was not doing her work adequately. In June 2010 the Supervisor met with Grievant and told Grievant that the Supervisor had written a counseling memorandum about Grievant's work performance. As the Supervisor discussed the counseling memo, Grievant interrupted the Supervisor and demanded specific examples of Grievant's behavior. At some point, Grievant said that she would not take this anymore, left the meeting, and slammed the Supervisor's door. Grievant then complained to the Dean about the Supervisor. The Supervisor and Agency managers concluded that the Supervisor would remain Grievant's supervisor except that the Assistant Professor would supervise Grievant with respect to Grievant's daily work tasks.

In July 2010, Grievant was instructed to call the Assistant Professor and the Supervisor from Grievant's office phone in the morning when Grievant arrived at work. They did not discuss what procedure Grievant was to follow if the Assistant Professor was out of the country. In August 2010, Grievant stopped calling the Supervisor but continued to call the Assistant Professor. The Assistant Professor was out of the country from November 12 through November 19, 2010. When Grievant arrived at work, she called the Assistant Professor's telephone and left a voice message saying she was at work. Grievant did not call the Supervisor.

The Supervisor believed that Grievant did not remember things that needed to be done from one year to the next. The Assistant Professor suggested that they put up a white board in the office where Grievant and faculty would see it. In August 2010, the Assistant Professor instructed Grievant to write on the white board recurring faculty events, responsibilities, and deadlines. This included listing conferences that faculty were attending and deadlines relating to the conferences. Grievant was instructed to update the information shown on the white board. By the end of October 2010, the Assistant Professor told the Supervisor that Grievant did not seem to be able to finish writing faculty tasks and deadlines on the white board. Grievant was given until November 3, 2010 to complete the assignment. When Grievant could not complete the

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<sup>1</sup> Agency Exhibit 7.

assignment by November 3, 2010, she was given until November 12, 2010. On November 12, 2010, Grievant told the Supervisor that she had completed the assignment. The Supervisor looked at the white board and realized that Grievant had not finished the assignment. Information that the Supervisor had asked Grievant to write on the white board had not been written on the white board. The Supervisor instructed Grievant to go to each faculty member's office, ask each faculty member about conference dates and student activities, and then write those dates on the white board. The Supervisor later asked faculty members if Grievant had met with them. The faculty members responded that Grievant had not met with them. On November 29, 2010, the Supervisor asked Grievant if she had met with the faculty. Grievant responded that the faculty were seldom in their offices. The Supervisor knew that this was not true because the department had faculty meetings on Tuesdays. The Supervisor instructed Grievant to meet with faculty the following day, Tuesday, November 30, 2010. All faculty members were working in the office on November 30, 2010. On December 1, 2010, the Supervisor confirmed that Grievant had not met with the faculty on November 30, 2010.

Employees with the Agency received annual performance evaluations. Employees were evaluated regarding their Core Responsibilities and received an overall rating. Possible ratings included: Extraordinary Achiever, High Achiever, Achiever, Fair Performer, and Unsatisfactory Performer.

On October 19, 2010, the Supervisor presented Grievant with a Notice of Improvement Needed.<sup>2</sup>

On October 19, 2010, the Supervisor presented Grievant and annual performance evaluation. For the Core Responsibility of "Assist department chair, faculty, and students", the Supervisor rated Grievant's performance as "Unsatisfactory Performer". The Supervisor listed 26 examples of Grievant's work performance. The Supervisor concluded:

Over the years, I have worked with [Grievant], trying to explain what I want. After repeated oral discussions with her, I added written details about my expectations, the dimensions of my evaluation of her performance and my assessment of that performance. The combination of oral instruction, written instruction and special, added supervision should have provided [Grievant] with all the assistance an employee can reasonably expect and a clear direction about improvement. In my judgment, the extraordinary investment of SOEA in [Grievant] has not been matched by improvement in her performance.

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<sup>2</sup> The Agency's issuance of a Notice of Improvement Needed should have been issued earlier in the performance cycle. Because it was issued on the day of the evaluation, it does not form a basis to permit the Agency to give Grievant an evaluation with an overall rating equivalent to "Below Contributor". Because Grievant received a Group I Written Notice during the performance cycle, however, the Supervisor had a basis to evaluate Grievant's work performance at the equivalent of "Below Contributor".

[Grievant] works hard to help students. She is friendly and responsive. Unfortunately, she sometimes gives mis-information and continues to advise students despite having been instructed not to serve as a faculty advisor.

For the Core Responsibility of "Information Manager" the Supervisor rated Grievant's work performance as "Unsatisfactory Performer". The Supervisor gave two examples of Grievant's work performance. For the Core Responsibility of "Customer Service", the Supervisor gave Grievant a rating of "Fair Performer". The Supervisor provided three examples of Grievant's work performance. For the Core Responsibility of "Personnel Manager" the Supervisor gave Grievant a rating of "Unsatisfactory Performer". The Supervisor provided six examples of Grievant's work performance.

The Supervisor gave Grievant an "Overall Rating" of "Unsatisfactory Performer" and provided "Overall Comments":

This is not performance expected of an employee who is responsible for the clerical and managerial support of a major unit within the University. I believe that continuing [Grievant] in the position she occupies is having a deleterious effect on the Department, the faculty, students and likely, the other support personnel. [Dr. M] has been exemplary in her assistance to [Grievant] but the issue is not the relation between [Dr. M] or vice versa. It is instead the effect of continuing [Grievant] in her current behavior. [Grievant's] chronic unresponsiveness, mistakes and inattention to her duties are damaging the work of the Department, its professors and its students.<sup>3</sup>

Grievant appealed the Supervisor's evaluation of her to the Director who was also the Reviewer. The Director obtained documentation from Grievant and from the Supervisor. He spent approximately two days reviewing each of the 37 examples listed by the Supervisor and reviewing the documentation provided by Grievant and the Supervisor to determine whether Grievant was properly evaluated for each Core Responsibility. He received assistance from the Human Resource Director who joined him in conducting the review. The Director also reviewed Grievant's prior evaluations.

For seven of the examples, the Director could not make a decision and believed they were "very close". Of the remaining 30 examples, the Director concluded that 17 were favorable to Grievant and 13 were unfavorable to Grievant. He decided to increase the rating from Unsatisfactory Performer to "Fair Performer". He believed his authority was limited to increasing the rating by only one level.

The Director was not obligated to meet with Grievant to explain his analysis of how he decided to increase the performance rating. He decided to do so as a courtesy to Grievant.

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<sup>3</sup> Grievant Exhibit 4.

On November 16, 2010, Grievant met with the Director in the Director's office. The office had two doors at opposite ends and a table with chairs in the middle. Grievant and the Director sat in two chairs at the table. They were sitting side by side. The Director showed Grievant his revised draft performance evaluation. The Director explained to Grievant what he had done and how he had reached his decision. Grievant believed that she should be rated a High Achiever. The Director told Grievant that he did not have the authority to raise her rating to that level. Grievant became upset. Grievant alleged that the Director and the Supervisor were engaged in a conspiracy against her. The Director told Grievant that he was not involved in a conspiracy because his rating would enable her to remain employed by the Agency. Grievant refused to accept the Director's decision. She pointed out that she had been an employee of the Agency for 19 years and had never been given such a low rating. The Director told Grievant that he could not increase her rating any higher. Grievant got up from her seat and backed up against the wall. Grievant began screaming at the Director. She was panting and rubbing her chest. Grievant engaged in this behavior for several minutes. Ms. G was working in her office area on the other side of the door and could hear Grievant shouting. Grievant sat down next to the Director and they continued their discussion. Grievant continued to allege a conspiracy and that the Supervisor lied all the time. Her behavior was "very animated". The Director became concerned that he was within closed doors and did not have a witness regarding Grievant's behavior. He became concerned for his own safety. The Director said for Grievant to sit for a minute while he went next door and brought Ms. G into the room so that Grievant could tell her that she was part a conspiracy against Grievant. Grievant grabbed her papers and walked out the other door. As she was leaving, the Director said that the meeting was not over but Grievant disregarded the Director's comments and left.

The meeting lasted approximately 20 minutes. The Director is soft-spoken and did not raise his voice during the meeting. He did not take any action that would have provoked Grievant's response.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>4</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

### Group II Written Notice – Disruptive Behavior

The Agency contends that Grievant engaged in inappropriate behavior on November 16, 2010 when she accused the Director of being part of a conspiracy and

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<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

accused the Supervisor of lying. Grievant's comments, however, constitute protected speech under *Va. Code 2.2-3000* which provides, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Grievant's other behavior that day was not protected.

Grievant's behavior with respect to panting and rubbing her chest and screaming at the Director was not protected activity. Grievant's behavior was disruptive. Grievant was so loud that she could be overheard by Ms. G in an adjoining room with the closed door. Grievant's behavior was so unusual and animated that Grievant upset the Director and caused him some concern for his own safety. The Agency has presented sufficient evidence to show the Grievant engaged in disruptive behavior on November 16, 2010.

DHRM Policy 1.60 provides:

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the **same offense** in his/her personnel file.

On March 23, 2010, Grievant received a Group I Written Notice for failure to follow instructions, disruptive behavior, and unsatisfactory work performance. On November 16, 2010, Grievant engaged in disruptive behavior. Because this was her second offense for disruptive behavior, the Agency could elevate the disciplinary action from a Group I offense to a Group II offense.

#### Group II Written Notice – Meet with Faculty

Failure to follow a supervisor's instruction is a Group II offense.<sup>5</sup> The Supervisor instructed Grievant to go to the office of each faculty member, obtain information from each faculty member regarding significant conference dates and student activities, and then write that information on the white board. Grievant failed to meet with faculty as instructed. On November 29, 2010, Grievant was reminded of the instruction. On November 30, 2010, faculty were in the office but Grievant failed to meet with any faculty. The agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

#### Group II Written Notice – Calling the Supervisor

The Agency contends the Grievant should receive a Group II Written Notice for failing to call the Supervisor during the week of November 12 through November 19, 2010. The Agency contends that Grievant should have called the Supervisor because the Assistant Professor was out of the country. The Agency's argument fails. Although the original instruction may have been for Grievant to call the Assistant Professor and to call the Supervisor, Grievant stopped calling the Supervisor in August 2010 without

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<sup>5</sup> See, Attachment A, DHRM Policy 1.60.



objection from the Supervisor. In July 2010, Grievant, the Assistant Professor, and the Supervisor did not discuss how Grievant was to respond when the Assistant Professor was out of the country. During the week of November 12 through November 19, 2010, Grievant continued to call the Assistant Professor to leave a voice message to establish the time Grievant had reported to work. Grievant complied with the instruction as she understood it and there is no basis for the Agency to take disciplinary action against her. The Group II Written Notice must be reversed.

### Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has received two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

### Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>7</sup> (2) suffered a materially adverse action<sup>8</sup>; and (3) a causal link exists between the adverse action and

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<sup>6</sup> Va. Code § 2.2-3005.

<sup>7</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>8</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the “materially adverse” standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>9</sup>

Grievant argued that the Supervisor retaliated against her because of the Supervisor's "increasing frustration for my being able to assert myself due to my no longer being financially obligated to her." The evidence showed that in November 2009 the Supervisor gave Grievant a gift of approximately \$2000 because Grievant was experiencing financial hardship. Grievant repaid the money even though the Supervisor did not expect repayment. This created some conflict between Grievant and the Supervisor.

Grievant engaged in protective activity by filing a grievance. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a connection between her protective activity and the materially adverse action. The evidence showed that the Agency took disciplinary action against Grievant because of her behavior. The Agency did not take disciplinary action against Grievant because of the gift made by the Supervisor to Grievant and 2009. Grievant has not established that the Agency retaliated against her.

#### Arbitrary or Capricious Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

The Supervisor thoroughly reviewed Grievant's work performance during the performance cycle. She relied upon sufficient facts to form a reasoned basis to evaluate Grievant's work performance. The Director reviewed the facts surrounding the Supervisor's assessment of Grievant's work performance. He issued a reevaluation that was based on appropriate facts and a reasoned basis.

Although the Director fully evaluated Grievant's work performance he incorrectly concluded that his authority was limited to increasing Grievant's overall rating by one level. The Director increased Grievant's overall rating to "Fair Performer" and

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<sup>9</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

disregarded the possibility that her rating could be “Extraordinary Achiever”, “High Achiever”, or “Achiever”.

Under DHRM Policy 1.40, a Reviewer is:

The supervisor of an employee’s immediate supervisor, or another person designated to review an employee’s work description, performance plan, performance rating and who responds to appeals of performance ratings.

The Reviewer’s role is:

The reviewer must review the performance plan and performance evaluation sections of the evaluation form before they are presented to the employee. If the reviewer does not agree with the evaluation, the reviewer should discuss the disagreements with the supervisor. The reviewer has the authority to change the employee’s evaluation. In addition, agencies may determine if higher levels of management may change the evaluation. This decision should be documented in the agency’s Salary Administration Plan.

If the reviewer is unable to review either section of an employee’s evaluation form, the next higher level of management should conduct the review.

DHRM Policy 1.40 describes Appeals as follows:

If an employee disagrees with an evaluation and cannot resolve the disagreement with the supervisor, the employee may appeal to the reviewer for another review of the evaluation.

Agencies may develop their own appeals process for reconsideration of employee evaluations. The appeals process should be documented within the Agency Salary Administration Plan.

Any appeal process must provide for the appeal to be made in writing to the reviewer within 10 workdays of the initial performance meeting.

A Reviewer’s Action on appeal is as follows:

The reviewer should discuss an employee’s appeal with the supervisor and employee. After discussion of the appeal, the reviewer should provide the employee with a written response within five (5) workdays of receiving it.

The response should indicate one of the following:

- the reviewer agrees with the evaluation;
- the supervisor will revise the evaluation;
- the supervisor will complete a new evaluation;
- the reviewer will revise the evaluation; or

- the reviewer will complete a new evaluation.

DHRM Policy 1.40 does not restrict the Reviewer's authority to increasing a rating by only one step. Neither party presented an Agency policy establishing that restriction. Because the Director completed his reevaluation using an incorrect assumption, the reevaluation is arbitrary and capricious. The Agency must repeat the reevaluation without the assumption that the Reviewer is limited to increasing Grievant's rating by one level.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for disruptive behavior is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction regarding meeting with faculty is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failing to call the Supervisor is **reversed**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

Grievant's request for relief from alleged retaliation is **denied**.

The Agency is **ordered** to repeat Grievant's evaluation from the point it failed to comply with DHRM Policy 1.40. The Agency's Reviewer must reevaluate Grievant's work performance without the assumption that Grievant's rating can only increase by one level.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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  
600 East Main St. STE 301  
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 all of your appeals 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 review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.<sup>10</sup>

[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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

September 16, 2011

[Grievant's attorney]

RE: **[Grievant] v. Virginia Commonwealth University**  
**Case No. 9537, 9538, 9539**

Dear [Attorney]:

The Agency head, Ms. Sara Wilson, has directed that I respond to this request for an administrative review of the hearing decision in the above referenced case. Please note that a hearing officer's original decision is subject to three types of administrative review, and an appealing party may file an administrative review request within 15 calendar days of the date the original hearing decision is issued if any or all of the following apply:

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 decision.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resource Management (DHRM). This request must refer 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.
3. A challenge to the hearing decision does not comply with the grievance procedure is made to Director of the Department of Employment Dispute Resolution. This request must state the specific requirement of the grievance procedure that 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.

In reference to item no. 2 above, in accordance with the grievance procedure, the grievant has failed to identify with which policy, either state or agency, the hearing decision is inconsistent. It appears that the issues the grievant raised are related to her disagreement with how the evidence was assessed and the outcome of the hearing rather than an inconsistent application of policy. Therefore, we must respectfully decline to honor this request.

Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services

October 4, 2011

[Grievant's Attorney]

RE: **[Grievant] v. Virginia Commonwealth University**  
**Case No. 9537, 9538, 9539**

Dear [Attorney]:

The Agency head, Ms. Sara Wilson, has directed that I respond to your request for an administrative review of the ruling issued by the Director of the Department of Employment Dispute Resolution (EDR) (No. 2012-3050). Please be reminded that this Department responded by letter dated September 16, 2011 to your original request for an administrative review. In that correspondence, we advised you that the grievant failed to identify any human resource management policy that the hearing officer's original decision violated. In your request dated September 20, 2011, you identified issues that you deem to be in violation of the Department of Employment Dispute Resolution's Manual and that agency's *Employee Code of Conduct*. The review of these issues is beyond the purview of this Department because the subject matter is not related to any human resource management policy.

You also raised the a concern that the hearing officer and the EDR failed to consider all the probative evidence which you feel would have supported a finding of retaliation. Please be informed that this Agency has no authority to intervene in evidentiary issues.

Therefore, as stated in our earlier correspondence, we have no basis to interfere with the application of this decision and we respectfully decline to honor this request.

Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services

*Virginia:*

*In the Circuit Court of the City of Richmond, John Marshall Courts Building*

..... Appellant  
v. CL11-4774  
VIRGINIA COMMONWEALTH UNIVERSITY Appellee

**ORDER**

The parties, by counsel, appeared on December 12, 2011 for argument on the appeal.

Upon its review, the court finds no decision of the hearing officers identified by the grievant that is contradictory to law.

It is, therefore, ORDERED that the decision of the hearing officer is affirmed. The grievant's objections are noted.

Copies of this order are mailed this day to counsel of record.

ENTER: 12/13/11

  
Judge

