

Issue: Administrative Review of Hearing Officer's decision in Case No. 10005; Ruling
Date: April 12, 2013; Ruling No. 2013-3568; Agency: Department of Alcoholic
Beverage Control; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Alcoholic Beverage Control
Ruling Number 2013-3568
April 12, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10005. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10005, as found by the Hearing Officer, are as follows:¹

The Department of Alcoholic Beverage Control employs Grievant as an Assistant Special Agent in Charge (ASAC) in Region S. He began serving as Assistant Special Agent in Charge in 2006. He held position number 362.

Each region is headed by a Special Agent in Charge (SAC). The Assistant Special Agent in Charge reports to the Special Agent in Charge.

The Agency began a reorganization process. Agency managers created a new regional office, merged two offices, downgraded a regional office to a satellite office and moved staff to accomplish Agency objectives.

SAC S was the SAC in charge of Region S and held position number 43. Grievant reported to SAC S. In December 2011, the Agency asked SAC S to serve in a new role focusing on outreach to the alcoholic beverage industry and training newer members of the unit. The Bureau Director wanted SAC S to serve in the new position because of his experience and favorable work history. SAC S agreed to the transfer and he began working in another office as part of the Agency’s headquarters. If SAC S had not agreed to the transfer, the Bureau Director would not have

¹ Decision of Hearing Officer, Case No. 10005 (“Hearing Decision”), March 8, 2013, at 2-3.

transferred him. In December 2011, Grievant was temporarily elevated from the ASAC position to the Acting SAC position in Region S. He retained his position number 362. At that time, the Enforcement Division Director informed Grievant that the S region SAC position “would be posted in the near future and that he would have an opportunity to apply for the position on a permanent basis.”

Grievant’s work performance as Acting SAC was without complaint from the Agency. He was able to perform the duties of the SAC position while also performing the duties of the ASAC. He performed both jobs well. He was highly regarded by his subordinates in Region S.

The Bureau Director went to Region L to observe a roll call meeting at the firing range involving SAC T and his subordinates. The Bureau Director observed how the special agents were interacting with SAC T. He observed what he considered “strained relations” between SAC T and the special agents. He saw special agents “rolling their eyes” when SAC T was speaking to them. He observed several special agents displaying “close body language” towards SAC T. His observation was consistent with what he had observed previously when visiting Region L. The Bureau Director concluded he had to intervene. He decided to move SAC T from Region L to Region S.

On July 3, 2012, the Bureau Director met with SAC T for dinner to tell SAC T about the transfer. The Bureau Director asked SAC T how he perceived his relationship with the agents in his region. SAC T said he felt animosity. The Bureau Director said he was glad that SAC T told him that because it was consistent with what the Bureau Director had observed. The Bureau Director said that he wanted to transfer SAC T to Region S so that SAC T could “start over” and move away from the group he had “grown up with”. The Bureau Director asked if SAC T would be willing to consider the transfer and SAC T said “yes.” The Bureau Director considered the transfer to be involuntary because if SAC T had said “no” the Bureau Director intended to transfer SAC T anyway. Later on, SAC T asked the Bureau Director what would have happened if SAC T had said “no” and the Bureau Director told SAC T that he would be transferred anyway.

On July 11, 2012, the Bureau Director met with Grievant and explained why he had made his decision to transfer SAC T. The Bureau Director told Grievant that the Agency would not be posting the position for recruitment and would be transferring SAC T to Region S. Grievant said he was disappointed with the decision and that he was concerned that the Bureau Director had eliminated any potential for Grievant to be promoted.

The Agency limits to 35 miles the driving distance that an employee with a State car can commute. Effective August 1, 2012, SAC T began working at the Region S office which was located more than 60 miles from the Agency's office in Region L. SAC T did not file any forms with the Agency indicating he would park his State car within 35 miles of Region S.

Effective August 10, 2012, the Agency initiated Personnel Action Notices documenting the transfer of

SAC T from position 307 in Region L to position 43 in Region S.
SAC S from position 43 in Region S to the newly created position 164 in the Agency's Headquarters.

Effective August 25, 2012, the Agency removed Grievant's temporary pay. This resulted in a ten percent reduction in Grievant's salary. His position number remained 362. He was neither demoted nor transferred as a result of the Personnel Action Notice.

On July 16, 2012, the grievant initiated a grievance challenging the Agency's failure to post the SAC position.² After the agency denied the grievant's request for qualification, the grievant appealed to EDR, and on December 4, 2012, EDR qualified the grievance for hearing "based on the issue of whether the [a]gency misapplied and/or unfairly applied policy."³ In a hearing decision dated March 8, 2013, the hearing officer denied the grievant's request for relief.⁴ The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁶ In his request for administrative review, the grievant raises a number of challenges to the hearing decision. These challenges are addressed below.

Misapplication of Policy

The majority of the grievant's challenges to the hearing officer's decision assert that the decision is inconsistent with state and agency policy. Specifically, the grievant argues that the

² Hearing Decision at 1.

³ *Id.*

⁴ Hearing Decision at 7.

⁵ Va. Code § 2.2-1202.1(2), (3), and (5).

⁶ See *Grievance Procedure Manual* § 6.4.

agency misapplied or unfairly applied DHRM hiring policy by failing to post or advertise the SAC position, and that the agency misapplied or unfairly applied General Orders 14 and 81. In addition, the grievant appears to assert that the hearing officer erred in not finding the agency's alleged disparate treatment of grievant to be "inconsistent with state and agency policy."

The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

General Order 81

The grievant asserts that the hearing officer erred in finding that the agency's failure to enforce General Order 81 with respect to SAC T had not been qualified for hearing. This argument is without merit. EDR qualified the grievant's claim that the agency violated its transfer policy, General Order 14.⁸ EDR did not qualify the question of whether the agency failed to apply enforce General Order 81 with respect to SAC T, and, indeed, the grievant could not have raised such a claim through the grievance process as it does not "pertain[] directly and personally to [his] own employment."⁹ Accordingly, the hearing officer was correct in finding that he was without jurisdiction to address this issue.¹⁰

FOIA Request

The grievant challenges the agency's having placed "undue and unjustified monetary burdens" on the grievant's rights to inspect agency records under the Virginia Freedom of Information Act ("FOIA"), when the agency allegedly informed the grievant that it would cost over \$3500.00 to review and copy the requested documents. As EDR has no authority to enforce the mandates of FOIA, the grievant must bring any claim regarding FOIA in a court of the appropriate jurisdiction.¹¹

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ EDR Ruling No., 2013-2436; *see also* EDR Ruling No. 2013-3404.

⁹ *See Grievance Procedure Manual* § 2.4.

¹⁰ *See Rules for Conducting Grievance Hearings* at I ("Any challenged management action or issue not qualified cannot be remedied through a hearing A hearing officer may not qualify an issue for hearing.") We note, however, that while the agency's failure to enforce General Order 81 was not qualified for hearing and therefore could not be the subject of a grant of relief, it may nevertheless be relevant to the issue of whether the agency failed to comply with General Order 14 and/or DHRM policy.

¹¹ Section 8.2 of the *Grievance Procedure Manual* provides parties to a grievance with a right to request and receive documents that is independent of any rights under FOIA. As such, after initiating the grievance, the grievant could have requested the documents at issue through the grievance procedure and have sought a noncompliance ruling from this Office in the event he believed the agency's response was incomplete or unreasonable. We further note that during the hearing process, the grievant apparently asked for and received an order for the documents previously requested under FOIA, and that he now appears to concede that the requested documents were produced in compliance with this order, to the extent any such documents existed at the time of his request (although he continues to challenge the agency's failure to produce or maintain appropriate documentation for the transfer).

Due Process

In addition, the grievant also appears to assert that the agency violated his due process rights in allegedly failing to follow policy in transferring SAC T, failing to document more fully the decision to transfer SAC T, and taking inconsistent positions with respect to the transfer. Constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”¹² is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.¹³ While EDR will address claims of due process to the extent they involve the pre- and post-disciplinary notice and hearing protections incorporated by the grievance procedure¹⁴, the issues raised by the grievant regarding the transfer of SAC T do not implicate these concerns. Because these claims raise legal questions falling outside the grievance process, they must be addressed, if at all, through the judicial process.

CONCLUSION AND APPEAL RIGHTS

For all of the reasons set forth above, we will not disturb the hearing officer’s decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁵ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷



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¹² *Davis v. Pak*, 856 F.2d 648, 651 (4th Cir. 1988); *see also* *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’” (citation omitted)); *Garraghty v. Jordon*, 830 F.2d 1295, 1299 (4th Cir. 1987) (“It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.”)

¹³ *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *See, e.g.*, EDR Ruling No. 2013-3572.

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; *see also* *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).