

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10372; Ruling  
Date: February 23, 2015; Ruling No. 2015-4094; Agency: Department of  
Corrections; Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2015-4094  
February 23, 2015

The agency has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 10372. For the reasons set forth below, EDR has no basis to disturb the hearing officer's decision in this case.

FACTS

The grievant was employed by the agency until March 19, 2014, when he was issued a Group II Written Notice and terminated based upon the accumulation of disciplinary actions.<sup>1</sup> Upon receipt of a dismissal grievance initiated by the grievant, EDR appointed a hearing officer to the case, and a hearing ultimately occurred on January 13, 2015. In the January 21, 2015 hearing decision, the Group II Written Notice was rescinded and the grievant was ordered to be reinstated to his former or a substantially equivalent position.<sup>2</sup> The agency does not request administrative review of this portion of the hearing decision.

However, the hearing officer also ordered as follows:

The grievant shall be awarded back pay from March 19, 2014 to January 21, 2015, with the exception of a period of 30 work days. I am imposing this limitation based on the hearing in this matter being postponed indefinitely through the action of the grievant. At no time after the matter was originally scheduled for hearing did he request a prompt hearing. The agency shall be entitled to offset this back pay with the interim earnings of the grievant.<sup>3</sup>

The agency challenges this order and argues that, due to the actions of the grievant and his counsel, the hearing was unreasonably delayed several months. The agency requests that the award of backpay be further limited to cover the period of time from September 9, 2014 through January 21, 2015. The grievant, through counsel, disputes the agency's assertion that he unreasonably delayed the scheduling of the hearing and contends that the hearing officer's decision should be upheld.

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<sup>1</sup> Decision of Hearing Officer, Case No. 10372 ("Hearing Decision"), January 21, 2015, at 1.

<sup>2</sup> *Id.* at 5-6.

<sup>3</sup> *Id.* at 6.

## 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 . . . .”<sup>4</sup> 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 action be correctly taken.<sup>5</sup>

The *Rules for Conducting Grievance Hearings* provide that “[b]ackpay may be awarded, and must be considered, as required by the circumstances of the individual case.”<sup>6</sup> Further, EDR has held that, as a general rule, full back pay (less interim earnings) should be awarded when an employee is reinstated after prevailing at hearing.<sup>7</sup> Simply because the grievant is eligible for back pay, however, does not automatically entitle him to full back pay for the entirety of the reinstatement period.<sup>8</sup> Under the *Grievance Procedure Manual*, the hearing officer may award full, partial, or no back pay.<sup>9</sup> For example, in some cases an agency may be able to show, by a preponderance of the evidence, that the grievant would not have been employed by the agency for all or part of the reinstatement period, regardless of any agency action such as termination. In such cases, an award of full back pay may constitute an inappropriate windfall to the grievant and an inappropriate punitive action against the agency. The amount of back pay, if any, to be awarded in such a situation is within the hearing officer’s discretion, taking into consideration these general principles as applied to the particular facts and circumstances of the case.

In the January 21, 2015 decision, the hearing officer considered the totality of the circumstances of this case and determined that the grievant’s actions caused the hearing to be postponed “indefinitely.”<sup>10</sup> In fact, based upon the information presented to EDR, it appears that the hearing officer ultimately set the date for the hearing without further input from the grievant to confirm his availability. Thus, the hearing officer imposed a deduction of thirty days from the total backpay award granted to the grievant.<sup>11</sup>

In its request for administrative review, the agency argues that because the grievant allowed the case to remain idle for almost eight months without effort to engage with the agency in its attempts to resolve the matter, a deduction of only 30 days from the total backpay award constitutes an unjust reward to the grievant. The agency requests that the grievant’s backpay award be further limited by a period of 126 days total, representing the period of time from his initial agreement to a proposed settlement offer, up until the date of the hearing. However, based upon EDR’s review of the procedural history of this case, we are unable to find that the hearing

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<sup>4</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> *Rules for Conducting Grievance Hearings* § VI(D)(2).

<sup>7</sup> See EDR Ruling Nos. 2013-3390, 2013-3402.

<sup>8</sup> See EDR Ruling No. 2009-2342.

<sup>9</sup> *Grievance Procedure Manual* § 5.9(a).

<sup>10</sup> Hearing Decision at 6.

<sup>11</sup> *Id.*

officer abused his authority or discretion in determining that a deduction of 30 days in the total backpay award was appropriate in this matter. The hearing officer clearly considered the facts of this particular case in granting the backpay award, and such action falls within the scope of his authority.<sup>12</sup> Therefore, we will not disturb the hearing decision on this basis.

#### APPEAL RIGHTS

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.<sup>13</sup> 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.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>12</sup> *Grievance Procedure Manual* § 5.9(a).

<sup>13</sup> *Id.* § 7.2(d).

<sup>14</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).