

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10111; Ruling  
Date: December 11, 2013; Ruling No. 2014-3769; Agency: Virginia Department of  
Health; Outcome: Remanded to AHO.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Department of Health  
Ruling Numbers 2014-3769  
December 11, 2013

The agency 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 10111. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The grievant was employed by the Virginia Department of Health (“agency”).<sup>1</sup> On April 17, 2013, the grievant was issued a Group III Written Notice of disciplinary action with removal for violation of DHRM Policy 1.80, *Workplace Violence*.<sup>2</sup> The grievant timely grieved the disciplinary actions.<sup>3</sup> Prior to the hearing, the parties reached a settlement agreement, subject to review by agency counsel.<sup>4</sup> After the introduction of additional requirements by agency counsel, the parties failed to consummate the agreement.<sup>5</sup> A hearing was subsequently held on October 25, 2013, and on November 4, 2013, the hearing officer issued a decision.<sup>6</sup>

In his decision, the hearing officer stated:

In relationship to the relief which the Hearing Officer may grant, the Hearing Officer feels that the Agreement which the parties reached on or about July 23, 2013, which caused them to instruct the Hearing Officer to dismiss the grievance, probably reached a more equitable decision than the Hearing Officer can reach based on the conflicting testimony that he received. Accordingly, to the extent that the Hearing Officer has this authority, pursuant to Section 5.9(a), of the Grievance Procedure Manual, the Hearing Officer orders that the Agreement, as constituted before the intervention of a third party, be reinstated between the parties with the following changes:

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<sup>1</sup> See Decision of Hearing Officer, Case No. 10111 (“Hearing Decision”), November 4, 2013, at 1.

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1.

1. Whatever back pay, attorney's fees, and/or other benefits granted shall be frozen as of the date of the original Agreement. No additional back pay, no additional benefits, no additional attorney's fees shall be awarded;
2. As an addition to that Agreement, the Hearing Officer orders that the Grievant agree that she shall not seek employment by any means from this Agency for ten (10) years from the date of this Hearing Officer's Decision.

If, and only if, the Grievant does not accept the terms set forth above, then the Hearing Officer rules that, while the testimony before the Hearing Officer was immensely conflicting and while the Hearing Officer had to assign to each witness different levels of believability based on their demeanor and character as they testified, the Hearing Officer did find one witness (AB), who was more reliable and more believable than all others, including the Grievant. This witness worked for the Agency for approximately five (5) months, and reported directly to the Grievant. This witness testified that, in that short time frame, she found working for the Grievant to be frustrating, inconsistent, frightening and chaotic. She further testified that there was a day where the Grievant, with her teeth gritted, screamed at her in a loud and harsh tone of voice, "I do not care that you do not like that I am your supervisor." This type of action caused this witness extreme anxiety while she worked with the Grievant. Indeed, prior to her leaving, she elected to have voluntary surgery for the simple reason that it allowed her to be away from the Grievant. She further testified that the Grievant told her that she was an embarrassment to the Agency. Based on the believability of this witness's testimony, the Hearing Officer finds that the Grievant violated DHRM Policy 1.80. That policy clearly sets forth that such a violation is subject to The Standards of Conduct found in Policy 1.60, and that Policy clearly provides for a termination based on a single event if the Agency deems that termination is the proper remedy.

The Hearing Officer believes that the Agreement between the parties with the two (2) caveats as above-referenced, most likely reaches the best and most equitable settlement between these parties. However, if the Grievant is not willing to accept that Agreement, with those two (2) caveats, then the Hearing Officer specifically finds that, based on the testimony of this one (1) witness, that the Agency has borne its burden of proof in this matter and that termination is the proper remedy.<sup>7</sup>

The agency has now requested administrative review of the hearing decision.

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<sup>7</sup> *Id.* at 4-5.

## 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>8</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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>9</sup>

The agency asserts that the hearing officer acted outside the scope of his authority in granting the grievant the relief provided by the settlement agreement. Section 5.9 of the *Grievance Procedure Manual* provides that “[i]n hearing contesting formal discipline, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless under the record evidence, the agency’s discipline exceeds the limits of reasonableness ....” Thus, once an agency satisfies its burden of showing that misconduct occurred and that its discipline was consistent with law and policy, that action must be upheld, unless the grievant has demonstrated a basis for mitigation. In the absence of such a showing by the grievant, a hearing officer has no authority to alter or amend the disciplinary action.

It appears that in this case, the hearing officer found that the agency had met its burden and that no basis for mitigation existed. Specifically, the hearing officer stated that in the event the grievant failed to accept the earlier settlement agreement, “then the Hearing Officer finds that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice to the Grievant, with termination, was appropriate.”<sup>10</sup> In reaching this conclusion, the hearing officer appears to have rejected any argument that mitigation of the disciplinary action was warranted, although there is no direct discussion of the mitigation standard as applied to the grievant’s case.<sup>11</sup> We appreciate the hearing officer’s desire to reach an equitable result in this matter. However, because he concluded that the disciplinary action was warranted and appropriate under the circumstances, he lacked the authority to grant relief to the grievant and could not direct that the terms of the settlement agreement be honored.<sup>12</sup>

Accordingly, we remand the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any other *new*

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<sup>8</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>9</sup> See *Grievance Procedure Manual* § 6.4(3).

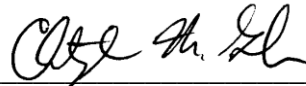
<sup>10</sup> Hearing Decision at 6; see also *id.* at 5 (“However, if the Grievant is not willing to accept that Agreement ... then the Hearing Officer specifically finds that, based on the testimony of this one (1) witness, that the Agency has borne its burden of proof in this matter and that termination is the proper remedy.”)

<sup>11</sup> See Hearing Decision at 5-6.

<sup>12</sup> Whether the hearing officer could issue an order in a decision consistent with the terms of an agreement reached by the parties is not raised here because the parties appear to no longer be in agreement as to any portion of the previously reached settlement.

*matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).<sup>13</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.<sup>14</sup>

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.<sup>15</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>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>



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<sup>13</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>14</sup> See *Grievance Procedure Manual* § 7.2(a).

<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

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

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