

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10332, 10333;  
Ruling Date: July 22, 2014; Ruling No. 2014-3922; Agency: Virginia Polytechnic  
Institute and State University; 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 Polytechnic Institute and State University  
Ruling Number 2014-3922  
July 22, 2014

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 10332/10333. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the Virginia Polytechnic Institute and State University (the “University”) as a Laboratory Specialist Senior.<sup>1</sup> On November 12, 2013, the grievant received an annual evaluation with an overall “Unacceptable Performance” rating.<sup>2</sup> Subsequently, on February 5, 2014, the grievant received a reevaluation, which again rated his performance as unacceptable.<sup>3</sup> He was removed from employment effective February 6, 2014.<sup>4</sup> The grievant timely grieved these management actions and a hearing was held on May 22, 2014.<sup>5</sup>

The hearing officer issued a hearing decision on June 11, 2014.<sup>6</sup> The hearing officer concluded that the University had met its burden of showing that there was sufficient evidence to support the grievant’s “Unacceptable Performance” rating during the reevaluation period, but that the November 12, 2013 evaluation was arbitrary and capricious because it failed to consider the grievant’s performance for the entire performance cycle.<sup>7</sup> The hearing officer directed the University to repeat the annual performance evaluation to consider the grievant’s work prior to April 28, 2013.<sup>8</sup> The grievant has now requested an administrative review by EDR of the hearing officer’s decision.

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<sup>1</sup> Decision of Hearing Officer, Case No. 10332/10333 (“Hearing Decision”), June 11, 2014, at 2.

<sup>2</sup> *Id.* at 1; *see* Agency Exhibit 2.

<sup>3</sup> Hearing Decision at 7-9; *see* Agency Exhibit 12.

<sup>4</sup> Hearing Decision at 1; Agency Exhibit 12 at 1.

<sup>5</sup> Hearing Decision at 1.

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

<sup>7</sup> *Id.* at 10-11.

<sup>8</sup> *Id.* at 11.

## 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>9</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>10</sup>

### *Inconsistency with State and Agency Policy*

The grievant’s request for administrative review asserts that the hearing officer’s decision is inconsistent with state and agency policy, such as, for example, the issue with the dates of the documentation. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>11</sup> The grievant has requested such a review. Accordingly, the grievant’s policy claims will not be addressed in this review.

### *Findings of Fact*

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>13</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant asserts that his unsatisfactory evaluation and reevaluation were arbitrary and capricious because they were based not on his performance, but were instead motivated by another employee’s desire to remove him from employment. Although the grievant disputes the hearing officer’s findings regarding his performance, a review of the record indicates that there is sufficient evidence to support the hearing officer’s conclusion that the grievant’s performance during the period after April 28, 2013 was unacceptable.<sup>14</sup> With respect to the grievant’s allegations regarding the University’s motivation in removing him from employment, the determination of credibility and motive lies squarely within the discretion of the hearing officer. Because the hearing officer’s findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer. Accordingly, EDR will not disturb the hearing decision on these bases.

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<sup>9</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>10</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>11</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>12</sup> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> See, e.g., Agency Exhibits 2, 5-8, 10, 12, 17-18.

CONCLUSION AND 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>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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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<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).