

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10625; Ruling
Date: October 15, 2015; Ruling No. 2016-4231; Agency: Virginia Community
College System; Outcome: Remanded to AHO.



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

ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2016-4231
October 15, 2015

The Virginia Community College System (“College”) 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 10625. For the reasons set forth below, the hearing decision is remanded to the hearing officer for further consideration.

FACTS

The grievant was employed as a senior budget analyst for a community college.¹ On May 19, 2015, the grievant received a Group III Written Notice with termination for unsatisfactory performance and unprofessional conduct.² The grievant grieved the disciplinary action, and a hearing was subsequently held on July 24, 2015.³ On August 26, 2015, the hearing officer issued a decision rescinding the disciplinary action.⁴ The College has now requested administrative review of the hearing officer’s decision.

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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁶

¹ See Decision of Hearing Officer, Case No. 10625 (“Hearing Decision”), August 26, 2015, at 1; Grievant’s Exhibit 2 at 000017.

² See Grievant’s Exhibit 2 at 000022.

³ See Hearing Decision at 1.

⁴ Hearing Decision at 1, 10.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

Hearing Officer Conduct

The College asserts that the hearing officer repeatedly asked a College witness unnecessary and inappropriate questions and failed to give the witness an opportunity to “fully respond.” EDR has thoroughly reviewed the hearing recording and concludes that the hearing officer conducted the hearing in a manner consistent with the grievance procedure, including that portion of the hearing cited by the College in support of this allegation. The College also asserts that the hearing officer failed to give the College an opportunity to cross-examine and impeach the grievant and his witnesses. EDR finds this objection to be wholly without merit, as a review of the hearing recording indicates that the College was provided with an opportunity to conduct an examination of the grievant and both of his witnesses.⁷ Accordingly, the hearing decision will not be disturbed on this basis.⁸

Consideration of Misconduct Charged

The College also challenges the hearing officer’s findings regarding the charges of misconduct against the grievant. The College argues, in part, that the hearing officer erred in concluding that the grievant’s conduct in relation to the submission of the final financial report to the Department of State did not constitute misconduct.⁹ EDR’s review indicates that the hearing officer’s findings of fact regarding the grievant’s communication to the Assistant Budget Director and the responsibility of the program administrator for providing data are based upon record evidence and therefore may not be disturbed.¹⁰ Construed broadly, however, the charges against the grievant also include allegations that the grievant mishandled the submission of the final financial report in July 2014, including failing to advise his supervisor(s) of his intent to submit an incomplete or inaccurate final financial report, submitting an incomplete or inaccurate final financial report, failing to advise his supervisor(s) that the report was incomplete or inaccurate prior to April 2015, and/or asking for his supervisors’ assistance in obtaining additional information from the program administrator.¹¹ As the hearing officer does not appear

⁷ See Hearing Recording, Track 3 at 2:35:19-3:04:01 (College’s cross-examination of the grievant), 3:22:36-3:22:37 (College declining to ask questions of the grievant’s first witness), 3:36:36-3:36:37 (College declining to ask questions of the grievant’s second witness).

⁸ EDR has considered all additional procedural objections raised by the College but has concluded, based on a review of the record, that the hearing officer’s actions were not inconsistent with either the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings*.

⁹ See Hearing Decision at 5-6, 9.

¹⁰ See, e.g., Grievant’s Exhibits 5, 6. The College asserts that it presented evidence contrary to the hearing officer’s findings and argues that the hearing officer should have deferred to the College in her interpretation of the evidence. However, 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.

¹¹ See Agency Exhibit 3 at 1-44, 176-181. With respect to the hearing officer’s finding that the grievant and his staff had advised the Budget Director of the problems with the cost share information starting in 2013 (Hearing Decision at 4), it is unclear from EDR’s review of the record what information the hearing officer relies upon to reach this finding. Further, even in the event the grievant had advised the Budget Director of his difficulties in obtaining the information, the hearing officer does not address whether the Budget Director was aware of the grievant’s intent to submit an incomplete final report or if the grievant sought assistance in obtaining the necessary information. The

to have considered these claims adequately, the hearing decision must be remanded for her to address whether the grievant engaged in misconduct in his handling of the final financial report in July 2014.

Similarly, in addressing the College's allegations regarding the grievant's failure to communicate with his supervisors, the hearing officer has not addressed adequately the claim that the grievant failed to communicate in the manner expected by the College. While the hearing officer notes that she found numerous examples of email communications that include the grievant's supervisors and finds that he discussed the State Department grant with his supervisor in a timely basis in April 2015, she does not 1) discuss adequately the nature of the instruction given to the grievant by his supervisors, 2) address other specific examples of non-communication cited by the College in its documentation (such as the three examples included with the Notice of Intent), or 3) discuss the grievant's role in including his supervisors in the communication (that is, whether the supervisors' inclusion in email communications was the result of the grievant's action or action by someone else).¹² The hearing decision must be remanded on this basis as well, so that the hearing officer may consider whether the grievant's communications were in accordance with the expectations set by the College.

Finally, we note that although the College elected to discipline the grievant's alleged poor performance and unprofessional conduct with a Group III Written Notice, under DHRM Policy 1.60, *Standards of Conduct*, poor performance is generally disciplined at the Group I level, or the Group II level where there has been repeated misconduct.¹³ Because the alleged poor performance cited by the College could potentially serve as a basis for a Group I or Group II Written Notice, the hearing officer should have considered, if she has not done so, whether any of the conduct proved by the College was sufficient to sustain a lower level of discipline.¹⁴ On remand, the hearing officer must also address whether the College has established a sufficient basis for a Group I or Group II Written Notice.¹⁵ In particular, the hearing officer should consider whether the grievant's alleged failure to provide a cost share health report satisfactory to his supervisors was adequate to establish poor performance warranting a Group I or Group II Written Notice. This analysis should include discussion of whether it was necessary for his supervisors to provide specific instruction regarding the report's content, or whether the contents of such a report should have already been known by someone working in the grievant's position and with his knowledge and experience. The hearing officer should also address whether the College presented evidence demonstrating poor performance by the grievant at a Group I or

hearing officer is therefore directed to reconsider her findings regarding the Budget Director's alleged knowledge and to identify the record basis for such findings.

¹² Hearing Decision at 5-6, 9.

¹³ See DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

¹⁴ For example, although an occasional failure to include a supervisor in an email chain or a difficulty in meeting a supervisor's performance expectations may not rise to the level of conduct warranting immediate termination, such actions may in some circumstances be sufficient to warrant a Group I Written Notice.

¹⁵ As the grievant had two active Group I Written Notices and an active Group II Written Notice at the time of his termination, a determination that sufficient misconduct occurred to warrant a Group I Written Notice would presumptively support his termination. See DHRM Policy 1.60, *Standards of Conduct*, § B(2).

Group II level with respect to any other conduct charged in the Notice of Intent and Written Notice.¹⁶

Inconsistency with State and Agency Policy

Fairly read, the College's request for administrative review asserts that the hearing officer's decision is 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.¹⁷ The College has requested such a review. Accordingly, the College's policy claims will not be addressed in this review.

CONCLUSION

For the foregoing reasons, we remand the decision for further consideration consistent with this ruling.¹⁸ Once the hearing officer issues her reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).¹⁹ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.²⁰

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



Christopher M. Grab, Director
Office of Employment Dispute Resolution

¹⁶ We note that to the extent the College argues that the grievant's performance in regard to the Grants Management Report should serve as a basis for the grievant's termination, this matter appears to have been the subject of a previous Group I Written Notice and as such, it may not form the basis of a subsequent disciplinary action. See College Exhibit 5.

¹⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁸ To the extent this ruling does not address any issue raised by the College in its request for administrative review, EDR has thoroughly reviewed the record and has determined either that the issue is not material, in that it has no impact on the result in this case, or that we are unable to assess the issue prior to remand. If, after remand, the College believes that any point not addressed in this ruling is material to the remanded decision, the College may raise its concern in a second administrative review request.

¹⁹ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²⁰ See *Grievance Procedure Manual* § 7.2(a).

²¹ *Id.* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).