Issue: Administrative Review/grievant claims hearing officer considered incorrect issue as qualified issue – imposed burden of proof on grievant – failed to consider mitigating circumstances; Ruling date: June 16, 2005; Ruling #2005-1015; Agency: Virginia State University; Outcome: hearing officer ordered to reconsider decision on issue before him; hearing officer in compliance on all other issues

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia State University
Ruling Number 2005-1015
June 16, 2005

Through her legal counsel, the grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8015. The grievant claims that the hearing officer erred by: (1) considering the issue qualified for hearing to be the grievant's termination, rather than the suspension offered by Virginia State University (VSU or the university) during the management resolution steps; (2) imposing the burden of proof on the grievant rather than the agency; and (3) failing to consider mitigating circumstances. For the reasons discussed below, this Department concludes that the hearing officer failed to comply with the grievance procedure in determining that the issue qualified for hearing was the grievant's termination, but complied with the grievance procedure with respect to the remaining issues raised by the grievant.

FACTS

The grievant was employed by the university's Development office. She also worked for the VSU Foundation as a part-time bookkeeper. An internal audit revealed that the grievant had earned more money from the Foundation for her part-time work than her full-time agency salary, even though the grievant was paid the same hourly rate for both jobs. The university's Board of Visitors then requested a more in-depth audit of the grievant's Foundation earnings. This audit concluded that the grievant overcharged the Foundation for more than 502 hours and that the grievant failed to submit leave forms to the agency for at least 33 hours of time she was performing work for the Foundation.

On January 4, 2005, the university gave the grievant a pre-termination due process letter and a copy of the audit memorandum detailing offenses in 2002 and 2003. The grievant received a Group III Written Notice on January 7, 2005 and was subsequently terminated.

The grievant initiated a grievance challenging her termination on January 21, 2005. Because the grievant elected to use the expedited grievance procedure, the grievance moved immediately to the second-step respondent. Following the second-step

meeting, the second-step respondent issued a written decision, in which she stated that she was "reducing the disciplinary action to a Group III offense with a 30 day suspension and a return to employment to a different department in accordance with the provisions of HR Policy 1.60."

The grievant subsequently advanced her grievance to the agency head for qualification. On the Grievance Form A, the grievant, through her counsel, stated that she was requesting qualification because she did "not agree with [the] decision to impose a 30 days suspension because [she] did not engage in improper conduct." The agency head checked the box on Form A indicating that he was qualifying the grievance for hearing and signed and dated the Form.

The hearing officer held a pre-hearing conference in this matter on February 28, 2005. During the conference, over the objection of counsel for the grievant, the hearing officer ruled that the issue qualified by the agency for hearing was the grievant's termination, rather than the suspension offered by the second-step respondent.

The grievance proceeded to hearing on March 22, 2005. In a decision issued on March 28, 2005, the hearing officer upheld the Group III Written Notice and the grievant's termination. On April 11, 2005, the grievant requested reconsideration by the hearing officer of his decision. The hearing officer subsequently issued a decision dated April 18, 2005, in which he concluded that there was no basis to change his previous decision.

DISCUSSION

By statute, this Department 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."[1] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[2]

Determination of Issues Qualified

The grievant argues that the hearing officer failed to comply with the grievance procedure when he determined that the issue qualified for hearing was the grievant's termination, rather than her suspension. The grievant asserts that the second-step respondent unconditionally modified the agency's disciplinary action to a thirty-day suspension and that it was this action, not the initial termination, on which she requested and received qualification.

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *See Grievance Procedure Manual* § 6.4(3).

Under the grievance procedure, only issues qualified by the agency head, the EDR Director or the Circuit Court may be decided by the hearing officer.[3] The agency states that its understanding was that the grievant's decision to pursue the grievance past the second step voided the second-step respondent's offer of relief, and therefore the only issue before the agency head for qualification was the grievant's termination. While we do not question that this was the agency's belief, there is no rule or requirement in the grievance procedure which provides that continuing a grievance voids relief granted by a step-respondent. An agency may certainly condition an offer of relief on the closing of a grievance, but there is insufficient evidence to support the agency's position that such was the case here. Generally, such a condition should be clearly and unequivocally communicated. Here, the university has failed to present any evidence that it advised the grievant that her termination would be reduced to a suspension *only* if she agreed to close her grievance.

Moreover, this Department has repeatedly held that in qualification decisions, the plain language of the Grievance Form A is determinative. For example, in Ruling No. 2004-611, we held that an agency was bound by having checked the box on the Form A qualifying the grievance for hearing, even though the agency subsequently claimed that the check mark was made in error. Similarly, in Ruling No. 2004-696, we held that a grievant was bound by having checked the box indicating that she was concluding her grievance, even though she asserted that was not her true intent.

The Grievance Form A is of paramount importance during the grievance procedure. Because the grievant, the agencies and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly express their intentions on that document. An inquiry into the subjective intent of the parties beyond that which is clearly and unambiguously expressed on the Form A would be impracticable. Likewise, allowing a party to change his or her original decision as indicated on Form A could be unfair to the opposing party. Therefore, this Department can only rely on the plain language of the Grievance Form A when determining the intent of a party.

Here, the plain language of the Form A indicates that the issue qualified for hearing was the grievant's suspension, not her termination. The second-step response, incorporated by reference into the Grievance Form A, unequivocally states that the step-respondent "is reducing" the discipline to a suspension. Further, when the grievant requested qualification of her grievance for hearing by the agency head on the Form A, she specifically indicated that she was challenging her suspension. The agency head then simply checked the box to qualify the grievance for hearing, without in any way limiting the qualification to the termination, or indicating that he rejected the grievant's request for hearing on her suspension. While we acknowledge the agency's position that it did not intend to qualify only the suspension for hearing, in the interests of fair notice to the

[3] *Rules for Conducting Grievance Hearings,* § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")

grievant, it was incumbent upon the agency to express that intention clearly and unequivocally on the Form A or related attachment.[4]

Issues that have not been qualified by the agency head, this Department, or a circuit court are not before the hearing officer and may not be resolved or remedied.[5] The hearing officer failed to comply with the grievance procedure when he essentially qualified the issue himself by determining that it was the grievant's termination. The only issue qualified by the university was the grievant's suspension, and his authority was limited to that issue. The hearing officer is therefore ordered to reconsider his decision in accordance with this ruling.

Burden of Proof

The grievant also asserts that the hearing officer improperly imposed the burden of proof on the grievant, rather than the agency.[6] Specifically, the grievant argues that the hearing officer erred by drawing "adverse inferences" from the grievant's failure to produce records of her time records for several months, her failure to produce her former supervisor, and the grievant's completion of her own paychecks from the Foundation. Each of these claims is addressed below.

Time Records

In its audit of the grievant's earnings, the university relied on the grievant's own notes of her time worked during the period from 2002 to 2004, which she recorded on the pages of a month-by-month calendar. Although the grievant worked every month during this period, several calendar pages were missing, and therefore the auditors could not review the grievant's time worked for those months. On the basis of the months for which the auditors had records, they determined that the grievant had overcharged the Foundation and failed to submit leave forms to the university. This conclusion led the university to take the disciplinary action challenged in the grievance.

In his decision, the hearing officer noted that several months were missing from the period audited, and that the grievant "did not proffer the records from the missing months." Citing this statement by the hearing officer, the grievant argues that the hearing officer improperly drew an adverse inference against her because of her failure to produce the missing records.

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[4] For example, had the grievant received notice of the agency's position, she could have appealed its qualification decision to this Department before it proceeded to hearing.

[5] *Rules for Conducting Grievance Hearings*, § V.C.

[6] As the grievant correctly notes, because the grievant's claim involved a disciplinary action, the university was required to show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. *Rules for Conducting Grievance Hearings*, § VI.B.

The university bore the burden of showing that its disciplinary action was warranted and appropriate under the circumstances.[7] The hearing officer concluded that the university met this burden on the basis of the audit and the underlying documentation. The records at issue were not relied upon by the university in taking the disciplinary action, but were instead apparently cited by the grievant as potentially exculpatory evidence. The burden of producing such evidence fell to the grievant, not the university. Moreover, there is no evidence that the hearing officer drew an "adverse inference" against the grievant, as that term is used in the *Rules for Conducting Grievance Hearings*,[8] rather than simply observing that the plaintiff failed to produce evidence to challenge the evidence presented by the university in support of its disciplinary action. Under these circumstances, we cannot conclude that the hearing officer failed to comply with the grievance procedure with respect to the missing time records.

Testimony of Former Supervisor and Completion of Paychecks

The grievant also argues that the hearing officer erred by "accept[ing] the credibility" of an affidavit by the grievant's former supervisor over the live testimony of the grievant and another witness, and by drawing an adverse inference against the grievant because of her completion of her own paychecks. Although characterized by the grievant as objections to improper adverse inferences, these challenges simply contest the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and grounds in the record for those findings."[10] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[11] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

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[7] *Rules for Conducting Grievance Hearings*, § VI.B.
[8] *See Rules for Conducting Grievance Hearings*, § V.5.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] Va. Code § 2.2-3005(C)(5).

Mitigation

The grievant also argues that the hearing officer failed to consider mitigating circumstances in determining whether to uphold the disciplinary action taken by the university. While the grievant is correct that a hearing officer is required to *consider* such circumstances,[12] the hearing officer stated in his decision on reconsideration that he in fact considered the length of the grievant's service with the university and her lack of previous disciplinary action in reaching his initial decision, but determined that these circumstances did not warrant mitigation of the disciplinary action. Accordingly, we cannot conclude that the hearing officer failed to comply with the grievance procedure on this issue.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is ordered to reconsider his decision in accordance with this ruling. 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.[13] 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.[14] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[15] This Department's rulings on matters of procedural compliance are final and nonappealable.[16]

Claudia T. Farr
Director

[12] *See Rules for Conducting Grievance Hearings*, § VI.B.
[13] *Grievance Procedure Manual*, § 7.2(d).
[14] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[15] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[16] Va. Code § 2.2-1001 (5).