

Issue: Administrative Review of hearing decision; Ruling Date: January 11, 2006; Ruling #2006-1150; Agency: Virginia Information Technologies Agency; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Information Technologies Agency
Ruling Number 2006-1150
January 11, 2006

The grievant has requested an administrative review of the hearing officer's decision in Case Number 8159.

FACTS

The Virginia Information Technologies Agency (VITA or the agency) employed the grievant as an Information Technology (IT) Specialist I.¹ In this capacity, he provided information technology support to employees of the Virginia Department of Transportation (VDOT).² On June 9, 2005, the agency issued the grievant a Group II Written Notice for misuse of state property, abuse of state time, and failure to follow management instructions regarding personal use of the Internet.³ As this was the grievant's second active Group II Written Notice, he was removed from employment effective June 9th.⁴

The grievant initiated a grievance challenging the agency's actions on June 27, 2005.⁵ After the parties failed to resolve the grievance during the management resolution steps, the agency head qualified the grievance for hearing.⁶ A hearing was held on August 30, 2005, and on August 31, 2005, the hearing officer issued a decision upholding the disciplinary action.⁷

The grievant argues that the agency violated the grievance procedure by not providing a full copy of the grievance record to the hearing officer. He also claims that

¹ Hearing Decision at 3.

² *Id.* at 3 & n. 3.

³ *Id.* at 2.

⁴ *Id.* at 2-3.

⁵ *Id.* at 3 n.2.

⁶ *Id.* at 2.

⁷ *Id.* at 2, 8.

the agency did not comply with Department of Human Resource Management (DHRM) Policy 1.75 in charging him with excessive Internet use.⁸

DISCUSSION

Failure to Provide a Complete Copy of the Grievance Record to the Hearing Officer

The grievant first asserts that the agency violated the grievance procedure by “fail[ing] to forward [his] entire grievance to EDR for review by the hearing officer.” According to the grievant, the hearing officer “had to admit [the grievant’s] second level response” because the agency had not submitted it in conjunction with the rest of the grievance record.

As an initial point, we note that the grievant does not challenge any asserted wrongdoing by the hearing officer. Rather, the grievant concedes that the hearing officer admitted the document in question. Further, the agency had no obligation to provide a copy of the grievance record under the *Grievance Procedure Manual*⁹ or the *Rules for Conducting Grievance Hearings*. While EDR’s publication “Basic Skills for Presenting Your Grievance at Hearing” notes that the agency must provide as an exhibit the Grievance Form A, with all attachments and resolution step responses,¹⁰ this publication is for instructional purposes only and does not supplement or supplant those rules contained in the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*.¹¹ Accordingly, while the best practice would have been for the agency to submit the entire Form A to the hearing officer, the agency’s failure to do so in this instance does not constitute reversible error on the hearing officer’s part, particularly here, where the document in question was indeed admitted to the hearing record.

The Agency’s Alleged Failure to Follow DHRM Policy 1.75

The grievant also argues that the agency failed to comply with DHRM Policy 1.75 in calculating his Internet usage. In particular, the grievant asserts that the agency was required to calculate usage in the manner set forth in hearing decision in Case Number 7928, which involved a Group II Written Notice issued by VDOT to one of its employees.

In substance, the grievant challenges the hearing decision on the grounds that the agency failed to interpret and apply DHRM Policy 1.75 correctly, and that the hearing

⁸ The grievant also alleges that the grieved disciplinary action was discriminatory and retaliatory. These issues were not raised in the Grievance Form A, however, and therefore were not before the hearing officer. See *Grievance Procedure Manual* § 2.4.

⁹ The agency was not required to provide the grievance record to EDR under § 4.3 of the *Grievance Procedure Manual* because that section applies only when the agency head has denied qualification of the grievance for hearing and EDR has been asked to make a subsequent qualification determination. Because the agency head had qualified both grievances, § 4.3 never applied.

¹⁰ *Basic Skills for Presenting Your Case at Hearing*, III.B.1.

¹¹ This Department recognizes the confusion that may have resulted from any inconsistency, however, and will address this issue in future revisions of the *Grievance Procedure Manual*, *Rules for Conducting Grievance Hearings*, and “Basic Skills for Presenting Your Case at Hearing.”

officer erred in upholding the agency's interpretation and application. Such questions of policy interpretation are not for this Department to determine, however. Rather, the Director of the Department of Human Resource Management (DHRM) has the authority to interpret all policies affecting state employees and to assure that hearing decisions are consistent with state policy.¹² In contrast, this Department has the authority to determine whether the hearing officer's findings of misconduct or inappropriate behavior are based upon the material issues and grounds in the record.¹³

In this case, the grievant made a timely request for administrative review by DHRM. On November 4, 2005, DHRM issued a policy ruling in which that agency concluded that there was "no basis to interfere" with the hearing officer's decision. Because DHRM, the agency charged with promulgation and interpretation of state policy, has reviewed the facts of this case and found no misapplication of policy, this Department cannot conclude that the hearing officer failed to comply with the grievance procedure.¹⁴

This Department's rulings on matters of compliance are final and non-appealable.¹⁵

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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸

Claudia T. Farr
Director

¹² Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2).

¹³ Hearing officers are authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings." See Va. Code § 2.2-3005-1(c)(ii) and *Grievance Procedure Manual* § 5.9.

¹⁴ Va. Code § 2.2-1201(13) states that DHRM shall "Develop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies." Section 2.2-1201(13) further states that "The [DHRM] Director of the Department shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies." See also *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

¹⁵ Va. Code 2.2-1001(5).

¹⁶ *Grievance Procedure Manual*, § 7.2(d).

¹⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁸ *Id.* See also *Va. Dept. of State Police vs. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).