

Issue: Administrative Review: Hearing Decision Appeal – Case No. 8531/8532;
Ruling Date: May 9, 2007; Ruling #2007-1635; Agency: Department of Minority
Business Enterprise; Outcome: Hearing Decision not in compliance, remanded to
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling Number 2007-1635
May 9, 2007

The agency has requested that this Department administratively review the hearing decision in Case Nos. 8531 and 8532. For the reasons set forth below, the grievance is remanded to the hearing officer for further consideration in accordance with this ruling.

FACTS

The Department of Minority Business Enterprise (DMBE or the agency) employs the grievant as a Program Administration Specialist I.¹ The relevant facts as set forth in Case Nos. 8531 and 8532 are as follows:

On June 16, 2006, Grievant filed a discrimination complaint with the Office of Equal Employment Services within the Department of Human Resource Management. She alleged discrimination based on race, gender, age, and national origin.

Grievant began reporting to the Supervisor sometime in August 2006.

Grievant applied for a position with the Department of Accounts. On her application for employment, she listed three people as references. One of the questions on the application was, "May we contact your present supervisor?" Grievant responded, "Only if being considered as finalist."

Ms. S was the director of the unit at DOA of the position for which Grievant had applied. Ms. S called Grievant and told her that Grievant as [sic] the sole finalist. Ms. S said she had already contacted Grievant's references but that before DOA could make a job offer, she had to contact

¹ Hearing Decision (Case No. 8531/8532) issued March 26, 2007 ("Hearing Decision") at 2.

Grievant's supervisor. Ms. S told Grievant that she would hope to contact Grievant by the end of the day with a job offer. Ms. S was unable to contact the Supervisor that day.

On October 16, 2006, Ms. S spoke with the Supervisor regarding Grievant's work performance. Ms. S asked about Grievant's customer service skills. The Supervisor's response was favorable. Ms. S asked how the Supervisor would rate Grievant's analysis skills. The Supervisor said "very good." Ms. S asked how the Supervisor would rate Grievant's writing skills. The Supervisor responded, "some difference in English vocabulary to American." Ms. S asked, "[i]f the applicant applied for another job with your agency/company would you hire them?" The Supervisor responded, "No." The Supervisor said that Grievant was an "excellent employee" and "detail oriented" but that Grievant had "filed several EEO complaints". The Supervisor expressed concern about Grievant's interaction with coworkers because Grievant's use of words came across as very harsh and not proper and was counseled. Ms. S asked the Supervisor if she had any comments about Grievant that she would like to share. The Supervisor responded that she would not like to see Grievant leave; that Grievant was very technically capable; had a lot of good experience and initiative.

On October 29, 2006, Grievant filed a grievance with the Agency alleging the Supervisor gave Grievant a "defamatory evaluation of my performance" to Ms. S.

Grievant worked in a small office cube. Her desk formed an "L" shape and provided the boundaries for two side of her work space. When sitting at her desk as if working at the desk, there was a stack of three drawers and three shelves behind her to her right side. The entrance to the office cube was directly behind her and to her left side. Grievant placed a chair in the entrance way leaving only a narrow passage into her office.

On October 30, 2006, the Supervisor walked to Grievant's office cube and walked into Grievant's work area. The Supervisor asked that Grievant remove commas placed in the address line for letters to be mailed. Grievant had developed a template containing commas to enable the commas to be matched appropriately with text automatically generated from the addressee's contact information. To remove the two commas, Grievant would have to re-program the template. The Agency was short-staffed and Grievant had assumed the duties formerly performed by other employees and did not believe she had adequate time to address what she perceived as a minor concern. Grievant asked the Supervisor what Grievant's priorities should be. The Supervisor had handed the two letters to Grievant. Grievant turned towards the cabinet and extended her right

arm and using her right hand tossed the two letters onto a shelf of the stack of cabinets and shelves in her office cube. The shelf was a little bit higher than her eye level. The Supervisor was not in Grievant's direct line of sight then Grievant tossed the letters on the shelf. Grievant placed the letters on the shelf because that was a location where she knew she could find them later.

On November 3, 2006, the Agency's Director sent Ms. S an email stating:

Please contact me ASAP re: grievance I received from [Grievant]. The crux of the grievance is that you told her she was the final candidate for a position in DOA, and that DMBE did something to change your mind. I need to know as soon as possible if she was ever told she was the sole candidate.

Ms. S forwarded the Agency's Director email to a DOA manager who replied on November 3, 2006:

[Grievant] was one of three final candidates of which all references were contacted. However, after [Ms. S] obtained referential information and we sat together and re-evaluated interview responses (both oral and written), experience, qualification, and an appropriate fit for the position. I asked that the position be reposted to determine if more qualified applicants would apply.

On November 6, 2006, the Supervisor presented Grievant with a written counseling memorandum regarding Grievant's behavior on October 30, 2006. The counseling memorandum alleged Grievant refused to make changes to two letters and "also hurled the 2 letters and envelopes towards my person, which landed in the cabinet located behind me."²

In a March 26, 2007 hearing decision, the hearing officer concluded that the agency had retaliated against the grievant and ordered the agency to "refrain from retaliating against Grievant for having filed an EEO complaint."³ The hearing officer also concluded that "[t]he Agency has not presented sufficient evidence to justify its issuance to Grievant of a counseling memorandum" and ordered the agency "to destroy the November 6, 2006 written counseling memorandum along with any copies of that memorandum and to refrain any [sic] taking any further action with respect to that memorandum or the counseling allegations contained therein."⁴

² *Id.* at 2-4 (footnotes omitted).

³ *Id.* at 6.

⁴ *Id.* at 5-6.

The agency timely requested an administrative review of the hearing officer's decision by the Director of the Department of Human Resource Management (DHRM). In a letter dated April 12, 2007, DHRM informed the agency that its request did not present policy issues but rather raised issues "related to how the hearing officer assessed the evidence and the issues he addressed in his decision." As such, the agency's request was forwarded to the Director of EDR for review. Accordingly, this Department did not receive a request for administrative review within the mandated 15 calendar day time period.⁵ However, pursuant to its exclusive statutory authority to establish and interpret the grievance process and "render final decisions on... all matters related to procedural compliance," this Department has long held that a timely request for administrative review initiated with the wrong reviewer will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day.⁶ Accordingly, because the claims now before us were timely received by DHRM, this Department will consider them as timely for purposes of our review.

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."⁷ 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.⁸

Findings and Conclusions with Regard to Retaliation Claim

In analyzing the grievant's retaliation claim, the hearing officer made the following findings of fact: "Ms. S asked, '[i]f the applicant applied for another job with your agency/company would you hire them?' The Supervisor responded, 'No.' The Supervisor said that Grievant was an 'excellent employee' and 'detail oriented' but that Grievant had 'filed several EEO complaints'."⁹ Based on these findings, the hearing officer concluded that "the Supervisor's comment revealed retaliatory intent. If Grievant left the Agency and then reapplied for a position and the Agency refused to re-hire [sic] her because she had filed an EEO complaint, that decision not to re-hire would be contrary to State policy" and "the Agency retaliated against Grievant by mentioning her EEO complaint during a job reference."¹⁰

⁵ See Grievance Procedure Manual § 7.2.

⁶ See Va. Code §2.2-1001(2) and (5) and EDR Ruling Nos. 2006-1383, 2006-1308, 2005-1053, 2003-123, 2003-124, and 2000-131.

⁷ Va. Code § 2.2-1001(2), (3), and (5).

⁸ See Grievance Procedure Manual § 6.4(3).

⁹ Hearing Decision at 3.

¹⁰ Hearing Decision at 5-6.

In its request for administrative review, the agency challenges the hearing officer's statement and conclusion that "[i]f Grievant left the Agency and then reapplied for a position and the Agency refused to rehire [sic] her because she had filed a EEO complaint, that decision not to rehire would be contrary to State Policy."¹¹ The agency claims the hearing officer "imposed a hypothetical set of facts onto the policy in drawing his conclusion" and "[a] hypothetical question cannot be part of the Hearing Officer's conclusions supporting his decision, particularly when the facts of the case do not support the questions posed or the conclusion reached."

In this case, the hearing officer found (and there appears to be no dispute) that the question "[i]f the applicant applied for another job with your agency/company would you hire them" was asked of the Supervisor. The agency's dispute appears to be with how the hearing officer interpreted this question in his hearing decision. In particular, the agency asserts that "[the question] clearly relates to an application from a person already working for the agency (i.e., employee works there now, employee is the applicant, and the question relates to the here and now)." In contrast, the hearing officer appears to interpret the question posed as if the proposed applicant had previously worked for the agency, left that agency, and was seeking to be rehired. However, the debate over whether the question relates to re-hire or hire within the agency is immaterial. In both cases, if the refusal to hire or rehire was based on a filing of EEO complaints, such action would violate policy. Here, the hearing officer finds, based upon record evidence, that the grievant's previous EEO complaints contributed to the Supervisor's negative response regarding the grievant's future employment with the agency (i.e., the Supervisor indicated that she would not hire (or re-hire) the grievant for other positions within the agency because the grievant had filed several EEO complaints) and it is upon this basis that the hearing officer upholds the grievant's claim of retaliation.¹² Thus, we find no error as to this particular objection.

Findings and Conclusions with Regard to the Counseling Memorandum

The agency also challenges the hearing officer's findings and conclusions with regard to the counseling memorandum. More specifically, the agency asserts that:

[t]he decision fails to address the issue of the Grievant's initial refusal/reluctance to make the change requested by the Supervisor which is the central issue of the counseling memorandum. By failing to consider these facts or render an explanation of such consideration, the Hearing Officer failed to satisfy the requirements of the hearing process and his duties thereunder.

¹¹ *Id.* at 5.

¹² Hearing Decision at 5.

The grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision that "contain[s] findings of fact on the material issues and the grounds in the record for those findings."¹³ According to the hearing decision, the Supervisor issued the grievant a counseling memorandum for "refus[ing] to make changes to two letters" and for hurling the two letters and envelopes towards the Supervisor, which landed in the cabinet located behind the Supervisor.¹⁴ In his hearing decision, the hearing officer finds that the counseling memorandum was unwarranted because the agency failed to present sufficient evidence that the grievant hurled the two letters towards the Supervisor. In particular, the hearing officer finds:

Grievant did not throw the letters towards the Supervisor. The cabinet was not located behind the Supervisor, it was located to the Supervisor's right. To the extent Grievant threw the letters it was only a short distance. Grievant tossed the letters onto a shelf of the cabinet rather than rolling her chair close enough to enable her to place the letters on the cabinet.

The Agency has not presented sufficient evidence to justify its issuance to Grievant of a counseling memorandum. Accordingly, the counseling memorandum must be reversed.¹⁵

However, in his conclusion, the hearing officer fails to discuss the allegation that the grievant had refused to make changes to two letters. Accordingly, it is unclear whether this allegation and the evidence presented to support the allegation were considered by the hearing officer when he concluded that the counseling memorandum must be reversed. Therefore, the grievance must be remanded for a determination of whether to uphold the counseling memorandum, in light of the allegation that the grievant had refused to make changes to two letters. This ruling in no way determines that the hearing officer should change the ultimate outcome of his original decision, only that consideration of the agency's evidence with regard to the grievant's refusal to change the letters is warranted. If additional information is required, the hearing officer is directed to reopen the hearing as necessary to take appropriate evidence from the parties.

In addition, the agency challenges the relief ordered by the hearing officer with regard to the counseling memorandum. Specifically, the agency asserts that "[p]rohibiting the agency from using the content of the counseling memorandum in the future effectively prevents the Agency's management from addressing the employee's refusal/reluctance to follow instructions if and when preparing performance evaluations, and when they reasonably believe it appropriate and/or necessary to do so."

As stated above, the hearing officer has not yet addressed all of the allegations contained in the counseling memorandum and as such, his order for relief could change in light of his consideration of this evidence. Accordingly, it would be premature for this

¹³ *Grievance Procedure Manual* § 5.9; see also *Rules for Conducting Grievance Hearings* § V(C).

¹⁴ Hearing Decision at 4.

¹⁵ Hearing Decision at 4-5.

Department to make a determination at this time on whether the relief ordered is in accordance with the grievance procedure rules.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is directed to reconsider and clarify 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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.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

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

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

¹⁸ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).