

Issue: Administrative Review of Hearing Officer's decision in Case No. 8593; Ruling Date: August 2, 2007; Ruling #2007-1729; Agency: Department of Correctional Education; Outcome: Hearing Decision Not In Compliance – Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Correctional Education
Ruling Number 2007-1729
August 2, 2007

The grievant has requested administrative review of the hearing officer's decision in Case Number 8593.¹ For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

In this case, the grievant challenged a portion of his 2005-06 performance evaluation, which rated his overall performance as "Contributor."² However, the grievant received a "Below Contributor" rating on one of the core responsibilities: Administration, Accuracy and Timeliness of Reports ("Administration").³ The grievant initiated a grievance challenging the rating in that one category as arbitrary or capricious, retaliatory, and/or a misapplication or unfair application of policy.⁴ The grievant received no relief during the management steps, but the agency head qualified the grievance for a hearing.

The hearing officer found that the agency rated the grievant "Below Contributor" in Administration because of "observed inadequacies in the Grievant's command of his budget, and that at the end of the fiscal year, the budget was overspent by \$2,000."⁵ In addition, the Assistant Superintendent testified regarding a "continuing problem or delay by the Grievant in completing reports, particularly the various, multiple Memorandums of Understanding the Agency required with cooperating agencies."⁶ As such, the hearing officer upheld the agency action and denied the grievant his requested relief.⁷

¹ The grievant originally requested reconsideration from the hearing officer by a letter of June 6, 2007. However, on June 8, 2007, the grievant also sent a copy of that letter to the Department of Human Resource Management (DHRM), seeking a ruling on administrative review that the hearing decision was inconsistent with policy. DHRM concluded that the grievant had not identified any specific state or agency policies and referred the request to this Department (EDR) without ruling on the merits of the grievant's arguments.

² Decision of Hearing Officer, Case No. 8593, May 31, 2007 ("Hearing Decision"), at 1.

³ *Id.* For ease of reference, this core responsibility will be referred to as "Administration" for purposes of this ruling.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ *Id.* at 2-3.

⁷ *Id.* at 6. The hearing officer affirmed this decision in a Reconsideration Decision issued June 19, 2007.

The grievant has now requested administrative review. The grievant alleges that some witnesses were not present for the hearing. He also states that the Memoranda of Understanding used to evaluate his performance under Administration should have been used to evaluate him under a different core responsibility. The grievant also makes several claims regarding factual issues.

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.”⁸ 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.⁹

Witness Issues

In his request for administrative review, the grievant presents the statement: “When witnesses thumb their noses at the grievance process and don’t show up, its [sic] hard to present evidence to the nexus. This has been the same pattern of behavior as in earlier hearings.”¹⁰ While the details of this argument are unclear, it is apparent that the grievant is raising an issue regarding certain witnesses who failed to appear at hearing. However, no further information is provided about the identity of these witnesses, their potential testimonies, or the importance of such evidence to the grievant’s case. Moreover, there was no statement made during the hearing on the record to indicate what specific argument the grievant might be making at this time.¹¹

A review of the hearing record does indicate that the grievant sought the testimony of at least three witnesses, all of whom were ordered to attend by the hearing officer, but they either did not attend the hearing or were not called as witnesses during the hearing. Of these witnesses, two were employees of the agency. Had the grievant attempted to call these witnesses to testify during the hearing and they failed to appear, there would be an argument that the case ought to be remanded to permit the grievant to examine these witnesses. It is the *agency’s* responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.¹² However, because the hearing record shows that the grievant never attempted to call any of these employees as witnesses during the hearing, never placed any sort of objection or discussion on the record about these witnesses, and has not raised a specific

⁸ Va. Code § 2.2-1001(2), (3), and (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ In a separate letter to the DHRM, the grievant added only that “various witnesses refused to show up for the hearing.”

¹¹ The only discussion about witnesses being absent from this hearing occurred as a preliminary matter at the beginning of the hearing. For instance, the hearing officer mentioned that a particular witness had sent a letter indicating that she was on approved leave and would not be attending the hearing. Hearing Tape 1, Side A, at Counter Nos. 132-92. Another had apparently requested to appear as the first witness in the hearing, *id.*, but she was not called to testify during the hearing. No further objection or discussion was put on the record by the grievant as to the importance of this witness or other particular witnesses.

¹² *Rules for Conducting Grievance Hearings* § III.E.

objection now, there is no basis to re-open the hearing for additional testimony of these witnesses.¹³

Retaliation

Although not specifically raised as an argument by the grievant, the hearing officer applied the incorrect standard in his retaliation discussion. EDR has held that, for purposes of the grievance procedure and grievance hearings, to establish a claim of retaliation, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹⁴ (2) the employee suffered a *materially adverse* action;¹⁵ and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity.¹⁶

In this case, the hearing officer applied an “adverse employment action” standard to the grievant’s claim of retaliation¹⁷ when he should have utilized, consistent with EDR precedent, the materially adverse standard. However, because the hearing officer also found that the grievant failed to establish the element of causation,¹⁸ the error is harmless. As such, there is no reason to remand the grievance for further consideration under the appropriate materially adverse standard. Even under that standard, because the hearing officer found that the grievant failed to sustain his burden on the element of causation, any remand would result in no change to the hearing officer’s decision.

“Improper direction” given to PSTs

The grievant has raised various arguments regarding apparent statements made by management to agency program support technicians (PSTs) that they were not to assist the grievant with administrative duties and, through implication or innuendo, that the grievant’s reinstatement was only temporary.¹⁹ The hearing officer addressed his concerns with these statements and recommended that the agency investigate and prevent any such “improper

¹³ The grievant also could have, but did not, raise an issue of party noncompliance during the hearing phase, upon which EDR could have appropriately ruled.

*Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer’s decision or order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing and **received by EDR** within 15 calendar days of the date of the hearing decision.*

Grievance Procedure Manual § 6.3 (emphasis in original). There is no indication based on the grievant’s submission and the hearing record that this procedure has been followed sufficient to place the issue before EDR.

¹⁴ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b)(4).

¹⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006).

¹⁶ E.g., EDR Ruling No. 2007-1530.

¹⁷ Hearing Decision at 4.

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 3.

direction” and “consider corrective action to stem any such improper activity and interference in the Grievant’s job duties.”²⁰ However, the grievant now claims that the agency’s statements were retaliatory and violated policy. While this might be true, such a claim was not before the hearing officer in this hearing as it was not included on the Grievance Form A. The subject grievance was solely regarding the grievant’s 2005-06 performance evaluation, not an independent claim about instructions given to agency PSTs. As such, the hearing officer appropriately did not rule on the substance of that conduct as an independent claim, but was within his discretion to make a recommendation.²¹

The grievant further argues that the agency’s instruction to the PSTs affected the grievant’s evaluated performance in the 2005-06 performance evaluation. A review of the hearing record does not reveal that any such evidence was presented at hearing linking the alleged lack of PST assistance and the grievant’s performance. Moreover, the hearing officer’s assessment of this evidence is a factual issue. Hearing officers are authorized to make “findings of fact as to the material issues in the case”²² and to determine the grievance based “on the material issues and grounds in the record for those findings.”²³ 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. Based on the evidence in the hearing record, this Department cannot conclude that the hearing officer’s findings or conclusions are unsupported by the hearing record. Consequently, remand is not appropriate on this issue.

Other Factual Issues

In addition to the above, the grievant has raised a number of factual arguments including those regarding budget figures, the agency’s alleged action “to withhold assets,” the grievant’s efforts to obtain budgetary information, and others. The grievant’s arguments address factual assessments made by the hearing officer. However, again, the grievant has not presented any evidence that the hearing officer’s findings or conclusions on these issues were unsupported by the hearing record. As such, this Department cannot substitute its judgment for that of the hearing officer with respect to these findings.

Memoranda of Understanding

The grievant argues that one of the bases on which he was evaluated, the Memoranda of Understanding (MOUs) or Memoranda of Agreement (MOAs), should have been considered under the core responsibility of “Inter-Agency Coordination,” rather than Administration. The Employee Work Profile (EWP) for employees in the grievant’s position contain Assessment Standards that further define the criteria by which an employee’s performance is measured in each core responsibility. In the Assessment Standards, “Reports” is a factor under the core responsibility of Administration, whereas “Memorandum of Understanding,” is a factor under the core responsibility of Inter-Agency Coordination.

²⁰ *Id.* at 6.

²¹ See *Rules for Conducting Grievance Hearings* §§ II, VI(A).

²² Va. Code § 2.2-3005.1(C)(ii).

²³ *Grievance Procedure Manual* § 5.9.

The agency noted under Administration on the grievant's performance evaluation that the grievant had turned in MOAs late and that some required further revisions. As stated, the grievant argues that this was an improper basis on which to evaluate his performance under the core responsibility of Administration because the Assessment Standards contain "Memorandum of Understanding" under Inter-Agency Coordination, not Administration. Based on a review of the hearing record, including the grievant's EWP, this Department agrees. The hearing officer should not have considered the MOUs/MOAs issue in assessing whether the agency's "Below Contributor" rating in Administration was arbitrary or capricious.²⁴

The agency reiterated during the hearing that the reason the grievant was given a "Below Contributor" rating in Administration was based, in part, on the grievant's shortcomings in completing the MOAs.²⁵ However, there was no evidence put on by the agency to establish why the MOAs would be rated under Administration instead of Inter-Agency Coordination.²⁶ One of the agency's witnesses stated that the problem was the timeliness and accuracy of the MOAs, and so the grievant's failures in these areas were evaluated under "Administration, Accuracy and Timeliness of Reports."²⁷ However, this position is not consistent with the agency's previous treatment of the grievant's performance on MOAs. For instance, in his February 13, 2006 letter,²⁸ April 3, 2006 letter,²⁹ and Interim Evaluation,³⁰ the grievant's supervisor assessed the grievant's performance on the MOUs/MOAs under "Inter-Agency Coordination" or "Memorandum of Understanding." In addition, in his September 5, 2006 observation, the grievant's supervisor rated the grievant as "Below Contributor" for "Reports" under "Administration" without discussing the MOUs/MOAs, but specifically indicated that the separate MOU factor, appearing under "Inter-Agency Coordination," was not rated.³¹ Lastly, and perhaps most tellingly, the grievant's performance on MOUs/MOAs was evaluated under the Inter-Agency Coordination core responsibility on the grievant's 2004-05 performance evaluation.³² It would be improper to assess the grievant's performance as to the core responsibility of Administration based on standards that were not part of that core responsibility without evidence regarding why the MOUs/MOAs should be evaluated as reports under Administration rather than under the usual core responsibility of Inter-Agency Coordination. Based on a review of the hearing record, no such evidence was presented.

²⁴ See DHRM Policy 1.40, *Performance Planning and Evaluation* (providing as the definition of "Performance Measures" (i.e., Measures for Core Responsibilities), "Qualitative and/or quantitative standards or measures against which *each core responsibility* ... is assessed.") (emphasis added). This Department recognizes that this determination may involve an application of policy normally reserved for consideration on administrative review by DHRM. However, as stated in footnote 1 above, DHRM has already issued its determination in this case, but did not consider the merits of the grievant's arguments (i.e., whether an agency can evaluate an employee's performance of a core responsibility based on consideration of duties not included within that core responsibility). As such, this Department is forced to make this assumption, based on a logical reading of the policy, to complete this ruling. Pursuant to the grievance procedure, the "hearing decision must be consistent with law and policy." *Grievance Procedure Manual* § 7.1.

²⁵ See, e.g., Hearing Tape 3, Side B, at Counter Nos. 164-200.

²⁶ The agency's advocate suggested during the hearing that MOAs are reports and, therefore, they fall under section 2.2 of the Assessment Standards (Reports) for the core responsibility of Administration. See Hearing Tape 2, Side A, at Counter Nos. 420-73. An advocate's argument is not evidence, however.

²⁷ See Hearing Tape 3, Side B, at Counter Nos. 164-200.

²⁸ Agency Ex. 3.

²⁹ Agency Ex. 4.

³⁰ Agency Ex. 6.

³¹ Agency Ex. 7.

³² Agency Ex. 13.

Because of the foregoing, the grievance must be remanded for further consideration by the hearing officer. The hearing officer is directed to reconsider whether the “Below Contributor” rating given to the grievant on the core responsibility of Administration was arbitrary or capricious. In so doing, the hearing officer shall not consider the grievant’s performance in the area of MOUs/MOAs. This ruling in no way determines that the “Below Contributor” rating should be changed, or that the agency must be ordered to re-evaluate the grievant’s performance. Rather, the hearing officer is required only to reconsider his decision consistent with this ruling.³³

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer must reconsider the “Below Contributor” rating the grievant received on the Administration core responsibility in his 2005-06 performance evaluation. In doing so, the hearing officer must not consider the grievant’s performance of his duties associated with the MOUs/MOAs.

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.³⁴ 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.³⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁶

Claudia T. Farr
Director

³³ The hearing is not to be reopened for either side to present further evidence. The grievant noted in his request for administrative review that he should have been allowed to provide evidence as to the MOUs/MOAs issue. To the extent that the grievant failed to do so at hearing, it was not because the hearing officer disallowed such evidence. Indeed, the hearing officer, upon allowing the agency to ask questions about the MOUs/MOAs over the grievant’s advocate’s objection, specifically stated that he would allow the grievant additional time to present evidence on that issue. *See* Hearing Tape 2, Side A, at Counter Nos. 420-73. As such, the grievant’s choice not to present that evidence at hearing is not an appropriate reason for remand.

³⁴ *Grievance Procedure Manual* § 7.2(d).

³⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³⁶ *Id.*; *see also* Virginia Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).