

Issue: Administrative Review of Case #'s 8257 and 8258/hearing decision appeals; Ruling  
Date: July 14, 2006; Ruling #2006-1338; Agency: Department of Social Services; Outcome:  
hearing officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Social Services  
Ruling Number 2006-1338  
July 14, 2006

The grievant has requested that this Department administratively review the decision in Case Nos. 8257 and 8258. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The grievant was employed by the Department of Social Services (DSS or the agency) as a Human Services Program Manager at the time of her separation from employment.<sup>1</sup> The facts as set forth in Case Nos. 8257 and 8258 are as follows:

On June 28, 2005, grievant submitted to her supervisor a memorandum of resignation and a job offer letter from a private sector company. The resignation was somewhat unusual in that a large portion of the memorandum was devoted to a recitation of grievant's accomplishments. The job offer specified that grievant would have to notify the company of her acceptance by July 15, 2005. Grievant notified her supervisor that her resignation would be effective August 1, 2005, and asked him if he would be interested in making a counter offer to induce her to remain with the agency. She complained that her salary was significantly lower than two other similarly situated employees in the same pay band.

On June 29, 2005, grievant's supervisor prepared and approved paperwork necessary to request a salary Retention counter offer that would increase grievant's salary by 15 percent. The Budget Unit approved the paperwork on June 30, 2005. The supervisor then submitted the paperwork to Human Resources for consideration. On July 5, 2005, the supervisor discussed the request with the Human Resources compensation manager. Both felt that grievant's job offer letter was odd because it did not include any information as to whom or how grievant should contact the company to notify it of her acceptance. The compensation manager noted that the letterhead did not have a telephone number for the company. She checked

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<sup>1</sup> February 17, 2006, Hearing Decision at 2.

on the Internet and found that the company exists and is headquartered in New York City. The compensation manager discussed the situation with the acting Human Resources Director who agreed that the offer letter appeared questionable. As a result, Human Resources decided that it would not approve the request for a salary increase and returned the paperwork to the supervisor "without action" on July 6, 2005.

After this, during the second week of July, the supervisor began necessary steps in anticipation of grievant's impending separation. He forwarded paperwork to human resources to begin the recruitment process to hire a replacement. He also met with grievant's staff and formulated an orderly process to handle grievant's duties until a replacement could be hired. This included the development of a document assigning various responsibilities to certain employees during the transition period. The supervisor asked grievant to review a checklist for close out items and meet with him to reconcile her leave hours.

Grievant was on vacation out of state from July 11 through 22, 2005. During her vacation, her fiancé had proposed to her and they discussed future plans. She and her fiancé determined that they wanted to build a house and, for various personal reasons, he did not want her to take a job that involved extensive travel. Because the job offer involved extensive travel, they determined that grievant should not accept the offer. Although grievant returned from vacation on July 22, 2005, she waited until late on July 27, 2005 to e-mail to her supervisor her request to rescind her resignation. She also spoke with her supervisor that day stating that she would agree to request rescission of her resignation if he would make certain changes in the division, attend mediation, treat her and her staff with more respect, and promise to make an attempt to give her a salary increase.

The supervisor received the e-mail the following morning. He spoke with the Special Advisor to the Commissioner who advised him that the Commissioner had no problem with the supervisor not granting the request to rescind. The Special Advisor also told the supervisor that grievant had told her on July 27, 2005 that she was expecting a job offer for more money than her current salary from a county DSS agency. The Special Advisor concluded from her conversation with grievant that she would probably be leaving soon to take that position. The supervisor then consulted with a human resources manager who advised him not to grant the request to rescind. On that same day, the supervisor responded to grievant by e-mail and by overnight letter to her residence that he would not grant grievant's request to rescind her resignation.

Grievant's subordinates believed that grievant never intended to leave her employment.

The grievant challenged the agency's refusal to accept her attempt to rescind the resignation on the basis that it was done without explanation, retaliatory, arbitrary and capricious, discriminatory, harassing, and demeaning.<sup>2</sup> The hearing officer addressed each of these claims and ultimately found that agency's actions were not improper and within the authority granted to the agency.<sup>3</sup>

### 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."<sup>4</sup> 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.<sup>5</sup>

#### *Findings of Fact*

The grievant complains that the hearing officer erred in his recitation of several facts. For example, she complains that at "no time did the employ [sic] request a counter offer." However, on the grievant's July 29, 2005 Grievance Form A, the grievant concedes that "[o]n June 28, 2005, I discussed the job offer with my supervisor to see if he would be interested in a counter offer, as he did with a previous employee." Thus, while the grievant does not expressly address on the Grievance Form A just who initiated the salary match discussion, it is evident from the grievant's own statement that such a discussion occurred. Moreover, the issue of who initiated this conversation does not appear to have been in any way outcome determinative. Accordingly, assuming without deciding that the hearing officer erred in characterizing the pay increase discussion as having been initiated by the grievant, this Department finds that any such error would have been harmless. The grievant also cites to several other findings as incorrect, which, assuming without deciding they were erroneous, would constitute harmless error, at best.<sup>6</sup>

The grievant also asserts that the hearing officer disregarded certain evidence and testimony. Such a challenge simply contests the hearing officer's findings of disputed fact,

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<sup>2</sup> *Id.*, at 5.

<sup>3</sup> *Id.*, at 9.

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> For example, the grievant appears to take issue with the precise date upon which the request to rescind her resignation was made and/or discussed. Request for Administrative Review, Page 2. However, the exact date that this occurred is simply not dispositive.

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"<sup>7</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>8</sup> By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>9</sup> 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.<sup>10</sup>

#### *Agency's Obligation to Accept Grievant's Request to Rescind her Resignation*

The grievant appears to object to the hearing officer's finding that the agency was not obligated to accept her request to rescind her resignation. Such an objection is properly viewed as a policy based challenge, which was addressed in a May 5, 2006 Department of Human Resource Management administrative review ruling. In the May 5<sup>th</sup> ruling, DHRM affirmed the hearing officer's decision in its entirety.

#### *Agency's Failure to Provide an Explanation for its Refusal to Allow Grievant to Rescind her Resignation*

The grievant challenges the hearing officer's holding that the agency was not required to provide an explanation for rejecting her attempt to rescind her resignation, calling this finding mere conjecture. This claim too is properly viewed as a policy based challenge, that was also addressed in the May 5, 2006 DHRM ruling, which affirmed the hearing decision.

#### *Retaliation*

The grievant also appears to take issue with the hearing officer's findings regarding her retaliation claim, asserting that she clearly suffered an adverse employment action when her request to rescind was denied and that her forewarning that she might use the grievance process was a protected activity. Assuming without deciding the validity of these assertions,

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<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> Va. Code § 2.2-3005(C)(5).

<sup>10</sup> The grievant also takes issue with the way that the hearing officer characterizes certain events. The grievant objects to the hearing officer's use of the language "threatened to leave." Request for Administrative Review, Page 4. The grievant asserts that that "threatened" is an inaccurate portrayal of her actions which she characterizes as simply being "open with her supervisor about applying elsewhere." *Id.* Under the facts of this case, the characterization by the hearing officer that the grievant "threatened to leave" cannot be viewed as error.

the grievant did not contest the hearing officer's conclusion that the grievant did not demonstrate any nexus between her notice that she was contemplating using the grievance process and the agency's failure to accept her resignation. Such a nexus is a required element of a retaliation claim, without which, the claim fails.

*Whether the Agency's Decision to Refuse to Allow the Grievant to Rescind was Arbitrary*

The hearing officer found that the agency's decision to not accept the grievant's request to rescind her resignation was not arbitrary for a number of reasons, including the fact that the grievant's supervisor had tired of her repeated requests for pay increases and that she had threatened to leave on many occasions. The grievant characterizes the finding as "conjecture." The grievant also asserts that she never requested a pay increase in conjunction with her resignation. The grievant's argument fails.

Even assuming for purposes of this ruling only that the finding was based on "conjecture" rather than a permissible inference drawn from the evidence in the case, the hearing officer found that the grievant's supervisor had learned from the Commissioner's office that the grievant was expecting yet another job offer from a county DSS office.<sup>11</sup> This finding alone would appear to be sufficient to allow the hearing officer to conclude that the decision not to allow the grievant to rescind her resignation was not arbitrary.

*Discrimination*

The grievant takes issue with the hearing officer's findings regarding her gender discrimination claim. The hearing officer found that the grievant had not suffered an adverse employment action when the agency refused to allow her to rescind her resignation. The hearing officer also found that the grievant "failed to present any evidence that [the agency's decision to disallow rescission] was based on the grievant's gender." Assuming without deciding that the grievant is correct that she suffered an adverse employment action, the grievant offers only the mere declaration that she "previously showed the agency (supervisor) discriminated against her on an adverse employment action, i.e. involuntary resignation and pay disparity based on job responsibility and performance," to refute the hearing officer's finding that she provided no evidence to link the agency's actions to the grievant's gender. That mere assertion, without more, is insufficient grounds to disturb the hearing officer's decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth below, this Department will not disturb the hearing decision.<sup>12</sup>

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<sup>11</sup> See also Hearing Tape 1, side B, beginning at counter #96.

<sup>12</sup> While not every point raised in the request for administrative review is discussed in this ruling, each has been carefully considered.

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.<sup>13</sup> 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.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>14</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>15</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).