

Issue: Administrative Review of Case #8234, 8236, 8241-R/hearing decision appeals;  
Ruling Date: July 19, 2006; Ruling #2006-1380; Agency: Virginia Information  
Technologies Agency; Outcome: hearing officer in compliance



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

ADMINISTRATIVE REVIEW AND COMPLIANCE  
RULING OF DIRECTOR

In the matter of the Virginia Information Technologies Agency  
Ruling Number 2006-1380  
July 19, 2006

Grievant K has requested that this Department administratively review the hearing officer's reconsideration decision in Case Number 8234 / 8236 / 8241-R. Additionally, Grievant K seeks a compliance ruling on whether the hearing officer appropriately issued his June 8, 2006 reconsideration opinion while there was a pending administrative review request before the Department of Human Resource Management (DHRM) Director.

FACTS

Grievant K is employed by the Virginia Information Technologies Agency (VITA or the agency) as an Information Specialist III.<sup>1</sup> On September 15, 2005, Grievant K received a Group II Written Notice for alleged inappropriate and unacceptable use of the Internet and e-mail and abuse of state time and resources. The grievant grieved the disciplinary action. After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.

A consolidated hearing<sup>2</sup> was held on January 20, 2006, and a written decision was issued on January 26, 2006.<sup>3</sup> In his decision, the hearing officer upheld the discipline against Grievant K.<sup>4</sup> Grievant K subsequently sought an administrative review of the hearing officer's decision from this Department.<sup>5</sup> In her request, Grievant K argued that

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8234 / 8236 / 8241 issued January 26, 2006.

<sup>2</sup> On December 14, 2005, this Department consolidated for hearing Grievant K's grievance with two other grievances initiated by VITA employees (Grievants H and F). See EDR Ruling #'s 2006-1207, 2006-1208, 2006-1209.

<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> See EDR Ruling #'s 2006-1274, 2006-1275, 2006-1276, 2006-1277.

the hearing officer improperly failed to mitigate the discipline against her.<sup>6</sup> In a May 8, 2006 administrative review decision, this Department ordered the hearing officer to reconsider and clarify his January 26<sup>th</sup> decision regarding mitigation.<sup>7</sup>

On June 8, 2006, the hearing officer issued a revised decision in response to this Department's May 8<sup>th</sup> order.<sup>8</sup> In his June 8<sup>th</sup> decision, the hearing officer considered mitigating circumstances and determined that "[t]here is no basis to alter the disciplinary action against Grievant K."<sup>9</sup> The grievant subsequently sought from this Department an administrative review of the hearing officer's June 8<sup>th</sup> decision. In her request, the grievant claims that the hearing officer failed to follow the mitigation guidelines set forth in the grievance procedure and by this Department in its May 8<sup>th</sup> ruling.

## DISCUSSION

### *Compliance Issue*

The grievant claims that the hearing officer erred by issuing his June 8, 2006 revised opinion while there is a pending administrative review request with the Director of DHRM. In support of her claim, the grievant cites to those sections of the grievance procedure statute and manual that address when a hearing officer's decision becomes a final hearing decision. In particular, the grievant claims that when read in conjunction, Va. Code §2.2-3006(C)<sup>10</sup> and *Grievance Procedure Manual* §7.2(d)(2)<sup>11</sup> require the hearing officer to refrain from issuing a revised decision until all requests for administrative review have been issued.

This Department disagrees with the grievant's interpretation of Va. Code § 2.2-3006(C) and *Grievance Procedure Manual* § 7.2(d)(2). Neither of these provisions alone, nor when read in conjunction, forbid a hearing officer from issuing a revised opinion in response to an order from this Department until DHRM has responded to the administrative review request before it. To the contrary, the grievance procedure states that if either EDR or DHRM order the hearing officer to revise his decision, as was the case here, the hearing officer should do so within 15 calendar days of the order.<sup>12</sup> Further, should DHRM order the hearing officer to revise his decision, he would be required to do so and would issue another decision in response to that order.<sup>13</sup> Accordingly, this

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Reconsideration Decision of Hearing Officer, Case No. 8234 / 8236 / 8241-R issued June 8, 2006.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> Va. Code § 2.2-3006(C) states: "[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion and any administrative review and judicial appeal...."

<sup>11</sup> Section 7.2(d)(2) of the *Grievance Procedure Manual* reads as follows: "[a] hearing officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when: (2) [a]ll timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision."

<sup>12</sup> See *Grievance Procedure Manual* § 7.2(c).

<sup>13</sup> *Id.*

Department concludes that the hearing officer complied with the grievance procedure when issuing his June 8<sup>th</sup> revised decision even though there was an outstanding administrative review request before the DHRM Director.

This Department's rulings on matters of compliance are final and nonappealable.<sup>14</sup>

*Administrative Review of June 8, 2006 Hearing Decision*

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>15</sup> In accordance with this exclusive authority, has EDR promulgated the *Grievance Procedure Manual*, which sets forth the rules that govern the grievance procedure. In keeping with the statutory mandate of providing a fair and expeditious<sup>16</sup> dispute resolution process, the *Grievance Procedure Manual* has established a framework to allow for prompt administrative and judicial review of hearing decisions.

The grievant claims that the hearing officer failed to follow the mitigation guidelines set forth in this Department's May 8<sup>th</sup> ruling as well as the grievance procedure manual. The grievant is essentially asking this Department to issue a second administrative review on the same issues explored in our May 8<sup>th</sup> ruling and to find the hearing officer noncompliant with the orders set forth in that ruling.

There is nothing in the grievance procedure that permits this Department to issue yet another administrative review on the issue of mitigation in this particular case. The grievance procedure's appeal framework was never intended to impede administrative reviewers, including the EDR Director, from carrying out their statutory obligations, such as issuing decisions related to procedural compliance. However, if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal. Similarly, the process for seeking implementation of a final hearing decision would be thwarted by the absence of any definitive point at which decisions could be considered final and ripe for petition.<sup>17</sup> Further, as stated above, this Department's May 8<sup>th</sup> ruling directed the hearing officer to

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<sup>14</sup> See Va. Code § 2.2-1001(5).

<sup>15</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>16</sup> See Va. Code § 2.2-3000(A) which states that “the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access under Va. Code § 2.2-3001.”

<sup>17</sup> Va. Code § 2.2-3006 (C) states “[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation.” Section 2.2-3006 (D) states “[e]ither party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer.” Va. Code § 2.2-3006 (D).

reconsider and clarify his January 26<sup>th</sup> decision regarding mitigation.<sup>18</sup> While the grievant may disagree with the hearing officer's conclusions in his June 8<sup>th</sup> reconsideration decision, the hearing officer did reconsider and clarify his earlier decision with regard to the issue of mitigation. As such, it appears that the hearing officer complied with this Department's May 8<sup>th</sup> order. Accordingly, this Department has no basis to rule that the hearing officer erred in his mitigation analysis.

#### APPEAL RIGHTS AND OTHER INFORMATION

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>19</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>20</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>21</sup>

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Claudia T. Farr  
Director

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<sup>18</sup> *Id.*

<sup>19</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>20</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>21</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).