Issue: Administrative Review/hearing officer's decision case #8315; Ruling date: August 7, 2006; Ruling #2006-1383; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: EDR will not disturb hearing officer's decision.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation, and Substance Abuse Services
Ruling Number 2006-1383
August 7, 2006

The grievant, by counsel, has requested that this Department administratively review the hearing officer's decision in Case Number 8315. For the reasons set forth below, we will not disturb the hearing officer's decision in this case.

FACTS

The underlying facts of this case, as set forth in the hearing decision are as follows:

> The Department of Mental Health Mental Retardation and Substance Abuse Services employed Grievant as an Administrative Office Specialist III until her removal effective January 30, 2006. She had been employed by the Agency for approximately two years.
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> In August 2005, Grievant was responsible for entering salary data into the Personnel Management Information System (PMIS). The Virginia Department of Accounts sends reports to agencies identifying discrepancies between entries in the CIPPS and PMIS databases. Grievant received those reports by email from a VDOA employee. Grievant was responsible for making entries in the PMIS system to make sure that system was consistent with CIPPS.
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> On August 25, 2005, an Agency employee received a promotion with a pay increase. Another employee transferred to another position but with a pay increase. In order for the pay increases to be properly recorded, the information was to be entered into the Personnel Management Information System (PMIS). PMIS is an on-line system use [sic] to maintain records for employees. Entries into the system were to be made by staff in the Human Resource department, not the Payroll department at the Agency.
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> On September 10, 2005, the Agency initiated a re-assignment of Grievant from the Human Resource Department to the Training and Staff Development Department of the Facility. Although paperwork was

completed on September 10, 2005, Grievant's duties did not actually change until October 10, 2005. Grievant's new position did not have any responsibility for making entries in PMIS. Another employee began entering information into the PMIS system.

On November 25, 2005, Agency managers realized the entries had not been made into PMIS. This caused the two employees to receive lower salaries than they were otherwise entitled.

On October 11, 2005, the Employee Services Manager sent Grievant an email stating:

> As you may or may not know we have been producing the EWPs for new hire DSAs while they are in training. [Ms. MM] has given me her electronic signature page and a EWP that was acceptable to all trainees. You will find those documents along with the list of new hires for the 9/10, 9/25, and 10/10 classes. I've discussed it with [Ms. E] and we would like for you to produce the EWPs.
>
> All that needs to be done is change the name and work unit on page 1 to correspond with the information provided by [Mr. D]. You will need to print page 1-4 from the EWP and [Ms. MM's] electronic signature page. [Ms. E] will get the EWPs as she will have to sign them and get the employees to sign.

Although no deadline was specified for the task, Grievant knew that EWPs had to be completed within a 30 day period because she had reminded Agency managers that they had not completed an EWP for her when she moved to her new position in the Training and Staff Development Department.

On October 19, 2005, Ms. PB discussed the assignment with Grievant. Ms. BP[sic] later told Grievant she still needed to complete the task.

On October 25, 2005, the Training Manager began supervising Grievant. On December 5, 2005 at 2:40 p.m., the Training Manager told Grievant to clear immediately her desk of all other work and complete the EWPs for the DSAs and have the completed work on the Training Manager's desk by December 6, 2005.

> Grievant did not complete the EWPs on December 5, 2005. She was not at work on December 6, 2005. On later date, another employee completed the work in approximately 35 minutes.
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> On November 29, 2005, Grievant suffered injuries in an automobile collision. She was out of work until December 5, 2005 when she returned to work for the day. She was unable to continue working and was out of work from December 6, 2005 until January 20, 2006.
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> In latter months of 2005, Grievant sought and received approval for educational leave to attend a class offered at a local community college. She completed the class in 2005 and wished to take another class in the Spring 2006 semester. Grievant requested approval to attend the class and obtain educational leave.
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> On January 20, 2006, the HR Director met with Grievant and told Grievant that her request for education leave had not been approved because Grievant had not presented any documents showing she had been admitted into the education program. The HR Director told Grievant, "you know, [Grievant's first name] you can't go to school."
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> On Wednesday, January 25, 2006, Grievant walked to the Training Manager's office and looked through the door window. The Training Manager was talking on the telephone but observed Grievant. The Training Manager gestured to Grievant to hold on until she finished the telephone conversation. Grievant left the Facility and attended her class at a local community college. After the Training Manager finished her telephone conversation, she looked for Grievant but could not find her. The Training Manager went to Grievant's office and asked another employee of Grievant's location. The employee said that Grievant was no longer in the office and had left to attend class.

In his April 24, 2006 decision, the hearing officer rescinded a Group I Written Notice for failing to make entries into the PMIS system, finding that the Grievant's job duties were in transition and she believed another employee was making those entries.[1] He concluded that "The evidence is insufficient for the Hearing Officer to conclude that Grievant knew she retained responsibility for making entries into PMIS for the two employees."[2] However, he upheld two Group II Written Notices. As to the January 24, 2006 Written Notice he found that:

> Grievant was instructed by a supervisor on October 11, 2005 to complete EWPs. This task would not have taken Grievant much time to complete.

[1] April 24, 2006 Hearing decision, p. 5.
[2] *Id.*

> Grievant ignored the instruction. Grievant was reminded of the instruction on October 19, 2005 and Grievant again ignored the instruction. Grievant was instructed on December 5, 2005 to clear her desk and complete the EWPs. Grievant did not clear her desk and begin working on the EWPs. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.[3]

As to the January 30, 2006 Written Notice, the hearing officer found:

> "Leaving the work site during work hours without permission" is a Group II offense. On Wednesday, January 25, 2006, Grievant left the work site without obtaining her supervisor's permission. On the prior Friday, January 20, 2006, the Employee Services Manager specifically told Grievant "you can't go to school." Grievant knew or should have known she was not authorized to leave the Facility during work hours without first obtaining approval from a supervisor. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice for leaving the work site without permission.[4]

On May 8, 2006 the grievant, by counsel, requested that the hearing officer reconsider his decision. In his June 16, 2006 decision, the hearing officer affirmed his earlier decision.

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."[5] 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.[6]

The Hearing Officer's Findings and Conclusions:

The grievant asserts that several critical issues of fact remained unresolved or were not cited. For example, the grievant asserts that the hearing officer never resolved whether the Written Notice issued for Failure to Follow a Supervisor's Instruction encompassed the "alleged instructions" of the training manager. [7] The grievant also points out that she (1) had

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[3] *Id*.
[4] *Id* at page. 6.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] The hearing officer responded to this objection by explaining that "If the Hearing Officer disregards the Training Manager's instruction for the sake of argument, the outcome of his case does not change. The Agency has established that Grievant failed to comply with the original instruction given in October to complete the EWPs." June 16, 2006, Reconsidered Decision, p. 2.

applied for "*Educational Assistance*" as opposed to "*Educational Leave*," (2) had "attended the first part of the subject course in the prior academic semester with the approval of the Agency, even though she had not been granted *Educational Assistance*, and (3) had been allowed to use educational leave in the prior semester to offset her hours away from work. The hearing officer reconsidered these and four other findings, and concluded that there was no reason to modify his decision.[8]

In this case, grievant's objections are primarily challenges to the hearing officer's findings of disputed fact, 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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. Such is the case here, thus, this Department has no reason to remand the decision.

Perjury:

The grievant asserts a witness committed perjury at the hearing. This Department consistently held that a request for a rehearing or reopening cannot be granted except in extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process. Virginia Court opinions are instructive as to the issues of perjury and the hearing process. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.[11] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process

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[8] The hearing officer explained that:

> [I]t is irrelevant whether she was seeking Educational Assistance or Educational Leave. Grievant was specifically told by the HR Director that she could not go to school. In order to vary from that instruction, Grievant would have had to obtain approval from the HR Director or the Training Manager. Although Grievant attempted to speak with the Training Manager who was on the telephone, Grievant did not wait until the Training Manager completed her call; instead, Grievant left the Facility without any authorization to do so. Grievant falsely asserts that she could have used personal leave to account for her absences. In light of the HR Director's instruction that Grievant could not go to school, Grievant was not authorized to disregard that instruction and use personal leave. Implicit in the HR Director's instruction is the message that no leave would be authorized to exit the Facility to attend class. *Id.*

[9] Va. Code § 2.2-3005.1(C)(ii).

[10] *Grievance Procedure Manual* § 5.9.

[11] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

indefinitely, and thus hinder a needed finality to litigation. Under the rationale of those courts, the grievant's claims of changed evidence or perjury, coming after the hearing decision has been issued, would not warrant reopening. Indeed, the grievant had the opportunity at her hearing to question the agency witness about the alleged inconsistencies in her testimony, and to attempt to ferret out any perjury at that time. Furthermore, the hearing officer addressed this very issue and listened to the recording grievant proffered that allegedly proved the perjury. He found:

> (1) the recording is of poor quality, (2) it is not always clear who is speaking, (3) many of the words spoken by the HR Director during that meeting cannot be discerned, and (4) to the extent words can be discerned from the recording, the fact that so many other words are indiscernible renders the context and meaning of the discernible words unreliable. Accordingly, the recording does not provide a basis upon which the Hearing Officer can determine whether the HR Director falsified her testimony during the hearing.[12]

Accordingly, we likewise conclude that there is no clear evidence of extreme circumstances or fraud such as to warrant a rehearing.

The Grievant's Failure to Complete the EWP Task Did Not Rise to the Level of a Group II:

The grievant's final argument is that the grievant's failure to complete the EWP task should have been appropriately charged as a Group I for poor performance rather than a Group II for failure to follow a supervisor's instruction. The grievant notes that she was never given a deadline to complete the task.

The hearing officer addressed this issue in his reconsidered decision and found that:

> Although Grievant was not given a specific deadline, Grievant knew the EWPs had to be completed within 30 days. Grievant did not complete the EWPs within 30 days of the initial assignment. Indeed, there is no reason to believe she <u>ever</u> intended to complete the EWPs. Accordingly, Grievant failed to follow a supervisor's instruction to complete EWPs.[13]

As a matter of non-compliance with the grievance procedure, we find no reason to disturb the hearing decision. To the extent that the grievant seeks to argue that the hearing decision is inconsistent with policy, such a challenge is not an issue for this Department to address. Rather, the Director (or her designee) of the Department of Human Resource Management (DHRM) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency

[12] June 16, 2006, Reconsideration Opinion, pp. 2-3. The recording proffered by the grievant was of the January 20, 2006 meeting between the Grievant and the HR Director.
[13] *Id.* at 2, (emphasis in original).

policy.[14] If the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14th Street, 12th Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

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.[15] **If the grievant does not appeal to the DHRM Director as described above, the decision will become a final decision 15 days from the date of this decision.**

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.[16] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[17] This Department's rulings on matters of procedural compliance are final and nonappealable.[18]

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Claudia T. Farr
Director

[14] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2).
[15] *Grievance Procedure Manual*, § 7.2(d).
[16] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[17] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).
[18] Va. Code § 2.2-1001 (5).