

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8658;  
Ruling Date: November 16, 2007; Ruling #2008-1842; Agency: State Board of  
Elections; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of the State Board of Elections

Ruling Number 2008-1842

November 16, 2007

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8658. For the reasons set forth below, the decision is remanded to the hearing officer for further review and clarification, and for revision consistent with this ruling.

FACTS

The grievant is a manager with SBE. On April 9, 2007, the grievant initiated a grievance challenging the agency's alleged retaliatory and harassing behavior. When the agency failed to qualify the grievance for hearing, the grievant requested a qualification ruling from this Department. This Department qualified the grievance for hearing and a hearing was subsequently held on September 17, 2007. In an October 2, 2007 hearing decision, the hearing officer found that the agency's actions were retaliatory and harassing and as such, ordered the following relief: (1) the agency is to provide the grievant with either her old office or sufficient office space to properly perform the duties assigned to her; (2) the grievant, for purposes of the overall organizational structure of SBE, is to report directly to the Deputy Secretary and not to the Confidential Policy Advisor; and (3) the agency is to create an environment free from discrimination and/or retaliation.<sup>1</sup>

On October 15, 2007, the agency requested an administrative review of the hearing officer's decision by this Department. In its request, the agency asserts that the hearing officer's order for relief exceeded his authority.

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

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8658 ("Hearing Decision"), issued October 2, 2007.

decisions...on all matters related to procedural compliance with the grievance procedure.”<sup>2</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>3</sup>

Under the *Rules for Conducting Grievance Hearings (Rules)*, “[i]f the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence.”<sup>4</sup> The *Rules* further state that “[t]he hearing officer should avoid providing specific remedies that would unduly interfere with management’s prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices).”<sup>5</sup>

The agency asserts that the hearing officer’s orders to (1) give the grievant her old office “or sufficient office space to properly perform the duties that have been assigned to her;” and (2) change the grievant’s reporting relationship so that she reports directly to the Deputy Secretary rather than the Confidential Policy Advisor are outside the bounds of his authority under the grievance procedure.<sup>6</sup> The agency’s objections to the hearing officer’s orders will be discussed in turn below.

#### *Hearing Officer’s Order Regarding Office Space*

In this case, after finding that the agency moved the grievant to a smaller office was harassing and done in retaliation for her prior grievance activity,<sup>7</sup> the hearing officer ordered

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

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

<sup>4</sup> *Rules for Conducting Grievance Hearings* § VI(C)(3).

<sup>5</sup> *Id.*

<sup>6</sup> More specifically, the agency contends that pursuant to *Grievance Procedure Manual* § 5.9(b), a hearing officer cannot transfer or direct assignment of an employee nor can he direct the methods, means or personnel by which work activities are to be carried out. The agency further challenges the hearing officer’s order for relief as inappropriate because the relief ordered was not relief requested by the grievant on the Form A. A hearing officer, however, is not limited to the specific relief requested by the grievant on the Form A. Rather, a hearing officer can order any relief so long as the relief ordered is consistent with law and policy. See *Rules for Conducting Grievance Hearings* § VI(A).

<sup>7</sup> In his decision, the hearing officer finds:

Here, the Grievant filed previous grievances, which is a protected activity. The Grievant was moved from a larger office to a smaller office, fellow employees were told by management at the Agency to not work with the Grievant, a member of the Grievant’s staff was moved with no input from the Grievant, she was given additional duties, the organizational chart was changed for no apparent reason to have the Grievant report to a Confidential Policy Advisor and management told other employees that some of their problems were caused by the filing of the Grievant’s prior grievances. All of this resulted in a materially adverse reaction [sic]. The Hearing Officer finds that there is a causal link between these two (2) when considering the testimony of the former Agency head and her apparent disgust that the Grievant would have the audacity to file a grievance and, when comparing the conflict in the testimony between the Agency witnesses, indicating that the move was justified because it put the Grievant closer to

the agency to return the grievant to her former office or to an office that would allow the grievant to perform her assigned duties.<sup>8</sup> Despite SBE's assertion to the contrary, this is not a case where the hearing officer has acted as a "super-personnel officer" and interfered with management's prerogatives to manage the agency by ordering a change to the grievant's office location. The hearing officer in this case found that the agency's action of moving the grievant to a smaller office was harassing and done in retaliation for her previous grievance activity. As such, the hearing officer ordered relief that would essentially correct this retaliatory and improper act and return the grievant to the status quo prior to the retaliatory act; specifically to the same or another office that would allow the grievant to perform her duties. This corrective relief and return to the status quo is precisely the type of relief contemplated by the grievance procedure and the *Rules for Conducting Grievance Hearings*.<sup>9</sup> Accordingly, this Department cannot conclude that the hearing officer exceeded his authority when he ordered that the grievant be moved from her current office to either her old office or to an objectively similar office.

It should be noted however that the hearing officer's order with regard to office space does not have to remain in place indefinitely. As stated above, the hearing officer has ordered that the grievant be moved to another office to correct a previous harassing and retaliatory act of the agency. This does not mean that the agency is barred from changing the grievant's office space in the future for legitimate non-retaliatory reasons.

#### *Hearing Officer's Order Regarding Grievant's Reporting Relationship*

As stated above, the hearing officer found that "the organizational chart was changed for no apparent reason to have the Grievant report to a Confidential Policy Advisor."<sup>10</sup> Upon a finding of retaliation, he ordered that the grievant's reporting relationship be changed so that she reports directly to the Deputy Secretary instead of the Confidential Policy Advisor.<sup>11</sup> The hearing decision is unclear, however, as to whether by ordering the grievant to report to the Deputy Secretary, the hearing officer was attempting to return the line of report to the way it was prior to the agency's harassing and retaliatory act of requiring the grievant to report to the

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her Supervisor and that would improve her performance as she worked better with close supervision, with the Grievant's witness testimony that indicated this was simply not true. The Hearing Officer was impressed that the second ranking person in this Agency disputed the Agency's position regarding this issue. Further, the Agency admits that it negatively commented on the Grievant's prior grievances in staff meetings and in Agency e-mail. Hearing Decision at 7 (footnotes omitted).

<sup>8</sup> See Hearing Decision at 7.

<sup>9</sup> See *Rules for Conducting Grievance Hearings* § VI(C)(3); see also, e.g., *Id.*, § VI(A) (a hearing officer has the power to reinstate a wrongly terminated employee); § VI(C)(1) (if the hearing officer finds that policy has been misapplied and/or unfairly applied, he may order the agency to "reapply the policy from the point at which it became tainted"); § VI(C)(2) (if the hearing officer finds an agency's assessment of an employee's performance to be arbitrary and capricious, he may order the agency to repeat the evaluation process); EDR Ruling #2007-1530 (determining that hearing officer acted within his authority when he ordered that the grievant be returned to his previous position upon finding that the grievant had been transferred out of retaliation for his previous grievance activity).

<sup>10</sup> Hearing Decision at 7.

<sup>11</sup> *Id.*

Confidential Policy Advisor (i.e., returning things to “status quo”) or whether he was ordering that the grievant report to someone new in order to remedy the harassing and retaliatory behavior of the agency. To the extent the hearing officer was merely returning things to the “status quo,” as stated above, such relief would be entirely appropriate and consistent with the grievance procedure and the *Rules for Conducting Grievance Hearings*. To the extent the hearing officer’s order was not intended to return things to the “status quo” but was an order that the grievant report to a particular individual and thereby creating a new reporting relationship, this would be outside the bounds of his authority to order (although he could recommend such an action). Accordingly, the decision is remanded to the hearing officer for further clarification as to this issue. We note too, that similar to the issue of office space, any such order on returning the reporting line to the status quo does not have to remain in place indefinitely. The agency may always change reporting lines for legitimate non-retaliatory reasons.

#### CONCLUSION AND APPEAL RIGHTS

The decision is remanded to the hearing officer for clarification regarding his order that the grievant report to the Deputy Secretary rather than the Confidential Policy Advisor. 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 DHRM, the hearing officer has issued a revised decision.<sup>12</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>13</sup> (However, an agency must request and receive approval from the EDR Director before filing a notice of appeal). Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>14</sup>

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Claudia T. Farr  
Director

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

<sup>13</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>14</sup> *Id.*; see also *Virginia Dep’t of State Police vs. Barton*, 39 Va. App. 439, 445, 573 S.E. 2d 319, 322 (2002).