

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8655;  
Ruling Date: January 2, 2008; Ruling #2008-1852; Agency: Department of  
Corrections; Outcome: Decision Remanded for Clarification.



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

**ADMINISTRATIVE REVIEW OF THE DIRECTOR**

In the matter of the Department of Corrections  
Ruling Nos. 2008-1852  
January 2, 2008

The grievant has requested an administrative review of the hearing officer's decision in Case Number 8655. She asserts that the hearing officer failed to address the issue of workplace harassment in his hearing decision. For the reasons explained below, this Department (EDR) agrees and remands the decision to the hearing officer to address this remaining issue.

FACTS

Prior to her demotion, the grievant was employed as an Institution Superintendent with DOC. On November 13, 2006, the grievant was informed that as a result of an internal affairs investigation concerning sexual misconduct cases at her facility, she was being removed from her position as Institution Superintendent. To effectuate the removal, the agency gave the grievant the option of either using the "voluntary demotion" pay practice to a different position in a lower pay band with the same salary or receiving a Group III Written Notice with demotion.<sup>1</sup> Regardless of the option she chose, it appears the agency had previously decided that she would no longer remain in her position as Institution Superintendent. The grievant ultimately chose a "voluntary demotion" without the Written Notice. Although she retained her current salary, the grievant claims that her new position is in a lower pay band, she no longer has state housing benefits, she lost supervisory responsibilities, and she suffered a change in duties and a loss of "job stature."

On November 19, 2006, the grievant initiated three grievances challenging her demotion. In these three grievances, the grievant alleges that her demotion was "coerced," the agency misapplied Department of Human Resource (DHRM) Policy 1.60, *Standards of Conduct*, by failing to provide the grievant with oral or written notification of the charge(s) and a reasonable opportunity to respond, and the agency unfairly applied Policy 1.60 as her demotion is inconsistent with how prison management has been treated

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<sup>1</sup> According to the agency, if the grievant had not chosen voluntary demotion, "she would have been charged with one or more Group III charges and other possible charges involving her failure to properly manage the correctional facility in a manner that provided for the safety and security of offenders and staff."

in other facilities under similar circumstances. Likewise, in a December 4, 2006 grievance, the grievant alleges that her demotion was “coerced,” the agency has misapplied and/or unfairly applied DHRM Policy 1.60, the investigative report(s) are erroneous, the primary investigator of her alleged mismanagement (Agent M) was biased and acted out of retaliation and the agency has misapplied DHRM Policy 2.30, *Workplace Harassment*.

The grievances advanced through the resolution steps but were not qualified by the agency on the basis that the grievant’s demotion and transfer were not disciplinary because the grievant had voluntarily requested the demotion and transfer. This Department qualified the four grievances noting that that while the choice to accept the demotion without an accompanying Written Notice may have been voluntary, the agency’s decision that the grievant could no longer remain in her position appears to have already been made and the grievant presented potential evidence calling into question whether the demotion and loss of housing were adverse and disciplinary.<sup>2</sup> In addition, EDR observed that the grievant had also asserted that her demotion was retaliatory and that the agency misapplied DHRM Policy 2.30, *Workplace Harassment*. Because the issue of informal discipline was qualified for hearing, EDR deemed it appropriate to qualify the grievant’s retaliation and harassment claims for hearing as well.

The grievances advanced to hearing and in his October 4, 2007 hearing decision, the hearing officer held that it appeared that the agency had tried to mix and match parts of various policies in order to justify the grievant’s demotion.<sup>3</sup> He went on to state that:

The Hearing Officer finds that the overwhelming evidence was that the Grievant was considered an “exceeds contributor” employee through the vast majority of the investigations that took place at her facility. The Hearing Officer specifically finds that her immediate Supervisors were aware of the investigations while they were ongoing and were aware of the results. The Hearing Officer specifically finds that the Grievant dealt with all issues as they came before her. The Hearing Officer finds that the Grievant did not fail to act on any issue that was brought to her. The Hearing Officer finds that, rather than follow DHRM Policy 1.40, the Agency attempted to threaten and coerce the Grievant into a demotion by threatening her with a Group III Written Notice pursuant to DHRM Policy 1.60 and Policy 135.1. The Hearing Officer finds that the Agency did not comply with Policy 3.05.<sup>4</sup>

The hearing officer also found that the grievant had not been subjected to retaliation.<sup>5</sup>

As a result of his findings, the hearing officer issued the following decision:

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<sup>2</sup> See EDR Ruling Numbers 2007-1551, 2007-1552, 2007-1554, 2007-1617 which is found on EDR’s website at <http://www.edr.virginia.gov/searchedr/2007-1551,%202007-1552,%202007-1554,%202007-1617.pdf>.

<sup>3</sup> See Decision of Hearing Officer, Case No. 8655 (“Hearing Decision”) at 9 issued October 4, 2007.

<sup>4</sup> Id. at 11.

<sup>5</sup> Id.

For the reasons stated herein, the Agency's actions are found to be an adverse employment action, which were primarily used to punish or correct the Grievant's behavior. The Hearing Officer is loathe to disrupt any continuity that has been established at the Grievant's prior location since her involuntary demotion. For that reason, the Hearing Officer orders the Agency to reinstate the Grievant to a comparable position as either a Superintendent or an Assistant Warden, such that she will be in the same Pay Band as she was when she was involuntarily demoted. The Hearing Officer orders the Agency to provide the Grievant similar housing as she had in her prior position or a supplement to her pay to compensate her for that housing. To the extent that the Grievant has lost wages because of being in a lower Pay band since her involuntary demotion, the Hearing Officer orders that the Agency reimburse her for such lost wages, if any. If the Agency is unable to provide an Assistant Wardenship, which is in the same Pay Band that the Grievant occupied when she was Superintendent, along with the appropriate housing or housing allowance, the Hearing Officer orders that the Agency return the Grievant to her original position with her original Pay Band and the housing provided at that Unit. Further, the Hearing Officer orders the Agency to send out an Agency-wide email announcing the Grievant's new position, just as the Agency did when it announced her demotion. Lastly, the Hearing Officer orders the Agency to comply with Policy 1.40 in so far as it is required to provide interim performance evaluations if management deems that the Grievant is not performing at a sufficient level.<sup>6</sup>

Neither the discussion nor decision section of hearing decision discussed the issue of workplace harassment.

#### 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>7</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>8</sup>

In her request for administrative review, the grievant argues that the hearing officer failed to address the issue of workplace harassment. Both the qualification decision and the hearing decision itself acknowledge that the issue of workplace harassment was an issue qualified for hearing, and thus were before the hearing officer

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<sup>6</sup> Id.

<sup>7</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

for determination.<sup>9</sup> Under the grievance procedure, issues qualified by the agency head, the EDR Director or the Circuit Court must be decided by the hearing officer.<sup>10</sup> However, except for the acknowledgement that the workplace harassment issue was qualified for hearing, there is no discussion of workplace harassment in the hearing decision. Accordingly, the hearing officer is ordered to reconsider his decision by addressing the issue of workplace harassment. The reconsidered decision must explain the basis for any decision on the issue of workplace harassment.<sup>11</sup> Also, the hearing officer and parties are reminded that it was the burden of the grievant to establish her workplace harassment claim by a preponderance of the evidence.

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reconsider his decision with respect to the issue of workplace harassment.

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>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> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>14</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>15</sup>

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Claudia T. Farr  
Director

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<sup>9</sup> EDR Ruling Numbers 2007-1551, 2007-1552, 2007-1554, 2007-1617; Hearing Decision at 2.

<sup>10</sup> See *Rules for Conducting Grievance Hearings* §§ II, V(C); see also Ruling No. 2006-1117.

<sup>11</sup> See *Rules for Conducting Grievance Hearings* § V(C); ("The decision must contain a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified, and clearly listing all required actions and any recommended actions.")

<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 Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>15</sup> Va. Code § 2.2-1001 (5).