

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8859; Ruling  
Date: September 16, 2008; Ruling #2009-2094; Agency: Virginia Community  
College System; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of the Virginia Community College System  
Ruling Number 2009-2094  
September 16, 2008

The Virginia Community College System (VCCS or agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8859. The agency has appealed the decision on the basis that the relief ordered by the hearing officer does not comply with the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings*. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The following is a summary of pertinent facts from the July 17, 2008 hearing decision in Case Number 8859.<sup>1</sup>

The Virginia Community College System employed Grievant as an Academic Coordinator at one of its facilities. The purpose of his position was:

The Academic Coordinator is the liaison between the target high schools and the Upward Bound Program, is responsible for scheduling weekly academic activities and providing weekly academic services. Screens and recommends tutors for hiring, as well as trains and supervises tutors. Develops Upward Bound Curriculum for Academic Year as well as Summer on Campus Program. The Academic Coordinator supervises work/study students and all travel events. Provides career guidance, educational counseling, and college admission/financial aid application assistance for participants. Maintains comprehensive participation records. Assist Director in overall program planning for Upward Bound.

---

<sup>1</sup> Footnotes from the original decision have been omitted.

Grievant's responsibilities included chaperoning high school student travel and overnight field trips

Grievant had been diagnosed with a condition called Urethral Stricture Disease for which he had been prescribed hydrocodone. He had been taking hydrocodone for several years and became addicted. Grievant decided to seek medical treatment which would require his absence from work for a short period of time. He expected to begin treatment from Dr. M. That treatment would include using Suboxone to help Grievant reverse his addiction to hydrocodone.

On October 11, 2007, Grievant asked to speak to the Supervisor. He told her that he needed to take leave next week because he was entering an outpatient drug treatment program in a nearby city. He said that for the last four months he had been snorting heroin every evening when he got home from work. He said that his body was starting to suffer and he decided to quit. Grievant told the Supervisor he had contacted a physician's group in another city and had an appointment on Tuesday, October 16, 2007 to enter an intensive outpatient program where he would be given Suboxone. Grievant denied any use of drugs during work hours and stated that he usually was asleep by 7:30 p.m. or 8:00 p.m. every evening which enabled him to get up early and be at work. The Supervisor sent an email to the Manager and to the Human Resource Officer advising them of her conversation with Grievant.

On Friday, October 12, 2007, the Manager advised the Supervisor to notify Grievant that he could not return to campus, go out to any of the local schools, or have any contact with students whatsoever. On Saturday, October 13, 2007, the Supervisor called Grievant and left a message on his cell phone. Instead of specifically instructing Grievant not to return to the campus, the Supervisor left a message saying that she had spoken with her supervisor and that he did not need to come to school or go around campus or be with the kids. Grievant did not construe the Supervisor's message as an instruction not to return to the campus.

On Monday, October 15, 2007, Grievant arrived at work. Agency managers assumed that the Supervisor had clearly instructed Grievant not to return to work and that he was defying her instruction. The Vice President instructed that Grievant should be escorted away from the campus by the Agency's security officer. The Vice President believed Grievant was addicted to heroin at the time he decided Grievant could not remain on the campus. Grievant was shocked, humiliated, and embarrassed to be escorted away from the Agency's facility.

October 16, 2007, the Human Resource Officer sent Grievant a letter advising him of the services available from the Employee Assistance Program. She also told him: "Also, as a participant of the Virginia Sickness and Disability Program (VSDP), you may wish to consider accessing the benefits available through this resource. I have enclosed a copy of the VSDP Handbook in case you do not have your copy."

On October 16, 2007, Grievant began receiving treatment from Dr. M, a Board Certified neurologist and psychologist skilled in the treatment of addiction. Dr. M treated Grievant for his hydrocodone addiction, not for heroin use.

On November 6, 2007, Grievant met with the Vice President, Manager, Supervisor, and Human Resource Officer. Grievant described his medical condition regarding a closed urethra and monthly treatments from a urologist. Grievant explained that he wanted to end his addiction to hydrocodone and was seeing a doctor for that issue only. He said that the Supervisor misunderstood his comments about heroin. Grievant said he told the Supervisor on October 11, 2007 that he was taking something "akin to heroin" and that she misunderstood him. Grievant presented a note from Dr. M indicating that he could return to work. The Vice President scoffed at the note and suggested it would be easy for any employee to get a note from a doctor saying the employee could return to work. The Vice President discarded the note. Grievant said that he would probably have surgery within the next couple of weeks. The Vice President told Grievant he was obligated to participate in the Employee Assistance Program and that he had to contact an Employee Assistance Program provider by November 9, 2007. The Human Resource Officer provided Grievant with information about filing for Short Term Disability under the Virginia Sickness and Disability Program. Grievant was "strongly encouraged again to apply for STD benefits as a possible means to continue to provide paid leave without utilizing your annual leave."

On November 7, 2007, the Vice President sent Grievant a letter summarizing their meeting and reminding Grievant that he was, "again instructed not to be on the ... campus while these issues are pending."

On November 8, 2007, Grievant initiated a claim for benefits with the Third Party Administrator. Although the Agency did not require Grievant to apply for Short Term Disability with the Third Party Administrator, it provided him with relevant information and encouraged him to consider applying for Short Term Disability. Grievant's application was approved. His "Benefit Start Date" for Short Term Disability was October 16, 2007. His "STD End Date" was April 22, 2008. As a result of the stress from being

removed from employment, Grievant experienced mental health difficulties leading to his qualification for Short Term Disability.

On November 9, 2007, Grievant called the Vice President and said he had called the Third Party Administrator and the EAP. Grievant said he had an appointment with a counselor. The Vice President sent Grievant a letter dated November 12, 2007 saying, in part, "It is good to hear that you have followed through with the Employee Assistance Program."

As part of its Third Step response on December 20, 2007, the Agency Head told Grievant:

You have not been terminated from your current position. You may return to work when you submit a drug test from an approved medical source verifying that you are not using illegal drugs or misusing or abusing prescription drugs and also participate in periodic drug testing.

On February 15, 2008, Grievant took a urine drug test at Dr. M's office. He tested positive for only one drug, a sleep medication. He had a prescription for that drug. He did not test positive for heroin. Grievant mailed the drug test to the Agency. The Agency did not contact Grievant once it had received the satisfactory drug test.

On April 29, 2008, the Third Party Administrator sent Grievant a letter notifying him that he was approved for Long Term Disability through the VSDP.

On May 12, 2008, the Agency sent Grievant a letter notifying him that because of his transition to Long Term Disability, his employment with the Agency has ended.<sup>2</sup>

Based on the foregoing facts, the hearing officer found that the agency had discriminated against the grievant when it removed the grievant from the workplace because it regarded him as being addicted to heroin. The hearing officer found that the "Grievant was an individual with a disability because the Agency regarded Grievant as having a physical or mental impairment that substantially limits one or more of his major life activities."<sup>3</sup> The hearing officer found that the "Agency regarded Grievant as a drug addict," and "regarded Grievant's perceived addiction as substantially limiting a major life activity of interacting with others."<sup>4</sup> He further held that "[t]here is no reason to believe Grievant could not perform the essential functions of his position had the Agency permitted him to continue working on their campus."<sup>5</sup> He found that because the

---

<sup>2</sup> Decision of Hearing Officer, Case No. 8859, issued July 17, 2008 ("Hearing Decision") at 2-5.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 9.

“Grievant was removed physically from employment and not permitted to return to work by the Agency,” he had suffered an “adverse employment action.”<sup>6</sup> The hearing officer concluded that “[t]he agency removed the Grievant from the workplace because it regarded him as being addicted to heroin. By doing so, the Agency discriminated against a qualified individual with a disability contrary to the Americans with Disabilities Act and DHRM Policy 2.50.”<sup>7</sup> Accordingly, the hearing officer ordered that the grievant be reinstated to his former or an objectively similar position.<sup>8</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>9</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>10</sup>

#### *The Propriety of the Relief Ordered by the Hearing Officer*

The agency asserts that the hearing officer’s order to the agency to reinstate the grievant does not comply with the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings*.

First, the agency appears to assert that the relief of reinstatement exceeds the scope of relief available under the *Rules for Conducting Grievance Hearings (Rules)*. Under the *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>11</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

---

<sup>6</sup> *Id.* at 11.

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

<sup>8</sup> The hearing officer ruled that:

In the event of Grievant is unwilling to return to his former position or an objectively similar position, the Agency's obligation to reinstate Grievant will cease at that time. In the event Grievant is unable to return to his former position or an objectively similar position after being given a reasonable opportunity to do so by the Agency, the Agency's obligation to reinstate Grievant will cease at that time. (Hearing Decision, at 13.)

The hearing officer explained that the relief he could order was “limited to restoring Grievant to the position he would have been in had the Agency not taken the discriminatory action against him.” (*Id.* at 11.)

<sup>9</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>10</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>11</sup> *Rules for Conducting Grievance Hearings*, § VI ( C )(3).

discriminatory supervisory practices).”<sup>12</sup> Here, the hearing officer found that the agency discriminated against the grievant. In order to cure the discrimination, the hearing officer ordered reinstatement to the former or an objectively similar position. While the *Rules* do not expressly state that a hearing officer can reinstate an employee who loses his or her job as a result of discrimination or retaliation, certainly nothing prohibits an order of reinstatement. More importantly, it is clear that reinstatement is typically the *only* action that adequately cures a discriminatory or retaliatory termination of employment. Thus, we find no merit in the argument that reinstatement is not authorized under the *Rules*. To the contrary, we expressly affirm that such relief is available in cases where job loss is caused by unlawful discrimination.

The agency also argues that the decision does not conform with Section 5.9(b) of the *Grievance Procedure Manual* which provides that a hearing decision cannot order the “hiring, promotion, transfer, assignment or retention of any employee,” or “[a]ny other relief that is inconsistent with the grievance statute or procedure.” The relief ordered here does not violate the above cited language from the *Grievance Procedure Manual*. This is not a case where the hearing officer is ordering a hiring. Rather, he has simply ordered reinstatement which is expressly authorized by Section 5.9(a) of *Grievance Procedure Manual*. Such relief is well within the authority of the hearing officer, fully consistent with the *Grievance Procedure Manual*, and is appropriate for findings of discrimination.

Finally, the agency argues that the relief ordered is inappropriate because it is inconsistent with law and policy. Under the *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings* hearing decisions must conform to law and policy.<sup>13</sup> The question as to whether a decision is consistent with policy and law is ultimately decided by the Department of Human Resource Management (DHRM); whether a decision is consistent with law, with the circuit court in the jurisdiction in which the grievance arose.<sup>14</sup> However, we are compelled to note that the policy provision referenced in the Agency’s ruling request to this Department would seem to have no bearing on this case. The cited provision states that “employees on LTD [long term disability] are inactive employees of the Commonwealth,” and that “[r]eturn to [their] pre-disability position is not guaranteed.”<sup>15</sup> Reliance on this language would appear to be misplaced because the hearing officer found that the agency “removed physically” the grievant from employment and he was “not permitted to return to work” despite a promise that he would be allowed if he provided the agency with a clean drug test, which he did long before he entered into LTD. In other words, the discrimination and violation of policy were found by the hearing officer to have occurred well *before* the grievant entered into LTD. The movement into LTD presumably would not have occurred if he had been allowed to return to work.<sup>16</sup> The remaining policy arguments appear equally unpersuasive as they too focus only on

---

<sup>12</sup> *Id.*

<sup>13</sup> *Grievance Procedure Manual* §5.9, and *Rules for Conducting Grievance Hearings* § VI (A).

<sup>14</sup> *See Grievance Procedure Manual* § 7.2 and 7.3. In this case, the agency has submitted a request for administrative review to DHRM, on the basis that the hearing decision is inconsistent with Policy 4.57.

<sup>15</sup> DHRM Policy 4.57, Virginia Sickness and Disability Program.

<sup>16</sup> The hearing decision notes that the grievant provided the agency on November 6, 2008, a note from his treating physician that stated that he could return to work (July 17, 2008 Hearing Decision, at 4) and that the grievant, in accord with agency instruction, provided evidence of a clean drug test. (*Id.* at 5.)

what happens to an employee once they have *appropriately* transitioned into LTD. These arguments all appear to presuppose that the grievant's transition into LTD was proper and inevitable.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this Department will not disturb the decision of the hearing officer.

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>17</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>18</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>19</sup>

---

Claudia T. Farr  
Director

---

<sup>17</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>18</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>19</sup> *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).