Issue: Administrative Review of Hearing Officer's Decision in Case No. 8910; Ruling Date: December 19, 2008; Ruling #2009-2109; Agency: Virginia Information Technologies Agency; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Information Technologies Agency
Ruling Number 2009-2109
December 19, 2008

The grievant, a former employee of the Virginia Information Technologies Agency (VITA or the agency), has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8910. For the reasons set forth below, we will not disturb the decision of the hearing officer.[1]

PROCEDURAL FACTS

The procedural facts of this case as set forth in the hearing officer's September 23, 2008 Response to the Grievant's Second Request for Reconsideration are as follows.

> The Hearing Officer's Decision in this matter was issued on August 12, 2008 and was mailed to the Grievant on that date. The Grievant's Appeal for Reconsideration was received by the Hearing Officer on Friday, September 12, 2008, which is thirty-one (31) days after the Hearing Officer's Decision was issued. Pursuant to VII(A) of the Rules for Conducting Grievance Hearings and Section 7.2(a) of the Grievance Procedure Manual, the Grievant must request a review by the Hearing Officer within fifteen (15) calendar days of the date of the original hearing Decision. In the Hearing Officer's original Decision which was issued on August 12, 2008, at page four (4), under Appeal Rights, the Grievant was put on Notice that any Administrative Review Request had to be filed within fifteen (15) calendar days from the date that the Decision was issued.
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> Upon receipt of the Hearing Officer's first denial of the Grievant's first request for reconsideration in this matter, the Grievant informed EDR that she had faxed her request for reconsideration to the Hearing Officer on the same date that she had faxed that document to EDR. Pursuant to the Hearing Officer's request, the Grievant provided the Hearing Officer with the fax confirmation page for the fax that she had sent to the Hearing Officer. That document clearly indicates under "result," that the "document jammed." In looking at her own fax

[1] While this Department does not expressly address each of the objections raised in her request for administrative review, all have been carefully considered and this Department has found no basis to disturb the decision on the grounds that it does not conform to the grievance procedure.

> confirmation page, it should have been clear to the Grievant that the fax did not go through and was not received by the Hearing Officer. It should be noted; that the Grievant waited until 4:48 p.m. on the last available date to ask for reconsideration, that her own fax machine indicated that the "document jammed"; that she did not call the Hearing Officer to find out if, in fact, he had received the document, that she did not re-send the document, and that she never followed up with a hard copy of her request for reconsideration.
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> The rules are quite clear in this matter. The Hearing Officer must receive the request for reconsideration within fifteen (15) calendar days of the date of the original Decision. That clock does not stop because a "jammed" fax was sent, it only stops when in fact the Hearing Officer receives the request for reconsideration. The Grievant could have phoned the Hearing Officer's office to inquire as to whether or not the fax had been received, the Grievant could have delivered a hard copy to the Hearing Officer, the Grievant could have e-mailed a copy to the Hearing Officer or the Grievant could have mailed a hard copy of the request with sufficient time for it to have reached the Hearing Officer on a timely basis. The Grievant availed herself to none of these remedies and, instead, waited until the last moment to send her request for reconsideration and failed to observe her own fax machine's confirmation indicating that the document had "jammed." The Grievant has failed to comply with the requirement of providing the Hearing Officer with a written request for reconsideration within fifteen (15) calendar days of the date of the original hearing Decision.
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> Accordingly, the Grievant is out of compliance and the Hearing Officer is not empowered nor required to review his Decision.

The Department of Human Resources Management (DHRM) was also asked by the grievant to administratively review the hearing decision. On December 9, 2008, the DHRM Director's designee issued a decision remanding the decision to the hearing officer.

DISCUSSION OF PROCEDURAL MATTER

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."[2] 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.[3]

Timeliness of the Request for Administrative Review to the Hearing Officer

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[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).

As reflected above, the hearing officer has refused to consider the grievant's request for reconsideration on the basis of timeliness. The hearing officer correctly states that the grievance procedure requires that requests for administrative review must be received by the administrative reviewer within 15 calendar days of the date of the original hearing decision. This Department has long held, however, that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period.[4] The reason for this is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, EDR, or DHRM—can be somewhat perplexing for parties not familiar with the process. However, this is not a case of a party not knowing the identity of the proper administrative reviewer for the issue to be reviewed. Instead of confusion about the review process, it appears that the grievant knew she needed to submit a request for reconsideration to the hearing officer, but simply failed to monitor her fax machine after attempting to transmit her request. Failure to check whether her request for reconsideration had been properly transmitted is not just cause for delay. Accordingly, we find no error with the hearing officer's refusal to consider the grievant's request for reconsideration.

FINDINGS OF FACT

The following findings of fact were set forth in the August 12, 2008 Decision of the Hearing Officer in Case No. 8910.

> The Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections, only eight (8) of which contained documents, and that notebook was accepted in its entirety as Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing ten (10) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.
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> The Grievant testified on her own behalf and called no other witnesses. The Grievant complained of the Agency's failure to provide her with a pay increase which was based on a finding on her Performance Evaluation that she was "below contributor." The Grievant offered no concrete evidence, other than her personal opinion, that the findings in the Performance Evaluation were inaccurate. The Grievant testified at some length that she had considerable problems with a Manager at the Agency and the Agency's testimony was that they moved the Grievant away from that Manager and placed her under a new

[4] EDR Ruling Nos. 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at *6-7 (January 15, 2008). (Court affirmed EDR's determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.) *But cf.* EDR Ruling No. 2008-2025. (Following a timely request to an AHO (based on purported incorrect legal conclusion), a request to EDR on different grounds than those raised in the reconsideration request (bias) more than 15 days after the original decision was untimely.)

Manager. The Grievant acknowledged that, in the time frame of the Performance Evaluation, she received two (2) Group I Written Notices for Unsatisfactory Performance. The Grievant grieved each of them and the Agency's position was sustained in each of those grievances. Clearly, pursuant to the receipt of the Group I Written Notices, the Grievant was on Notice that the Agency felt that her job performance was unsatisfactory.

The Grievant testified that she did not receive a timely notice of her Performance Evaluation. The Performance Evaluation was for the time frame of November 1, 2005 through October 31, 2006. From November 1, 2005 through December 9, 2005, and from July 27, 2006 to date, the Grievant was and continues to be on either short term disability or long term disability. Accordingly, the Grievant was not at the Agency when the Performance Evaluation was performed during the month of September, 2006. While it might have been the best practice to mail the Performance Evaluation to the Grievant in September, 2006, the Agency witness testified that this was not done as the Grievant was on short term and long term disability for stress and depression at work and it was felt best to deliver that by hand when she returned to work.

DHRM Policy 1.40- Performance Planning and Evaluation defines a "below contributor" rating. To receive a "below contributor" rating, an employee must have received at least one (1) documented Notice of Improvement Needed/Substandard Performance form within the performance cycle. A Written Notice that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "below contributor." Not only was the Grievant provided with two (2) Written Notices but the Agency met with her and established a plan of performance to help her in no longer being a "below contributor" employee.

The Grievant did not meet her burden of proof to show by a preponderance of the evidence that the Agency's actions were inappropriate or unwarranted. Indeed, the Grievant's own testimony, the evidence contained in Grievant's Exhibit 1, the Agency's testimony and the evidence contained in Agency's Exhibit 1 clearly established that the Agency did all that it possibly could to assist this Grievant and her work performance clearly continued to be substandard.

The Grievant offered no evidence at all regarding a failure to comply with ADA. Accordingly, the Hearing Officer finds that the Grievant has not borne her burden of proof on that issue.

Based on the grievant's failure to meet her burden of proof to establish that the agency's actions were inappropriate or unwarranted, the hearing officer upheld the agency's action.[5]

DISCUSSION

On August 27, 2008, the 15th day following the hearing, this Department received the grievant's request for administrative review. The grievant prepared a single request for administrative review addressed to: (1) the hearing officer, (2) the EDR Director, and (3) the Department of Human Resource Management (DHRM) Director. In her request for administrative review, the grievant has raised a variety of objections to the hearing decision. This ruling will address only those portions of the appeal that relate to alleged failure to comport with the Grievance Procedure. The DHRM Director (or her designee) will address those portions of the request for administrative appeal in which the grievant asserts are inconsistent with policy. As stated above, the hearing officer correctly refused to reconsider his decision because he did not timely receive the request for review.

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."[6] 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.[7]

Factual Arguments

The grievant asserts that a number of findings of facts are not supported by record evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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. Here, the grievant contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority.

Moreover, the hearing officer's factual findings are supported by record evidence. Indeed, many of the alleged errors asserted by the grievant would not appear to be of a nature

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[5] Decision of the Hearing Officer, Case No. 8910, issued August 12, 2008, p. 4.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4.
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.

that would have made a substantive difference in the outcome of the decision.[10] Moreover, a review of a recording of the hearing reveals that the agency provided sufficient testimonial evidence to support its position that the grievant's performance was at a below contributor level. The hearing officer appears to have found that this testimony, as well as other evidence, supported the agency's position that it "did all that it possibly could to assist this Grievant and her work performance clearly continued to be substandard." [11] Accordingly, this Department has no reason to disturb the findings of fact.

New Evidence

The grievant asserts that new evidence shows that her evaluation was created after the dates reflected on her evaluation.[12] Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[13] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[14] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered after the judgment was entered; (2) due diligence to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; <u>and</u> (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[15]

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[10] For example, the grievant notes that the hearing decision states that the performance period ran from November 1, 2005 through October 31, 2006, rather than from October 25, 2005 through October 24, 2006. To the extent that the timeframe listed in the hearing decision was erroneous, the grievant provides no explanation as to how this error would have made any impact on the hearing decision. Likewise, the grievant's point that she challenged two written notices on a single grievance form rather than on two separate forms changes nothing in this case. However, the grievant does raise an issue that <u>if true</u> might have had a bearing on the outcome of the hearing decision. She asserts that her disability absences caused her evaluation rating to be lowered. She appears to base this on an e-mail from the Agency Human Resource Director which explained that the grievant's evaluation "rating was not based solely on the one project. Instead, it was based on [her] overall performance (or non performance) during the performance year." While one could potentially draw the conclusion that this statement may indicate that the evaluation was tainted by the grievant's absences, an equally plausible interpretation is that the grievant's non-performance, (i.e., poor performance when at work) led to the below contributor rating. Hearing officers have the exclusive authority to make determinations as to what a particular piece of evidence means and the appropriate weight that should be attached to that evidence. Where a hearing officer could reach more than one conclusion regarding a particular piece of evidence, this Department will not substitute its judgment for that of the hearing officer.

[11] August 12, 2008 Hearing Decision, at 3.

[12] Grievant's Request for Administrative Review, p. 3.

[13] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[14] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

[15] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the grievant has provided no information to support a contention that the evidence to which she cites should be considered newly discovered evidence under this standard. Moreover, this evidence was discussed at length at the hearing and thus is neither new nor newly discovered.[16] Consequently, there is no basis to re-open the hearing for consideration of this evidence.

Inconsistency with Policy

The grievant also submitted a request for administrative review to the DHRM Director. The grievant asserts that hearing officer relied upon a provision in policy that was not in effect at the time the grievance occurred, a provision which allowed the agency to substitute a Written Notice for the Notice of Improvement Need/Substandard Performance (NIN/SP) form.[17] In addition, the grievant asserts that, contrary to policy, she was never given a performance improvement plan, which she asserts would have "help[ed] [her] in no longer being a 'below contributor employee.'"[18] The grievant also asserts that she was not given an opportunity to provide a self-assessment which policy requires.[19]

On December 9, 2008, the DHRM Director's designee issued an administrative review ruling. As to the challenge that the hearing officer relied upon a policy provision that had not been adopted at the time that events that formed the basis of the grievance occurred,[20] DHRM held that it was inappropriate for the agency to use a Written Notice in lieu of a NIN/SP.[21] The ruling further held that the agency's actions were therefore inconsistent with policy. Accordingly, the hearing officer was ordered to reconsider his decision to ensure that it complied with the policy in effect during the relevant time period. Given DHRM's holding that the wrong policy was considered by the hearing officer, remanding the decision was the appropriate response by DHRM.

The grievant also asserted that, contrary to policy, she was never given a performance plan, which she asserts would have "help[ed] [her] in no longer being a 'below contributor employee.'" DHRM held that:

> It is clear from the Performance Evaluation that the writer of the evaluation indicated that there was an Employee Development Plan. It was also indicated that the 2nd and 3rd quarter objectives in the Development Plan were not achieved. This matter is evidentiary in nature and will not be discussed further by this Agency.[22]

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[16] Recording of Hearing, file #2.
[17] Grievant's Request for Administrative Review, p. 2.
[18] *Id.* at 3.
[19] *Id.*
[20] Prior to July 10, 2007, DHRM Policy 1.40 required agencies to issue employees a Notice of Improvement Needed/Substandard Performance (NIN/SP) before it could rate employees as "Below Contributor." On July 10, 2007, DHRM Policy 1.40 was amended to allow agencies to issue *either* a NIN/SP *or* a Written Notice as a prerequisite to giving an overall "Below Contributor" rating.
[21] December 9, 2008, Policy Ruling of the Department of Human Resource Management, p. 3.
[22] December 9, 2008, Policy Ruling of the Department of Human Resource Management, pp. 3-4.

In this response, the DHRM decision seems to address the agency's general duty to provide basic employee development, planning and guidance to its employees, through the DHRM Employee Work Profile form.[23] What is *not* addressed by the DHRM ruling, yet appears to have been fairly raised by the grievant's request for administrative review, is the question of what sort of guidance an agency is obligated to provide an employee once her performance falls to an unacceptable level. While the grievant's appeal might have been more clearly articulated, it seems that she was challenging the apparent lack of an improvement plan (as opposed to an employee development plan),[24] such as the improvement plan required to accompany a NIN/SP.[25] Given that DHRM has not addressed the extent of an agency's obligation to provide performance improvement planning and guidance following sub-par performance, and given that the grievant appears to have raised this concern, the hearing officer must consider the alleged lack of a post-poor performance improvement plan in conjunction with DHRM's remand instruction to apply the appropriate performance evaluation policy.

The grievant asserts that she was not offered the opportunity to provide a self-assessment for her 2006 evaluation. In response the DHRM decision holds that:

> Policy 1.40 states, "Each employee must be afforded an opportunity to provide the supervisor with a self-assessment of his or her job performance for the rating period. The employee should be asked to provide a self-evaluation at least two weeks prior to the evaluation meeting. A supervisor must review and consider the self-assessment when completing each employee's performance evaluation." To the extent that this did not occur is a violation of policy. However, given the circumstances of the case under consideration, it is the opinion of this Agency that such a violation is not probative.[26]

Here, DHRM appropriately addressed the policy impact of a potential failure to provide an employee with the opportunity to provide a self-assessment, finding that such an omission would be a violation of policy. However, the decision goes further, finding that "such a violation is not probative" in this case. While it is not clear precisely what is intended by this statement, we note that <u>the hearing officer</u> (not DHRM) is the appropriate entity to assess the potential impact of a policy violation on a grieved action. Here, DHRM found that any failure to offer a self-assessment opportunity would be a violation of policy. Accordingly, to the extent that the grievant was not granted an opportunity to provide a self-assessment, the hearing officer must decide whether such a policy violation resulted in an arbitrary, capricious or otherwise unfair performance evaluation.

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[23] *See* DHRM Policy 1.40, Employee Work Profile Form, Part III (Employee Development Plan), where "personal learning goals" and "learning steps/resource needs" are to be listed, and in Part VII, where "year-end learning accomplishments" are to be noted.
[24] The document to which the August 12, 2008 Hearing Decision cites to as the established plan of performance was grievant's position description. (August 12, 2008 Hearing Decision, at 3, citing to Agency Exhibit 1, tab 4.)
[25] See DHRM Policy 1.40, "Identifying Substandard Performance" section which states that: "The Notice of Improvement Needed/Substandard Performance form must include an improvement plan, which should have an improvement period of no less than 30 days or more than 180 days."
[26] December 9, 2008 Policy Ruling of the Department of Human Resource Management, p. 3.

Finally, the DHRM decision addresses the grievant's charge that the use of short term and long term disability leave had a negative effect on her overall performance evaluation. The DHRM decision states that:

> In accordance with policy, attendance should not have a negative impact on an overall performance rating. Rather, attendance should have an impact on the percentage increase of compensation granted to the employee. The agency supported its contention that the grievant was not a contributor based on the hearing officer upholding the two Written Notices which were issued for unsatisfactory performance. There is no indication on the performance evaluation form that the use of short term disability leave by the grievant had a negative effect on her performance evaluation.

Here, the DHRM ruling appropriately addresses whether policy allows attendance to be used to adversely impact a performance evaluation. However, the DHRM decision goes further and moves into the domain of the hearing officer by making the factual finding that: "[t]here is no indication on the performance evaluation form that the use of short term disability leave by the grievant had a negative effect on her performance evaluation." The determination of whether, in a particular grievance, the use of leave affected a grievant's performance evaluation is a fact-finding function that falls under the exclusive scope of authority of the hearing officer. Accordingly, the hearing officer is not bound by the DHRM ruling finding that "[t]here is no indication on the performance evaluation form that the use of short term disability leave by the grievant had a negative effect on her performance evaluation."[27]

APPEAL RIGHTS AND OTHER INFORMATION

This has been remanded to the hearing officer for further clarification and consideration as set forth in detail above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[28] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[29]

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.[30] 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

[27] The lack of any indication on the performance evaluation form that the use of disability leave affected the grievant's evaluation is hardly dispositive. Indeed, the grievant cites to an e-mail (Grievant Exhibit 1, Tab 4, pp. at 4C), not the evaluation as evidence that disability leave affected her evaluation.
[28] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[29] *See Grievance Procedure Manual* § 7.2(a).
[30] *Grievance Procedure Manual* § 7.2(d).

arose.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

Claudia T. Farr
Director

[31] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).