

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8969/8970; Ruling Date: April 28, 2009; Ruling #2009-2207; Agency: Virginia Community College System; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia Community College System  
Ruling Number 2009-2207  
April 28, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8969 / 8970. For the reasons set forth below, this matter will be remanded to the hearing officer for further clarification.

FACTS

Prior to his resignation, the grievant was employed with the agency as an Administrative and Program Specialist. On February 11, 2008, the grievant was issued two Group II Written Notices for allegedly failing to follow the Dean's October 2007 instructions to raise any concerns he may have regarding faculty actions directly with her.<sup>1</sup> The first written notice ("Written Notice 1") was issued as a result of an e-mail the grievant sent to Ms. D, an adjunct faculty member.<sup>2</sup> Other salient facts as set forth in Case No. 8969 / 8970 with regard to the second written notice ("Written Notice 2") are as follows:

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<sup>1</sup> On October 11, 2007, in response to an e-mail the grievant sent to the Dean and Ms. K. regarding alleged fraud by Ms. K, the Dean told the grievant he was not responsible for monitoring the actions of adjunct faculty and was to bring his concerns about adjunct faculty directly to her instead of others at the agency. *See* Decision of Hearing Officer, Case No. 8969 / 8970, Dec. 30, 2008 ("Hearing Decision") at 2-3.

<sup>2</sup> *See* Hearing Decision at 3-5. In this e-mail exchange, Ms. D asked the grievant a question regarding where/how to process incomplete grade forms; specifically, whether or not the grievant needed both copies of the form. *Id.* at 3. The grievant answered Ms. D's question by stating that both copies of the form were needed. *Id.* However, the grievant went on to state that: "[s]ince there [have] been so many issues with your students and their grades it is more important that you follow the appropriate procedures and we maintain the proper records." *Id.* (alteration in original). Ms. D was offended by the grievant's comments and responded as such copying the Dean on her e-mail back to the grievant. *Id.* at 3-4. The Dean considered the grievant's e-mail to Ms. D to be contrary to her previous instruction to bring his concerns regarding faculty directly to her. *Id.* at 4. As such, the grievant was issued Written Notice 1. *Id.* at 5. In his December 30<sup>th</sup> decision, the hearing officer upheld the issuance of Written Notice 1 and determined that Written Notice 1 was not retaliatory. *Id.* at 5-6.

On January 17, 2008, the Human Resource Director sent Agency staff including Grievant an email regarding "Leave Roll over Announcement." The email stated, in part:

Please feel free to contact HR via the leave Inquires [sic] email address if you have any questions or concerns regarding your leave records. After 1/22/08, human resources will be able to rollover the leave balances to give the provisions for the new leave year, 1/10/2008 – 1/09/2009. These leave balances will be available for view by the end of the month.

Grievant responded:

Since we have had a few faculty members call in today and cancel their classes and office hours are they required to take leave? Is there a college policy when faculty and staff decided not to work when the college is open and taking leave?

The HR Director replied:

I suggest you speak with their supervisors, since we do not know what type of arrangement has been made, if any. College policies do state that employees not reporting to work should use leave, however, supervisors have the right to flex employees work hours.

Grievant responded:

Thanks. I will contact the fraud, waste and abuse hotline and relay your comments and the incidents reported to you for investigation.

The HR Director replied:

I don't think you have any information to contact anybody relative to fraud. You asked me a question, and I gave you a general answer, based on policies. I also told you that supervisors had the authority to flex employees' work schedule.

You, therefore, have no knowledge of arrangements that could have been made between employees and their supervisor, so you have no specific information to

determine if there is any wrong, much less anything to report. Please do not take it upon yourself to monitor faculty work hours. This is the job of the Deans. If you believe there is something out of place, you need to speak with the Dean.

The Dean considered Grievant's email to the HR Director to be contrary to her instruction because Grievant was raising his concerns about faculty leave with an employee other than the Dean.<sup>3</sup>

On March 6, 2008, the grievant initiated two grievances challenging Written Notice 1 and Written Notice 2. After the parties failed to resolve the grievances during the management resolution steps, the agency head qualified both grievances for hearing. The grievances were subsequently consolidated for hearing and a hearing was held on December 19, 2008. In a December 30, 2008 decision, the hearing officer upheld the agency's issuance of Written Notice 1 and Written Notice 2.<sup>4</sup> In a January 9, 2009 reconsideration decision, the hearing officer upheld his earlier decision and denied the grievant's request for reconsideration.<sup>5</sup> The grievant now requests administrative review from this Department.

### 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>6</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>7</sup> The grievant has presented various arguments in his request for administrative review. These arguments have been consolidated into topics and addressed below.

#### *Hearing Officer's Findings of Fact/Conclusions*

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>8</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>9</sup> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions

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<sup>3</sup> Hearing Decision at 4-5.

<sup>4</sup> Hearing Decision at 7.

<sup>5</sup> Reconsideration of Hearing Officer, Case No. 8969/8970-R, Jan. 9, 2009 ("Reconsideration Decision"), at 2.

<sup>6</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>7</sup> See *Grievance Procedure Manual* § 6.4.

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.<sup>10</sup> Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>11</sup> 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 argues that the hearing officer erred and/or abused his discretion by finding no retaliation on the part of the Dean in issuing Written Notice 1 and Written Notice 2. A review of the hearing record demonstrates sufficient evidence to support the hearing officer's fact-findings and decision with regard to Written Notice 1.<sup>12</sup> However, for the reasons set forth below, this Department concludes that the hearing decision must be remanded to the hearing officer for clarification and/or reconsideration as to his findings and conclusions with regard to Written Notice 2.

In his request for administrative review, the grievant indicates that his e-mail communication with the HR Director, the subject of Written Notice 2, was not misconduct, but rather was "going through the proper channels" in reporting to a member of agency management possible fraud, waste or gross mismanagement. As such, the grievant contends that his email communication with the HR Director was in and of itself a protected activity for which he should not have suffered retribution.<sup>13</sup> Additionally, the grievant argues that he felt the Dean to be a possible contributor in the fraudulent behavior and as such, he should not have been required to bring his concerns regarding such activities to the Dean.<sup>14</sup>

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<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> Of particular significance is the hearing officer's finding that when the Dean had decided to issue Written Notice 1, she was not aware of the grievant's contacts with the Fraud, Waste and Abuse Hotline. Hearing Decision at 6. Additionally, there is evidence in the record that the Dean had, at a minimum, contemplated issuing Written Notice 1 prior to the grievant's e-mail communication with the HR Director and thus, prior to the grievant announcing his intent to report to the Fraud, Waste and Abuse Hotline. Hearing Recording at 41:58 through 44:52. Consequently, this Department has no basis to disturb the hearing officer's findings as they stand with regard to Written Notice 1.

<sup>13</sup> The grievant's request for administrative review to this Department states as follows: "The written notices are also directly causally related to me reporting in good faith the possible fraud or unethical behavior....When [the HR Director] sent out her email she represented herself as management and also testified that she believed herself to be management. I also believed she was management and the best person to raise the issues....Contacting [the HR Director] was going through the proper channels."

<sup>14</sup> In his request for administrative review, the grievant asserts that "[e]veryone agrees that this happens, [the Dean's] claim is that all issues must go through her, even though part of the issues are gross mismanagement by [the Dean]. Nobody should be required to report misconduct to the person committing the misconduct or be disciplined for reporting them to management or FWA."

In the Reconsideration Decision, the hearing officer states:

Grievant argues he sent his email to the HR Director in order to report fraud and abuse to her. The HR Director had no responsibility for investigating fraud. There is nothing in the HR Director's email to Grievant and other staff suggesting she was soliciting information about fraud at the University. Grievant did not report any specific instances of fraud to the HR Director. The most appropriate interpretation of Grievant's email is that he was informing the HR Director of his intent to report fraud to the State Fraud, Waste and Abuse Hotline. It was unnecessary for Grievant to inform the HR Director that he was reporting fraud to the State Fraud, Waste and Abuse Hotline. In short, Grievant was letting someone outside of his chain of command know that he had unspecified concerns about fraud at the Agency.<sup>15</sup>

While the hearing officer finds that the HR Director had no responsibility to investigate a claim of fraud herself and her email to the grievant was not soliciting information about fraud at the agency, it is unclear how these two findings of fact would dispel the grievant's contention that his correspondence with the HR Director was nevertheless protected activity. The grievance procedure protects employees who report an "incidence of fraud, abuse, or gross mismanagement."<sup>16</sup> Even more broadly, the grievance procedure provides that "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisor and management."<sup>17</sup> The grievance procedure does not require that, to be considered protected activity, a complaint or concern regarding an incidence of suspected fraud, abuse, or gross mismanagement be made only to those within agency management who have the specific responsibility to investigate, or in response to a solicitation for such information. Accordingly, the hearing officer is ordered to clarify and/or explain the relevance of his findings -- that the HR Director had no responsibility to investigate claims of fraud and that she was not soliciting such information -- to the issue of whether the grievant's email communication with the HR Director was protected activity, an issue about which the hearing decision is silent. If the hearing officer finds that the grievant's email communication to the HR Director was protected activity, he is directed on remand to

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<sup>15</sup> Reconsideration Decision at 2 (footnote omitted).

<sup>16</sup> Va. Code § 2.2-3004(A). *See also* Executive Order 12 (2006) (Governor directing State Internal Auditor to continue the State Employee Fraud, Waste, and Abuse Hotline, and ordering that "under no circumstances" shall anyone directly or indirectly attempt to retaliate against someone suspected of calling or cooperating with the Hotline").

<sup>17</sup> Va. Code § 2.2-3000(A). *See also* EDR Ruling #2009-2088; EDR Ruling ##2009-1964, 2008-1970. However, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness. *Cf.* EEOC Compliance Manual, Section 8, "Retaliation," at 8-7, at <http://www.eeoc.gov/policy/docs/retal.html> (for the anti-retaliation provisions to apply, the protected acts under Title VII must be "reasonable" and based on a good faith belief in the impropriety of the management action being challenged).

consider the effect of such a determination on the grievant's overall claim that Written Notice 2 was retaliatory.<sup>18</sup>

Finally, the hearing officer finds that grievant's e-mail communication with the HR Director was contrary to the Dean's instructions because the HR Director was outside the grievant's chain of command.<sup>19</sup> In essence, it appears the hearing officer has found that the grievant must always bring his workplace concerns to the Dean, his immediate supervisor, and that the grievant's failure to do so, being contrary to the Dean's instructions, warrants discipline. However, employees of the Commonwealth are encouraged to report "situations where fraud, waste or abuse may be occurring" to *management*.<sup>20</sup> That is, Commonwealth employees are permitted and encouraged to bring their concerns of suspected fraud, waste or abuse to management, not just his or her immediate supervisor. This is consistent with the well-established principle that an employee should not be required to raise his concerns with the very person suspected of engaging in the alleged improper behavior.<sup>21</sup> Here, the grievant has alleged that he believed the Dean was involved in the alleged fraudulent behavior that he was attempting to report to the HR Director. Again, it is unclear whether in upholding Written Notice 2 for failure to follow supervisory instructions, the hearing officer had considered these arguments, and in particular, the propriety of disciplining an employee for violating an instruction which, if interpreted and applied too broadly, may run counter to an employee's rights to bring concerns to management under the grievance statutes and Executive Order 12.<sup>22</sup> Accordingly, in light of the above, the hearing officer is ordered to

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<sup>18</sup> In this regard, although the hearing officer found that "[w]hen the Dean decided to issue the first written notice, she was not aware Grievant had contacted the State Fraud, Waste and Abuse Hotline," the hearing decisions are silent as to whether the Dean was aware that the Grievant had contacted the Hotline, or whether the Dean suspected or perceived the Grievant to have contacted the Hotline, when she decided to issue Written Notice 2. A grievant may satisfy the protected activity requirement by demonstrating either that he engaged in a protected activity or was suspected or perceived as doing so by the agency. *See e.g.*, EDR Ruling #2006-1280; *see also* Executive Order 12 (2006)(prohibiting retaliation "against someone suspected of calling or cooperating with the Hotline").

<sup>19</sup> *See* Reconsideration Decision at 2.

<sup>20</sup> *See* Executive Order 12 (2006)(ordering the State Internal Auditor to "[m]ake available to state employees a variety of means to report fraud, waste, and abuse in the Commonwealth's business, one of which will be an anonymous toll-free telephone number, *and also including, but not limited to*, any other communications through the Governor's office, Cabinet Secretaries, agency heads, U.S. Mail, e-mail, fax, and the Internet) (emphasis added). *See also* [http://www.doa.virginia.gov/DSIA/Fraud\\_and\\_Abuse\\_Hotline.cfm](http://www.doa.virginia.gov/DSIA/Fraud_and_Abuse_Hotline.cfm) ("it is every state employee's obligation to report significant instances of fraud, waste, or abuse to management").

<sup>21</sup> *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986)(U.S. Supreme Court noting in a sexual harassment case that it was not surprising that the plaintiff employee had failed to report the harassment to her supervisor, the alleged harasser, and that the employer's defense might have been "substantially stronger" if its procedures had been "better calculated to encourage victims of harassment to come forward" by providing other reporting options for employees.

<sup>22</sup> In his decisions, the hearing officer finds the Dean credible in her assertion that she did not retaliate against the grievant when issuing Written Notice 2. This Department is not disputing the Dean's credibility and fully recognizes that the Dean may have believed that she appropriately issued Written Notice 2 because she found the grievant's actions contrary to her instructions. However, as noted above, an instruction such as the one at issue in this case could effectively bar the grievant from exercising his rights under the grievance statutes and/or Executive Order 12, thus the question remains as to whether discipline

clarify his decision with regard to his findings and conclusions as to whether Written Notice 2 was warranted and appropriate.

### *Bias*

The grievant claims that the hearing officer was biased in favor of the agency. The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has “a direct, personal, substantial [or] pecuniary interest” in the outcome of a case.<sup>23</sup> While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.<sup>24</sup> In this case, the grievant has not claimed nor presented evidence that the hearing officer had a “direct, personal, substantial or pecuniary interest” in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed actionable bias in this case.

### *Exclusion of Evidence/Scope of Relief*

The grievant also claims that the hearing officer erred and/or abused his discretion by not allowing the grievant to present evidence of the alleged hostile and/or abusive work environment that he endured, which, he claims, ultimately culminated in his resignation from employment with VCCS. A review of the hearing tapes in this case reveals that the hearing officer did in fact restrict the introduction of such evidence because the issue of a hostile and/or abusive work environment which allegedly resulted in the grievant’s resignation was not an issue qualified for hearing.<sup>25</sup> However, despite the hearing officer’s conclusion at the hearing that the hostile work environment/resignation issue had not been qualified for hearing, he does address and decide the grievant’s claim of hostile work environment in both the Hearing Decision and Reconsideration Decision.<sup>26</sup>

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can be “warranted and appropriate” under the grievance procedure in this particular case when the discipline is based on instructions that may conflict with applicable law.

<sup>23</sup> Welsh v. Commonwealth, 14 Va. App. 300, 314-15, 416 S.E.2d 451, 460 (1992) (alteration in original).

<sup>24</sup> See, e.g., EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

<sup>25</sup> Hearing Recording at 1:33:35 through 1:40:07.

<sup>26</sup> More specifically, in his December 30<sup>th</sup> hearing decision, the hearing officer states: “Grievant contends he was subject to a hostile work environment...Grievant has presented no credible evidence to support his assertion that the Agency created a hostile work environment for him or that the Agency’s disciplinary action against him [sic].” Hearing Decision at 7. Moreover, in his January 8, 2009 reconsideration decision, the hearing officer finds: “Grievant contends the Agency engaged in workplace harassment...Grievant has presented no credible evidence to show that the Agency took action against him because of his race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability....The Agency did not engage in workplace harassment.” Reconsideration Decision at 2 (footnote omitted).



Under the grievance procedure, only issues qualified by the agency head, the EDR Director, or the Circuit Court may be decided by the hearing officer.<sup>27</sup> In this case, the grievant's resignation from employment from VCCS was not an issue in either Grievance 1 or Grievance 2. Moreover, neither Grievance 1 nor Grievance 2 mention the alleged hostile work environment endured by the grievant which he claims led to his resignation. Thus, the hearing officer was correct in his determination at the hearing that the issue of a hostile work environment resulting in resignation was not an issue qualified by the agency head or the EDR Director and therefore was not an issue he could decide. However, because such issues were not qualified, the hearing officer erred in addressing and resolving in his decisions the issue of whether the agency created a hostile work environment or otherwise engage in workplace harassment. The hearing officer is therefore directed to revise his decision and reconsideration decision by deleting the sections addressing the grievant's claims of hostile work environment or workplace harassment.

#### CONCLUSION APPEAL RIGHTS AND OTHER INFORMATION

As outlined above, the hearing officer is ordered to clarify his decision with regard to Written Notice 2 and to revise his decisions by deleting the sections on the unqualified issues of hostile work environment and workplace harassment. This Department finds no other reason to disturb the hearing officer's decision. The parties may seek administrative review of the reconsidered decision **within 15 calendar days** of the date of that reconsidered decision. 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>28</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>29</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>30</sup>

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Claudia T. Farr  
Director

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<sup>27</sup> See *Rules for Conducting Grievance Hearings* § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")

<sup>28</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>29</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>30</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).