

Issue: Administrative Review of Hearing Officer's Remanded Decision in Case No. 8975); Ruling Date: March 16, 2009; Ruling #2009-2236; Agency: University of Virginia; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the University of Virginia  
Ruling Number 2009-2236  
March 16, 2009

INTRODUCTION

On February 25, 2009, this Department (EDR) received the grievant's request for administrative review of the hearing officer's Second Reconsideration decision in Case Number 8975<sup>1</sup> concerning the grievant's grievance with the University of Virginia (the University). For the reasons set forth below, the hearing decision is remanded to the hearing officer for further clarification.<sup>2</sup>

FACTS

On February 6, 2009, this Department issued Ruling No. 2009-2192, which addressed the grievant's request for administrative review of the hearing decision in Case Number 8975. Per that ruling, the case was remanded to the hearing officer for clarification and consideration of the grievant's mitigation arguments consistent with the "exceeds the limits of reasonableness" standard.<sup>3</sup> Further, this Department directed that the hearing officer "must also explain his findings as to those grounds asserted by the grievant."<sup>4</sup> Following remand, the hearing officer issued the Second Reconsideration decision on February 10, 2009.<sup>5</sup> The grievant now requests administrative review of that decision, arguing that the hearing officer failed to consider one of his arguments for mitigation.

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<sup>1</sup> Decision of Hearing Officer, Response to EDR Request, Case No. 8975, Feb. 10, 2009 ("Second Reconsideration").

<sup>2</sup> The University argues that the grievance procedure does not allow for this request for administrative review of a revised hearing decision. However, this Department has held that following remand to a hearing officer, both parties 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). *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056; EDR Ruling Nos. 2007-1563, 2007-1637, 2007-1691; EDR Ruling No. 2007-1556. In this case, the grievant has challenged the hearing officer's mitigation analysis, which had not been included in the original hearing decision, and thus could not have been challenged in the grievant's original administrative review request. As such, the grievant's request is appropriate to consider.

<sup>3</sup> EDR Ruling No. 2009-2192.

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

<sup>5</sup> Second Reconsideration at 1.

## 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 argues that the hearing officer did not consider his mitigation argument that the University, and specifically the grievant’s supervisor, did not consistently apply certain policies and practices concerning, for example, leave, work attendance, and related documentation. In the Second Reconsideration decision, the hearing officer only addressed the grievant’s assertion that the agency had not presented evidence of treatment of similarly situated employees.<sup>8</sup> That hearing decision correctly indicates that it is the grievant, not the agency, who must offer evidence at hearing as to how policies and practices were applied to similarly situated employees. However, as asserted by the grievant in his current request for administrative review, the Second Reconsideration decision does not address the grievant’s evidence that he had purportedly provided regarding alleged inconsistent application, the grievant’s awareness of those practices, and how the grievant’s behavior was affected.<sup>9</sup> These arguments were raised in the grievant’s first administrative review request to this Department and in the grievant’s original request for reconsideration to the hearing officer.<sup>10</sup>

Because it appears the hearing officer only responded to the grievant’s statements about the agency’s failure to present evidence, this Department cannot deduce from the Second Reconsideration decision whether the hearing officer has considered the grievant’s evidence of the alleged inconsistent application of policies. As such, the hearing decision must again be remanded for additional clarification of the hearing officer’s consideration of the alleged mitigating factor of inconsistent application.

This Ruling in no way states that the grievant’s evidence is sufficient or requires the hearing officer to mitigate the disciplinary action at issue in this case. This Ruling only provides that in responding to the grievant’s mitigation claim, the hearing officer must clarify the hearing

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

<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> Second Reconsideration at 2.

<sup>9</sup> It appears the grievant may have raised the agency’s lack of evidence, if that is the case, to indicate that the grievant’s alleged evidence of inconsistent application of policies was “unrebutted.” Based on the grievant’s requests for administrative review and reconsideration, the grievant’s evidence allegedly includes, in part, the testimony of other employees in the grievant’s department being “allowed to leave work early without requesting or being charged with any type of leave.” Grievant’s Request for Reconsideration at 7. The grievant additionally cites to his knowledge of these practices and his presumption that the records in these instances were falsified. *Id.*

<sup>10</sup> *Id.* at 7-8.

decision to demonstrate consideration of the grievant's evidence regarding inconsistent application of policies.

APPEAL RIGHTS AND OTHER INFORMATION

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>11</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>12</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>13</sup>

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Claudia T. Farr  
Director

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<sup>11</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>12</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>13</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).