

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8953; Ruling Date: July 20, 2009; Ruling #2009-2300; Agency: Department of Corrections; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2009-2300  
July 20, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8953. For the reasons set forth below, the decision is remanded for further consideration.

FACTS

The facts set forth in the hearing decision issued in Case Number 8953 are as follows:

On June 13, 2008, grievant was terminated by Written Notice for "Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." The Written Notice did not specify the Group Category.

From the evidence presented, the Department gave Grievant every opportunity to improve his attendance problems. Through meetings and counseling, he was granted every due process right to address his absences.

Careful review of Grievant's rights under [Family Medical Leave Act] FMLA from the evidence shows that where FMLA was appropriate, on an incident by incident basis, he was granted his full rights under the statute, to-wit:

In 2005, no FMLA qualified absences, no three day absences and no request for FMLA protected leave.

In 2006, absences due to his wife's health issues, pregnancy, child birth and absences due to stress were his allowable hours and he was allowed "leave without pay" after the FMLA approved time was exhausted.

In 2007, Grievant had 14 days of qualifying absences and an additional 138 hours of leave with no absence over two days and no information that twenty of the 138 hours qualified for FMLA protected leave.

In 2008, Grievant had several absences, none indicating a protected health problem and FMLA was not requested.

There was no evidence of disparate treatment of the Grievant.

The Department properly posted posters explaining FMLA and policy requirements.

Grievant had an active Group II Written Notice at the time of termination.

Grievant was given the choice of leave with or without pay and always chose FMLA time with leave.

From the evidence presented, Grievant admitted he was not a dependable employee, that he was not "a morning person". He often felt better later in the day after calling in sick in the morning. He admitted that his Supervisors tried to accommodate him by moving him to positions which would keep his interest up.<sup>1</sup>

Based on these facts, the hearing officer reached the following "Applicable Law and Opinion":

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable

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<sup>1</sup> Hearing Decision, Case No. 8953, issued April 9, 2009 ("Hearing Decision") at 2-3.

statutes and to the policies and procedures promulgated by DHRM, including Policy Number 4.20 "Family and Medical Leave".

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Operating Procedure, 135.1, Standards of Conduct shall be and are consistent with Department of Human Resources Managements (DHRM) policy which sets the standards for professional conduct and behavior, and corrective actions for unacceptable behavior.

Sick Leave Verification Policy and Procedure was clarified by Department of Corrections Memorandum dated September 29, 2000, and applied in Required Sick Leave Policy dated December 18, 2002.

The Grievant's rights under the FMLA after careful review do not appear to have been violated. The Department's records indicate Grievant was given FMLA protection where he qualified. His constitutional rights of due process, from the evidence were carefully and admittedly observed. Grievant admitted that he was not a "dependable employee". Grievant had been told in 2005 on his Annual Performance Evaluation that he needed to work on his leave usage. This admonition was repeated by his supervisors many times since then. In August of 2006, he called in sick and was seen coaching a Little League All-Star Game, later that day.

The Department proved that the Grievant failed to follow his supervisors [sic] instructions not to violate leave/attendance written policy performance requirements outlined in Policy Number 5-12, such failure constituted misconduct and the discipline was consistent with the law and the policy, and the discipline did not exceed the limits of reasonableness. From the face of the Written Notice, even though the "Group II" box was not checked, the Written Notice clearly states that Grievant is terminated as of June 13, 2008, for policy violations under Policy Number 5-12, resulting in "his no longer being a viable employee for retention." He has had ample opportunity to respond as required in Operating Procedure 135.1 and the Grievance Procedure.

Grievant had an active Group II Written Notice at the time of termination.

From the evidence, the Department's action did not violate Grievant's due process rights, complied with FMLA requirements and was in the bounds of specific policy. Termination was not disparate for the actions of Grievant.<sup>2</sup>

Based on the forgoing "Applicable Law and Opinion," the hearing officer upheld the Written Notice and termination.<sup>3</sup>

### DISCUSSION

The grievant (by counsel) objects to the hearing decision in this case on the basis that the grievant's due process rights were purportedly violated.

#### *I. Due Process*

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"<sup>4</sup> is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.<sup>5</sup> However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive

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<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Davis v. Pak*, 856 F.2d 648, 651 (4<sup>th</sup> Cir. 1988); *see also Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); *Bowens v. N.C. Dep't of Human Res.*, 710 F.2d 1015, 1019 (4<sup>th</sup> Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also Huntley v. N.C. State Bd. Of Educ.*, 493 F.2d 1016, 1018-21 (4<sup>th</sup> Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also Garraghty v. Jordon*, 830 F.2d 1295, 1299 (4<sup>th</sup> Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.") (citing to *Cleveland Bd. of Education v. Loudermill*, 105 S. Ct. at 1487, 1495; *Arnett v. Kennedy*, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974)).

<sup>5</sup> *See Va. Code* § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.”<sup>6</sup> Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.<sup>7</sup>

A. Failure of the Written Notice to State a Level of Offense

In this case, the grievant was charged with “Failure to follow supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.’ [Grievant’s] continuous failure to apply himself in abiding by the attendance performance requirements outlined in Policy #5-12 has resulted in his no longer being a viable employee for retention.” The Notice expressly terminated the grievant’s employment but neither the Written Notice nor the attached supporting memorandum originally listed the level of the offense. However, at some point prior to the hearing, the Written Notice was designated as a Group II Offense.

As noted above, the essence of due process is that an employee must be provided with sufficient notice of the charged misconduct so that he is able to challenge the charge. Here, the grievant was provided with notice of the alleged charge of poor attendance in sufficient detail to respond to that charge. In addition, while the grievant was not originally informed of the level of the offense, the Written Notice made it clear that the grievant’s employment was being terminated because of his attendance problems. Thus, he was aware of the serious nature of the charges.<sup>8</sup> Moreover, the initial oversight of failure to list the level of the offense was corrected prior to hearing and any delay in receiving notice of the level of the Group Notice did not in this case appear to prejudice the grievant in challenging the alleged poor attendance charge.<sup>9</sup> Thus, we find no reason to disturb the decision on the basis of lack of notice.

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<sup>6</sup> *Rules for Conducting Grievance Hearings* § VI(B) citing to O’Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that “[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.”

<sup>7</sup> See EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

<sup>8</sup> *C.f.* Curtis v. Montgomery County Public Schools, 242 Fed. App. 109, (4th Cir. 2007)(unpublished decision). (Employee had notice of the serious allegations against him, but asserted that he was not given notice of the possible consequences of the investigation. Noting that it was undisputed that the employee was, prior to his dismissal, notified of the charges against him and provided an opportunity to present his side of the story, the court held that the employee was on notice of the serious possible consequences of his employer’s investigation, thus he had been granted all the process that was due.)

<sup>9</sup> This is not to say that all omissions or deficiencies in a Written Notice can be fully cured through modification or correction prior to hearing. A number of factors, such as the proximity in time for any such modification to the grievance hearing will impact whether any deficiency is cured. Here,

The grievant also objects to the fact that the individual who ultimately corrected the Written Notice, the HR Officer, had no authority to designate the level of violation. Having addressed this objection from a due process/*Rules* perspective, any remaining argument about the propriety of the designation of the level of the offense is not one that this Department has authority to review. We believe that the more appropriate reviewer for an argument that the wrong person issued the level of offense is the Department of Human Resource Management (DHRM) Director, who is charged with promulgating and interpreting state policy. A request for administrative review by the DHRM Director is pending and should address this objection from a policy perspective.

B. Inappropriate and Unprofessional Behavior by the Agency's Representative

The grievant also asserts that the interruptive behavior of the agency representative coupled with the hearing officer's failure to curtail this purported behavior, impeded the grievant's presentation of his case, thus denying him due process. A review of the recording of the hearing revealed that the agency's representative did object on a number of occasions and at least one objection was, on its face, clearly without merit.<sup>10</sup> Other agency objections were also overruled. For example, the agency's representative objected, on the basis of relevance, to grievant's counsel's cross-examination regarding the Warden's knowledge of how much leave an employee is entitled under the FMLA.<sup>11</sup> Although the hearing officer appeared to initially side with the agency, he allowed the grievant's representative to pursue her questioning of the Warden on this point.<sup>12</sup> The hearing officer also overruled the agency's 'asked and answered' objection concerning cross-examination of the HR Officer regarding the absence of any fraud associated with doctor's excuses.<sup>13</sup> Likewise, the hearing officer overruled an objection raised by the agency's representative regarding the HR Officer's knowledge of case law on the FMLA.<sup>14</sup> In addition, the hearing officer appeared to admonish the agency's representative by stating that "if you want to testify, I'll be glad to swear you in."<sup>15</sup>

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the grievant has provided no evidence that the delay in correcting the omission prejudiced his ability to rebut the charge of poor attendance.

<sup>10</sup> When the grievant's counsel attempted to cross-examine the Warden as to whether he had ever experienced a certain situation, the agency's representative objected on the basis of "speculation." The question was not a hypothetical requiring a speculative response. Rather, it was an attempt to discern whether the Warden himself had ever found himself in a particular situation—one which the grievant allegedly found himself facing. The grievant's counsel was, however, permitted to pursue the "have you ever" question. Tape 2, Side B at 100.

<sup>11</sup> Hearing Tape 2, Side A at 345.

<sup>12</sup> *Id.* at 380.

<sup>13</sup> Hearing Tape 1, Side A at 355.

<sup>14</sup> Hearing Tape 4, Side A at 99.

<sup>15</sup> Hearing Tape 1, Side A at 295.

On the other hand, the hearing officer upheld other objections by the agency's representative. For example, the agency's representative objected to cross-examination of the Lieutenant regarding potential bias stemming from his Lieutenant's alleged affair with the grievant's ex-wife. (While the relevancy objection was sustained, the hearing officer offered that if a foundation was laid, he might let the testimony in.)<sup>16</sup> Similarly, the hearing officer appears to have appropriately upheld (on two occasions) objections to a previously issued Group II Notice that was not before him.<sup>17</sup> The hearing officer also appears to have appropriately sustained the agency's objection to the grievant's attempt to introduce evidence relating to his unemployment compensation claim.<sup>18</sup> When taken as a whole, we cannot conclude that objections raised by the agency's representative were so excessive or disruptive as to have denied the grievant the full and fair hearing required by due process.

## *II. The Decision Does Not Conform to the Family Medical Leave Act*

The grievant asserts that the hearing decision does not conform to the FMLA. This is essentially a legal issue that can be raised with the circuit court in the jurisdiction in which the grievance arose.<sup>19</sup> However, because the *Rules for Conducting Grievance Hearings* requires that all decisions “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,*” this Department will review and address legally premised challenges solely on the basis that a decision does not comport with the above *Rules* requirement.<sup>20</sup>

As an initial point, we note that the *Grievance Procedure Manual* does not expressly address the burdens of the parties in a case such as this where the agency disciplines an employee for poor attendance and the employee challenges the discipline on the basis of protection provided by FMLA. With “disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances.”<sup>21</sup> On the other hand, the *Grievance Procedure Manual* states that “in all other actions, the employee must

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<sup>16</sup> Hearing Tape 2, Side A at 89.

<sup>17</sup> Hearing Tape 2, Side B at 120 and Tape 3, Side A at 275. The objections were properly sustained essentially on the basis that the Written Notice either had been or could have been challenged and was not subject to re-litigation.

<sup>18</sup> Hearing Tape 3, Side B at 310; *Rules for Conducting Grievance Hearings* §IV (D).

<sup>19</sup> *Grievance Procedure Manual* § 7.3(C).

<sup>20</sup> *Rules for Conducting Grievance Hearings* § V (C) (emphasis added).

<sup>21</sup> *Grievance Procedure Manual* § 5.8.



present his evidence first and must prove [his] claim by a preponderance of the evidence.”<sup>22</sup> The *Grievance Procedure Manual* does not expressly address how these two provisions interact in this sort of situation but as explained below, we find Federal Merit System Protection Board (MSPB) law instructive.

Under MSPB law (by no means mandatory authority but nonetheless persuasive), when a disciplined employee asserts that the discipline was issued for an improper reason, the employee is deemed to be raising an affirmative defense and it is the employee’s burden to prove the affirmative defense.<sup>23</sup> Under MSPB law, the agency has no burden to disprove the affirmative defense.<sup>24</sup> We believe that this is an appropriate model for cases under the grievance procedure as well. Accordingly, the grievant must establish by a preponderance of the evidence that the agency’s actions violated the FMLA.

#### A. Three Day Rule

The grievant asserts that the HR Officer testified that she notifies employees of their rights under the FMLA only after three consecutive days of absence. The hearing officer seems to have adopted a three-day rule but did not discuss it.<sup>25</sup> While the FMLA does utilize a three-day rule in at least one of its regulations, it does not appear to be relevant in every case. Under CFR 29 CFR 825.115, a serious health condition involving continuing treatment by a health care provider includes:

a) Incapacity and treatment. A period of incapacity of *more than three consecutive, full calendar days*, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider;  
or

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<sup>22</sup> *Id.*

<sup>23</sup> *Edwards v. Dep’t of Veterans Affairs*, 100 M.S.P.R. 437, 2005 MSPB LEXIS 6557 (2005).

<sup>24</sup> *Id.*

<sup>25</sup> As noted in the “Facts” section of this ruling, the decision finds that: “In 2005, no FMLA qualified absences, *no three day absences* and no request for FMLA protected leave.” Also, the hearing officer held that “[i]n 2007, Grievant had 14 days of qualifying absences and an additional 138 hours of leave with *no absence over two days* and no information that twenty of the 138 hours qualified for FMLA protected leave.” (Emphasis added).

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. (Emphasis added.)

However, a serious health condition involving continuing treatment by a health care provider can also include:

c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc).<sup>26</sup>

(At hearing the grievant appeared to argue that his absences were often of an episodic nature.)<sup>27</sup> Whether the above regulation is the source of the agency's three-day rule was not evident from a review of the hearing record. Whatever the source, the agency appears to have adopted a three-day rule, and more importantly, the hearing officer seems to have as well.<sup>28</sup> Because the hearing 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," and given the hearing officer's apparent reliance on the three-day rule to support his holding that the grievant's FMLA rights were not violated, the hearing officer should have discussed the source of the rule, its content, and how it supports his holding.

## B. Discrimination under the FMLA

The second point raised by the grievant is that the agency effectively penalized him for utilizing FMLA leave. The FMLA prohibits an employer from discriminating or retaliating against an employee for exercising his rights under the FMLA.<sup>29</sup> The hearing decision holds that the grievant was granted his full rights under the FMLA based, in part, on the findings discussed above in the "Facts" section of this ruling, including the lack of three day absences. Not discussed is the argument raised by the grievant at hearing and in his brief

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<sup>26</sup> 29 CFR 825.115.

<sup>27</sup> Hearing Tape 4, Side A at 52.

<sup>28</sup> Hearing Decision at 3.

<sup>29</sup> See 29 CFR 825.220.

regarding his remaining leave balance. The grievant has repeatedly asserted that if the time away from work for FMLA absences is deducted from his leave balance, he would have had ample leave to cover his recent absences.<sup>30</sup> The hearing decision did not, but should have, addressed this central argument. Accordingly, the decision is remanded to the hearing officer to respond to each of these two FMLA objections.

## *II. Hearsay*

The grievant objects to the hearing officer's curtailing of the grievant's testimony regarding what others may have said about the HR Officer. The agency objected on the basis of "facts and rumors."<sup>31</sup> The grievant's counsel noted that hearsay is allowed in a grievance hearing, to which the hearing officer stated "it is if I say it is."<sup>32</sup> The hearing officer apparently ruled in favor of the agency, explaining that "I think that's taking it a little far afield."<sup>33</sup> Based on his statements, it was not clear whether the hearing officer construed the agency's objection, (which was admittedly ambiguous), to be one of relevancy or hearsay. The hearing officer asserted at hearing that he is not bound by the Rules of Evidence. It is true that the *Rules* state that "the technical rules of evidence do not apply,"<sup>34</sup> thus, as EDR has long held in rulings, if probative, hearsay evidence is admissible.<sup>35</sup> Therefore, to the extent that the hearing officer excluded the testimony solely because it was hearsay, such an exclusion on that basis alone would be error. Accordingly, if the testimony was excluded on the basis of hearsay alone, the hearing officer is ordered to reopen the hearing to allow the grievant to introduce the excluded testimony.<sup>36</sup> Such a re-opening may be conducted via telephonic conference.

## *IV. Findings of Fact*

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<sup>30</sup> Grievant Memo at 2-3. The grievant notes that the agency presented documentation and testimony justifying the grievant's discharge on low leave balances which deducted all FMLA leave hours. The grievant asserts that if the FMLA leave had not been counted the grievant "would have had at least 576 additional hours on the books." *Id.* at 3. The grievant asserts that an "employee with 576 hours on the books can hardly be guilty of excessive absenteeism." *Id.* See also, Hearing Tape 2, Side A at 365.

<sup>31</sup> Hearing Tape 3, Side A at 68.

<sup>32</sup> *Id.* at 70.

<sup>33</sup> *Id.* at 72.

<sup>34</sup> *Rules* at §IV (D).

<sup>35</sup> EDR Rulings Nos. 2007-1630; 2004-614.

<sup>36</sup> Nothing in this ruling is intended to prohibit the agency from raising other objections to this previously excluded testimony.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>37</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>38</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 objects to the hearing officer’s discounting of his testimony regarding a statement that he made to the Lieutenant. The Lieutenant testified that the grievant stated that he was “not a morning person.” The grievant subsequently attempted to place the statement in context by explaining that because he was not a morning person, if the Lieutenant had any serious matters to discuss, he would prefer that they be raised after the grievant had been on shift for an hour or so. Under cross-examination, however, the Lieutenant was clear that he had not heard the comment in that context.<sup>39</sup> Because the hearing officer’s findings regarding the “morning person” comment are based upon evidence in the record, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

#### V. *Bias*

The grievant claims that the hearing officer was biased, and that a review of the hearing tapes will reveal that bias. The grievant further asserts that the hearing officer added “testimony which was not given.”

As an initial point, the testimony that the grievant asserts was added related to the agency’s posting of FMLA notices. The decision did not cite to testimony for the proposition that the agency “properly posted posters explaining FMLA and policy requirements.” For that matter, the decision did not cite to any evidence for this proposition. We note that the agency’s rebuttal to the grievant’s post hearing brief asserted that:

To prove that the FMLA is properly presented and employees approved I offer: We have a poster in both the main prison and building and in the hallway outside Human Resources as required by law. Employees receive a presentation in orientation and it is obvious that [grievant] knew the procedures with his many uses.<sup>40</sup>

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<sup>37</sup> Va. Code § 2.2-3005.1(C).

<sup>38</sup> *Grievance Procedure Manual* § 5.9.

<sup>39</sup> Hearing Tape 2 Side A at 20 (“No, I didn’t misunderstand that statement.”)

<sup>40</sup> Agency’s Rebuttal dated March 26, 2008 [sic].

The hearing officer granted the grievant the opportunity to provide a brief on the FMLA, and the agency an opportunity to provide rebuttal. The opportunity presented to the parties appeared to be an offer to provide briefs on their interpretation of the law and how the law impacted the facts presented at hearing. It would be an unusual circumstance indeed, where such an opportunity is used as a means to introduce new evidence, as there is no opportunity to test the veracity of such evidence. Assuming that the rebuttal brief was the source for the finding regarding the posting of posters, any potential error associated with accepting evidence in this manner can be cured. Again, assuming that the source of the finding was the rebuttal brief, because this decision has been remanded for further clarification and reopening, the grievant, if he desires, shall be allowed to present evidence to rebut the agency's assertion that it complied with FMLA notice requirements.

As to the overarching objection of bias, 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>41</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>42</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. Rather, the grievant's claims of alleged bias are essentially his grounds for appeal to this Department on various other aspects of the hearing officer's alleged noncompliance with the grievance procedure. Those issues have been addressed in this ruling and, where ordered by EDR, will be reconsidered by the hearing officer on remand. In sum, this Department cannot conclude that the hearing officer showed actionable bias in this case.

A final point: while we find no bias in this case, we note that at one point the hearing officer counseled the grievant's attorney for coming close to arguing with a witness when she was cross-examining the HR Officer's knowledge of case law on the FMLA. Based on a review of the hearing recording, reasonable observers could certainly reach different conclusions as to whether the questioning by grievant's counsel was "approaching argumentative." Notwithstanding this characterization, we note that as described in Section I(B) of this ruling, the hearing officer overruled a number of the agency's objections and cautioned its representative about testifying.

#### APPEAL RIGHTS AND OTHER INFORMATION

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<sup>41</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992) (alteration in original).

<sup>42</sup> *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

This case is remanded to the hearing officer for further clarification and consideration as set forth 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).<sup>43</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.<sup>44</sup>

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>45</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>46</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>47</sup>

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Claudia T. Farr  
Director

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<sup>43</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>44</sup> See *Grievance Procedure Manual* § 7.2(a).

<sup>45</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>46</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>47</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).