

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9080; Ruling  
Date: October 16, 2009; Ruling #2009-2352; Agency: Department of Education;  
Outcome: Hearing Decision In Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Education  
Ruling No. 2009-2352  
October 16, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9080. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision.

FACTS

The Department of Education ("agency") employed Grievant as a reading assessment specialist.<sup>1</sup> On November 7, 2008, the grievant timely initiated a grievance challenging the elimination of his position and subsequent layoff.<sup>2</sup> In his grievance, the grievant asserted that his layoff was in retaliation for his complaints about test development and constituted a misapplication of state policy.<sup>3</sup>

After qualification by this Department in EDR Ruling No. 2009-2198, the grievance advanced to hearing. In a hearing decision dated June 9, 2009, the hearing officer held that the grievant had failed to establish that his layoff was retaliatory or a misapplication of policy.<sup>4</sup> The grievant has requested an administrative review of the hearing officer's decision.

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>5</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>6</sup>

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<sup>1</sup> Decision of Hearing Officer in Case. No. 9080, issued June 9, 2009 ("Hearing Decision"), at 1-2.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.* at 1, 11.

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

<sup>6</sup> *See Grievance Procedure Manual* § 6.4.

The grievant raises two arguments with respect to the hearing officer's decision. First, he asserts that the hearing officer erred in finding that he had failed to prove his claim of retaliation. In addition, he argues that the hearing officer should have recused himself from hearing the case. Each of these arguments will be addressed below.

### *Retaliation*

The grievant argues that the hearing officer erred with respect to the grievant's claim of retaliation. In particular, he charges that the hearing officer did not understand his objections regarding "linking sets" and "P-values" (concepts that apparently relate to how test difficulty is measured), and as a result, failed to consider these objections as protected activity. He also challenges the hearing officer's conclusion that the grievant had failed to show that the agency's stated reason for the grievant's layoff were pretextual.

While the grievant is correct that the hearing officer found that the majority of his actions did not constitute protected activity, the hearing officer's basis for reaching this conclusion appears to have been a determination that any conduct in which the grievant engaged in the course of his job could not be considered protected. Whether the hearing officer erred in his findings with respect to the grievant's protected activities is immaterial, however, as the hearing officer specifically found that even had the grievant been able to reach his *prima facie* burden, he had nevertheless failed to prove that the agency's stated reason for his layoff was a pretext for retaliation.<sup>7</sup>

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 grounds in the record for those findings."<sup>9</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.

The grievant's arguments appear to contest issues such as 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. While the grievant may not agree with the hearing officer that the agency's stated reasons for his layoff were worthy of credence, the hearing officer's findings appear to be based on record evidence and will not be overturned.

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<sup>7</sup> Hearing Decision at 10 -11.

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

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

*Recusal*

The grievant also asserts that the hearing officer should have recused himself from the case because of his work as a hearing officer in Department of Education special education cases. As the grievant acknowledges, the hearing officer advised the parties of this work prior to the hearing and asked them to let him know of any objections. Although the grievant alleges that he advised he was uncomfortable with the hearing officer's work with Department of Education cases, the grievant admits that his lawyer did not raise any objections to the hearing officer.<sup>10</sup>

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>11</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>12</sup> Because 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, we find no evidence of actionable bias in this case.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer's 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>13</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>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>

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Claudia T. Farr  
Director

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<sup>10</sup> The grievant also asserts that the hearing officer has a .929 percentage of "siding" with agencies in EDR cases, a figure he apparently calculated from the hearing decisions available to the public on this Department's website. While the grievant argues that this information should have been made available to him, the information on which he based his calculations is available to the general public at any time, through access to our website.

<sup>11</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992) (alteration in original).

<sup>12</sup> *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

<sup>13</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>14</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; *see also* *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).