

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9083, 9107;  
Ruling Date: August 31, 2009; Ruling #2010-2387; Agency: University of Mary  
Washington; Outcome: Remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the University of Mary Washington  
Ruling No. 2010-2387  
August 31, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Numbers 9083 and 9107. For the reasons set forth below, this case is remanded for further consideration.

FACTS

The grievant in this case challenged her "Below Contributor" rating on her October 2008 Performance Evaluation as well as her termination based on an accumulation of Written Notices. In his decision, the hearing officer upheld the grievant's termination, but found that the agency had erred in issuing the Performance Evaluation. As relief, the hearing officer directed the agency to revise the Performance Evaluation and give her a rating of "Contributor." The agency has challenged the hearing officer's decision on the basis that the relief ordered was outside the hearing officer's authority.

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>1</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>2</sup>

In this case, the agency asserts that having, in effect, found the performance evaluation to be arbitrary and capricious, the hearing officer could not order the agency to award a particular rating. Instead, the agency argues, the hearing officer was limited to requiring the agency to re-evaluate the grievant.

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<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>2</sup> See *Grievance Procedure Manual* § 6.4.

As the agency correctly notes, § VI(C)(2) of the *Rules for Conducting Grievance Hearings* provides, “[i]f a contested performance evaluation is qualified for hearing, and a hearing officer finds that it is arbitrary or capricious, the only remedy is for the agency to repeat the evaluation process and provide a rating with a reasoned basis related to established expectations. The remedy cannot include an award of any particular rating.” Thus, while the hearing officer in this case was free to recommend a particular rating,<sup>3</sup> he exceeded his authority in directing that particular sections of the evaluation be changed and the grievant be given an overall rating of “contributor.” Accordingly, the hearing decision is remanded to the hearing officer for him to reconsider his decision in light of this Ruling.

#### 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 and any reconsidered hearing decisions following such review have been decided.<sup>4</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>5</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>6</sup> This Department’s rulings on matters of procedural compliance are final and nonappealable.<sup>7</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> See Va. Code §2.2-3006(D).

<sup>4</sup> *Grievance Procedure Manual*, § 7.2(d).

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

<sup>6</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>7</sup> See Va. Code § 2.2-1001 (5), § 2.2-3003 (G).