

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9155;  
Ruling Date: December 4, 2009; Ruling #2010-2420; Agency: University of  
Virginia Health System; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the University of Virginia Health System  
Ruling Number 2010-2420  
December 4, 2009

The grievant has asked this Department to administratively review the hearing officer's decision in Case No. 9155. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On January 16, 2009, the grievant received a Formal Performance Improvement Counseling Form with removal for inappropriately accessing patient records.<sup>1</sup> The grievant timely initiated a grievance challenging the disciplinary action, and a hearing was held on August 21, 2009.<sup>2</sup> In a hearing decision dated August 27, 2009, the hearing officer upheld the disciplinary action.<sup>3</sup>

The grievant subsequently sought reconsideration of the hearing decision, which the hearing officer denied on November 10, 2009.<sup>4</sup> The grievant now seeks an administrative review decision 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>5</sup> If the hearing officer's exercise of authority is not in compliance with the

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<sup>1</sup> Decision of Hearing Officer, Case No. 9155, issued August 27, 2009 ("Hearing Decision") at 1.

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

<sup>3</sup> *Id.* at 1, 5.

<sup>4</sup> Reconsideration Decision of the Hearing Officer, Case No. 9155-R, issued November 10, 2009 ("Reconsideration Decision").

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

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>

The grievant asks this Department for administrative review on two bases: (1) the decision was rendered without subject matter jurisdiction due to an error by the agency at the first management resolution step, and (2) the hearing officer failed to make “required findings of fact on four material issues.” Each of these grounds will be addressed below.

1. The Hearing Officer Lacked Subject Matter Jurisdiction

The grievant asserts that the University did not have the appropriate individual act as the first step respondent during the management resolution steps of the grievance process and therefore the hearing officer lacked subject matter jurisdiction over the case.

The grievant first raised the issue of the proper first-step respondent in a compliance ruling request to the EDR Director. In EDR Ruling No. 2009-2279, the Director held that the agency’s acted in compliance with the grievance procedure with respect to the first-step respondent. Moreover, even if procedural noncompliance had occurred during the management steps, that would not have removed jurisdiction from the hearing officer. Jurisdiction was conferred through the qualification process after the grievant requested that her grievance advance to hearing. As noted in that Ruling, the EDR Director’s decisions on matters of compliance are final and nonappealable.

2. The Hearing Officer Failed to Make Certain Findings of Fact

The grievant further asserts that the hearing officer failed to make findings of fact on four “material” issues: “(1) who was [the grievant’s] immediate supervisor at the time of the termination; (2) whether the Agency failed to consider at all, much less failed to carefully consider, the Grievant’s work record prior to terminating her for conduct for which agency policy required such consideration prior to termination; (3) whether, had such consideration occurred, that consideration would have resulted in suspension rather than termination; and (4) whether the termination of [the grievant] was, or was not, motivated in whole or in part by the downsizing of her department.”

As the grievant admits, the first of these issues—the identity of the grievant’s immediate supervisor—is relevant only to the grievant’s argument regarding the hearing officer’s jurisdiction. As that argument is wholly without merit, for the reasons set forth in EDR Ruling No.2009-2279, the hearing officer did not err in not addressing this question.

The second and third issues raised by the grievant would only be material if the agency were required, as a matter of policy, to carefully consider the grievant’s work record prior to terminating her. However, the hearing officer’s interpretation of agency

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

policy is not an issue for this Department to address. Rather, the Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.<sup>7</sup> Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state or agency policy and therefore erred by not addressing the issues raised by the grievant.<sup>8</sup>

If the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM regarding these issues but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.<sup>9</sup>

The fourth and last of the "material" issues identified was specifically addressed by the hearing officer in his reconsideration decision. In that decision, the hearing officer stated that "[n]o credible evidence was presented to support [the] allegation" that the grievant's removal was motivated by a desire to reduce staff.<sup>10</sup>

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>11</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>12</sup> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions 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>13</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>14</sup>

Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses'

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<sup>7</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>8</sup> In the event DHRM concludes that the agency was required to consider the grievant's work history, the hearing decision must be remanded to the hearing officer to determine whether the agency engaged in the appropriate consideration and if not, what the appropriate remedy should be.

<sup>9</sup> See, e.g., EDR Ruling No. 2008-1829. The grievant also asserts that the hearing officer erred in his reconsideration decision by characterizing the agency's alleged failure to consider the grievant's work record as a matter of mitigation. The validity of this contention turns on the same policy issue—that is, whether the agency had an obligation under policy to consider the grievant's work record prior to taking disciplinary action—and can only be resolved by DHRM.

<sup>10</sup> Reconsideration Decision at 2 fn.3.

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

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. Thus, to the extent the agency challenges the hearing officer's findings of fact and his weighing of the evidence, such determinations are entirely within the hearing officer's authority.

In this case, the hearing officer concluded that no credible evidence was presented to support the grievant's assertion regarding the alleged motivation to downsize, and the grievant has not identified sufficient evidence to call into question this conclusion. While the grievant asserts that agency testimony indicated that at the time of the hearing, the agency intended to eliminate the grievant's previous position, that evidence does not in itself demonstrate a motive to downsize at the time of the grievant's termination approximately seven months earlier. Accordingly, this Department must uphold the hearing officer's finding of fact with respect to this issue.

#### 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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.<sup>15</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>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>

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Claudia T. Farr  
Director

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<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).