Issue: Administrative Review of Hearing Officer's Decision in Case No. 8604; Ruling Date: March 12, 2010; Ruling #2010-2500; Agency: Department of State Police; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2010-2500
March 12, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's second reconsideration in Case Number 8604.

FACTS

The grievant is employed as a Trooper with the Virginia State Police ("VSP" or "agency"). On January 1, 2006, the grievant co-founded the Virginia Troopers Alliance ("VTA"), a local of the International Union of Police Associations, AFL-CIO. The grievant claims that since becoming affiliated with the VTA, he has endured significant and frequent acts of discrimination and/or retaliation by VSP. In an October 19, 2006 grievance, the grievant asserted that his 2006 annual performance evaluation rating was lowered as a result of retaliation for his union activity. The grievant received an overall "Contributor" rating on his 2006 performance evaluation.[1] The grievant challenged his performance evaluation by initiating a grievance on October 19, 2006. His grievance also alleges that his 2006 performance evaluation is arbitrary or capricious and that the agency misapplied or unfairly applied policy. The grievant asserts that as a result of the "Contributor" rating his leave accrual has been adversely affected along with his promotional competiveness.

The October 19, 2006 grievance advanced to hearing and on May 21, 2009, the hearing officer upheld the agency's overall "Contributor" rating.[2] In upholding the agency's rating of the grievant's performance, the hearing officer held that:

> Grievant argues that the Agency scheduled his court dates during the K-9 training and, thus, he could not attend the training. He contends the Agency's assessment of his K-9 duties as being at a "contributor" level is arbitrary. If the Agency had scheduled Grievant's court dates intentionally so that he would miss the K-9

[1] The VSP rating system has 5 rating categories: "Extraordinary Contributor," "Major Contributor," "Contributor," "Marginal Contributor," and "Below Contributor."
[2] Decision of Hearing Officer, Case No. 8604, issued May 21, 2009, ("Hearing Decision"). The full facts and subsequent holdings of this case are set forth in Detail in the Hearing Decision which can be found on EDR's website at: http://www.edr.virginia.gov/searchhearing/2009-8604%20Decision.pdf.

> training, Grievant may have an argument towards retaliation. The evidence is unclear how Grievant's court dates were set and by whom. What is clear is that Grievant did not attend the K-9 training. The absence of such training would be a fact for the Agency to consider when concluding to rate Grievant's work performance on the K-9 unit as "contributor."[3]

The grievant subsequently asked the hearing officer to reconsider his decision and appealed to the EDR Director and the Department of Human Resource Management (DHRM) Director. In his request for administrative review the grievant asserted that he missed training because of scheduling conflicts caused by court appearances and he was not allowed to make the training up. He asserted that after his involvement with the Virginia Troopers Alliance the missed training was used to downgrade his performance evaluation. In his First Reconsideration Decision, the hearing officer affirmed his earlier decision and held that:

> Grievant argues he attempted to make up missed canine handler meetings but Sergeant C indicted it was unnecessary to do so. In hindsight, it may have been a mistake for the Agency to deny Grievant the opportunity to make up the canine handler meeting dates, but it does not show that his evaluation was arbitrary or capricious. The Sergeant who evaluated Grievant took into consideration that Grievant did not attend the necessary training. He did not disregard material facts as part of his evaluation of Grievant's work performance.[4]

In EDR Ruling No. 2009-2335, this Department remanded the decision to the hearing officer with the following instruction:

> The statement that "[t]here is no reason to believe Grievant was denied the opportunity to retake missed classes in order to retaliate against Grievant or to single out Grievant based on some improper reason," addresses retaliation but does not fully address the grievant's arbitrary or capricious claim because it does not necessarily follow that because a decision is not retaliatory, it cannot be arbitrary. Although the Sergeant who evaluated Grievant may have taken into consideration that the grievant did not attend the necessary training, testimony and evidence that the grievant was not allowed to make up missed training and was told that he did not have to, seems to be, at least on its face, potentially both relevant and material. Thus, the hearing officer is asked to clarify why they are not.[5]

In pertinent part, the hearing officer provided the following response to EDR Ruling No. 2009-2335 in his Second Reconsideration Decision:

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[3] Hearing Decision at 16.
[4] Reconsideration Decision of Hearing Officer, Case No. 8604-R, issued July 24, 2009, ("First Reconsideration Decision") at 2-3.
[5] EDR Ruling No. 2009-2335 at 5.

> Although the Hearing Officer might have evaluated Grievant differently knowing that Grievant had sought to make up training but was not permitted to do so, this does not make the Agency's evaluation of Grievant arbitrary or capricious. Grievant brought to the Agency's attention that he sought to make up the training and was not permitted to do so. It might not have been "fair" to Grievant to deny him the opportunity to make up the training; however, the Agency is entitled to make decisions regarding its operations needs such as that it needed Grievant to perform duties more pressing than making up training. There is no reason to believe that Grievant was denied training for any malevolent reason such as attempting to reduce Grievant's performance evaluation or to retaliate against him for his union affiliation. Part of the definition of arbitrary and capricious includes disregarding facts. In this case, the Agency did not disregard that (1) Grievant did not attend certain training, (2) Grievant sought to make up the training and (3) the Agency denied Grievant's request to make up the training.[6] Grievant's evaluation takes into consideration all of these facts. The Agency did not disregard material and relevant facts. Its evaluation is not without a reasoned basis. The Agency's evaluation of Grievant was not arbitrary or capricious.[7]

The grievant again appealed the decision to each of the three administrative reviewers. He asserts that "[s]imply saying that 'it may not have been fair to Grievant to deny him the opportunity to make up the training' is a deliberately blind oversimplification of fact." In addition, the grievant reasserts an argument raised in his previous request for administrative review -- that he was not given sufficient time to present his case. Following the issuance of the hearing officer's Second Reconsideration Decision, the designee of the Director of the Department of Human Resource Management (DHRM) issued his Administrative Review. DHRM's decision concluded that the hearing decision was consistent with policy.

DISCUSSION

The objections raised by the grievant in his current request for administrative review are the same as those raised in his first request for administrative review to this Department. Those objections were previously addressed in EDR Ruling No. 2009-2335, and, as directed by that Ruling, reconsidered by the hearing officer in his Second Reconsideration Decision. As such, this Department has no further authority to revisit the grievant's objections and rule again on those issues. As we have ruled in other prior cases, the plain language of the *Grievance Procedure Manual* precludes the issuance of multiple administrative review rulings by the EDR

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[6] The Hearing Decision held in a footnote that:

> The Agency's expectation of its employees including Grievant is that they perform at a level sufficient for them to be contributors. It may be the case that the Agency's manager decided that Grievant could perform his job sufficiently (at a contributor level) without making up the training and that Grievant's time would be better spent on other more significant duties to the Agency. Such a decision would be appropriate for Agency managers to make and would not render Grievant's evaluation arbitrary or capricious even if it served to deny Grievant a higher rating regarding training.

[7] Second Reconsideration Decision of Hearing Officer, Case No. 8604-R2, issued December 23, 2009.

and DHRM Directors.[8] Moreover, if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal.

That being said, we acknowledge the grievant's concern over the denial of training and the potential impact that it had on his annual performance evaluation. The statement in the hearing officer's Second Reconsideration, that the agency "is entitled to make decisions regarding its operations needs such as that it needed Grievant to perform duties more pressing than making up training" is unquestionably true; we agree that an agency is entitled to alter its priorities. However, the issue here is not whether an agency can alter its priorities, but whether it would be arbitrary or capricious, and/or inconsistent with state policy, for an agency to lower an employee's performance rating on the basis of an uncompleted EWP responsibility (such as training) when the agency did not permit the employee to complete that EWP responsibility. The Second Reconsideration appears to so hold.[9]

In addition, neither the hearing decision (including both Reconsiderations) nor the DHRM administrative review ruling addressed the following provision of DHRM Policy 1.40 (Performance Planning and Evaluation, *Performance Cycle* section), although it would seem to be potentially applicable:

> If a supervisor changes an employee's performance plan during the performance cycle, the employee should be evaluated based on the performance plan in effect during each portion of the cycle. Evaluations of performance during each portion of the cycle should be consolidated to an "overall" rating and documented on the form that is in effect at the end of the cycle.

This policy provision appears to address how an agency must weigh an employee's performance when changes have been made during the cycle to the performance plan. A DHRM administrative review ruling as to whether the hearing decision was consistent with this policy provision potentially could have had some bearing on the issue here. We note, too, that the DHRM administrative review ruling upholds the agency's action relying in part on a factual conclusion that "the grievant was not penalized for not completing the training."[10] That fact-finding does not appear to be expressly stated in the hearing decision.[11]

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[8] See EDR Ruling Nos. 2004-859; 2006-1289; 2006-1348; 2009-2328.

[9] See note 6 above.

[10] This holding from DHRM could appear to imply that had the grievant been penalized, its policy ruling would not have upheld the hearing decision on the training issue.

[11] Further, *Agency Exhibit H*, General Order No. 11, (15)(c) states that employees who receive an overall performance rating of "Major Contributor" are awarded 20 hours of recognition leave. The General Order states that in order to receive an overall rating of "Major Contributor" the employee must have ratings of "Major Contributor" or above on at least 50% of all core responsibilities and no more than one rating at the "Marginal" or "Below Contributor" level. In the grievant's annual evaluation (*Grievant Exhibit 13*), the grievant received "Contributor" ratings in three categories, "Major Contributor" in one category, "Extraordinary Contributor" in one category, and "Marginal Contributor" in the category in question here ("Maintain Equipment and Professional

Ultimately, however, neither the hearing officer, DHRM nor this Department have any authority to review the hearing decision again absent perhaps an order from the circuit court remanding the decision for further clarification or consideration. Thus, at this point, any remaining appeal must be directed to the circuit court in the jurisdiction in which the grievance arose. Such appeal must assert that the decision is contradictory to law.

CONCLUSION, 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.[12] The hearing decision is now a final decision. 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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Claudia T. Farr
Director

Standards") where the missed training has been raised as an issue. We note also that the category in question was modified by the third step respondent during the grievance process to include the statement that "[Grievant] has twice been disciplined for altering his patrol vehicle." Thus, it would seem very unlikely that the grievant's rating in the "Maintain Equipment and Professional Standards" category would have been raised to the level of "Major Contributor" even if the missed training had been considered differently, given the two disciplinary actions for modifying his patrol car. That issue, however, is not for this Department to make on administrative review, and the hearing decision offers no findings that directly address it.

[12] *Grievance Procedure Manual* § 7.2(d).

[13] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[14] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).