

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9199; Ruling  
Date: March 1, 2010; Ruling #2010-2501; Agency: College of William & Mary;  
Outcome: Hearing Decision In Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the College of William and Mary  
Ruling Number 2010-2501  
March 1, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9199 which found that the grievant was not the victim of retaliation.

FACTS

In his November 9, 2009 decision in Case No. 9199, the hearing officer held that the grievant had not been retaliated against on the basis of her union activity. In a document dated November 23, 2009 ("Request 1"), the grievant requested both the Department of Human Resource Management (DHRM) and the hearing officer to review the November 9, 2009 decision. On December 23, 2009, the hearing officer responded to Request 1 by issuing a reconsidered decision, which upheld his original Decision. DHRM responded to Request 1 on February 10, 2010, declining to disturb the decision. On January 6, 2010, this Department received a request dated January 4, 2010 ("Request 2") for administrative review.

DISCUSSION

As set forth in §7 of the *Grievance Procedure Manual*, a hearing officer's original decision is subject to three types of administrative review. First, a request for reconsideration, generally based on newly discovered evidence or incorrect legal conclusions, must be addressed by the hearing officer. A request for review on the grounds of inconsistency with state or agency policy must be addressed by DHRM. Finally, a request for review on the grounds that the hearing decision does not comply with the grievance procedure must be addressed by this Department. Administrative review requests must be made in writing, and *received* within 15 calendar days of the date of the original hearing decision.<sup>1</sup> In this case, the November 9, 2009 hearing decision also advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM), or EDR must

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<sup>1</sup> *Grievance Procedure Manual* § 7.2(a).

be received by the reviewer within 15 calendar days of the date the original decision was issued.<sup>2</sup> The fifteenth calendar day from November 9, 2009 is November 24, 2009.

*Request 1*

The grievant did not submit Request 1 to this Department. However, this Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period.<sup>3</sup> The reason for this is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, EDR, or DHRM—can be somewhat perplexing for parties not familiar with the process. In this case, one of the grievant’s objections is essentially that the hearing officer’s holding (that she was not a victim of retaliation) is unsupported by the record evidence. Although the *Grievance Procedure Manual* does not expressly indicate where such a claim should be directed, both hearing officers and this Department have frequently addressed such objections. Therefore, because the objection was timely raised with other administrative reviewers, DHRM and the hearing officer, we will consider it timely to EDR and will now address that objection.

Under the grievance procedure, hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>4</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>5</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.

In Request 1, the grievant notes that the Museum’s Housekeeping Supervisor used work zones as the basis for denying the grievant overtime while admitting that he worked outside of his own zone. In other words, the grievant appears to suggest that work zones were used as a pretext to cover up the true reason for denying the grievant overtime: retaliation. But, as supported by testimony at hearing,<sup>6</sup> the hearing decision concludes that the Supervisor discontinued the practice of allowing the grievant (whose regular duty post was the Library) to work overtime at the Museum in order to give the overtime to employees whose regular duty post was the Museum, and who had complained about overtime going to non-Museum workers. In other words, the hearing officer appeared to hold that the reason for removing overtime was not retaliation but was to appease those who regularly worked at the Museum under the

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<sup>2</sup> Hearing Decision at 5.

<sup>3</sup> EDR Ruling Nos. 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at \*6-7 (January 15, 2008). (Court affirmed EDR’s determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.)

<sup>4</sup> Va. Code § 2.2-3005.1(C).

<sup>5</sup> *Grievance Procedure Manual* § 5.9.

<sup>6</sup> Hearing recording beginning at 3:55:00.

Museum's Housekeeping Supervisor. Because record evidence supports the hearing officer's findings and holding we cannot disturb them.

*Request 2*

Grievant's Request 2, received by this Department on January 6, 2010, is clearly untimely to challenge the original November 9, 2009 hearing decision. Further, Request 2 cannot be used to challenge the hearing officer's December 23, 2009 reconsidered decision. Following the issuance of a reconsidered hearing decision, this Department has accepted requests for administrative review only when such requests raise a new issue, not addressed in the original hearing decision, that pertains to compliance with the grievance procedure.<sup>7</sup> This is not such a case, as the hearing officer's December 23, 2009 reconsidered decision added no new issues. Thus, all objections raised in Request 2 were (or could have been challenged) through Request 1.

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>8</sup> Because DHRM has issued its ruling, the hearing decision becomes final with the issuance of this Ruling. Within 30 calendar days of the date of the issuance of this Ruling, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>9</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>10</sup>

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Claudia T. Farr  
Director

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<sup>7</sup> See, e.g., EDR Ruling Nos. 2010-2428; 2009-2275; 2008-2055, 2008-2056; 2007-1563, 2007-1637, 2007-1691.

<sup>8</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>9</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>10</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).