Issue: Administrative Review of Hearing Officer's Decision in Case No. 9232; Ruling Date: March 29, 2010; Ruling #2010-2537; Agency: Department of Social Services; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2010-2537
March 29, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9232. For the reasons set forth below, the grievance is remanded in accordance with this ruling.

FACTS

The salient facts as set forth in the hearing decision for Case No. 9232 are as follows:

> In her grievance, the grievant challenges the classification of her position, asserting that the agency failed to follow properly the Commonwealth's classification policy. The grievant's current role is Administrative and Office Specialist III and her work title is Program Support Technician ("PST"). In 1999, the grievant was hired as a PST Senior. As a PST Senior, the grievant's documented duties included serving as the "lead worker" over other agency employees. According to the agency, over time, the lead responsibilities were decreased and ultimately removed from the grievant's employee work profile ("EWP") in 2000. The agency asserts that the removal of these lead worker responsibilities rendered the grievant a PST rather than a PST Senior. However, the grievant's EWP continued to document her work title as a PST Senior until 2006. Moreover, at least some of her EWPs after 2000 contain language that could potentially be construed as describing the grievant's job elements or core responsibilities as including back-up assistance to staff in the absence of the supervisor, as well as the training of staff, as assigned.
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> In 2007, the agency conducted an agency-wide study that led to certain changes in classification and compensation. Those employees performing the duties of a PST Senior were moved from pay band 3 to pay band 4 with a new role title of General Administration Supervisor

I/Coordinator I. According to the agency, because the grievant was not performing the duties of a PST Senior, she was not moved to the new pay band 4 role. Moreover, the grievant's role title, role code and pay band remained unchanged and the [sic] she actually received a salary increase as a result of the 2007 Classification and Compensation Study. After the study was conducted and the grievant became aware that employees with a working title of PST Senior were moved to a different role in a higher pay band, the grievant questioned agency management on why her classification had not been changed. As a result of the grievant's inquiries, the agency apparently conducted an individual assessment of the grievant's job duties in August 2007. This internal assessment revealed that the grievant was actually performing the duties of a PST despite the fact that her EWP documented her working title as a PST Senior. As such, the agency asserts that the grievant is properly classified as an Administrative and Office Specialist III with a working title of PST in pay band 3.

In January 2008, at the agency's invitation, the grievant completed a Position Description Questionnaire ("PDQ") whereby she assessed her current duties and responsibilities and submitted it to the agency for review. Grievant Exh. 2. The grievant's direct supervisor signed off on the PDQ as prepared by the grievant. The agency did not change the grievant's work title or classification as a result of the PDQ. The grievant initiated her grievance on August 15, 2008 to challenge her classification and what she characterizes as a "demotion" from a PST Senior to a PST while other PST Seniors were "promoted to a higher pay band."

Throughout her challenge to her classification, the grievant requested documentation supporting the agency's rationale, including the PDQs that had been completed for other PST Senior positions. Despite the grievant's requests for such documentation, she never received the PDQs for other PST Seniors. The agency's third step response stated that "[a]ll information regarding these reviews was shared with you." Agency Exh. 1. However, because the grievant did not seek a pre-hearing order from the hearing officer under the grievance hearing procedure, the hearing officer has no authority to grant compliance relief for the agency's failure to honor the grievant's document request during earlier stages of her grievance.

The agency's human resource manager testified that the grievant's position was thoroughly reviewed for classification and it was deemed that the position was properly classified as pay band 3 instead of pay band 4. The agency asserts that over time, the grievant's lead worker duties diminished and were ultimately removed from her EWP in 2000 and as such, she could no longer be classified as a PST Senior. However, as noted

above, in 2008, the grievant was asked to complete a PDQ in order to assess her current duties and responsibilities. In this PDQ, one of the things the grievant was asked to identify was her level of supervision and scope of responsibilities over her own work as well as the work of other agency employees. In response, the grievant indicated that she was "formally assigned to serve as the lead worker over professional or administrative employees" and listed five employees, all PSTs, that she allegedly led. The last page of the PDQ, entitled the "Immediate Supervisor's Statement," was completed by the employee's immediate supervisor, who assessed the employee's responses to the PDQ for accuracy and completeness. One question posed to the immediate supervisor was whether "the description of the job as given by the employee accurately reflect[s] the tasks, duties and responsibilities that are actually required of [the] position?" The grievant's supervisor completed this page of the PDQ and answered affirmatively to the question regarding whether the grievant had accurately defined her job responsibilities. The grievant's immediate supervisor appears to have agreed with the grievant's statement that she currently leads other workers, a duty which the agency asserts the grievant no longer performed and as such, rendered her a PST rather than a PST Senior. After 2000, the year management allegedly removed the lead responsibilities from her EWP, the grievant's EWP continued to reflect that she was a PST Senior. Based on the foregoing, the grievant has a very rational basis to pursue this grievance.

The agency's human resource manager testified that a HR consultant reviewed the PDQ and found discrepancies, notably that the grievant did not actually have or exercise lead worker responsibilities. The grievant's direct supervisor, after the grievance was filed, reviewed the PDQ and revised her approval of the PDQ, deeming, instead, that the grievant's position had, in fact, no lead responsibilities. Agency Exh. 4. The supervisor testified that she did not give the PDQ document the attention she should have and erred when initially approving it as written by the grievant.

The agency never presented to the grievant, until the grievance hearing, information and documentation of the direct supervisor's retreat on her approval of the PDQ. The grievant's direct supervisor testified at the grievance hearing that she did, in fact, concede she had overlooked the details of the PDQ and made an error in approving the PDQ that was prepared by the grievant, and the supervisor testified that the revisions to the PDQ were justified by the grievant's actual job duties. The supervisor testified that the grievant had no lead worker responsibilities.

The grievant relied on her job title and her historically recognized position as a lead employee. The grievant, however, in support of her

grievance, did not testify to any specific lead duties that she recently or currently was expected to perform or did perform. While the grievant was the most senior among her co-workers, that fact, alone, does not establish that her position should properly be in a different, higher pay band. The grievant did not rebut the agency's evidence that the PDQ as completed by the grievant overstated her job responsibilities.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies. For issues of policy misapplication, the relief may include an order for the agency to reapply the policy. Implicit in the hearing officer's statutory authority is the ability independently to determine whether the agency misapplied policy. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

While the *Tatum* case involved a disciplinary matter, the same principle of the *de novo* review applies to cases involving the alleged misapplication of policy.

Based on the manner, tone, and demeanor of the witnesses, I find that the agency has presented sufficient facts to rebut the grievant's presentation regarding classification of her position. However, I find the grievant's genuineness and good faith belief of her misclassification was unnecessarily fueled by the agency's inexplicable failure to provide the grievant the complete information she continuously sought. The grievant was justified in questioning her classification, and it was rather regrettable that the agency did not present the complete information to the grievant, including her immediate supervisor's rescission of her prior approval of the PDQ that indicated a higher level of administrative duties and supervision. However, the grievant presented no facts or actual lead duties that she was required or expected to perform. The agency could have better responded earlier to the grievance, and perhaps even avoided a hearing, especially regarding the direct supervisor's PDQ reversal. This

> grievance, however, must be decided on the facts of the grievant's actual job duties as presented and not the agency's poor handling of the grievant's challenge. Based on the facts, the grievant has not borne her burden of proof that the agency misclassified her position.[1]

The grievant subsequently sought a reconsideration decision from the hearing officer. In a decision dated February 10, 2010, the hearing officer upheld his January 25, 2010 Hearing Decision.[2] The grievant now seeks an administrative review of the hearing officer's 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."[3] 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.[4]

Witnesses and Exhibits

The grievant asserts that the hearing officer erred by allowing two witnesses to testify that were not included on the agency's prehearing witness list.[5] More specifically, the grievant objects to testimony presented by her immediate supervisor and a human resources manager. For the reasons set forth below, this Department finds no error on the part of the hearing officer in allowing these two witnesses to testify.[6]

As the hearing officer correctly notes in his Reconsideration Decision, under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[7] Moreover, by statute, hearing officers have the duty to receive probative evidence and to

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[1] Decision of Hearing Officer, Case No. 9232, issued January 25, 2010 ("Hearing Decision") at 2-5.
[2] *See* Decision of Hearing Officer, Case No. 9232, issued February 10, 2010 ("Reconsideration Decision") at 1-3.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] According to the grievant, the agency's prehearing witness list included two individuals. Neither of these individuals however were called as witnesses at the hearing.
[6] As an initial note, while the testimony of the human resources manager was offered during the agency's presentation of its case, it appears that the grievant's supervisor was called merely as a rebuttal witness. Rebuttal evidence, such as the testimony provided by the grievant's supervisor, is evidence presented to contradict evidence put forth at the hearing by the opposing party. Therefore, rebuttal witnesses, by their very nature, are not necessarily known to be needed until evidence is presented at the hearing and consequently, may not be on the prehearing witness list.
[7] Va. Code § 2.2-3005(C)(6).

exclude only evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[8] Thus, where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, this Department has held the hearing officer must nevertheless admit the evidence, but in the interests of due process, must ensure that the opposing party is not prejudiced by the dilatory proffer of evidence, for instance by adjourning the hearing to allow the opposing party time to respond.[9]

At issue in this case is whether the grievant is properly classified. At hearing, the agency's human resource manager testified regarding the agency's assessment of the grievant's job duties and her classification in relation to those duties. Additionally, during the hearing, the grievant relied heavily on her PDQ assessment of her job duties. In this PDQ, the grievant indicated that she performs lead responsibilities. The grievant's supervisor signed the PDQ indicating that she agreed with the grievant's assessment of her responsibilities. At hearing, however, the grievant's supervisor testified that upon looking at the PDQ again, she realized that the grievant's assessment of her responsibilities was incorrect.[10] Based on the foregoing, both the human resource manager's testimony and the supervisor's testimony would appear to be highly relevant and probative in this case and this Department concludes that the hearing officer was bound to allow such testimony so long as the grievant was not prejudiced by the agency's dilatory proffer of evidence.

Of particular significance in the determination of whether the grievant was prejudiced by the agency's failure to disclose the names of the witnesses expected to be called at hearing is the fact that the grievant had the opportunity at hearing to question the witnesses regarding any inconsistencies in the assessment of the grievant's job duties. Moreover, it does not appear that the issues in this case and the information offered by the witnesses were of such a nature that adjournment of the hearing to allow the grievant time to respond was necessary. Further, at the end of the agency's presentation of evidence and in particular, after testimony by the human resources manager that the

[8] Va. Code § 2.2-3005(C)(5).
[9] *See* EDR Ruling #2006-1387 and EDR Ruling #2006-1290.
[10] The grievant argues that her supervisor was "directed [by upper management] to change her position on the PDQ." The supervisor was asked by management to review the PDQ for accuracy, however, according to the supervisor, after reviewing the PDQ, she unilaterally changed her assessment. To the extent the grievant is arguing her supervisor perjured herself at hearing, this Department concludes that there is no clear evidence of extreme circumstances or fraud perpetrated upon the hearing process such as to warrant a rehearing. Virginia Court opinions are instructive as to the issues of perjury and the hearing process. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment. *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983). Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. In this case, the grievant had the opportunity at her hearing to question the supervisor about the alleged inconsistencies in the assessment of the grievant's job functions, and to attempt to ferret out any perjury at that time.

grievant's supervisor had changed her earlier assessment of the grievant's job functions, the hearing officer gave the grievant some time to reevaluate her case and provide any additional evidence.[11]

In addition, at hearing, the grievant objected to the testimony of her supervisor on the basis that the supervisor, who signed the PDQ and conceded that the grievant had lead responsibilities, should not be allowed to testify in contradiction to that PDQ.[12] Similarly, in her request for administrative review, the grievant claims the hearing officer erred by allowing her supervisor to testify in contradiction to the evidence presented by the grievant.

The grievant's challenge to the witness' testimony in this case, however, simply contests the weight and credibility that the hearing officer accorded to the testimony of the witness at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority. Further, 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.

Here, the hearing officer's findings are based upon the record evidence and the material issues of the case. For example, both the human resources manager and the grievant's supervisor testified that the grievant is properly classified.[13] The hearing officer appears to have relied upon the testimony of these witnesses to support his findings and conclusions.[14] For all of the foregoing reasons, this Department finds no error by the hearing officer in allowing the testimony of these two witnesses despite the agency's failure to include them on the prehearing witness list.[15]

The grievant also objects to the hearing officer's admission of exhibits created by the agency after the grievance was filed. There is nothing in the grievance process or the *Rules for Conducting Grievance Hearings* ("*Rules*") that prohibits a hearing officer from considering exhibits created after the grievance was initiated. As stated above, a hearing officer is bound to admit all probative evidence regardless of when such evidence came into existence. It appears that the grievant's objection is primarily based on the hearing officer's admission of documentation indicating that the grievant is properly classified as

[11] Hearing Recording, Case No. 9232.
[12] *Id.*
[13] Hearing Recording, Case No. 9232.
[14] Hearing Decision at 3-5.
[15] This is not to say that this Department condones an agency's failure to abide by the hearing officer's prehearing orders. Rather, under the circumstances of this case, this Department finds no error in allowing the testimony of these particular witnesses because the witnesses had relevant and probative evidence and the grievant was not prejudiced by the late proffer of evidence.

a PST. Such documentation is certainly relevant and probative in this case and as such, the hearing officer did not error in admitting such evidence.

The grievant appears again to be challenging the admission of this evidence because it contradicts earlier evidence. As noted earlier, in cases 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 discussed above, the hearing officer's findings are based upon evidence in the record and the material issues of the case and as such, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Documents Issue

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[16] Accordingly, after the initiation of a grievance, either party may request the opposing party to provide all documents relevant to the actions grieved. A party has a duty to conduct a reasonable search to determine whether the requested documentation is available and to provide the documents, as well as any related "just cause"[17] objections for not providing any documents, to the other party in a timely manner.[18] Once a hearing officer has been appointed, this Department has long held that all disputes relating to the production of documents should be presented to the hearing officer for his determination.[19] If the opposing party fails to produce the documents requested, the requesting party may seek an order from the hearing officer compelling production of the documents.[20]

In this case, the hearing officer recognized the grievant's attempt to obtain documentation from the agency, but concluded that he lacked the authority to provide relief because the grievant did not seek a pre-hearing order for the production of documents.[21] However, the *Rules for Conducting Grievance Hearings* state that:

> Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer **or the EDR**

[16] Va. Code § 2.2-3003(E). This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.
[17] "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9. Examples of "just cause" for failure to produce documents include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.
[18] *See Grievance Procedure Manual* § 8.2.
[19] *Id.*
[20] *See Rules for Conducting Grievance Hearings* § III(E).
[21] Hearing Decision at 3; Reconsideration Decision at 2-3.

> **Director had ordered**. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor.[22]

In EDR Ruling #2009-2140, the Director of EDR ordered the agency to produce "documents related to the evaluation and classification of the other PST positions in other divisions in relation to the 2007 study on which the classification of the grievant's position was based."[23] Accordingly, the agency was ordered by the EDR Director to produce certain documents and as noted above, if those documents were not produced in accordance with EDR's order, the hearing officer had the ability to draw an adverse inference against the agency for failure to comply. It is unclear whether the hearing officer recognized his authority to draw an adverse inference as a result of the agency's alleged failure to comply with EDR's order. Accordingly, the decision is remanded to the hearing officer for clarification as to whether he considered his ability to draw an adverse inference under these circumstances. To the extent that he did not recognize his authority to draw an adverse inference against the agency, he is instructed on remand to consider whether an adverse inference should be drawn against the agency in this case and what impact, if any, such an inference would have on the hearing decision.

Policy Interpretation/Violation

On March 17, 2010, the grievant submitted additional information to this Department challenging the hearing officer's application of DHRM Policy 1.40. The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[24] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

Requests for administrative review must be made and *received* by the reviewer within 15 calendar days of the date of the hearing decision.[25] In this case, it appears that the grievant timely requested an administrative review ruling from DHRM. Thus, the grievant may present additional evidence to DHRM for consideration, so long as the evidence presented supports the issues raised in her original timely request for administrative review to that Department. However, the grievant cannot now raise an entirely new policy violation with DHRM because it is beyond the 15 calendar day time period for filing appeals. If DHRM finds that the hearing officer's interpretation of

[22] *Id* at § V(B) (emphasis added).
[23] EDR Ruling #2009-2140.
[24] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[25] *See* Grievance *Procedure Manual* § 7.2(a).

policy was incorrect, the DHRM Director's authority is limited to asking the hearing officer to reconsider his decision in accordance with its interpretation of policy.[26]

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is ordered to reconsider his decision in accordance with this ruling. 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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29] This Department's rulings on matters of procedural compliance are final and nonappealable.[30]

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Claudia T. Farr
Director

[26] *Grievance Procedure Manual* § 7.2(a)(2).
[27] *Grievance Procedure Manual*, § 7.2(d).
[28] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[29] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).
[30] Va. Code § 2.2-1001 (5).