Issue: Administrative Review of Hearing Officer's Decision in Case No. 9212; Ruling Date: June 8, 2010; Ruling #2010-2557, 2010-2558; Agency: Department of Agriculture and Consumer Services; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Agriculture and Consumer Services
Ruling Numbers 2010-2557 and 2010-2558
June 8, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9212. The grievant has also asked that this Department reconsider EDR Ruling Number 2010-2551 issued on February 22, 2010. For the reasons set forth below, there is no reason to disturb the hearing officer's decision in Case No. 9212 or this Department's earlier compliance ruling.

FACTS

On October 9, 2008, the grievant initiated a grievance challenging his layoff.[1] The grievance proceeded through the management steps without resolve and was ultimately qualified for hearing by this Department on September 15, 2009.[2] A hearing officer was appointed on October 6, 2009 and the grievance was heard at a hearing held over the course of two days on November 12 and 13, 2009.[3] After the hearing, but prior to the issuance of the hearing officer's decision, the grievant requested a compliance ruling from this Department.[4] In his ruling request, the grievant sought to have the hearing officer disqualified because of his delay in issuing a hearing decision, and due to other issues regarding the hearing officer's request for submissions on issues related to potential adverse inferences following the hearing.[5]

In EDR Ruling Number 2010-2551, this Department determined that the delay in issuing the hearing decision in Case Number 9212 was not unreasonable given the "complex factual history" and "various issues that contributed to the understandably delayed decision in this matter."[6] In addition, this Department found that it was within the discretion of the hearing officer to request post-hearing briefs and the hearing officer did not abuse his discretion by making such a request in this case.[7] The grievant also challenged the contents of the post-

[1] Decision of Hearing Officer in Case No. 9212 issued February 19, 2010 ("Hearing Decision") at 1.
[2] *See* EDR Ruling Number 2010-2405.
[3] Hearing Decision at 1.
[4] *See* EDR Ruling Number 2010-2551.
[5] *Id.*
[6] *Id.*
[7] *Id.*

hearing brief submitted by the agency. This Department declined to address this issue in EDR Ruling Number 2010-2551 on the basis that it is an issue better suited for determination as part of the administrative review process.[8] The grievant now asks this Department to reconsider EDR Ruling Number 2010-2551.

The grievant also seeks an administrative review of the hearing decision issued on February 19, 2010. The salient facts as set forth in Case Number 9212 are as follows:

FINDINGS OF FACT

1. The Grievant was employed by the Agency for approximately 19 years before the layoff of which he complains in this proceeding as a Compliance Safety Officer IV. GE 1; AE B.

2. The Grievant was previously a regional supervisor for the Agency.

3. On March 1, 2007, the Grievant was transferred from his regional supervisor position to a special assignments position as a Special Projects Officer.

4. In the special assignments position, the Grievant was assigned to work from home, instead of at the regional office.

5. The Grievant was given certain special assignments, the most important of which was the task of rewriting and/or creating the program's policies and manuals. The Grievant also performed trend analysis in this position. This initially temporary assignment was continued through 2007.

6. In December, 2007, the Grievant filed a grievance concerning the continuation of the special assignments position, particularly without an updated Employee Work Profile (EWP) and a telework agreement.

7. That grievance resulted in mediation, after which the Grievant agreed to be permanently assigned to the special assignments position and was afforded the opportunity to provide input to management concerning his work, job duties and EWP.

8. The Grievant was involved in supporting another employee's grievance concerning the selection for Position #00350 as early as March 28, 2007.

9. The Grievant's position was identified and selected for layoff in October 2008.

[8] *Id.*

10. The Grievant asserts that the Agency has retaliated against him in selecting his special assignments position for elimination and has raised the additional issues specified in his Form A concerning how the layoff was effectuated.

11. The Agency concedes that the Grievant engaged in various protected activities and, in any event, the hearing officer finds that the Grievant has proven that he engaged in the following relevant, material protected acts.

12. The Grievant participated as a witness in another Agency employee's grievance hearing on February 7, 2008. GE 3.

13. The Grievant contacted elected public officials, including on June 12, 2008 and on July 14, 2008 to express several matters of public concern. GE 28 and GE 29.

14. The Grievant has expressed concerns relating to the handling of investigations and the roles of various Agency employees to his immediate supervisors and management on various occasions from 2006 until August 2008.

15. The Grievant suffered a materially adverse action when he was laid off.

16. However, the Grievant has failed to carry his burden of proving by a preponderance of the evidence that a causal link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because he engaged in the protected activity.

17. In August 2008, the Agency was directed by the State to prepare general fund budget reductions of 5%, 10%, and 15%.

18. In preparing the different budget reduction strategies, the various divisions within the Agency considered the Agency's mission and critical functions to identify positions, resources and services that could be reduced or eliminated.

19. Management's overriding goal was to limit as much as possible the adverse impact on direct services to Agency clients and to citizens of the Commonwealth. To achieve this overriding goal, management placed the highest priority on maintaining the level of field operations as much as possible. Accordingly, administrative positions which were not considered to be of critical need were particularly vulnerable to elimination or layoff. Grievant's special assignments position was

considered by management to be essentially an administrative position not of critical need.

20. Program Managers in the Division of Consumer Protection were asked to evaluate their core services and work with the Division's Business Manager in the compilation of the different budget reduction strategies, all of which originated at the program level.

21. The decision to eliminate the Special Projects Officer position in the Office of Product and Industry Standards ("OPIS") was made exclusively by program management based on program needs.

22. The Division's Business Manager compiled the different reduction strategies submitted by the programs and aggregated them, which the Division Director then reviewed and approved as a package for submission to the Agency's Budget Director.

23. The Commissioner looked at the proposals before the Agency subsequently submitted a number of scenarios to the Department of Planning and Budget ("DPB") for its consideration.

24. Staff in DPB and the Governor's Office made the final decision on the functions, funding and positions to reduce or eliminate.

25. In all, there were layoffs relating to four (4) positions (including the Grievant) and about fifteen positions were eliminated.

26. The Agency was notified late on Wednesday, October 8, 2008, regarding the positions targeted by the Governor's Office for layoff.

27. At that time, the Agency was advised that the Governor would announce the State's budget reductions the following day, Thursday, October 9, 2008,.

28. The budget reductions information was embargoed at the direct order of the Governor's Office until the Governor released the information at his 11:00 a.m. news conference.

29. However, the Agency decided to notify employees subject to layoff just prior to the Governor's news conference so that when the reduction information was released they would have some advance warning prior to the Governor's announcement to the general public.

30. Accordingly, management decided that the Agency's best practical option to make a preemptive notification to those persons about to be laid off

(including the Grievant) before the Governor's announcement was by telephone. Thus the Grievant was notified by management verbally of his layoff on October 9, 2008. The notification was provided in writing on October 17, 2008 and the layoff was effective on November 9, 2008.

31. The Agency's Human Resource Office ("HRO") prepared a layoff letter, the initial notice of layoff, and the Interagency Placement Screening Form yellow-card on Friday, October 10, 2008.

32. These documents were signed by the HRO Director on Tuesday, October 14, 2008, and subsequently mailed to the Grievant.

33. Monday, October 12, 2009 was Columbus Day, a holiday and the HRO Director was on leave in Florida the previous week.

34. Pursuant to DHRM Policy, notice must be given at least two weeks prior to the effective date of layoff.

35. The effective date of the Grievant's layoff was November 9, 2008. Accordingly, the Agency complied with DHRM's notification requirements and, in fact, exceeded that policy requirement.

36. The Grievant's position was the only Compliance/Safety Officer IV position designated as Special Projects Officer and performing such work and duties. There were five other employees in the Agency classified in this role code, and four of those are in OPIS but they perform difficult work and have different duties and are Regional Team Leaders.

37. The Governor's Office and DPB required the Agency and all other state executive agencies, to submit budget reduction proposals, including one for a 15% general fund reduction, which was the one ultimately utilized by the Governor's Office.

38. The request from DPB included criteria for assessing specific items to be included in the proposals, particularly those items that should have the least direct impact on the Agency's direct services to its clients and to the general public.

39. The OPIS management who prepared the OPIS portion of the Agency proposal considered only those criteria as requested by DPB, and Agency senior management reviewed the various agency divisions' proposals only to ensure that they considered only those criteria as requested by DPB before submitting the proposals to the Governor's Office.

40. The elimination of the Grievant's position and layoff of the Grievant was listed 40th out of 46 possible proposed items for reduction, of which the Governor's Office accepted 30 items for reduction. The Governor's Office also made its own independent assessment of priorities and this assessment differed from the prioritization submitted by the Agency.

41. The Grievant was initially asked to take the special assignments position from which he was laid off due to a legitimate business need principally to review and improve the Agency's policies and procedures.

42. The Grievant voluntarily chose to remain in that same special assignments position on a permanent basis after the mediation.

43. The Agency has used some of the Grievant's policy revisions and is still in the process of reviewing others due largely to the extensive revisions to existing policies proposed by the Grievant.

44. The Agency could not have been aware of the nature of any impending budget reductions at the time the Grievant was initially placed in his special assignment position or when he chose to remain there, nor could the Agency have been aware at that time of the criteria it would be asked by the Governor's Office to consider if forced to prepare future budget reduction proposals.

45. The Agency has hired several new employees since the Grievant's layoff, including administrative employees, but only in positions of critical need.

46. The Grievant was the only employee in the Agency with the particular role and performing the particular work duties that role required, and therefore the Agency did not misapply policy by not identifying other employees with less seniority for layoff instead of Grievant.

47. The Agency had at the time of notification of the layoff, no internal vacancies which DHRM Policy would require to be offered to the Grievant.

48. The Agency properly provided at the time of the Grievant's written notification of layoff, and more than two weeks before the effective date of the layoff, the required Interagency Placement Card and all other required documentation.

49. Any alleged misapplication of policy concerning payment of accrued leave due to the Grievant has been cured by the Agency and is therefore moot.

50. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

51. The hearing officer also makes additional findings of fact in the following section of this Decision.[9]

In addition, the hearing officer found:

When the Governor's Office and DPB requested that all state executive agencies prepare several budget reduction proposals, including a proposal for a 15% reduction in those agencies' general fund expenditures, DPB provided specific guidance on the criteria to be considered. AE B-11 to B-20. Included in these criteria were the consideration of eliminating lower-priority activities that don't affect the services provided to the Agency's clients and not to eliminate core services to the public. AE B-16 to B-17.

Each office within the Agency was directed to prepare budget reduction proposals in accordance with the DPB criteria. For OPIS, Mr. D and Mr. B worked together to prepare the OPIS proposals. The OPIS proposal was collected with the proposals of the other offices within the Division of Consumer Protection, with no changes being made to the proposals by the Division Director or Division Business Manager. The proposals from each division within the Agency were collected by the Agency's Senior Management and Budget Personnel for review to ensure that the proposals met the requested criteria, and to prioritize the items for all of the proposals in one agency wide proposal. AE B-31 to B-36.

The Agency wide proposal included 46 items of which the elimination of the Grievant's position was rated the 40th least-impactful to the Agency's services, but not the highest rated proposed layoff. AE B-31 to B-36. The Governor's Office made the final decision to accept 30 of the proposed items, including the elimination of the Grievant's position. AE B-49 to B-50.

The persons within the Agency tasked with developing the proposals considered only the appropriate factors as requested by DPB. No direct evidence was provided by the Grievant to show that any retaliatory intent existed during the preparation of those budget proposals.[10]

[9] Hearing Decision at 2-6.
[10] *Id.* at 7.

Based on the foregoing findings of fact, the hearing officer found that the grievant had not borne his burden of proving by a preponderance of the evidence that the layoff policy was misapplied or that the agency had retaliated against him.[11]

The grievant subsequently sought a reconsideration decision from the hearing officer. In an April 16, 2010 decision, the hearing officer affirmed his February 19, 2010 hearing decision.[12] The grievant now seeks administrative review from this Department.

DISCUSSION

Administrative Review

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."[13] 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.[14]

Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within thirty-five days of the appointment of the hearing officer.[15] In addition, the grievant challenges the failure of the hearing officer to include in the hearing decision the reasons why the decision was not issued within this time period.

According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are instructed to attempt to hold the hearing and issue a written decision within 35 calendar days of appointment.[16] Preferably, hearings take place and decisions are written within this 35-day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.[17] As this Department

[11] *Id.* at 9-11.
[12] Reconsideration Decision of the Hearing Officer in Case No. 9212 issued April 16, 2010 ("Reconsideration Decision") at 5.
[13] Va. Code § 2.2-1001(2), (3), and (5).
[14] *See Grievance Procedure Manual* § 6.4(3).
[15] In this case, the hearing officer was appointed on October 6, 2009, and the hearing held November 12 and 13, 2009. The hearing decision was issued on February 19, 2010.
[16] *Grievance Procedure Manual* § 5.1. ("The hearing *should* be held and a written decision issued within 35 calendar days of the hearing officer's appointment.") (Emphasis added).
[17] *See, e.g.*, EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135. This Department views the 35-day language of the Rules as directive rather than mandatory. Standing alone, failure to issue a decision within the 35-day timeframe does not serve as grounds for a rehearing or favorable decision. *Cf.* Va. Dept. of Taxation vs. Brailey, 2008 Va. App. LEXIS 19 (2008) (unpublished decision).

noted in EDR Ruling Number 2010-2551, this case involved a complex factual history, which apparently took two days to present at hearing. Accordingly, this Department concludes that there is no indication of inappropriate or improper delay in this case.

Moreover, the grievant's argument that the hearing officer erred by failing to include in his decision the reasons for the extension of time past the 35 calendar is somewhat misplaced. The rules state that "[t]he hearing officer may extend the 35-day time period for just cause – generally circumstances beyond a party's control such as an accident, illness, or death in the family. If an extension [of the 35 calendar day period] is granted, the reasons for the extension should be stated prominently in the written decision."[18] This provision of the grievance procedure applies to those situations where a party to the grievance has asked for a continuance or extension of time. It is not intended to require the hearing officer to include in the decision the reasons why the decision was issued outside the 35 calendar day period in every circumstance, as is apparently believed by the grievant. Moreover, it should be noted that there was an extension of time granted to the grievant in this case and the hearing officer included the reasons for that extension in his February 19th decision.[19] Based on the foregoing, there is no basis to conclude that the hearing officer violated the grievance procedure in failing to include the reason why his decision was issued beyond 35 calendar days.

Finally, the grievant argues that his Constitutional due process rights have been violated by the length of time it took the hearing officer to issue a decision in this matter. Constitutional due process is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[20] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. The essence of Constitutional due process is "notice of the charges and an opportunity to be heard."[21] However, the opportunity to be heard must be provided "at a meaningful time and in a meaningful

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[18] *Rules for Conducting Grievance Hearings* § III(B).

[19] More specifically, in his decision, the hearing officer stated the following: "[t]he Grievant moved for a relatively short continuance. The hearing officer found that the process was best served if the Grievant was represented by an advocate of his choosing and that, under the facts and circumstances of this proceeding, a relatively short continuance would serve the interests of justice. Accordingly, just cause existed for the continuance. The hearing was rescheduled to November 12-13, 2009." Hearing Decision at 1.

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

[21] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* Garraghty v. Jordon, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing to Cleveland Bd. of Education v. Loudermill, 105 S. Ct. 1487, 1495 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71, 40 L. Ed. 2d 15, 94 S. Ct. 1633, reh'g denied, 417 U.S. 977, 41 L. Ed. 2d 1148, 94 S. Ct. 3187 (1974).

manner."[22] Accordingly, there "is a point at which an unjustified delay in completing a post-deprivation proceeding would become a constitutional violation."[23] "In determining how long a delay is justified in affording a [post-deprivation] hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken."[24]

In this case, the hearing officer was appointed on October 6, 2009. Accordingly, under the *Rules* a decision should normally have been issued no later than November 13, 2009.[25] However, as noted above, the grievant requested an extension of the hearing date and as such, the hearings in this matter were not held until November 12th and 13th. Moreover, this case apparently involved a complex factual history and the hearing officer asked the parties to supply post-hearing briefs which were due no later than November 30, 2009. The hearing decision was issued on February 19, 2010, which was a little less than three months after the parties submitted their post-hearing briefs. While this Department recognizes that the grievant's interest in contesting his layoff is substantial, and that any length of delay in a hearing and/or decision could cause some level of harm to this interest, this Department cannot conclude that the delay was of such duration to be unreasonable.[26] Moreover, the grievant has offered no evidence, other than the *Rules*' nonmandatory provision that a decision "should" be issued within 35 calendar days of appointment of a hearing officer, to support a conclusion that the delay in issuing the hearing decision was unjustified. Based on the foregoing, this Department cannot find that the delay of the duration at issue in this case deprived the grievant of due process as a matter of compliance under the *Rules*. However, as noted above, Constitutional due process is a legal concept that the grievant may raise with the circuit court once all administrative review decisions have been issued in this matter.[27]

Post Hearing Briefs

The grievant also challenges certain issues regarding the hearing officer's request for submissions following the hearing. According to the grievant, the hearing officer requested that the grievant submit information about documents he alleged the agency had failed to produce. On the same topic, the hearing officer apparently requested that the agency brief the issue of adverse inferences related to possible failures in document productions. As noted above, this

[22] City of Los Angeles v. David, 538 U.S. 715, 717 (2003)(quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).
[23] David, 538 U.S. at 717. *See also* FDIC v. Mallen, 486 U.S. 230, 242 (1988).
[24] *Mallen*, 486 U.S. at 242.
[25] This date includes three days for mailing. *See Rules for Conducting Grievance Hearings* § V(C)("A written decision should be issued no later than 35 calendar days after the date shown on the hearing officer's appointment letter, allowing for an additional three days from the date of appointment for mailing.")
[26] *See e.g. Loudermill***,** 470 U.S. 547 ("A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*. Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.")(emphasis added). *See also Mallen*, 486 U.S. at 243 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation.)
[27] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

issue was addressed in EDR Ruling Number 2010-2551 and as discussed in that ruling, there is nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* that would prohibit a hearing officer from requesting briefs following the hearing and as such, providing an opportunity to the parties to provide submissions after hearing is within the hearing officer's discretion.[28] There does not appear to be any abuse of discretion by the hearing officer's request for these submissions in this case.

The grievant also asserts that the agency's brief inappropriately contained testimony and irrelevant, immaterial, insubstantial and repetitive information. Moreover, the grievant challenges the hearing officer's inclusion in the hearing decision "copied sections" from the agency's post hearing brief and "information…..both parties were not present to hear."[29] Further, the grievant asserts that the statements of the agency's attorney in the post hearing brief amounted to "testimony," and, in violation of his due process rights, the grievant was not given the opportunity to cross-examine the attorney.

The post-hearing briefs in this case were sought by the hearing officer for the purpose of gaining clarification as to the position of the parties with regard to certain issues and are not part of the record evidence. The agency's representative is not deemed a witness by virtue of the fact that he presented factual information in the agency's post-hearing brief. Moreover, any information contained in that post-hearing brief is not "testimony" as it was not provided by a witness under oath.[30] Further, the hearing officer's inclusion of specific information from the agency's post-hearing brief does not violate the grievance procedure so long as there is record evidence to support those sections that appear to have been taken from the brief and included in the hearing decision. This Department has reviewed the record evidence in this case, including the hearing recording, and has found support in the record for the hearing officer's findings, and more specifically, those findings that are identical to information contained in the agency's post hearing brief. Accordingly, we can find no error by the hearing officer.

Moreover, it appears that the grievant's challenge here simply contests the weight and credibility that the hearing officer accorded to the testimony of the various witnesses 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. Here, as discussed below, the hearing officer's findings are based upon evidence in the record and the material issues of the case. Accordingly, this Department has no reason to remand the decision.

Other Alleged Hearing Decision Errors

[28] *See e.g.* EDR Ruling 2006-1376 and EDR Ruling 2006-1125, 2007-1456.
[29] More specifically, the grievant challenges findings of fact numbers 16, 19, 21, 25, 34-37, 39, 41-47 and 48-50.
[30] Testimony is "[e]vidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is [a] particular kind of evidence that comes to tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial or quasi-judicial." Black's Law Dictionary 10 (6th ed. 1990)

The grievant also challenges the hearing officer's alleged failure to include "the grounds in the record" for findings of fact numbers 2 through 11 and 14 through 51.[31] According to the *Rules*, "[t]he [hearing] decision must contain a statement of the issues qualified [and] findings of fact on material issues and the grounds in the record for those findings."[32] In addition, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[33] 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.

As stated before, this Department has reviewed the record evidence in this case. All of the hearing officer's findings of fact and conclusions are supported by the record, either in exhibits or witness testimony. Thus, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. While the hearing decision does not specifically identify what record evidence supports each of the findings of fact 2 through 11 and 14 through 51, this Department finds no reason to remand the decision to the hearing officer again, because those findings, like all the findings, have record support. Moreover, with the exception of findings of fact numbers 16, 19, 21, 25, 34-37, 39, 41-47 and 48-50, the grievant has not even stated that the findings of fact at issue were not part of the record evidence; rather, he merely asserts that the hearing officer failed to cite the location in the record from which the facts were derived. This Department cannot conclude that the hearing officer's failure to include in his decision the specific cite to the record was error.

In sum, while the grievant may disagree with the hearing officer's findings and conclusions, this Department cannot disturb the hearing officer's decision when that decision is supported by the record evidence.

Reconsideration of EDR Ruling Number 2010-2551

The issues raised in EDR Ruling Number 2010-2551 that the grievant seeks to have reconsidered here, (i.e., delay in issuing the hearing decision, the request for post-hearing briefs, and the information contained in the post-hearing brief submitted by the agency) have been thoroughly addressed by this Department above as part of the grievant's request for administrative review.

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[31] In addition, the grievant challenges the hearing officer's failure to include in the decision the words "Decision of the Hearing Officer", a statement of the issues qualified for hearing, and the fact that the agency was represented by an attorney. Failure to include the specific words "Decision of the Hearing Officer" in the decision is not a basis to remand the decision. It is clear that the document is the hearing officer's decision in Case No. 9212. Further, contrary to the grievant's assertions, the hearing decision does state that the agency was represented by an attorney as well as identifies the issues qualified for hearing. *See* Hearing Decision at 1-2.

[32] *Rules for Conducting Grievance Hearings*, § V(C).

[33] Va. Code § 2.2-3005(C)(5).

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.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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Claudia T. Farr
Director

[34] *Grievance Procedure Manual* § 7.2(d).
[35] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).