

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9272;
Ruling Date: April 6, 2010; Ruling #2010-2572, 2010-2573; Agency:
Department of Veterans Services; Outcome: Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Veterans Services
Ruling Numbers 2010-2572, 2010-2573
April 6, 2010

The grievant and the Department of Veterans Services (DVS or the agency) have requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9272. For the reasons set forth below, the decision is remanded in accordance with this ruling.

FACTS

The grievant was issued a Group I Written Notice for unsatisfactory attendance and a Group II Written Notice for insubordination. The grievant challenged the disciplinary actions by filing a grievance on November 4, 2009. In her grievance, the grievant alleges that the disciplinary actions were issued in violation of policy and were motivated by discrimination based on race, gender and disability. After the parties failed to resolve the grievance during the management resolution steps, the grievance proceeded to a hearing on February 23, 2010.

The salient facts as set forth in the hearing decision for Case No. 9272 are as follows:

The Department of Veterans' Services employs Grievant as a Certified Nursing Assistant. She began working for the Agency on April 1, 2008. The purpose of her position is:

The Certified Nursing Assistant is responsible for providing direct care to residents during their shift and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedure set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of residents are met and/or providing treatments and care as instructed.

On August 7, 2009 and August 8, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she was not reporting to work because her mother had been admitted to a hospital. On September 8, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she would not be in to work. On September 30, 2009, Grievant was scheduled to work but did not report to work. She called the Facility and informed a supervisor that she would not be coming to work.

On October 5, 2009, Grievant met with Ms. L who told Grievant that Grievant would not be paid for a day Grievant was absent. This upset Grievant. Grievant went to Mr. O's office to discuss the issue. Mr. O explained the policy to Grievant. This angered Grievant and she became loud. Grievant asked Mr. O, "Do you think you are fair?" Mr. O responded "yes". Grievant became louder and started talking about other people not being docked for their absences. Grievant was so loud that an employee working in another office walked towards Mr. O's office and asked if Mr. O wanted his door closed. Mr. O declined because he wanted a witness to Grievant's behavior and he was concerned for his safety. Grievant stood over Mr. O's desk and shook her hands at Mr. O. Grievant yelled, "You're so rude and nasty, you're just nasty. You have no heart. You're nasty." Grievant then walked away from Mr. O's office.

Mr. O works as the Assistant Director of Nursing at the Facility. He is a white male who is often disrespectful, demeaning, and abrasive towards African American female Certified Nursing Assistants working at the Facility. He made racially offensive comments to several African American employees.¹

As a result of the foregoing findings of fact, the hearing officer upheld the Group I Written Notice for unsatisfactory attendance, but reduced the Group II Written Notice for insubordination to a Group I for disruptive behavior.² In addition, the hearing officer found that the grievant was subjected to a hostile work environment based on race and ordered the agency to end the racially hostile behavior.³ Both the agency and the grievant now seek administrative review of the hearing officer's March 2, 2010 decision.

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

¹ Decision of Hearing Officer, Case No. 9272, issued March 2, 2010 ("Hearing Decision") at 2-3 (internal footnotes have been omitted).

² *Id.* at 4-5.

³ *Id.* at 6-7.

procedure.”⁴ 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.⁵

Grievant’s Request for Administrative Review

In her request for administrative review, the grievant primarily asserts that the hearing officer misapplied various provisions of policy in rendering his March 2nd decision. 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.⁶ Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to her appeal to this Department, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer’s interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.⁷

The grievant is also challenging the hearing officer’s decision on a procedural basis as well. In particular, the grievant asserts that the hearing decision failed to address whether, prior to her receipt of the written notices, her due process right to notice of the charges and a reasonable opportunity to respond was violated by the agency. This issue had been listed on her Grievance Form A, and was properly before the hearing officer, as her grievance had been qualified by the agency head in its entirety.

Under the grievance procedure, hearing decisions must identify the issues qualified and contain findings of fact and conclusions of law and policy on those issues.⁸

In this case, although qualified for hearing and properly raised with the hearing officer, the hearing decision does not address this issue, and it is unclear whether the hearing officer considered the claim. The hearing officer may need to provide only a minimal response to the grievant’s claim but he must address it nonetheless. Accordingly, this Department remands the hearing decision for consideration of the questions of (1) whether the grievant’s due process rights were violated when the agency apparently failed to give her an opportunity to respond to the charges set forth in the written notices; and (2) whether state or agency policy was violated by this apparent failure and, if so, the impact if any, of the violation.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

⁷ *Grievance Procedure Manual* § 7.2 (a)(2).

⁸ See *Rules for Conducting Grievance Hearings* at II.

Agency's Request for Administrative Review

The agency challenges the hearing officer's conclusion that the grievant has been subjected to a racially hostile work environment. With regard to the claim of racially hostile work environment, the hearing officer concludes:

Grievant has presented sufficient evidence to show that Mr. O created a hostile work environment based on race. Several of Grievant's witnesses testified with credibility that Mr. O spoke to them in an abrasive, demeaning, and contemptuous manner. The witnesses were African American females. For example, Ms. R, an African American female, testified that she attempted to speak with Mr. O about her work schedule. Mr. O did not want to hear what she was saying. At one point Mr. O "got into her face" slapped his hands and said that she "would go by the schedule." He made these comments in a rude and abrasive manner. Ms. H is an African American female. When she attempted to tell Mr. O her side of a dispute involving her termination, Mr. O did not want to listen to her. He banged his desk, clapped his hands, and kept interrupting her. As she left he gave her the "peace sign". When she asked what that meant, Mr. O said, "ain't this how ya'll do." She construed this as a comment about behavior of African Americans and Mr. O's attempt to mock that behavior. Ms. M testified that during a weekend she worked, Mr. O brought doughnuts to approximately three African American females who were working on the weekend. One of the woman asked if Mr. O could bring in chicken next time and Mr. O responded, "You people eat enough chicken." The women perceived the comment "you people" to refer to African Americans. Eating chicken in excess is a negative stereotype of African Americans. Based on Mr. O's behavior and comments towards African American employees, Grievant has demonstrated that Mr. O created a hostile work environment for employees at the Facility. Mr. O's actions were unwelcome. They were based on the protected status of race, in particular, the status as of African Americans. Mr. O's actions were pervasive because many employees were affected and their perceptions of Mr. O and the Agency were affective negatively. Mr. O's status as a manager of the nursing department is sufficient to impute his actions to the Agency. He was involved in the hiring, firing, and daily supervision of Agency nursing staff.

The Agency contends that approximately 78 percent of its Certified Nursing Assistants are African American females and that Mr. O participated in the hiring of most of those employees. The hiring of African American females suggests that Mr. O may not act based on race in his hiring decisions. It is not necessary, however, for Grievant to show that Mr. O created a hostile work environment with every action during every day of his employment. It is sufficient if Grievant can show that on

some occasions Mr. O has acted with racial bias. Grievant has met that standard.

The agency asserts that the hearing officer's finding that Mr. O created a racially hostile work environment was "not directly and personally related to the grievant, outside the scope of the authority of the hearing officer, inconsistent with the grievance procedure's parameters of issues that may qualify for hearing, and well beyond the issue qualified for a hearing by the agency head in this case."⁹ In support of its claims, the agency asserts that the only issue before the hearing officer was whether the disciplinary actions taken against the grievant were tainted by racial animus and as such, his findings "regarding the work environment as a whole" was beyond his authority. For the following reasons, this Department disagrees.

In her grievance, the grievant alleges that "Mr. O stated I was disruptive and insubordinate on the written notice. Mr. O was loud with me. He tries to put fear in the Afro-American employees. He has no respect for Afro-American women and talks to them anyway he wants to. This particular day he was loud with me and as I was leaving the office he yelled at me, 'you can always resign'." The grievant also states in her grievance that "Mr. O make [sic] most of us feel that we are back on the slave plantation and he is our white master."

Based on the foregoing, there is no question that the grievant alleged race discrimination in her grievance. Moreover, the grievance was qualified for hearing by the agency head in its entirety, with no issues excluded.¹⁰ Further, because the issue of race discrimination was qualified for a hearing, there was nothing improper about the grievant calling witnesses to testify as to the alleged racial animus they have endured by Mr. O to support her claim that she was subjected to racial animus by Mr. O as well. What the hearing officer failed to do was determine whether or not the disciplinary actions in this case were tainted by the racial animus found to be exhibited by Mr. O.¹¹ However, his failure in this regard does not render his findings regarding a racially hostile work environment "outside the scope of his authority" or otherwise improper such that it should be stricken from the hearing decision.

⁹ The agency further asserts that the hearing officer's decision was inconsistent with law. Whether the hearing decision is consistent with law should be directed to the circuit court in the jurisdiction in which the grievance arose rather than this Department. *See Grievance Procedure Manual* §7.3(a).

¹⁰ In his qualification determination, the agency head states: "[a]lthough there is insufficient evidence to support the allegation of discrimination the grievance qualifies for hearing because it challenges formal disciplinary actions (Group I Written Notice and Group II Written Notice)."

¹¹ Whether the disciplinary actions in this case were tainted by racial animus was an issue before the hearing officer. While the hearing officer discusses both the disciplinary actions and the racial animus by Mr. O, he fails to address whether there was a connection between the two. If he had found such a connection, the reduction of the discipline potentially could have been greater. However, neither the grievant nor the agency challenged the hearing decision on that basis and as such, this Department cannot address it on administrative review.

Accordingly, this Department concludes that the hearing officer acted within the scope of his authority when he considered and addressed the issue of a hostile work environment based on race.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the decision is remanded to the hearing officer for consideration of the grievant's argument that her due process rights were violated. 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 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 This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁵

Claudia T. Farr
Director

¹² *Grievance Procedure Manual*, § 7.2(d).

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

¹⁴ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

¹⁵ Va. Code § 2.2-1001 (5).