

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9267;  
Ruling Date: May 18, 2010; Ruling #2010-2577; Agency: Virginia State  
University; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia State University  
Ruling Number 2010-2577  
May 18, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9267. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts of this case, as set forth in the hearing decision in Case 9267, are as follows:

Virginia State University employed Grievant as and Administrative & Program Specialist III. His working title was Payroll Technician. His Position Objective was to, "provide accurate and timely payments to Hourly and Student Employees." He had been employed by the Agency for approximately 19 years prior to his removal effective October 30, 2009.

Grievant had prior active disciplinary action. On January 16, 2009, Grievant received a Group II Written Notice with a five work day suspension.

In November 2008, Grievant was issued a Notice of Improvement Needed/Substandard Performance due to his continued payroll errors, continued failure to follow a supervisor's instructions, and for not following Agency and State payroll policies and procedures.

The Supervisor gave Grievant numerous instructions relevant during the time period of February 2009 through July 2009. The Supervisor instructed Grievant that time sheets for students and hourly workers should be submitted by the employee's supervisor or submitted in a sealed envelope. Grievant accepted timesheets directly from students contrary to the Supervisor's instructions.

The Supervisor instructed Grievant to submit weekly reports in a timely manner every Monday. Grievant submitted some but not all of his weekly reports on Mondays.

The Supervisor instructed Grievant to review timesheets to ensure that the hours were calculated correctly and that a supervisor had signed each timesheet. Grievant did not always do this.

The Supervisor instructed Grievant to make deposits within two business days of receiving money. Grievant did not always timely deposit the money

A spreadsheet was developed and given to Grievant as a tool to assist him in managing the manual processing associated with hourly payrolls. If properly used and maintained, the spreadsheet would (1) provide a reconciliation of variances between the amount indicated on the individual hourly timesheets and the amount that would be certified to the DLA, (2) provide a mechanism to track employee's end date and (3) provide a tool for tracking student contracts and A-21s. The Supervisor instructed Grievant to use the spreadsheet. When one of Grievant's coworkers told him the spreadsheet was not helpful, Grievant discontinued using the spreadsheet without obtaining the approval of the Supervisor.

The Supervisor instructed Grievant to organize his work area to set up a folder and put payroll information into it so that anyone in the office could access the folder and see what Grievant was working on. Grievant did not comply with this instruction.

The Supervisor instructed Grievant that after he processed the payroll he was to review the payroll to ensure that everything was keyed into the computer system properly and processed correctly. Grievant complied with this instruction sometimes, but not always.

The Supervisor instructed Grievant that when a student employee's contract ended, Grievant was to terminate that contract in the Agency's computer system. Otherwise the student would be overpaid. Grievant did not always do this on a timely basis.

On July 29, 2009, the Agency discovered that an hourly employee, Mr. S, had been receiving overpayments from an Adjunct Faculty assignment that should have ended on December 13, 2006. Mr. S was receiving a payment of \$365.63 per pay period for teaching a lecture class from August 2006 to December 2006. Mr. S's payments continued until July 16, 2009 because his Adjunct Faculty payments were not manually turned off by Grievant in the

Agency's accounting system. The overpayments made since January 2007 totaled \$20,840.91.<sup>1</sup>

On October 30, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions. On November 30, 2009, Grievant timely filed a grievance to challenge the Agency's action.<sup>2</sup>

Based on the preceding Findings of Fact the hearing officer reached the following Conclusions of Policy:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instruction is a Group II offense. Grievant was given numerous instructions by the Supervisor. He failed to comply with those instructions. For example, the Supervisor instructed Grievant to utilize a spreadsheet tool in order to improve his work performance. Grievant unilaterally decided to stop using that tool and his performance suffered. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency argued that Grievant should receive a Group III Written Notice. Although there are many examples of Grievant failing to follow the Supervisor's instructions, none of those examples independently rise to the level of a Group III offense. The Agency could have issued several Group II Written Notices. Instead, it chose to issue one Written Notice.

Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's removal of grievant must be upheld.

Grievant argued that the Agency should have transferred him to another available position within the Agency in light of his longevity with the Agency. This argument fails. Nothing in State policy requires that the Agency transfer Grievant to another position in lieu of removal. The Agency

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<sup>1</sup> Decision of the Hearing Officer in Case 9267, issued March 5, 2010 ("Hearing Decision."), pp. 2-3. Footnotes from the hearing decision have been omitted here.

<sup>2</sup> *Id.* at 1.

has discretion regarding whether to transfer Grievant to another position. In this case, the Agency concluded it would not be appropriate to transfer Grievant to another position.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....” Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant’s length of service is not sufficient in itself to serve as a mitigating circumstance. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.<sup>3</sup>

## 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.”<sup>4</sup> 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.<sup>5</sup>

### *Findings of Fact*

The first objection raised by the grievant appears to be a challenge to the hearing officer’s conclusions drawn from his analysis of his factual findings. The grievant essentially asserts that he had a justification for one of the many charges of failure to follow instructions and/or policy.

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<sup>3</sup> *Id.* at 4-5.

<sup>4</sup> *Va. Code § 2.2-1001(2), (3), and (5).*

<sup>5</sup> *See Grievance Procedure Manual § 6.4(3).*

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>6</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>7</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.

Specifically, the grievant challenges the hearing officer’s conclusion that “[w]hen one of Grievant’s coworkers told him the spreadsheet [developed to assist the grievant in processing hourly payrolls] was not helpful, Grievant discontinued using the spreadsheet without obtaining the approval of the Supervisor.”<sup>8</sup> The grievant asserts that due to a coworker’s health challenge, the coworker had informed him that “it was difficult for her to understand the new format” of the report. Accordingly, he states that “[b]ecause of my compassion for her predicament, I informed my supervisor of her request for me to submit report [sic] in the original format.” Thus, he appears to argue that he had good cause for discontinuing use of the form.

Critically, grievant admitted that he stopped using the spreadsheet without being told to by his supervisors.<sup>9</sup> The grievant testified that having to use the spreadsheet created “double work.”<sup>10</sup> Furthermore, while the grievant testified that he informed his supervisor that the coworker in question had stated that using the spreadsheet took too long, he never testified that his supervisor gave him permission to discontinue use of the spreadsheet. Informing his supervisor that another employee found the spreadsheet time consuming is not the equivalent of receiving permission to discontinue its use. Nothing in his testimony refutes his earlier admission that he discontinued using the spreadsheet without being told to do so by his supervisor.<sup>11</sup> Moreover, the hearing record contains sufficient evidence to support a multitude of other failures to follow procedures and instructions, which the grievant did not appear to contest.<sup>12</sup>

*Mitigation: Inconsistent Discipline*

The grievant essentially claims that although he was partially responsible for the overpayment to the adjunct faculty member, others (e.g., the Budget Manager) also share some responsibility for the erroneous overpayment. Therefore, it is unfair to fire him and not others.

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<sup>6</sup> Va. Code § 2.2-3005.1(C).

<sup>7</sup> *Grievance Procedure Manual* § 5.9.

<sup>8</sup> Hearing Decision at 3.

<sup>9</sup> Testimony of the grievant beginning at 1:15:44.

<sup>10</sup> *Id.* at 1:17:00.

<sup>11</sup> Indeed even the Request for Administrative Review only states that the grievant informed his supervisor of the coworker’s request for him to submit the report in the original form. He does not assert that he was given permission to discontinue use of the spreadsheet.

<sup>12</sup> Testimony of the grievant’s direct supervisor, the Payroll Manager, beginning at 36:00.

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings* (“*Rules*”) provides that an example of mitigating circumstances includes the inconsistent application of discipline, in other words, instances where a grievant’s discipline is inconsistent with that of other “similarly situated” employees. Inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.<sup>13</sup> As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.<sup>14</sup>

The first factor that the grievant has the burden of establishing is the existence of appropriate comparators—persons who committed similar infractions—who are “similarly situated” to the grievant. While the grievant points to the Budget Manager as a potential comparator, he offered no evidence as to how the Budget Manager was implicated in the overpayment, or what his duties were and how those responsibilities related to the overpayment. Moreover, as reflected above, the overpayment was just one of several actions for which the grievant was disciplined. The grievant has provided no evidence that the Budget Manager committed multiple infractions nor does the grievant even make this assertion. Accordingly, the grievant has not met his burden of establishing that an appropriate comparator exists.

#### 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.<sup>15</sup> 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.<sup>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> *Rules* § VI(B)(1).

<sup>14</sup> See e.g., EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. See also *Bingham v. Dept. Of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at \*18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).