

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9551; Ruling  
Date: December 15, 2011; Ruling No. 2012-3056; Agency: Department of State  
Police; Outcome: Remanded to AHO.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of State Police  
Ruling Number 2012-3056  
December 15, 2011

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9551. For the reason set forth below, this Department remands the decision for further consideration by the hearing officer consistent with this ruling.

**FACTS**

The facts of this case are relatively straightforward. The grievant was erroneously overpaid by the agency for a period of years, beginning in 2004 upon the agency's implementation of a plan to correct various pay inequities.<sup>1</sup> Grievant believed that the agency had correctly calculated his salary adjustment, relying upon a 2004 letter from the human resources director specifying his compensation.<sup>2</sup> By the time the agency discovered the overpayment, the grievant had been overpaid by \$27,874.61.<sup>3</sup> The grievant has requested that the agency allow repayment in the form of a reduction in his leave balances. The agency denied his request and is of the position that the overpayment should be collected from the grievant's paychecks.

The grievant initiated a grievance regarding the overpayment and repayment matter and, when this Department did not qualify the grievance for hearing,<sup>4</sup> the circuit court did. The grievance advanced to hearing on May 19, 2011 and, on July 29, 2011, the hearing officer issued a hearing decision in which he found no misapplication or unfair application of policy by the agency in seeking full repayment, and thus ordered no relief. However, the hearing officer recommended that the agency require the grievant to pay back only \$9,000 of the overpayment, resulting in a credit to the grievant of over \$18,000 of his founded repayment obligation.

The hearing officer offered the following rationales for his recommendation:

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<sup>1</sup> July 29, 2011 Hearing Decision, p. 4.

<sup>2</sup> *Id.*, p. 5.

<sup>3</sup> *Id.*, p. 9-10.

<sup>4</sup> See EDR Ruling No. 2010-2599 (concluding the grievance did not raise a sufficient question as to whether any policies were misapplied and/or unfairly applied).

There are several reasons why it is appropriate for the Hearing Officer to recommend that the Agency seek reimbursement from Grievant for an amount less than the total amount of the overpayment. First, it is clear the Grievant took no action or engaged in any behavior that could be construed as inappropriate, contrary to policy, contrary to regulation, or contrary to State law. Grievant is a victim of errors made by Agency employees possessing skills and abilities that should have enabled them to avoid making errors regarding Grievant's compensation. Grievant did not know nor should he have known that Agency employees made errors that resulted in an overpayment to him.

Second, Grievant did not receive a windfall from the overpayment. The Agency contends Grievant received a windfall because he was over compensated for several years. Grievant adjusted his lifestyle based on an assumption of a certain level of compensation. Had Grievant's compensation been properly calculated, he would have been able to adjust his financial lifestyle accordingly.

Third, the Agency's error was not only to incorrectly classify Grievant in 2004, it failed to timely identify its error. In 2004, the Agency calculated Grievant's salary using a Pay Amount of \$48,117 instead of using a Pay Amount of \$45,267 or a difference of \$2,850. If the Agency had timely identified its error, the hardship on Grievant of repaying \$2,850 would have been significantly less than the hardship of having to repay approximately \$27,000.

Fourth, Grievant has had to obtain legal counsel to properly evaluate the Agency's claim against him. Although parties are responsible for their own legal expenses under the Grievance Procedure, Grievant would not have needed to obtain legal counsel if Agency employees had performed their duties properly. His decision to have his claim evaluated by an attorney is understandable and appropriate. Grievant did not anticipate that the Hearing Officer would wish to consider his legal expenses as part of a recommendation and, thus, the amount of Grievant's legal expense is not known to the Hearing Officer.

Fifth, the Agency intends to recover money from Grievant in the form of having one dollar returned for every dollar overpaid. Grievant has already incurred and likely paid federal and State income taxes on the overpayment he received in the form of income. Although the Agency intends to reverse the transaction and recover its money, TOPIC 50510 recognizes that the IRS does not treat an overpayment in such a straightforward manner. TOPIC 50510 states that Grievant will not be able to file an amended tax return to reduce his prior income and recover the additional income taxes he paid on his inflated salary. Grievant will have to take a deduction on his income tax returns going forward. TOPIC 50510 states:

The wages paid in error in the prior year remain taxable to the employee for that year. This is because the employee received and had use of those funds during that year.

The IRS considers that the employee received and had use of the funds, but the Agency makes no such distinction. When it recovers all of its money, the Agency will be made whole. Grievant may or may not be made whole by taking a deduction when he files future tax returns. The Agency's error has created at least two additional tax problems for Grievant. The issue is so complex that it would be reasonable for Grievant to employ the services of a tax professional to determine how to comply with federal tax law to solve an unusual tax problem. In addition, Grievant may or may not be made whole if he deducts the overpayments on his future federal tax returns as outlined in TOPIC 50510.

Upon consideration of these five factors, the Hearing Officer recommends that the Agency reduce the amount of the overpayment to \$9,000 and collect that amount in monthly payments over a 64 month period.<sup>5</sup>

The agency now seeks administrative review from this Department regarding the propriety of the hearing officer's recommendation.

#### 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>6</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>7</sup>

The agency had raised several objections to the hearing officer's recommendation to reduce the amount owed to the Commonwealth from \$27,874.61 to \$9,000.00. The underpinning for each of these objections is essentially that the hearing officer may not award relief, whether by order or recommendation, that is inconsistent with law, policy, and the grievance procedure.

This case presents an issue of first impression. We are unaware of any court decision or prior administrative ruling by an EDR Director addressing the nature and scope of a hearing officer's recommendation following the General Assembly's 2000 amendment of the grievance statutes to allow a party to petition a circuit court for an order implementing such a recommendation.<sup>8</sup> The current *Rules for Conducting Grievance Hearings* ("Rules") provides the following limited information regarding recommendations:

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<sup>5</sup> July 29, 2011 Hearing Decision, pp. 15-16.

<sup>6</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> The General Assembly changed the grievance statutes to expressly grant circuit courts the authority to implement recommendations in response to the 1998 Virginia Supreme Court decision of Department of Environmental Quality vs. Wright, 256 Va. 236, 504 S.E.2d 862 (1998). In that case, an employee grieved his transfer to another position as disciplinary and retaliatory, as well as a misapplication of personnel policies, procedures, rules, or regulations. The Director of this Department ruled that only one issue qualified for a hearing: whether the employee's "reassignment and reclassification was disciplinary." The hearing officer subsequently found that the transfer was

Hearing officers should be aware that as of 2000, a party may petition the circuit court for an order implementing a hearing officer's order or recommendation. Therefore, hearing officers should be cognizant that, as a practical matter, their recommendations may have the same force and effect as their orders. If a recommendation is made, the hearing decision should clearly identify it as such and distinguish it from an order. Absent a court order, an agency is not compelled to act upon any recommendation. All remedies provided by a hearing officer in his decision, whether ordered or recommended, must conform to law and policy.

This ruling reviews the hearing officer's recommended relief solely on the basis of its consistency with the relief available to employees through the grievance procedure. Here, the agency asserts in part that by crediting the grievant with assumed expenses of legal counsel, the hearing officer effectively awarded attorney's fees. This Department agrees with the agency that legal expense fees are not a proper consideration. The *Grievance Procedure Manual* expressly states that: "Attorneys' fees are not available under the grievance procedure, with one exception: an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."<sup>9</sup> Because attorney's fees are not available in a case such as this which does not challenge a discharge, the hearing officer should not have considered legal expenses as a factor. Moreover, under the grievance procedure, a hearing officer has no authority to award monetary damages.<sup>10</sup> We conclude that the entire monetary relief recommended by the hearing officer – an offset of approximately \$18,000 from the total repayment due the agency -- is tantamount to damages, and thus beyond the scope of relief that can be ordered or recommended by a hearing officer under the grievance procedure. Accordingly, the hearing officer's recommended relief is not in compliance with the grievance procedure. Upon remand, the hearing officer is ordered to revise the hearing decision consistent with this ruling.

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Claudia T. Farr  
Director

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not disciplinary but was instead arbitrary. The hearing officer, however, was unable to order the return of the employee to his former position because the issue of whether the transfer was arbitrary had not been qualified for hearing, only the issue of whether the transfer was disciplinary had been qualified. The hearing officer nonetheless had the authority under the grievance procedure rules at the time to make a recommendation, and thus did so. The Supreme Court of Virginia ultimately held that under the grievance statutes then in existence, circuit courts did not have the authority to order the implementation of a hearing officer's recommendation, only a hearing officer's order.

<sup>9</sup> *Grievance Procedure Manual* § 7.2(e).

<sup>10</sup> *Grievance Procedure Manual* § 5.9(b); see also EDR Ruling Nos. 2008-1793, 2004-741.