Issue: Administrative Review of Hearing Officer's Decision in Case No. 9620; Ruling Date: December 7, 2011; Ruling No. 2012-3076; Agency: Virginia Community College System; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginian Community College System
Ruling No. 2012-3076
December 7, 2011

The grievant has requested that this Department administratively review the hearing decision in Case Number 9620. In her grievance, the grievant challenged a Group II Written Notice.[1] The hearing officer upheld the discipline in an August 9, 2011 hearing decision. For the reasons set forth below, this Department will not disturb the decision.

FACTS OF THE CASE

Pertinent facts and related conclusions of this case, as set forth in the hearing decision in Case Number 9620, are as follows.

> The grievant is employed as an administrative support person at a public college in the Commonwealth of Virginia (hereafter referred to as the agency, the school, or the college). The school has employed her for several years prior to the incidents giving rise to this grievance. During several of those years, the school gave the grievant an above contributor rating on her employee work profile.
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> In or about September, 2009 the grievant accused another employee of the school of creating a hostile work environment. The supervisor resolved that issue without formal discipline being issued to either the grievant or her co-worker.
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> The grievant is a pleasant individual with a rather unique personality. She has suffered from various health issues during recent years. In the fall of 2010, she began eating raw garlic as a homeopathic way of dealing with certain of her health problems. This practice created an offensive odor at her worksite. After several complaints were made, two air fresheners were placed in the office where the grievant was assigned. The air fresheners were the suggestion of her supervisor. A co-worker (Employee X) acted upon the suggestion. Within approximately two weeks after the air fresheners were placed in the office, the grievant began suffering from vision and other health issues. She attributed those problems to the presence of the air fresheners. Her feelings were confirmed by a brief conversation with her nurse practitioner.

[1] Decision of the Hearing Officer in Case Number 9620 issued August 9, 2011 ("Hearing Decision") at 1.

The grievant took a sick day on December 22, 2010. The following day, while the office was closed for the Christmas holidays, she returned and removed the air fresheners. She took them to her home and placed them on her porch.

On December 27, she wrote a letter to the school president. In this letter, she made numerous accusations against Employee X. The letter began:

> "I am writing to ask you to please help me! Please do not let (Employee X) continue to persecute me, and now she is trying to kill me."

The grievant proceeded to detail her relationship with Employee X. She made several allegations against Employee X including:

- That Employee X had stated that she "would do whatever she had to, to get what she wanted" and that she wanted the position of the grievant. The grievant said that her supervisor had failed to respond to concerns regarding the statements;
- That she feared that Employee X was attempting to poison her, citing that her food kept in her refrigerator at the office had been subject to tampering;
- That Employee X had removed an envelope from a purse or bag of the grievant, which envelope contained a check payable to a charity supported by the grievant. Again, the grievant said that the supervisor failed to respond to her concerns;
- That the phone settings on her cell phone had been changed;
- That the air fresheners had been pointed at her by Employee X.

  The grievant admits that she knows of no evidence supporting the allegations, both direct and implied, made in the letter that Employee X had attempted to tamper with her food, had stolen the envelope from her bag, or had changed the settings on her cell phone.

The grievant mailed the letter by overnight delivery on or about December 27. Because school was still closed for the holidays, she had it directed to the school president at his home. He received the letter on December 29 and immediately directed that an investigation be commenced. When the school reopened on January 3, 2011, the supervisor of the grievant transferred Employee X to another worksite pending the results of the investigation. A lengthy and complete investigation was performed. It revealed no basis for the allegations in the letter, specifically including that Employee X was persecuting and attempting to kill the grievant.

The Human Resource Director notified the grievant on February 1 that she was to participate in counseling sessions through the Employee Assistance Program. The Human Resource Director gave as her reason the unfounded allegations in the letter of December 27, 2010. Those allegations yielded concern over the emotional and mental health of the grievant. The grievant has complied

with that directive. At the hearing in this matter, she testified that she was not in her right mind at the time she wrote the letter.

The grievant received a Notice of Improvement Needed on February 28. She was found to have violated the provision of her employee work profile that requires her to "work to enhance the image of the department" and school. The document also recited her failing to maintain an effective working relationship with other employees. The counseling sessions mentioned above were prescribed as part of her improvement plan. The grievant acknowledged that she was actively working on these concerns.

In addition, on February 28 the agency issued to the grievant Group II Written Notice based on three violations. Prior to the hearing, the agency voluntarily dropped two of the violations and proceeded only on the basis of the December 27, 2010 letter.

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The grievant admits that she wrote the letter of December 27, 2010. She recognizes that writing and sending the letter were wrong. She came to the realization on or before January 6 that she needed help for her emotional issues. The grievant has not argued, nor has she presented any expert testimony, that her emotional problems prevented her from knowing right from wrong or conforming her actions to appropriate legal standards on December 27.

The Department of Resource Management for the Commonwealth of Virginia has issued Policy 1.60, labeled "Standards of Conduct." The grievant is challenging her Group II Discipline issued under that policy. Group II offenses are those "that significantly impact business operations." The letter of the grievant set in motion a chain of events. The most serious of these events was the investigation commenced by the Human Resource Director. The school President contacted her at her home upon his receipt of the letter on December 29. Her investigation began in earnest when the school re-opened on January 3. The investigation consumed an estimated minimum of 40 hours of administrative and supervisory time during a crucial period of the school year. This investigation of unfounded allegations certainly qualifies as a substantial or significant disruption of the operations of the college. Therefore, the letter clearly qualifies as misconduct subject to a Group II Written Notice. It also supports the issuance of the Notice of Improvement Needed.

In upholding the Group II Written Notice, the hearing officer found the agency's actions neither retaliatory nor beyond the bounds of reasonableness.

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."[2] 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.[3]

I. The Grievant Challenges the Hearing Decision on Several Evidentiary Bases

The grievant asserts that the hearing officer misstated the length of time that the grievant was exposed to the air freshener, incorrectly finding that it was only two weeks when in fact it was closer to two and one half months. Assuming without deciding that the grievant is correct about the length of exposure, the error has no apparent relevance to the sustained charge of making accusations about co-worker Employee X—with no supporting evidence that she had attempted to tamper with the grievant's food, stolen an envelope from her bag, changed the settings on her cell phone or was persecuting and attempting to kill her—which led to a lengthy investigation that significantly disrupted the operations of the college. Because there is no obvious relationship between the timeframe of exposure, and because the grievant has offered no explanation of how the timeframe relates to the sustained charge, this Department has no reason to disturb the decision based on any evidentiary timeframe disparity.

The grievant also asserts that the hearing officer fails to mention reports of a physician and a Licensed Professional Counselor (LPC), therefore the decision must be remanded to the hearing officer. As an initial point, there is no requirement that a hearing decision specifically address each piece of evidence admitted into evidence. Moreover, the decision reflects that the hearing officer was aware of and specifically mentioned the grievant's health issues. More to the point, however, the hearing decision points to absence of any expert testimony that links the grievant's December 27th letter to any psychological impairment, in other words, that her "emotional problems prevented her from knowing right from wrong or conforming her actions to appropriate legal standards on December 27." The notes from the grievant's physician [apparently, proposed Exhibits 1-3 from grievant's prehearing submissions] do not appear to address in any manner any potential linkage between the December 27th letter and any emotional problems. Furthermore, a report from the LPC was not readily identifiable from the list of 55 documents listed by the grievant as potential evidence nor was the LPC listed as a potential witness. Accordingly, this Department has no basis to disturb the decision based on the Physician's or LPC's reports.

II. Decision is Inconsistent with Policy

The grievant asserts that the decision is inconsistent with policy. However, this Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. Rather, the Director of the Department of Human Resource Management ("DHRM") (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.[4] The grievant has appropriately raised her concerns regarding policy with the DHRM Director and only a

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[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2); *see also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy.

III. Lack of a Verbatim Recording of the Hearing

During the hearing, it was discovered that, due to an equipment malfunction, the hearing had not been properly recorded. At that point, a new recording device was brought in to record the remainder of the hearing. The parties stipulated that there was no reason to go back and recall witnesses who had already testified. The grievant asserts that the lack of a verbatim recording of the hearing "frustrates administrative and judicial review" of the decision. Having agreed that there was no need to go back and recall witnesses to re-testify, the grievant may not now complain that she is prejudiced by the lack of a verbatim recording of the entire hearing. The time to correct the effects of the recording problem was at the hearing and the grievant (through counsel) agreed that recalling witnesses was unnecessary. Moreover, the grievant's request for administrative review does not identify any specific manner in which lack of a verbatim recording of the hearing "frustrates administrative and judicial review" of the decision by, for example, preventing the confirmation that the record evidence exists to support the sustained charge. Accordingly, there is no reason to disturb the decision on this basis.

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.[5] 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.[6] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[7]

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Claudia T. Farr
Director

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