Issue: Administrative Review of Hearing Officer's Decision in Case No. 9692; Ruling Date: February 14, 2012; Ruling No. 2012-3179; Agency: University of Virginia Health System; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling Number 2012-3179
February 14, 2012

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9692. For the reasons set forth below, this Department remands the decision to the hearing officer to rule on the issue of attorney's fees and restoration of benefits.

FACTS

The procedural background, facts, and related conclusions of this case are set forth in detail in Case No. 9692. For purposes of this ruling the facts can be summarized as follows.

On December 22, 2010, the grievant received an Informal Counseling. On March 25, 2011, the grievant received a Formal Performance Counseling Form. On June 3, 2011, the grievant received a Formal Performance Counseling Form which resulted in a performance warning and suspension.

In the course of grieving the Formal Performance Counseling of June 3, 2011, the grievant created a grievance package of data that she felt was relevant to her grievance. Her Grievance Form A consisted of 81 pages of various documents, e-mails and patient records.

The Second Step Respondent reviewed the Grievance Form A and concluded that the suspension of the grievant, pursuant to the Formal Performance Counseling of June 3, 2011, was appropriate. The Second Step Respondent then mailed the Grievance Form A to the grievant's home address. The Grievance Form A contained the disputed medical records.

Subsequently, the grievant delivered the Grievance Form A to the President of the University, who is the designated Third Step Respondent. Only at the President's office did someone notice that the Grievance Form A contained purported privileged medical records. That office returned the Grievance Form A and a subsequent investigation took place. The grievant was ultimately terminated for disclosure of confidential information.

The grievant grieved her termination and, in an October 31, 2011 hearing decision, the hearing officer reinstated her employment. He held that while he could find no violation of policy as a result of the transmittal of the confidential documents, he found that:

> It appears to this Hearing Officer that, if the Grievant was in violation of anything, her violation was that of being in possession of these records. There is no convincing evidence that she did not come into possession in a manner that was approved. There is no evidence that these documents were distributed to anyone other than the Second and Third Step Respondents. However, there is evidence that, once the Grievant came into possession of these documents, the documents were maintained in her possession. The Grievant testified that she maintained them in her desk at work or, after her grievance package was mailed to her home by the Second Step Respondent, the Grievant then kept them in her possession at all times. The Grievant has been charged with intentionally accessing and intentionally distributing confidential patient records. She has not been charged with improper possession.
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> The Grievant by counsel argued that various HIPPA regulations indicated that she was entitled to possession of these documents. For purposes of this finding, the Hearing Officer does not need to reach that argument.
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> The Hearing Officer finds that the Grievant, based on the evidence submitted before him, violated Policy 707(E)(6)(a) in that she left confidential information in a public area. That public area was in her desk at work.
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> For reasons stated herein, the Hearing Officer finds that the Agency has not bourne its burden of proof in this matter regarding a Policy 707, Level 3 violation. However, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter regarding a Policy 707, Level 1 violation. The Hearing Officer orders that the disciplinary action be amended, pursuant to his finding and that the Grievant be reinstated to her former position or, if occupied, to an objectively similar position.

The October 31, 2011 hearing decision, did not address the issue of benefits or attorney's fees. The grievant requested that the hearing officer reconsider his decision, asserting that she did not violate any policy. The hearing officer declined to revise his original Hearing Decision. The Reconsidered Decision did not address the restoration of benefits or attorney's fees. In her ruling request to this Department, the grievant has essentially requested that EDR instruct the hearing officer to award attorney's fees and order the reinstatement of benefits.

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."[1] 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.[2]

Findings of Fact

The grievant appears to challenge the hearing decision on the basis of the hearing officer's findings and his determinations regarding the credibility of witnesses. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[3] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[4] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[5] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[6]

Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witness 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. Thus, to the extent the grievant is challenging the hearing officer's findings of fact and his weighing of the evidence, such determinations are entirely within the hearing officer's authority.

In this case, the hearing officer found "unpersuasive and unbelievable" the grievant's contention that "the confidential information on or about her desk was never left unattended or without being locked in the desk" and "the door to her office was never left open except when the Grievant was in her office." As noted above, it is the exclusive role of the hearing officer to determine the witness credibility and make findings of fact. In doing so, hearing officers must, among other things, listen to witness testimony, observe demeanors, consider corroborating and contradictory testimony, and consider the plausibility of all testimony. It is not for this Department to second-guess the hearing officer regarding such fact-finding. Accordingly, this Department will not disturb the hearing officer's findings regarding the credibility of the grievant's testimony.

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[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *Grievance Procedure Manual* § 6.4.
[3] Va. Code § 2.2-3005.1(C).
[4] *Grievance Procedure Manual* § 5.9.
[5] *Rules for Conducting Grievance Hearings* § VI(B).
[6] *Grievance Procedure Manual* § 5.8.

Attorney's Fees

The grievant asserts that the hearing officer should have awarded her attorney fees in this case. Virginia Code § 2.2-3005.1 provides that "[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." That statute further provides that all awards of attorney's fees "must be in accordance with rules established by the Department of Employment Dispute Resolution."[7] The *Grievance Procedure Manual* states the rule regarding when a grievant has "substantially prevailed":

> 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. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his former (or an objectively similar) position.[8]

This Department has long interpreted this provision to mean a grievant "substantially prevails" in a discharge grievance if she gets her job back, in other words, whenever a hearing officer's decision contains an order of reinstatement.[9] Therefore, because the October 31, 2011 hearing decision directed the grievant's reinstatement to employment, the grievant substantially prevailed at hearing. Accordingly, the hearing officer should have awarded attorney's fees unless special circumstances would have made an award unjust. Thus, the decision is remanded for the hearing officer to address the issue of attorney's fees.

We note that the agency has agreed to pay reasonable attorney's fees in this case. However, the parties appear to disagree as to what constitutes "reasonable fees." If the hearing officer finds no special circumstances that would make an award of fees unjust, and he awards fees in his remand decision, the *Grievance Procedure Manual* provides the following (which has been slightly modified to address the procedural posture of this case):

> [C]ounsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the [remand] decision, counsel's petition for reasonable attorneys' fees [if not already provided]. The petition shall include an affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting the Grievance Hearings. A copy of the fees petition must be provided to the opposing party at the time it is

[7] Va. Code § 2.2-3005.1(A).
[8] *Grievance Procedure Manual* § 7.2(e)(emphasis in original). *See also Rules for Conducting Grievance Hearings* § VI(D).
[9] *See* EDR Ruling No. 2006-1336.

> submitted to the hearing officer. The agency may contest the fees petition by providing a written rebuttal to the hearing officer.
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> If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition, and should do so no later than 30 days from the date of the [remand] decision.
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> If either party has timely requested an administrative review as described in §7.2(a), all other administrative reviews must be issued (including any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the fees addendum within 15 calendar days of the issuance of the last of the administrative review decisions.
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> Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with this Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.
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> Like all final hearing decisions, a final decision rendered by a hearing officer under this subsection (7.2(e)) shall not be enforceable until the conclusion of any judicial appeals.

Benefits

Neither the original Hearing Decision nor the Reconsideration Decision mention the restoration of benefits. This Department assumes that by reinstating the grievant's employment, reinstatement of benefits was presumed by the hearing officer. It appears to have been presumed by the agency, having agreed to restore benefits. Moreover, this Department can imagine few, if any, situations where reinstatement and back-pay would be awarded but benefits would not. Because hearing officer will issue a remand decision addressing the issue of attorney's fees, he is instructed to expressly address the restoration of benefits.

Lack of Jurisdiction for EDR to Rule in this Matter

In a response to the grievant's request of administrative review, the agency states that the level of discipline which was ultimately upheld by the hearing officer, a Level 1 violation, is a "description of the misconduct, not a disciplinary action," and that under agency policy the "normal disciplinary action" for a Level 1 violation is an "informal counseling with the appropriate retraining mandate." The agency notes that an informal letter of counseling with

retraining falls in the category of "informal supervisory actions," which under the grievance procedure, does not qualify for hearing and cannot be administratively appealed.

To the extent that the agency is arguing that this Department has no jurisdiction to rule, such an argument must fail. The grievant was terminated from employment and challenged that disciplinary termination. The disciplinary termination was qualified for hearing and the hearing officer found it to be improper. His reduction of the termination to a counseling in no way removed this matter from the jurisdiction of either the hearing officer or any administrative reviewer. Jurisdiction continues in a grievance regardless of whether any action is modified by a hearing officer to a level that would not have originally been eligible for qualification, such as a counseling.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[10] 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.[11] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[12]

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Claudia T. Farr
Director

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