Issue: Administrative Review of Hearing Officer's Decision in Case No. 9786; Ruling Date: August 2, 2012; Ruling No. 2012-3363; Agency: Virginia Department of Transportation; Outcome: Remanded to AHO.

# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

*Office of Employment Dispute Resolution*

## ADMINISTRATIVE REVIEW

In the matter of the Department of Transportation
Ruling Number 2012-3363
August 2, 2012

The agency has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9786. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

## FACTS

The pertinent procedural and substantive facts of this case, as set forth in the hearing decision in Case No. 9786, are as follows:[1]

1. Grievant was given a Group III Written Notice with 5 day suspension without pay for providing false information to management regarding her personal "relationship" which was inferred to be meretricious with an employee, which is the subject of this grievance.

2. Grievant, at the time in question, was an Administrative Program Manager II for civil regulations with the Agency and denied a "relationship" with an employee.

3. The agency recovered Grievant's "e-mails" to the employee in question pertaining to her divorce and references to her wedding vows, plus for a dinner meeting with the "employee", expressing the fact that she felt he was a "good person" and her feeling that she could only date one person at a time.

4. The Agency did not define "relationship", and anything between the Grievant and the employee of a sexual nature was not proved.

[1] Decision of Hearing Officer, Case No. 9786 ("Hearing Decision"), May 17, 2012, at 1-2.

5. The emphasis on "relationship" from the Agency was sexual in nature, which was not proved.

6. The Agency witnesses appeared united to discredit the Grievant.

7. Grievant had been an exemplary employee for many years.

8. There are numerous "e-mails" between Grievant and the employee in question. None of which spoke of an improper or sexual relationship.

In a May 17, 2012 hearing decision, the hearing officer held the Group III Written Notice was "not confirmed" and he "suggested that it be withdrawn or drastically reduced to a Group I with back pay reinstated."[2] The agency now seeks administrative review from EDR.

## DISCUSSION

By statute, the Department of Human Resource Management's Office of Employment Dispute Resolution (EDR) 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."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

*Findings of Fact/Lack of Evidence in the Hearing Officer's Decision*

The agency challenges that "there is no justification or evidence that supports the [hearing] decision rendered." Specifically, the agency alleges that the hearing officer's "Findings of Fact are not factual and do not address the issue of the grievance." Moreover, the agency asserts "[t]he decision was absent of grounds in the record for which the hearing officer developed the facts stated or the decision rendered."

A hearing decision "*must* contain findings of fact on the material issues and the grounds in the record for those findings."[5] Pursuant to the *Rules for Conducting Grievance Hearings ("Rules")*, it is also the hearing officer's responsibility to write a hearing decision that contains: 1) a statement of the issues qualified; 2) conclusions of policy and law; 3) any aggravating or

[2] *Id*. at 2.
[3] Va. Code § 2.2-1202.1(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] *Grievance Procedure Manual* § 5.9 (emphasis added).

mitigating factors that were pertinent to the decision; and 4) clearly defined order(s).[6] Furthermore, in cases involving discipline, the *Rules* state that:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[7]

In this case, the hearing officer's duty was to determine whether the grievant falsified a state document and provided false information to management.[8] The hearing officer held that the agency did not define "relationship," nor did it prove a sexual relationship between the grievant and the other employee.[9] However, the findings of fact and subsequent decision are virtually silent about whether the grievant falsified a state document and/or made a false statement to management despite agency and grievant testimony and exhibits introduced on those issues. Accordingly, we find the hearing officer's decision does not contain findings of fact about the material issues of this case. Moreover, because the hearing decision is deficient in its lack of factual findings, analysis, and conclusions on the material issues of this case, it is unclear how the hearing officer related his findings of fact to the issue(s) qualified for hearing or how the decision rendered was warranted. As it currently stands, a reader would have a difficult time understanding what the grievant was disciplined for, what evidence was presented by either party, or what conclusions the evidence supports.

Therefore, the hearing decision is remanded to the hearing officer to consider what facts are in the record evidence to support (or not support) the agency's action, and if the facts support the agency's cited action, to consider whether the grievant's actions constituted misconduct. On remand, the hearing officer must adhere to the requirements of the *Grievance Procedure Manual* and the *Rules* in issuing a complete decision. In so doing, the hearing officer must analyze the facts of the case through the disciplinary framework outlined above. As such, if the hearing officer finds the grievant's actions constituted misconduct, then the hearing officer also has an independent duty to assess the appropriate severity of the discipline, to determine whether the agency's discipline was consistent with law and policy, and to discuss whether mitigating and/or aggravating circumstances existed. Upon issuing his reconsideration decision, if the hearing

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[6] *Rules for Conducting Grievance Hearings ("Rules")* at II. For example, the hearing officer's holding that "suggested" a reduction or rescission of the disciplinary action at issue is not "clearly defined."
[7] *Rules* at VI(B).
[8] Hearing Decision at 1.
[9] *Id*.

officer finds that mitigating circumstances do exist, he must state *in writing* the grounds in the record for those findings.

*Appearance of Bias*

The agency asserts that the hearing officer gave the appearance of bias towards the grievant when he stated in his findings of fact that "[t]he Agency witnesses appeared united to discredit the Grievant," but he failed to mention the alleged consistent testimony of the agency's witnesses. It appears the agency contends that because the hearing officer's factual findings tend to support the grievant's position in this case, he was biased against the agency.

The *Rules for Conducting Grievance Hearings (Rules)* provide that a hearing officer is responsible for:

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[10]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[11]

The agency has not identified any applicable rules or requirements to support its position, nor are we aware of any. As to the EDR requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," the applicable standard is generally consistent with the manner in which the Virginia Court of Appeals reviews recusal cases.[12] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[13] EDR has found the Court of Appeals standard instructive and has held that in compliance reviews by EDR on the issue of a hearing officer's failure to recuse (disqualify) himself, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[14] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[15]

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[10] *Rules* at II.
[11] EDR Policy 2.01, p. 3.
[12] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals and found its holdings persuasive.
[13] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[14] *See, e.g.*, EDR Ruling No. 2011-2807.
[15] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[16] This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Therefore, EDR finds no reason to disturb the hearing officer's decision for this reason.

## CONCLUSION

As currently drafted, the hearing officer's decision is incomplete and does not comply with the grievance procedure and *Rules for Conducting Grievance Hearings*. Therefore, for the reasons set forth above, we remand the decision for further clarification and consideration. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[17] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[18]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]

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[16] *C.f.,* Al-Ghani v. Commonwealth No. 0264-98-4, 1999 Va. App. LEXIS 275 at * 12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings **adverse** to a defendant, standing alone, is insufficient to establish **bias** requiring recusal.")
[17] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[18] *See Grievance Procedure Manual* § 7.2(a).
[19] *Grievance Procedure Manual* § 7.2(d).
[20] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[21] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).