



# COMMONWEALTH OF VIRGINIA

*Department Of Human Resource Management*

*Office of Employment Dispute Resolution*

## DECISION OF HEARING OFFICER

In re:

**Case Number: 12014**

**Hearing Date: November 20, 2023**

**Decision Issued: February 2, 2024**

## PROCEDURAL HISTORY

On May 30, 2023, Grievant initiated a grievance asserting that:

1) I was denied an equal opportunity to compete for the position of "station manager." To my knowledge, there was no official recruitment/official announcement with an application deadline through HR, therefore I was not given the opportunity to officially apply. I was also not given the opportunity to be temporarily officially placed in that official role (denied advancement to a state authorized position for which I am fully qualified and in which I have served in an unofficial capacity for at least the last 17 years).

2) I have not yet, to my knowledge, received a position review (audit) for a possible role change/re-classification through Human Resources, a request I have consistently made due to the many years I have performed duties outside of my current position.

3) I have not been compensated for the additional duties that I have performed with no one in the station manager position for at least 17 years.

4) I would like noted that in my Fall 2022 performance evaluation, in the "employee comments" section, I repeated my request for a position review (re-classification) due to the fact that I was performing duties of a station manager, which is not my official position. For many years, I have

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written the same request in my employee comments, demonstrating my supervisor(s) officially knew I was under-compensated.<sup>1</sup>

Grievant noted that the relief she sought was:

- 1) For a position review to be completed and my role/classification status to be finalized through Human Resources, and the information shared with me.
- 2) That my supervisor of record remain as it is (chairperson of the department).
- 3) Compensation for the additional work that I have performed, over the last 17 years, above and beyond my position as it is listed.<sup>2</sup>

The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 31, 2023, the University qualified the grievance in full for a hearing.<sup>3</sup> On October 10, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer.

A pre-hearing conference was held on October 16, 2023, and the hearing was scheduled for November 20, 2023. On November 9, 2023, the Grievant requested a continuance to allow her additional time to secure representation in this matter. The University objected, out of concern for further delay to the process due to the upcoming holiday season, winter break for the University and planned vacations; reasons that also had been cited by both parties when the hearing date was originally agreed upon during the prehearing conference call. The Hearing Officer found that Grievant had not provided just cause for her request and denied the Grievant's request for continuance.<sup>4</sup>

After business hours on Wednesday, November 15, 2023, the Agency notified the Grievant and the Hearing Officer of the University's objections to the Grievant's witness list on the basis of relevance and requested a pre-hearing conference to have its objections addressed prior to the hearing scheduled for Monday, November 20, 2023.

On the morning of Thursday, November 16, 2023, the Hearing Officer via email provided the parties with the Hearing Officer's available times and requested information about the parties' availability for a pre-hearing conference.

On the afternoon of Thursday, November 16, 2023, the Grievant emailed the Hearing Officer notifying the Hearing Officer that she was preparing to submit a "formal letter of noncompliance per section 6.3 of Grievance Procedure Manual" and advising the Hearing Officer of her "preference to hold off on said conference until a decision may be made on [Grievant's] complaint of noncompliance."

On November 17, 2023, the Grievant emailed the Hearing Officer her "Claim of Noncompliance (Per Section 6.3)." The Hearing Officer then scheduled a pre-hearing conference call on that same day as it was the last business day prior to the hearing date.

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<sup>1</sup> University Ex. at 1-4.

<sup>2</sup> University Ex. at 1-4.

<sup>3</sup> University Ex. at 82.

<sup>4</sup> Email from Hearing Officer to the parties (Nov. 9, 2023).

At the time for the prehearing conference call, the Grievant emailed the Hearing Officer and the Agency that she did “not feel comfortable speaking further without legal counsel present to protect [her] federal and state rights, as well as the rights afforded to [her] by the grievance process.”

The Hearing Officer replied to both parties by email and advised them that to the extent that the Grievant intended her email correspondence on November 17, 2023, to serve as a request for a continuance of the grievance hearing scheduled to begin at 9:30 AM on Monday, November 20, 2023, such request for continuance was denied for lack of just cause shown.<sup>5</sup>

On November 20, 2023, a hearing was held at a University facility. At the beginning of the hearing the Hearing Officer took up the University’s objections to the Grievant’s witnesses and the Grievant’s assertions regarding non-compliance prior to the assignment of the Hearing Officer to this matter. The Grievant, through her advocate, requested a continuance of the hearing which the Hearing Officer denied.

Both the Grievant and the University submitted documents for exhibits that were accepted into the grievance record. The Hearing Officer has carefully considered all evidence presented.

## **APPEARANCES**

Grievant  
Grievant’s Advocate  
Agency Representative  
Agency Party Designee  
Witnesses

## **ISSUES**

Whether the University misapplied or unfairly applied policy?

## **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief the Grievant seeks should be granted. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

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<sup>5</sup> Email from Hearing Officer to the parties (Nov. 17, 2023).

Grievant is a Radio Production Specialist in a Department at Virginia State University. Grievant has been employed by the University for more than 26 years. Performance evaluations that Grievant received during the period 2017 to 2022 gave Grievant an overall performance rating of extraordinary contributor.

The University's radio station did not have a station manager for a number of years.<sup>6</sup>

Witness 2 works in the University radio station. Witness 2 described himself as receiving work assignments from Grievant. Witness 2 described Grievant as "basically [running] the radio station" for more than 15 of the 16 years he has been working at the radio station.<sup>7</sup>

Witness 1 testified that during his time with the University as a chief of staff from 2005-2014 and as an associate professor from 2015-2017, he considered Grievant to be the "go-to" person for the University's radio station and that he believed Grievant was "managing" the radio station. Grievant was not, however, in Witness 1's supervisory reporting chain and he was not aware of her specific job duties.

Witness 3 testified that from sometime in 2007 or 2008 until 2010, the radio station was one of the operational units that reported to her. When Witness 3 oversaw the radio station, she conducted an organizational study of the radio station, including an assessment of job duties and responsibilities of the radio station. As a result of her assessment, Witness 3 recommended personnel actions and a facilities' upgrade for the radio station. Among the personnel actions that Witness 3 recommended was a reclassification of Grievant's position. Witness 3 believed that at that time Grievant was performing duties beyond her job description and was not being compensated accordingly. Witness 3 testified that at that time Grievant's position was that of a program manager which Witness 3 described as a position that typically would put on programming for the station. According to Witness 3, Grievant also was overseeing the operations of the radio station including overseeing staff and purchasing for the radio station. Witness 3 testified that in May 2010, Witness 3 completed paperwork to reclassify Grievant's position. But Witness 3's contract was not renewed at the end of June 2010 and Witness 3 left the University before she could conclude her efforts to reclassify Grievant's position.<sup>8</sup> Witness 3 also testified that before she left the University in June 2010, she advised Grievant of her efforts to reclassify Grievant's position.<sup>9</sup>

In April 2023, the University appointed an individual to serve as Assistant Professor/[University Radio] Station Manager beginning April 10, 2023.<sup>10</sup>

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<sup>6</sup> There was no specific testimony as to when, prior to April 2023, the University last had an individual in a position or role described as "station manager" for the radio station. Grievant asserted in the materials she submitted with her grievance that the "last official station manager left in late 2004" and that she had been performing duties "outside [her] current position" for "at least 17 years." Witness 2 described Grievant as "basically [running] the radio station" for more than 15 of the 16 years he has been working at the radio station. See University Ex. at 3; Hearing recording at 2:36:22-2:36:42.

<sup>7</sup> Hearing recording at 2:36:22-2:36:42.

<sup>8</sup> Hearing recording at 2:52:10-2:55:43.

<sup>9</sup> Hearing recording at 3:09:44-3:11:28.

<sup>10</sup> University Ex. at 52.

## CONCLUSIONS OF POLICY

Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>11</sup> A hearing officer may order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy. If a hearing officer determines that a policy mandate has been misapplied or applied unfairly, the hearing officer may order the agency to reapply the policy from the point at which it became tainted.

In order to prove that the University misapplied policy, Grievant must prove that the University misapplied or unfairly applied a policy that it was mandated to follow.

Grievant argued that she “was denied an equal opportunity to compete for the position of ‘station manager’” because “[t]o [her] knowledge, there was no official recruitment/official announcement with an application deadline through HR.” Grievant included select pages of DHRM Policy 2.10, Hiring, in the exhibits she submitted that were admitted into the record. The policy provides that “[j]ob postings for all classified positions must be listed in the Recruitment Management System (RMS) for a minimum of five consecutive workdays, not counting Saturdays, Sundays, and holidays” except in certain listed situations.<sup>12</sup>

The University argued that it was not required to adhere to the provisions of DHRM Policy 2.10 with respect to the position at issue because the position was an adjunct faculty position filled by appointment. The Agency did not offer any witness testimony but included in its exhibits a completed Departmental Request for Personnel Action Form (A-21) and signed offer letter for the position both of which refer to the position as “faculty adjunct” and appear to indicate a contract period for the appointment.<sup>13</sup>

DHRM Policy 2.10 applies to full-time, quasi full-time and part-time classified employees whose terms and conditions of employment are subject to the Virginia Personnel Act (Va. Code § 2.2-2900 et seq.). Teaching, research, administrative and professional faculty positions are not classified positions and are not subject to the terms and conditions of the Virginia Personnel Act or DHRM Policy 2.10.<sup>14</sup> Grievant has not offered any information or proof that the University was required to comply with the recruitment requirements of DHRM Policy 2.10 with respect to its appointment of an individual as an adjunct faculty member to serve as “Assistant Professor/[University Radio] Station Manager.”

To the extent Grievant asserted that the “station manager” position was a classified position rather than a faculty position, she offered no evidence to support her assertion.

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<sup>11</sup> See Va. Code § 2.2-3004.B.

<sup>12</sup> DHRM Policy 2.10, Hiring.

<sup>13</sup> See University Ex. at 51 and 52.

<sup>14</sup> See DHRM Policy 2.10, Hiring; DHRM Policy 2.20, Types of Employment; see also Va. Code §§ 2.2-2905 and 23.1-1021.

Grievant offered no information as to any other policy that she believed required the University to have an “official recruitment/official announcement with application deadline through HR” for the recruitment of a “station manager.”

Grievant asserted that she had been performing additional duties, including the duties of a station manager for approximately 17 years and that she had not been properly compensated for performing those additional duties. Grievant also asserted that in her “Fall 2022 performance evaluation, in the “employee comments” section, [she] repeated [her] request for a position review (re-classification)” and that she had written the same “request for many years” which Grievant argued demonstrated that her supervisors “officially knew” she was “undercompensated.”<sup>15</sup>

Grievant did not identify any policy that the University misapplied or unfairly applied with respect to the classification of Grievant’s position or the compensation Grievant received. The University provided information which showed that the University completed a review of Grievant’s position and compensation in the Spring of 2022.<sup>16</sup> Information included in the exhibits provided by Grievant and the University indicated that the Grievant became aware that the review had been conducted during the grievance process. Grievant appeared to argue that she should have been invited to participate in the University’s review of Grievant’s position and compensation, but she pointed to no policy that required the University to allow or invite her to participate in such review. Grievant also appeared to disagree with the timing of her receipt of the information, the outcome of the review and the University’s failure or delay in implementing recommendations associated with the review, but she pointed to no policy that required different action by the University or that the University misapplied or unfairly applied.

The Commonwealth utilizes a compensation management system that organizes state classified positions into occupational families. Each occupational family includes career groups and each career group includes roles. The Department of Human Resource Management (DHRM) promulgates policies and procedures that govern the administration of compensation for all classified employees of the Commonwealth.

DHRM Policy 3.05, Compensation provides that “[a]gencies must set or adjust salaries based on the [guidelines set forth in the policy]” and that “[s]alary decisions must be documented.” Among other responsibilities, agencies must ensure that they have a salary administration plan to support workforce and succession initiatives, that they review their practices to ensure that similarly situated employees are treated consistently, and that they have appropriate documentation for their compensation actions.

The policy requires that appropriate pay factors be considered by managers for determining and justifying pay actions. The policy defines pay factors to include: “Agency Business Need; Duties and Responsibilities; Performance; Work Experience and Education; KSAs and Competencies; Training, Certification and Licensure; Internal Salary Alignment; Market Availability, Salary Reference Data; Total Compensation, Budget Implications; Long Term Impact; and Current Salary.” The policy goes on to set forth the various pay practices (or rules) an agency may utilize for setting or changing

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<sup>15</sup> University Ex. at 3.

<sup>16</sup> University Ex. at 53-64.

compensation, including “Starting Pay, Promotion, Voluntary Transfer, Voluntary Demotion, Temporary Pay, Role Change, In-Band Adjustment, Disciplinary or Performance-Related Salary Action, and Competitive Offer.”

The Policy sets forth the various pay practices that an agency may utilize to adjust an employee’s compensation to reflect any number of potential changes that may arise with respect to an employee’s employment, including a change of duties. The Policy leaves to agency management, however, the discretion to assess the facts of a particular situation, the weight to give to the various pay factors and the ultimate decision as to which, if any pay practice and compensation adjustment may be appropriate under the circumstances.

Grievant argued, and her witnesses agreed, that Grievant was a dedicated employee who consistently worked more than 40 hours a week and performed duties outside of her job description to ensure the successful operation of the University’s radio station. But Grievant has provided no evidence to prove that the University misapplied or unfairly applied policy when it exercised its discretion with respect to its decisions about how to manage and staff the University radio station, including when and how to fill positions and with respect to its review of, and compensation for, Grievant’s position.

A hearing officer is not a “super-personnel” officer. As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute her judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. Therefore, in providing any remedy the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.<sup>17</sup>

Grievant has not proved by a preponderance of the evidence that the University misapplied or unfairly applied policy.

## DECISION

For the reasons state herein, Grievant’s request for relief is **denied**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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<sup>17</sup> See Office of Employment Dispute Resolution, Rules for Conducting Grievance Hearings § VI (July 1, 2020).

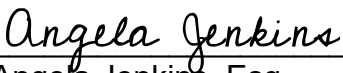
Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>18</sup>

  
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Angela Jenkins, Esq.  
Hearing Officer

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<sup>18</sup> See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.