

**REPORT OF THE
JOINT LEGISLATIVE AUDIT
AND REVIEW COMMISSION**

**REVIEW OF THE USE OF
GRIEVANCE HEARING OFFICERS**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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Philip A. Leone

Preface

Item 16 O from the 1999 Appropriation Act directed the Joint Legislative Audit and Review Commission (JLARC) to conduct a review of grievance hearings, in particular the use of hearing officers in grievance cases. The Commonwealth's grievance hearing process is the responsibility of the Department of Employee Relations Counselors (DERC). This report presents the results of the review of DERC's management of the grievance hearing process and the selection and use of hearing officers.

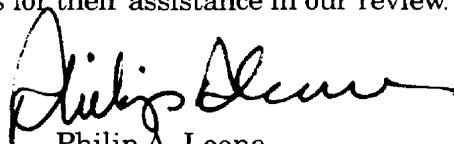
JLARC staff found that the hearing officer structure for employee grievances is generally adequate. The major strength of the current system is its ability to provide independent, impartial adjudicators for employee grievances. The major shortcoming is that it does not promote consistency in grievance decisions. The report identifies a number of steps that could be taken to address the shortcomings of the current system while maintaining its strengths. These steps include reducing the number of hearing officers who hear grievance cases, improving the training of hearing officers, and better defining the role of hearing officers in deciding grievances.

Another option considered was the establishment of an appeals process for hearing officer decisions. Based on an examination of the advantages and disadvantages of an appeals process, this report concludes that such a process does not appear necessary or cost-effective to implement at this time.

JLARC staff also considered the need for a full-time hearing officer system for employee grievances. JLARC staff found that the use of full-time hearing officers might have some advantages over the current system in the areas of consistency and experience. However, the loss of independence and subsequent appearance of bias could erode trust in the system. Further, it appears that a full-time system would be more costly than the current system. The recommendations in this report should address the concerns with the current system without the need to institute a new hearing officer structure.

This review also examined complaints that DERC may engage in "judge-shopping" in assigning hearing officers to grievance cases. Analysis of case assignment data suggests that DERC makes these assignments on a rotating basis and does not engage in judge-shopping. However, there are currently no safeguards in place to minimize the potential for abuse of the process. To provide a level of assurance to employees and agencies that the process cannot likely be "rigged," JLARC staff recommend that the Office of the Executive Secretary of the Supreme Court provide oversight of DERC's selection and removal of hearing officers for employee grievance cases.

On behalf of the JLARC staff, I would like to thank the staff of the Department of Employee Relations Counselors, the Office of the Executive Secretary of the Supreme Court, and Virginia's grievance hearing officers for their assistance in our review.



Philip A. Leone
Director

December 23, 1999

JLARC Report Summary

REVIEW OF THE USE OF GRIEVANCE HEARING OFFICERS

December 1999

Joint Legislative
Audit and Review
Commission

The Fourteenth Amendment to the U.S. Constitution requires due process before a government takes an action that affects a person's property interest. By law, State non-probationary, classified employees have a property interest in their employment. Due process is provided to State employees through the Commonwealth's grievance procedure.

Specifically, the grievance procedure is a formal process whereby State employees can bring workplace complaints to upper levels of management in an agency. For certain types of complaints, such as those related to disciplinary actions against an employee, the employee also has a right to

be heard by an independent third-party who decides the merit of the grievance and, if appropriate, the remedies (within certain guidelines). The Commonwealth uses administrative hearing officers to conduct the grievance hearings. These hearing officers are private sector attorneys eligible to preside at State agency administrative hearings. The Executive Secretary of the Supreme Court appoints and maintains the official list of hearing officers.

The grievance hearing process is the responsibility of the Department of Employee Relations Counselors (DERC). DERC uses the Executive Secretary's list to select hearing officers for grievance cases. Item 16 of the 1999 Appropriation Act directed JLARC to conduct a review of State employee grievance hearings. The mandate specifically called for an examination of the use of hearing officers in that process. This report presents the results of the review of DERC's management of the grievance hearing process and the selection and use of hearing officers.

Hearing Officer Performance Is Generally Good, But Needs Some Improvement

Based on interviews with State agencies and employee associations and data reviewed during the course of this study, it appears that users of the hearing officer system are generally satisfied with the performance of hearing officers. State agency representatives reported receiving sound, timely decisions from the majority of hearing officers with whom they have interacted. Employee associations also reported general satisfaction with grievance hearing officers. Further, there was agreement that the use of hearing officers to hear grievance cases was a significant improvement over the previous practice of using panels.

However, as with any system in which a large number of individuals are asked to make judgments, there is a range in the quality of the work received from hearing officers. In some cases, hearing officers are not meeting performance expectations. Examples of complaints that have been raised regarding individual hearing officer performance include untimely decisions, decisions that are inconsistent with State policy or the grievance procedure, and inappropriate conduct. While hearing officers generally appear to be performing adequately, individual poor performance can serve to undermine confidence in the grievance process, and therefore, needs to be addressed.

State Oversight of Grievance Hearing Officers Should Be Strengthened

Section 2.1-116.03 – 6 of the *Code of Virginia* gives the following authority to DERC:

...establish a process to select, on a rotating basis, hearing officers from the list maintained by the Executive Secretary of the Supreme Court; train and assign such hearing officers to conduct grievance hearings; and evaluate the quality of their services to determine eligibility for continued selection.

Consistent with the outcome of a recent federal district court case, this language gives DERC authority to modify the Office of the Executive Secretary's (OES) list of hearing officers for its own purposes. DERC has made use of this authority in the past year through the development of a new selection policy and removal of some hearing officers from the list of those who may hear grievance cases.

Selection of Hearing Officers. JLARC staff found that DERC's selection process for assigning individual cases to

hearing officers appears appropriate. While documentation was not adequate to definitively rule out that any "judge-shopping" is occurring, the analyses conducted suggest that DERC assigns cases to hearing officers on a rotating basis. However, given the current selection authority granted to DERC, the potential for abuse of the process exists. To provide a level of assurance to employees and agencies that the process cannot likely be "rigged," it appears appropriate to institute an oversight role for the OES.

The following recommendations are made:

- **The General Assembly may wish to amend the *Code of Virginia* to specify that the OES provide oversight of DERC's hearing officer selection process.**
- **The General Assembly may wish to amend §2.1-116.03 – 6 of the *Code of Virginia* to require that DERC use the OES' list of hearing officers through the use of a shared automated system. The OES and DERC should work together to develop a shared automated system for maintaining the list of hearing officers eligible to hear grievance cases and for selecting hearing officers for individual grievance cases.**

Evaluation of Hearing Officers. Both DERC and the OES conduct evaluations of hearing officers. During the past year and a half, DERC has implemented an enhanced evaluation process designed to improve the accountability of hearing officers. JLARC staff found that this revised evaluation process appears to be a generally sound method for evaluating hearing officers. However, there are some additional modifications that are warranted to ensure that

hearing officers are properly held accountable for their performance. In addition, the OES needs to significantly revise its hearing officer evaluation process to better determine hearing officers' fitness for continued appointment.

The following recommendations are made:

- **DERC should develop a written policy describing its evaluation process and rating system. It should follow this policy in future evaluation ratings of hearing officers.**
- **DERC should begin tracking the date of grievance hearings. In assessing the timeliness of hearing officers' work, it should specifically examine the time between the hearing date and the date of the written decision.**
- **The OES should conduct a review of its hearing officer evaluation process. In part, the process should be revised to incorporate the views of all parties to a hearing concerning the hearing officer. Further, the OES should obtain the individual evaluations on a more timely basis. In addition, the OES should consider revising the evaluation form to directly ascertain each party's views of the hearing officers' continued service. Finally, the OES should reassess the required minimum score it uses in making reappointment decisions.**

Removal of Hearing Officers. Hearing officers can be removed from the list of those qualified to hear grievance cases by the OES and by DERC. The OES has the option not to reappoint a hearing officer at the end of his or her three-year term or to

remove a hearing officer at any time for cause. DERC also can remove hearing officers from the list of those qualified to hear State grievance cases based on its internal review process.

Since inadequate hearing officer performance can negatively impact the grievance process, it appears appropriate for DERC to make removal decisions based on the performance measures it has developed. However, to ensure the independence of the system it may be necessary for the OES to serve as an independent appeal to these decisions. To give the appropriate authority to both the OES and DERC, changes to the *Code of Virginia* will be necessary.

During the past year the reappointment process has been delayed by both DERC and the OES. Initially, DERC did not submit hearing officer evaluations to the OES on a timely basis. Subsequently, the OES delayed making final decisions concerning reappointments. Currently, there are decisions pending on 49 hearing officers due for reappointment since August 1998. This has created confusion and concern among hearing officers and needs to be remedied.

The following recommendations are made:

- **The General Assembly may wish to amend the *Code of Virginia* to explicitly authorize DERC to remove hearing officers from the list of hearing officers qualified to hear grievance hearings. In addition, the General Assembly may wish to amend the *Code of Virginia* to provide for an appeal of a hearing officer's removal to the OES.**
- **The OES should take immediate action to address the evaluation and reappointment of hearing officers as soon as possible.**

Actions Are Needed to Better Meet Grievance System Goals

Based upon a review of the *Code of Virginia*, arbitration literature, and interviews with Virginia and other state grievance administrators, JLARC staff identified six goals for a grievance hearing system. These goals include impartiality, independence, consistency, expertise, timeliness, and cost-effectiveness. JLARC staff assessed the current grievance system in terms of how well it meets each of these goals. Based on this analysis, the major strength of the current system is its ability to provide independent, impartial adjudicators for employee grievances. The major shortcoming of the current system is that it does not promote consistency in grievance decisions.

There are a number of steps that could be taken to address the concerns noted with the grievance hearing process and hearing officer system. First, the number of hearing officers who hear grievance cases should be reduced. This would enable the remain-

ing hearing officers to gain more experience, which in turn could help minimize inconsistencies and errors in hearing officer decisions. In addition, the role of hearing officers in deciding grievances needs to be identified and explained to all hearing officers, agencies, and other interested parties. Currently, inconsistencies arise out of a lack of clear consensus on what the role of hearing officers is, particularly in disciplinary cases.

Improvements are also needed in preparing hearing officers for their responsibilities regarding grievances. In particular, DERC needs to modify and enhance its annual training for hearing officers. It also needs to maintain an ongoing dialog with hearing officers, providing them with access to information throughout the year that will enable them to perform their duties well.

DERC also needs to address delays in the grievance process resulting from untimely DERC rulings. The average length of time DERC takes to issue rulings has in-

Assessment of the Grievance Process in Meeting Goals of the System

Goal	Assessment
Impartiality of Hearing Officers	✓
Independence of Hearing Officers	✓
Consistency of Decisions	✗
Expertise of Hearing Officers	○
Timeliness of Decisions	○
Cost-effectiveness of Process	✓

Key: ✓ = Meets goal ○ = Meets goal but needs improvement ✗ = Does not meet goal

Source: JLARC staff analysis.

creased considerably in the past two years, placing an unreasonable burden on both grievants and agencies.

Finally, a mechanism needs to be instituted to enable review of hearing officer decisions for consistency with agency policies. While the current hearing officer system in general appears sound, instituting these steps would result in an improved system that better meets the needs of State agencies and employees alike.

The following recommendations are made:

- **The General Assembly may wish to consider amending §9-6.14:14.1 of the *Code of Virginia* to give the OES specific authority to set a limit on the number of hearing officers in each region.**
- **The OES, in coordination with DERC, should develop a plan to reduce the number of hearing officers in those regions where there are currently too many hearing officers. The plan should include consideration of caseload trends and the minimum number of hearing officers needed in each region.**
- **The General Assembly may wish to consider identifying in statute the role of hearing officers in deciding cases, particularly those involving employee discipline imposed by an agency.**
- **DERC should modify its hearing officer guidance documents to reflect the General Assembly's definition of the role of hearing officers in grievances. It should also routinely explain this role at the annual hearing officer training.**

- **DERC should expand its training for new grievance hearing officers to more comprehensively orient the hearing officers to State personnel policies as well as the types of cases they can be expected to hear. Further, the department should revise its annual training program to better address the types of cases hearing officers hear most often. Opportunities should be provided to discuss actual examples of case decisions and procedural issues that periodically arise.**

- **DERC should provide hearing officers with access to redacted grievance hearing decisions.**

- **The General Assembly may wish to consider amending §2.1-342.01 of the *Code of Virginia* (Freedom of Information Act) to specify that the exclusion of personnel information does not prohibit DERC from providing prior hearing officer decisions in a redacted format.**

- **DERC should provide opportunities for additional communication and information sharing between the department and hearing officers. The department should also provide a medium through which the hearing officers could have more interaction with each other.**

- **The Department of Personnel and Training should study possible options for ensuring that hearing officer decisions are consistent with agency policies. It should report on its findings and any subsequent action taken to the House and Senate General Laws Committees by July 1, 2000.**

A final step that could be taken to address consistency in the resolution of employment disputes would be to implement an appeals process, whereby hearing officer decisions could be overturned by a higher authority. As hearing officer decisions are filtered through an appeals body with the authority to overturn decisions, greater consistency would likely result in the final decisions. However, an appeals process would lengthen the grievance procedure and make it more costly. Based on an examination of the advantages and disadvantages of an appeals process, this report concludes that an appeals process does not appear warranted at this time.

Alternative Structures for a Grievance Hearing Officer System

One of the issues prompting this JLARC study was a proposal by DERC to move toward a full-time hearing officer system for grievances in Virginia. In assessing the appropriateness of a full-time model, JLARC staff examined alternative grievance structures in place in other states and the federal government. Two alternative full-time hearing officer models (administrative and judicial) were assessed in terms of how

well they promote the goals of impartiality, independence, consistency, expertise, timeliness, and cost-effectiveness. The full-time models were also compared to the current part-time system.

The use of full-time hearing officers might present advantages over the current system in the areas of consistency and experience; however, the loss of independence and subsequent appearance of bias could seriously erode trust in the grievance system. The current structure in Virginia already provides for the impartiality and independence of hearing officers in the grievance process. The employee association representatives and most agency representatives interviewed for this study believe that the current administrative hearing officer system is generally sound. Instead of changing the basic structure, most representatives identified actions that could be taken to simply improve the deficiencies of the current system. Adoption of the recommendations in this report should result in a grievance hearing structure that adequately meets the goals identified for a sound hearing system. Therefore, it does not appear that instituting a full-time hearing officer system is needed at this time.

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I. Introduction

The Fourteenth Amendment to the U.S. Constitution requires due process before a government takes an action that affects a person's property interest. By law, State non-probationary, classified employees have a property interest in their employment. Due process is provided to State employees through the Commonwealth's grievance procedure.

Specifically, the grievance procedure is a formal process whereby State employees can bring workplace complaints to upper levels of management in an agency. For certain types of complaints, such as those related to disciplinary actions against an employee, the employee also has a right to be heard by an independent third-party who decides the merit of the grievance and, if appropriate, the remedies (within certain guidelines). The Commonwealth uses administrative hearing officers to conduct the grievance hearings. These hearing officers are private sector attorneys eligible to preside at State agency administrative hearings. The Executive Secretary of the Supreme Court appoints and maintains the official list of hearing officers.

The grievance hearing process is the responsibility of the Department of Employee Relations Counselors (DERC). DERC uses the Executive Secretary's list to select hearing officers for grievance cases. Item 16 of the 1999 Appropriation Act directed JLARC to conduct a review of State employee grievance hearings (Appendix A). The mandate specifically called for an examination of the use of hearing officers in that process. This report presents the results of the review of DERC's management of the grievance hearing process and the selection and use of hearing officers.

This chapter identifies the roles of each entity involved in the grievance process as well as the steps of the grievance procedure. In addition, a brief history of the grievance process is included.

HISTORY OF THE GRIEVANCE PROCESS IN VIRGINIA

The first establishment of some form of employee grievance rights was an amendment of the Virginia Personnel Act by the General Assembly in 1970. This amendment required the Governor to establish and maintain, "An appeal procedure which shall assure all persons employed under [the Virginia Personnel Act] a full and impartial inquiry into the circumstances of removal." A number of changes in the 1970s served to expand employees' access to a grievance process to disputes beyond termination actions. In addition, the State instituted a uniform employee grievance procedure. The General Assembly created the Office of Employee Relations Counselors in 1978 to oversee the grievance process.

The process evolved over time, but generally required that a panel of three lay persons be convened to hear grievance cases that were not resolved at the agency level.

Each party to the grievance selected a panel member and then those two members selected the third member. In 1985, the General Assembly amended the Virginia Personnel Act by placing restrictions on who could serve as panel members and requiring that in cases of termination, the third panel member should be appointed by the director of DERC from the list of administrative hearing officers maintained by the Office of the Executive Secretary of the Supreme Court.

The last set of major changes to the grievance procedure occurred in 1995. Exhibit 1 summarizes these changes. One significant change was that, instead of using a panel, hearings were to be conducted by a single administrative hearing officer. DERC was given the responsibility to assign a hearing officer to each case, using the OES' list of hearing officers.

Exhibit 1

Major Changes to the Grievance Procedure in 1995

Independent Hearing

- Hearing procedure is changed from a three-member panel to a hearing before one administrative hearing officer that is chosen from the list maintained by the Office of the Executive Secretary of the Supreme Court.

Changes in Management Steps

- Expanded issues that could be grieved through the management steps to include any employee-agency dispute.
- Added an expedited process for grievances involving loss of wages.

Appeals of Qualification Determinations

- Added an appeal to DERC from an agency head's determination that a grievance does not qualify for a hearing.
- DERC's determination can then be appealed to circuit court.

Attorney's Fees for Implementation

- Added a provision to allow attorney's fees to be awarded to either party if a party must petition the circuit court for the implementation of a hearing officer's decision.

Sources: DERC document, *History of Employee Grievance Rights in Virginia*, and *1995 Acts of Assembly*.

DIVISION OF RESPONSIBILITIES FOR GRIEVANCE HEARINGS

There are four entities with responsibilities related to the grievance hearing process, aside from the parties involved in the grievance. DERC has authority to administer and oversee the grievance process. The Office of the Executive Secretary of the Supreme Court (OES) is responsible for appointing hearing officers to be used in State administrative hearings, such as grievance hearings. Administrative hearing officers hear cases and write decisions that determine the outcomes of grievances. Upon request, the Department of Personnel and Training issues rulings on whether or not a hearing officer's decision is consistent with State policy. The specific responsibilities of these entities are discussed in this section.

Role of the Department of Employee Relations Counselors

DERC is responsible for overseeing the establishment of a comprehensive program of employee relations management. Its responsibilities revolve around four areas: employee relations training, counseling, mediation, and the grievance process. Currently, DERC has a maximum employment level of 15 positions to carry out its assigned tasks.

Consistent with *Code of Virginia* provisions, DERC administers the grievance process. This responsibility includes three primary activities. First, DERC promulgates the procedures that must be followed by all parties involved in a grievance, including the grievant, agency, and hearing officer. For example, the *Grievance Procedure* issued by DERC identifies the number of days within which certain steps must be taken by an agency once a grievance has been filed. In addition, DERC issues rules for conducting grievance hearings.

A second major activity is the issuance of formal rulings pertaining to the grievance process. There are three types of rulings that DERC issues:

- whether a person has access to the grievance procedure (“access”);
- whether the grievance is qualified for a hearing (“qualification”); and
- whether a party to the grievance or the hearing officer has fully complied with the grievance procedure (“compliance”).

Access rulings concern the employee's status (that is, classified or exempt) and whether he or she is covered under the grievance process. Qualification rulings address whether the grievance may proceed to the hearing stage if not resolved at the agency level. Only certain types of grievances are allowed to move forward to the hearing stage. (This is discussed in more detail later in this chapter.) Lastly, compliance rulings concern, for example, whether mandated time deadlines were met and

whether the hearing officer followed the rules for administering the hearing. DERC staff spend a lot of time researching and issuing rulings. Staff issued 246 rulings in 1998.

The third main grievance-related activity pertains to administration of the hearing officers used in the grievance process. The *Code of Virginia* gives DERC responsibility to:

...establish a process to select, on a rotating basis, hearing officers from the list maintained by the Executive Secretary of the Supreme Court; train and assign such hearing officers to conduct grievance hearings; and evaluate the quality of their services to determine eligibility for continued selection.

One of the DERC counselors is charged with overseeing the hearing officers, including selecting the hearing officers for individual cases and answering any questions that hearing officers may have. In addition, this staff person maintains databases on all grievance hearings and hearing officers. He also solicits evaluations of hearing officers from all parties involved in grievance hearings. Several DERC staff also participate in annual training of hearing officers.

Role of the Office of the Executive Secretary of the Supreme Court

Section 9-6.14:14.1 of the *Code of Virginia* defines the use and requirements of hearing officers under the Administrative Process Act (APA). As mentioned previously, the list of hearing officers is prepared and maintained by the OES. The list is used for the hearings conducted under the APA as well as for grievance hearings (which are exempt from the APA). The Executive Secretary has authority to promulgate regulations to govern the hearing officer system. In addition, all agencies except DERC must call the OES to have a hearing officer appointed to the case. The OES assigns the hearing officers on a rotating basis.

As part of its requirements for the hearing officers, the OES mandates that hearing officers receive training pertaining to their duties at least annually. The OES holds the hearing officer training twice yearly. At that time, DERC and the Department of Education are afforded the opportunity to provide specialized training to the hearing officers on the grievance procedure and special education cases, respectively.

The Executive Secretary of the Supreme Court also has the authority to evaluate hearing officers. Once every three years, agencies involved in hearings are requested to comment on a hearing officer's performance. The Executive Secretary uses these comments to determine whether to reappoint the hearing officer for another three-year term. In addition, the *Code of Virginia* authorizes the Executive Secretary to remove a hearing officer from the list for cause after notice in writing and a hearing. According to OES staff, they rarely fail to reappoint a hearing officer to another term or remove a hearing officer for cause.

Role of Administrative Hearing Officers

At the time of this study, there were 135 hearing officers on the OES' list – 124 of which were qualified to hear grievance cases. According to OES staff, the number of hearing officers has remained fairly constant over the last several years. Hearing officers hear an average of less than three grievance cases a year. However, the actual number of cases per hearing officer per year varies depending in which region the hearing officer resides. DERC separates the hearing officers into six regions based on geographic location (Figure 1). Due to the concentration of State business and employees in the Richmond area, hearing officers in the Richmond region tend to hear the most cases.

Section 9-6.14:14.1 A of the *Code of Virginia* mandates the following minimum qualifications for hearing officers:

1. active membership in good standing in the Virginia State Bar;
2. active practice of law for at least five years; and
3. completion of the course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer will be assigned to a proceeding before that agency.

Consistent with this *Code of Virginia* provision, DERC requires a minimum of eight hours of grievance-related training annually before a hearing officer is allowed to hear grievance cases. In addition, the OES' *Hearing Officer System Rules of Administration* requires that hearing officers have demonstrated legal writing ability and have administrative law experience. Hearing officers are appointed for a three-year term, renewable upon continued compliance with the minimum qualifications.

Hearing officers have many responsibilities in relation to the grievance hearing process. Those specified in DERC's *Grievance Procedure* include the following:

1. issue orders for witnesses or documents;
2. administer oaths;
3. receive documentary evidence and hear testimony, and exclude that which is irrelevant, immaterial, repetitive, or confidential by law;
4. decide on procedural requests;
5. hold a conference (in person or by telephone) to simplify the issues, decide procedural matters, discuss settlement possibilities, and establish the time, date, and place of the hearing;

6. order the parties to exchange a list of witnesses and documents; and
7. determine the grievance based on the evidence (not on procedural matters that had occurred in the processing of the grievance) and provide appropriate relief.

The hourly rates that hearing officers can charge are set by DERC. Fees are based on three categories: hearing time (\$75/hr.), administrative time (\$50/hr.), and clerical time (\$15/hr.). Hearing officers billed an average of \$1,062 per hearing in calendar year 1998 and an average of \$1,197 for the first half of 1999. Individual fees ranged from \$66 to \$5,495 in 1998. The agency involved in the grievance pays for the cost of the hearing officer.

Role of the Department of Personnel and Training

Section 2.1-116.07 of the *Code of Virginia* states that a hearing officer's decision is "final and binding if consistent with law and policy." It further states that the Department of Personnel and Training (DPT) shall determine whether the decision is consistent with policy. The *Grievance Procedure* provides a process whereby either party to a grievance may challenge a hearing officer's decision on the grounds that it is inconsistent with State policy. Upon receipt of a challenge, DPT will review the decision and issue a ruling as to whether it is consistent with policy. Very few of the challenged hearing officer decisions have been found by DPT to be inconsistent with policy.

THE GRIEVANCE PROCEDURE

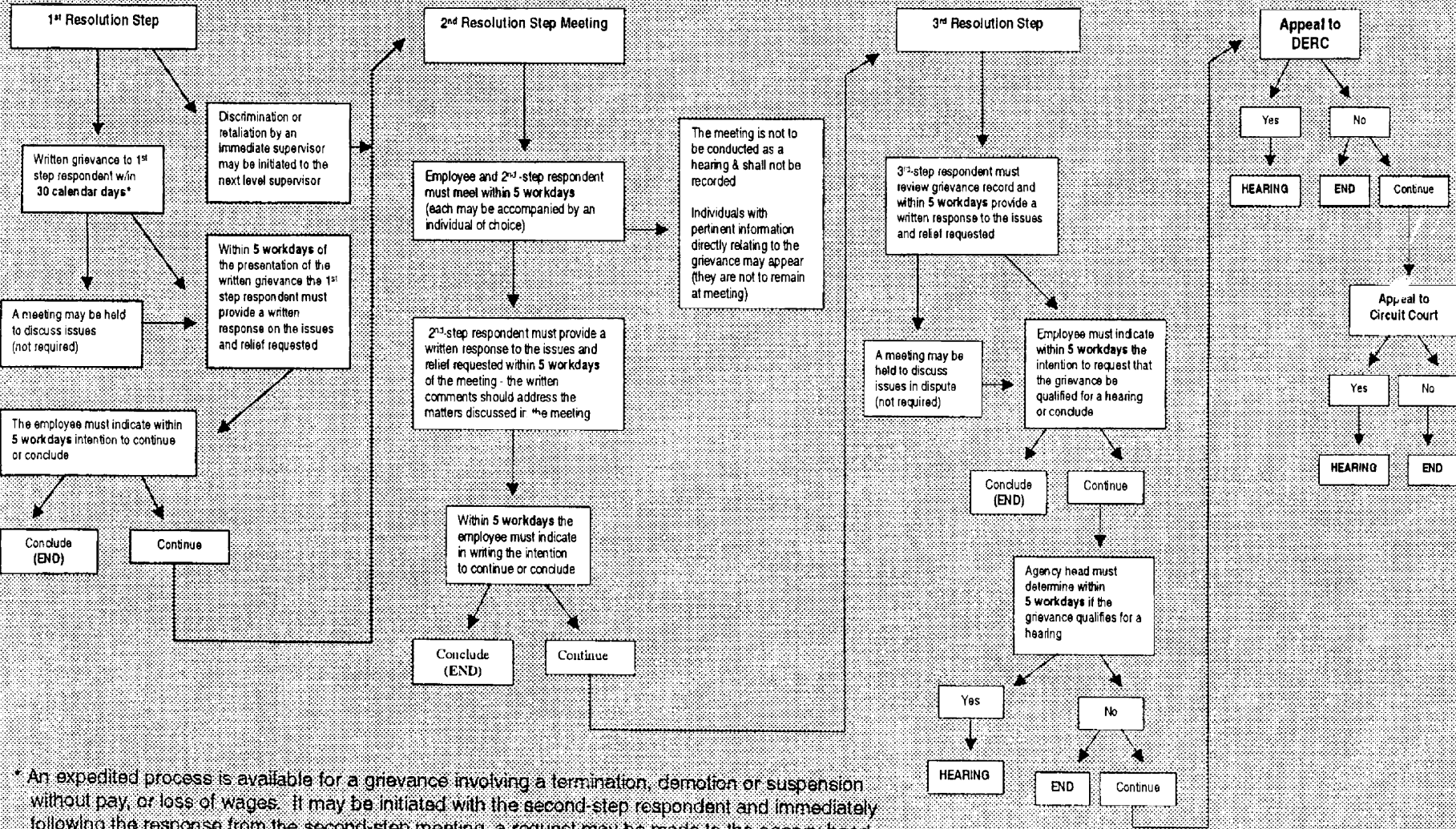
As mentioned previously, DERC has responsibility for administration and oversight of the grievance process. The grievance process requires that the grievant first try to resolve the dispute at the agency level. If that effort fails, certain grievances can be brought before an independent hearing officer for resolution. The decision of the hearing officer is final provided it is consistent with law and State personnel policies. This section of the chapter describes the steps involved in the grievance procedure.

The Resolution Steps

The grievance procedure includes three resolution steps that precede a hearing. Figure 2 provides an illustration of the steps leading up to a hearing. The first resolution step requires that a written grievance be initiated to the first-step respondent, the immediate supervisor, within 30 days of the action being grieved. The first-step respondent must provide a written response on the issues. If the grievance is not concluded at this point, then the grievant may proceed to the second resolution step in which a meeting

Figure 2

Resolution Steps of the Grievance Procedure



* An expedited process is available for a grievance involving a termination, demotion or suspension without pay, or loss of wages. It may be initiated with the second-step respondent and immediately following the response from the second-step meeting, a request may be made to the agency head that the grievance be qualified for a hearing.

must occur between the grievant and the second-step respondent (the next level supervisor). The second-step respondent must also provide a written response.

Again, if the grievance is not resolved, then the grievant may proceed to the third resolution step. Here, the third-step respondent (the agency head or someone from senior management) will review the grievance record and provide a written response to the issues. A meeting may be held with the grievant to discuss the issues but is not required. If the grievance is not resolved, the agency head has five days to decide whether the grievance is qualified to proceed to a hearing.

Qualification of a Hearing

Exhibit 2 illustrates actions that are to be qualified and specific examples of actions that are not qualified for a hearing. Again, only those grievances that are qualified proceed to a hearing. If the agency head makes the determination that the grievance does not qualify for a hearing, there is a process that allows the grievant to appeal the agency head's decision to DERC and then to the circuit court. A hearing will take place if either DERC or the circuit court decides that the grievance is qualified.

In 1998, DERC qualified 19 of the 107 grievances in which a ruling was requested. Employees appealed to a circuit court 31 of the 88 remaining grievances not qualified by DERC. The courts qualified six of the 31 grievances appealed.

The Grievance Hearing

After the determination has been made that the grievance is qualified for a hearing, DERC staff selects a hearing officer, on a rotating basis, from the list maintained by the OES. Once the hearing officer has been appointed, the hearing must be held and the case decision written within 30 days. However, this time period can be extended for good cause.

The hearing is supposed to last no more than one day, unless the hearing officer decides that the time is not sufficient or fair for both parties to present their evidence. Both parties may be represented by themselves, a lawyer, or another representative. All hearing officers must follow DERC's *Rules for Conducting Grievance Hearings*. Exhibit 3 (page 11) provides a list of rules that govern the grievance hearing process. Section 2.1-116.08 of the *Code of Virginia* provides an exception to this hearing process for employees of the Departments of Corrections and Juvenile Justice who have been terminated for inmate abuse, criminal conviction, or for being placed on probation for a first offense. Instead of using the hearing officer system, these employees appeal the agencies' decisions to the circuit court in the jurisdiction in which the employee had been employed.

Once the hearing has been completed, the hearing officer must write a decision that includes the findings of fact and the rationale behind those findings. In

Exhibit 2

Qualification of a Hearing

<p>Actions which are qualified:</p>	<p>Actions which are not qualified: (if the complaint relates solely to one of the following)</p>
<p>1. Formal discipline (Written Notices and terminations, suspensions, demotions, transfers, or assignments issued in conjunction with such Written Notices) and dismissals for unsatisfactory performance must be qualified.</p> <p>If the facts support one or more of the following actions, the grievance should be qualified:</p> <p>2. Unfair application or misapplication of polices, procedures, rules, and regulations;</p> <p>3. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;</p> <p>4. Arbitrary or capricious performance evaluation;</p> <p>5. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such a law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting a violation of fraud, waste, or abuse to the State Hotline, or exercising any right otherwise protected by law; or</p> <p>6. Disciplinary transfers, assignments, demotions, suspensions, or other actions which similarly affect the employment status of an employee.</p>	<p>1. Establishment or revision of wages, salaries, position classifications, or general benefits;</p> <p>2. Contents of statutes, ordinances, personnel policies, procedures, rules, and regulations;</p> <p>3. Means, methods, and personnel by which work activities are undertaken;</p> <p>4. Hiring, promotion, transfer, assignment, and retention of employees;</p> <p>5. Termination, layoff, demotion, or suspension from duties because of lack of work, reduction in the workforce, or job abolition;</p> <p>6. Work activity accepted by an employee as a condition of employment or which may be reasonably expected to be a part of the content of the job;</p> <p>7. Relief of employees from duties in emergencies; or</p> <p>8. Informal supervisory instructions (for example, counseling memorandum, oral reprimand, manner of providing supervisory directions).</p> <p>Note: Claims under this section can be qualified if there is some support for a claim of retaliation, discrimination, discipline, or misapplication of policy.</p>
<p>Source: DERC <i>Grievance Procedure</i>.</p>	

Exhibit 3**Rules for the Grievance Hearing**

1. Opening and closing statements may be made by each party;
2. Each party may be represented by an individual of choice;
3. In disciplinary actions, the agency must present its evidence first and must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances;
4. With all other actions, the employee must present his or her evidence first and must show by a preponderance of evidence that a proper claim is present;
5. Formal rules of evidence do not apply;
6. Non-party witnesses are not to be present in the hearing except to give testimony and be cross-examined;
7. Exhibits offered may be received into evidence and made part of the record;
8. The hearing must be recorded verbatim. [The agency has the responsibility of arranging for proper recording equipment.] The hearing officer is responsible for the recording and is to preserve the recorded tapes as part of the grievance record;
9. The hearing officer has the authority to determine the propriety of the attendance of all persons not having direct involvement in the hearing including witnesses and spectators; and
10. The hearing should be closed to the public.

Source: DERC *Grievance Procedure*.

addition, if the hearing officer is granting relief then this should be included in the decision. The hearing officer is supposed to use the relief requested by the grievant as guidance but is not bound by this when granting relief. Some examples of relief include a reduction in the level of disciplinary action issued, reinstatement to the former or a similar position in the organization, and the award of partial or full back pay. There can be no award of damages or attorney fees.

There can be challenges to the hearing officer's decision. Either party may request that the hearing officer reconsider his or her decision if the party feels that

there were incorrect legal conclusions and/or can request that the hearing be reopened to hear new evidence. The hearing officer has complete discretion regarding whether or not to grant a request to reconsider or reopen the case. The second category of challenges concerns whether the decision was consistent with State personnel policies. These challenges are made to the Director of the Department of Personnel and Training and must cite a particular mandate in policy that the party believes has been violated. The Director of DPT can only direct the hearing officer to make the decision conform to written policy if he rules that it does not.

Other challenges that may develop during a grievance hearing are based on issues of compliance and can include party non-compliance and hearing officer non-compliance. Issues of party non-compliance are when a party does not take a required action. Upon a request for a ruling from DERC, it will determine if there was non-compliance and can decide the case in favor of the other party when one party fails to correct a violation. Hearing officer non-compliance concerns questions as to the hearing officer's conduct during the hearing or the exercise of authority. A party must submit such a complaint to DERC within five days of the time that the error was noticed. The only remedy in this situation is that the action be correctly taken by the hearing officer. DERC rulings on compliance are final; they cannot be appealed. DERC issued 117 rulings concerning compliance in 1998, of which 21 pertained to questions of hearing officer compliance.

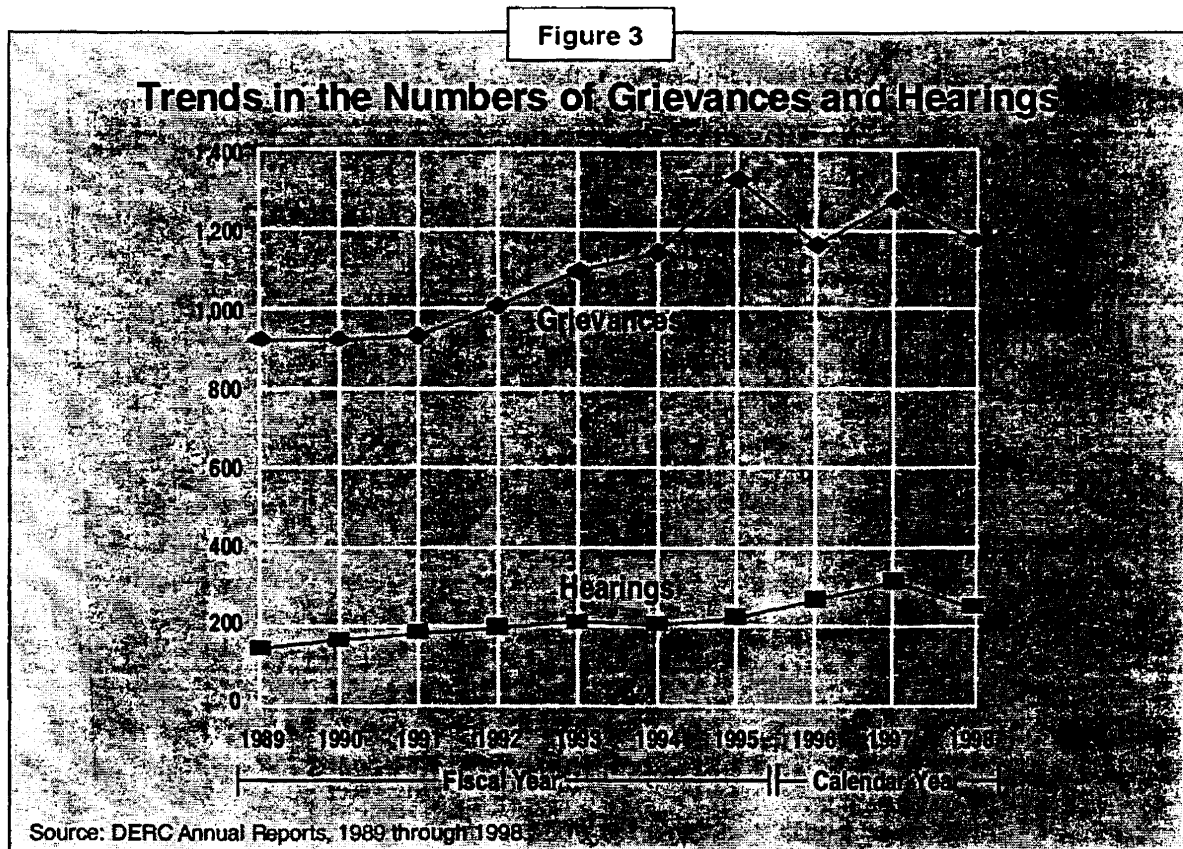
USE OF THE GRIEVANCE PROCEDURE

As part of its responsibilities regarding the grievance procedure, DERC maintains numerous data about employee grievances and the disposition of those grievances. The following section provides information on the number of grievances and grievance hearings, the types of issues raised in grievances, the resolution of grievances, and State agencies' involvement with the grievance procedure.

Numbers of Grievances and Hearings

The numbers of grievances and hearings have steadily grown since the grievance process was initiated, in part because the types of concerns that are grievable have expanded. However, in recent years both the numbers of grievances and subsequent hearings appear to have leveled off. Figure 3 shows the numbers of grievances and hearings that occurred from 1989 to 1998. During the past four years (since the last significant change to the grievance procedure was enacted), the average number of grievances per year was around 1,200, while the average number of hearings per year was approximately 260.

The number of employees who initiate grievances represents a very small percentage of the State workforce. The number of grievances as a percentage of the workforce is between one and two percent annually.



Issues Grieved

Legislative changes to the State grievance process in 1995 expanded classified employees' access to the grievance procedure to include essentially any disputes between State agencies and their employees. (As previously discussed, however, only certain types of disputes may proceed to the hearing stage.) Most grievances arise over a disciplinary action taken by an agency toward an employee. In 1998, 53 percent of the grievances challenged an agency's disciplinary action. Figure 4 identifies the number of grievances according to the issue raised in the grievance.

Resolution of Grievances

There are several points in the process at which grievances may be resolved. Most grievances are resolved during one of the three agency resolution steps. Generally, between one-fifth and one-fourth of the grievances in any year progress to the hearing stage.

Figure 5 (page 15) demonstrates at what point the grievances initiated in 1998 were closed. Two-thirds of the grievances were resolved during the resolution



steps. An additional 12 percent of grievances were not resolved through the management steps but did not progress to a hearing. Only 21 percent of the grievances in 1998 were closed at the hearing phase.

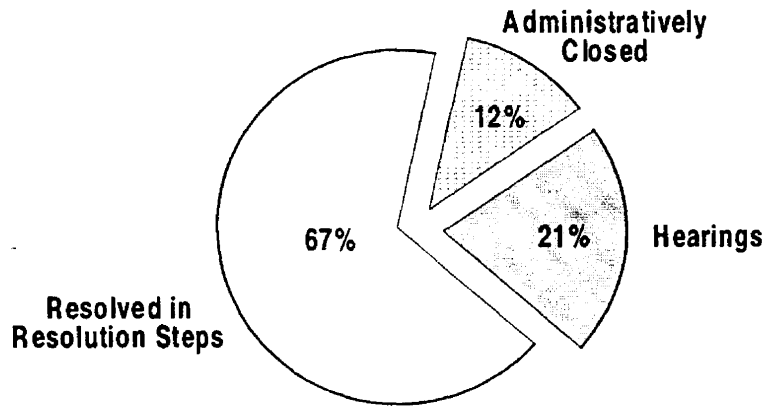
DERC maintains data on the outcomes of all grievances. The outcomes of hearing officer decisions are divided into three categories. First, the hearing officer could decide completely in favor of the employee. Second, the agency's action could be completely upheld. The third category is referred to as a "split" decision whereby the hearing officer determines, for example, that an improper action occurred but that the punishment issued by the agency was too severe and should be lessened.

Figure 6 identifies the outcomes of hearing officer decisions in 1998. Grievances are separated into the categories of non-termination discipline, termination, and other. Figure 6 shows that the majority of outcomes favored the agencies involved in the grievances. Overall, hearing officers upheld agencies' actions in 57 percent of the grievances.

The average length of time between initiation and conclusion of a grievance was 89 days in 1998. The timeline for concluding grievances was reduced considerably with the changes to the grievance procedure in 1995. In the fiscal year immediately preceding the changes, grievances took an average of 129 days to resolve.

Figure 5

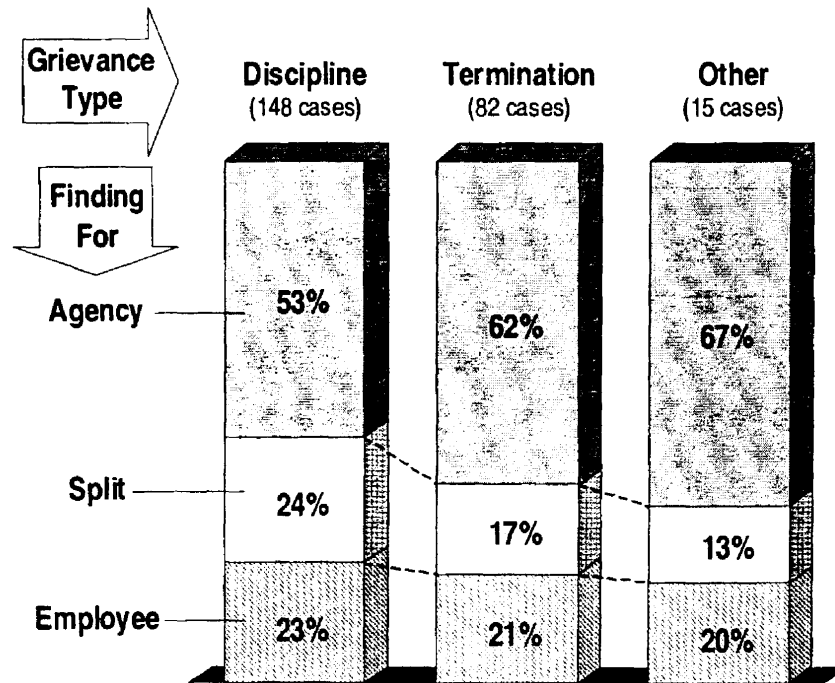
Stages at Which 1998 Grievances Were Closed



Source: DERC 1998 Annual Report.

Figure 6

Grievance Hearing Outcomes by Type of Grievance, 1998



Source: JLARC staff analysis of DERC database.

Agencies' Involvement with the Grievance Process

In 1998, 42 agencies were party to at least one grievance case. However, only eight agencies were involved in at least 25 grievances that year. These eight agencies accounted for 83 percent of all grievances concluded in 1998. Further, they accounted for 79 percent of the grievance hearings.

Table 1 lists the agencies that had the most grievances in 1998. As reflected in the table, the Department of Corrections (DOC) and Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) were involved in the majority of grievances.

Agencies paid hearing officers a total of \$256,350 in 1998 for grievance hearings. Consistent with the number of hearings conducted, DOC and MHMRSAS incurred the greatest costs for grievance hearings.

JLARC REVIEW

This review provides an assessment of the Commonwealth's grievance hearing process and particularly its use of administrative hearing officers in the process. This section describes the specific issues addressed by the study and the research activities undertaken to address the issues.

Table 1

Agencies with the Most Grievances in 1998

<u>Agency</u>	<u>Number of Grievances</u>	<u>Number of Hearings</u>	<u>Total Cost</u>
Department of Corrections	469	92	\$69,628
Mental Health, Mental Retardation and Substance Abuse Services	228	50	46,432
Department of Transportation	88	31	31,362
Department of Juvenile Justice	55	18	15,515
University of Virginia	46	7	4,710
Department of Health	31	6	11,023
Virginia State Police	30	7	9,992
George Mason University	29	2	6,618

Source: DERC databases on grievances and hearing officer costs.

Study Issues

JLARC staff identified nine major issues for evaluation of the Commonwealth's grievance hearing process and administrative hearing officers:

- Are the current requirements to become a hearing officer adequate?
- Is there an appropriate number of hearing officers who hear grievance cases?
- Does DERC select hearing officers for individual grievance cases in an appropriate manner?
- Do hearing officers appear to meet performance expectations?
- Are hearing officers provided adequate training?
- Is the Commonwealth's oversight structure for hearing officers effective and efficient?
- Does the cost of the current hearing officer structure appear reasonable?
- Should the grievance hearing process include an appeal of hearing officer decisions?
- Would an alternative hearing officer structure result in a more cost-effective, efficient, and fair system for hearing grievance cases?

Research Activities

Several research activities were undertaken to address the study issues. These activities included structured interviews, a survey of administrative hearing officers, review of DERC databases, review of OES and DERC evaluation files for hearing officers, review of DERC and DPT compliance rulings, review of the OES' hearing officer appointment files, review of other states' grievance hearing structures, document reviews, and attendance at the OES and DERC hearing officer training.

Structured Interviews. JLARC staff conducted interviews with agencies involved in overseeing the grievance process and hearing officers, agencies with extensive involvement with hearing officers, and hearing officer and employee association representatives. In particular, JLARC staff interviewed staff of DERC, OES, and DPT to gain an understanding of the hearing officer structure and grievance process, each agency's role in the process, and the perceived strengths and weaknesses associated with the system.

In addition, staff from State agencies with the highest number of grievance hearings filed each year were interviewed. These agencies were the Department of

Corrections; Department of Mental Health, Mental Retardation, and Substance Abuse Services; Virginia Department of Transportation; Department of Juvenile Justice; and the Virginia State Police. JLARC staff also interviewed staff of the Attorney General's Office, who are responsible for representing State agencies in grievances involving employee terminations. JLARC staff obtained these agencies' perspectives on the adequacy of the grievance hearing process and the quality of hearing officers' performance.

JLARC staff also interviewed staff from two agencies besides DERC that use the services of hearing officers most frequently – the Department of Education and the Department of Professional and Occupational Regulation – to gain their views on the performance of hearing officers and the OES' administration of hearing officers. Further, two State agencies that have their own in-house hearing officers – the Department of Motor Vehicles and the Virginia Employment Commission – were interviewed to obtain comparative information on other hearing officer structures and processes used by the State. Finally, JLARC staff interviewed representatives from two statewide employee associations and the Virginia Association of Administrative Hearing Officers concerning the adequacy of the grievance process and hearing officer structure.

Survey of Administrative Hearing Officers. JLARC staff sent a survey to all hearing officers who are qualified to hear grievance cases (Appendix B). Responses from 84 (68 percent) of the 124 hearing officers were received. The survey was used to obtain descriptive information on the backgrounds of hearing officers, as well as their views on the appropriateness of their caseloads, fees allowed, the assistance and training provided them by the OES and DERC, and changes they think need to be made to the hearing officer system.

Review of DERC Databases. DERC maintains several databases related to the grievance hearing process. In particular, it has databases containing information on all grievances, hearings, DERC rulings issued, and hearing officers. These databases cover the entire period during which hearing officers have been used in grievance hearings. From analysis of these databases, JLARC staff were able to determine the level of use of the grievance procedure and specifically grievance hearings, hearing outcomes, the number and outcomes of DERC compliance rulings pertaining to hearing officers, hearing costs, and the assignment of cases to hearing officers, among other information.

Review of DERC and OES Evaluation Files on Hearing Officers. Both DERC and the OES conduct evaluations of hearing officers on a periodic basis. In part, these evaluations entail obtaining the opinions of the hearing parties concerning the performance of the hearing officers. JLARC staff reviewed the evaluation files of both DERC and the OES for 67 hearing officers. The files for all of the hearing officers for which DERC completed evaluations during the past year were reviewed, as well as a random sample of 20 percent of the remaining hearing officers. The corresponding OES evaluation files for these hearing officers were also reviewed.

Review of DERC and DPT Written Rulings Pertaining to Grievances.

As previously described, both DERC and DPT issue written rulings affecting grievances. In particular, DERC issues two types of compliance rulings that pertain directly to hearing officers. First, it issues rulings concerning the conduct of hearings – for example whether procedural rules were followed. Second, it issues rulings concerning whether a hearing decision is consistent with the grievance procedure. For example, a hearing officer can decide only grievances qualified for a hearing as assigned by DERC. During the past four years DERC issued 90 hearing officer-related rulings. JLARC staff reviewed a sample of 44 of these rulings.

DPT issues rulings pertaining to whether the hearing officer's decision is consistent with State policy. DPT issued 68 rulings about hearing officers' decisions during the past four years. JLARC staff reviewed all of these rulings.

Review of OES Hearing Officer Appointment Files. The OES maintains a file on every hearing officer on its list. The file contains information on the hearing officer's initial and subsequent appointments, records of all administrative hearings that have been assigned to that hearing officer by the OES, and any letters of complaint submitted to the OES about the hearing officer. JLARC staff reviewed a sample of 51 hearing officer files.

Review of Alternative Grievance Hearing Structures. Other states have a variety of systems that deal with the grievance hearing process. There are different formats that include full-time administrative law judges, panels, part-time hearing officers, and other decision-makers. JLARC staff collected information on the federal government's and surrounding states' processes through a review of relevant internet web sites and telephone interviews with appropriate state and federal staffs. Information from the following states was obtained: Kentucky, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, and West Virginia.

In addition, several national organizations were contacted to obtain information on model processes, hearing officer qualifications, caseloads, and other relevant information. Organizations interviewed for this review include: American Arbitration Association, International Personnel Management Association, National Public Employer Labor Relations Association, and American Federation of State, County, and Municipal Employees.

Document Reviews. As part of the research process, JLARC staff reviewed numerous documents. Those reviewed include: relevant sections of the *Code of Virginia*, DERC annual reports for the past ten years, past studies of the grievance process, DPT's *Standards of Conduct* and other policies, the *Grievance Procedure*, *Rules for Conducting Grievance Hearings*, the *OES' Hearing Officer Handbook*, and all DERC training materials from the past three years. In addition, JLARC staff attended the annual training sponsored by the OES for hearing officers who hear grievance cases.

REPORT ORGANIZATION

The remainder of this report is organized into three chapters. Chapter II discusses performance issues pertaining to the current hearing officer system, including the performance of hearing officers and State oversight thereof. Chapter III discusses the goals of a hearing officer system and the extent to which the current system meets those goals. It identifies systemic concerns with the grievance process and use of hearing officers that need to be addressed. Finally, a discussion of alternative hearing officer structures is included in Chapter IV.

II. Performance and Oversight of Grievance Hearing Officers

Grievance hearing officers play an integral role in ensuring the soundness of the Commonwealth's grievance process. While they must be given latitude to independently assess employee grievances, they must also be held accountable for their performance. Poor hearing officer performance reflects negatively on the grievance process and is an impediment to the goal of providing a fair hearing for all parties. JLARC staff found that grievance hearing officers generally perform their duties well. Still, there are some performance concerns that warrant attention.

The Department of Employee Relations Counselors (DERC) has begun to address problems with hearing officer performance through its evaluation, selection, and removal processes. However, DERC's unrestricted authority to select and remove hearing officers has raised concerns regarding possible abuse of the independent hearing officer system. JLARC staff found that DERC appears to select hearing officers based on a rotational basis and does not engage in "judge-shopping." Nonetheless, it appears that an oversight structure should be implemented to ensure the integrity of the system and provide a level of assurance to employees and agencies that the process is truly impartial.

HEARING OFFICER PERFORMANCE

Based on State agency and employee association interviews and data reviewed during the course of this study, it appears that users of the hearing officer system are generally satisfied with the performance of hearing officers. State agency representatives reported receiving sound, timely decisions from the majority of hearing officers with whom they have interacted. Employee associations also reported general satisfaction with grievance hearing officers. Further, there was agreement that the use of hearing officers to hear grievance cases was a significant improvement over the previous practice of using panels.

However, as with any system in which a large number of individuals are asked to make judgments, there is a range in the quality of the work received from hearing officers. In some cases, hearing officers are not meeting performance expectations. Examples of complaints that have been raised regarding individual hearing officer performance include untimely decisions, decisions that are inconsistent with State policy or the grievance procedure, and inappropriate conduct. While hearing officers generally appear to be performing adequately, individual poor performance can serve to undermine confidence in the grievance process, and therefore, needs to be addressed.

Hearing Officer Performance Appears Generally Adequate

According to §2.1-116.07 of the *Code of Virginia*, hearing officers' decisions are final and binding if consistent with law and policy. Given that hearing officers are vested with this substantial responsibility, it is important that they perform their duties well. JLARC staff examined a number of indicators of hearing officer performance to assess the extent to which hearing officer performance appears adequate. Specifically, JLARC staff obtained the opinions of the parties involved with grievance hearings and hearing officers through a review of written hearing officer evaluations and interviews with State agency and State employee association representatives. In addition, JLARC staff determined the extent to which hearing officers were found to have committed errors in the grievance procedure or issued decisions that were inconsistent with State personnel policies. Finally, the timeliness of hearing officer decisions was examined. Through this review, JLARC staff found that hearing officers are generally meeting performance expectations.

Written Evaluations Reflect Adequate Hearing Officer Performance.

As will be described in more detail later in this chapter, both the Office of the Executive Secretary of the Supreme Court (OES) and DERC conduct periodic evaluations of hearing officers. Hearing officers are evaluated by the OES and DERC every three years (corresponding to their three-year appointment cycle). In addition, approximately one month after a hearing officer's decision, DERC asks the parties to the grievance to complete an evaluation of the hearing officer. DERC uses these individual party evaluations in completing its own evaluation of the hearing officer for submission to the OES at the end of each three-year cycle.

JLARC staff reviewed the evaluation files for a sample of 67 hearing officers, including the files for all hearing officers who have been evaluated by DERC since August 1998. The corresponding OES evaluation files for these hearing officers were also reviewed. This review revealed that most hearing officers receive satisfactory evaluations. While the OES has not made reappointment decisions for most of the hearing officers in the sample, analysis of the evaluation scores revealed that most hearing officers received average evaluation scores well above the OES' minimum score for granting reappointment. Further, of the 42 hearing officers for which DERC has made a recommendation to the OES concerning whether or not to reappoint, DERC recommended reappointment for 35 of these hearing officers.

Examples of the level of satisfaction with hearing officers used in grievance hearings, as cited in parties' evaluations, include the following:

[The hearing officer] was well prepared and very familiar with the Commonwealth's employment practices and labor laws in general.

* * *

My "5" ratings [the highest rating possible] in all respects are well deserved by [the hearing officer]. His manner and control of the hear-

ing was in every way a model of proper procedure and this comes from the “losing” side.

* * *

[The hearing officer] was extremely interested in conducting a fair and impartial hearing. Was very considerate toward both the grievant and the [agency].

State Agencies and Employee Associations Reported General Satisfaction with Most Hearing Officers. The results of the hearing officer evaluations were substantiated through interviews with State agency and employee associations. JLARC staff interviewed representatives from the five State agencies having the most grievance hearings in 1998 – the Department of Corrections; the Department of Mental Health, Mental Retardation and Substance Abuse Services; the Virginia Department of Transportation; the Department of Juvenile Justice; and the Virginia State Police. These agencies accounted for over three-fourths of all State grievance hearings in 1998. While all cited examples of problems they have encountered with hearing officer decisions, they generally reported satisfaction with the performance of the majority of hearing officers. While having less direct involvement with hearing officers, representatives from State employee associations reported that they receive very few complaints from employees about grievance hearing officers.

Further, as previously described, hearing officers hear a variety of State administrative cases besides grievances. JLARC staff interviewed two State agencies that use these hearing officers in the course of their agencies’ business – the Department of Education and the Department of Professional and Occupational Regulation. These agencies also reported general satisfaction with the performance of the hearing officers with whom they have worked.

Few Grievance Decisions Are Remanded to Hearing Officers for Revision. Another performance indicator examined by JLARC staff was the extent to which hearing officers were found to have committed errors in the grievance procedure or issued decisions that were inconsistent with State personnel policies. Either party to a grievance may challenge the conduct of the hearing officer or the hearing officer’s decision on the grounds that the conduct or decision was not consistent with the grievance procedure. DERC will then issue a ruling as to whether the hearing officer erred in his or her deliberations. If so, DERC can remand the decision to the hearing officer for revision. Likewise, if a party believes a hearing officer’s decision is inconsistent with State personnel policy, that party can submit a request to the Department of Personnel and Training (DPT) for a ruling concerning the policy issue.

Since the State began using hearing officers for grievance cases in 1995, a total of 1,124 grievances have been heard by hearing officers. During this time period, there were 90 requests for DERC rulings concerning hearing officers’ conduct or decisions. Based on a file review of 44 of these rulings, approximately 40 percent of the requests came from agencies and 60 percent from grievants. Of the 90 requests for rulings, DERC

found that the hearing officers were in compliance in 61 cases, were not in compliance in 18 cases, and were provided general guidance in the remaining 11 cases. (Guidance would include, for example, reminding the hearing officer that the formal rules of evidence do not apply in grievance hearings.) These results suggest that there are relatively few problems concerning hearing officers' adherence to the grievance procedure.

Over the same time period, DPT issued 68 rulings pertaining to whether hearing officer decisions were consistent with State personnel policies. Of these rulings, DPT found only seven decisions that were inconsistent with State policy. In these cases, the decisions were remanded to the hearing officer for revision.

Agencies Reported General Satisfaction with Timeliness of Hearing Officer Decisions. According to the *Rules for Conducting Grievance Hearings*, hearing officers are supposed to issue their decision within 30 calendar days from the date they receive their appointment letter. Hearing officers can extend this time period for good cause. Based on data from 1995 to the present, the median number of days from hearing officer case assignment to decision was 42 days. While this is beyond the 30-day requirement, according to agency representatives and hearing officers most delays are attributable to difficulties in scheduling the two parties to the grievance within the allotted time, particularly if either is represented by legal counsel. All of the State agencies interviewed during this study reported that hearing officer decisions are generally timely.

Further, based on data contained in DERC's annual reports for the past ten years, the median length of time to complete a grievance is much less under the hearing officer system compared to the panel system. The median length of a grievance case peaked at 171 days in 1993. In 1998, the median length of a grievance case was 70 days. While some of the timeframes for completing steps in the grievance process were shortened at the same time the hearing officer system was instituted, a number of the State agency representatives reported that the replacement of panels with hearing officers was a major factor in the decrease in time required to complete a grievance.

Some Hearing Officers Do Not Meet Performance Expectations

Despite the overall satisfaction with hearing officers, the results from the JLARC review also suggest that there are problems with the performance of some hearing officers. These problems concern both the decisions issued as well as the conduct of some hearing officers.

The area of concern cited most often by DERC and parties to grievances is untimely hearing officer decisions. For example:

In a 13-month period a hearing officer received evaluations from four parties. Among the parties were both grievants and agencies. All four parties commented that the hearing officer was untimely with a decision. In one of these cases, DERC had to request the decision from the hearing officer.

* * *

In 1999, DERC cited a hearing officer for issuing untimely decisions in ten of the 12 cases assigned to that hearing officer. As noted in a DERC evaluation of this hearing officer, "In these ... ten hearings, [hearing officer] failed to conduct the hearing until 32 to 73 days after his appointment. Further, the written decisions were not rendered in these cases until 28 to 175 days after the hearing." DERC recommended that the OES not reappoint this hearing officer and has removed the person from DERC's list of hearing officers eligible to hear grievance cases, pending the OES' decision.

* * *

A hearing officer failed to provide a written decision in two grievance cases assigned to that hearing officer, even after repeated written requests from DERC to do so. The cases eventually had to be reassigned to another hearing officer. As provided for in Rule Four A of the OES' Hearing Officer System Rules of Administration, DERC subsequently requested that the OES remove this hearing officer from its list of qualified hearing officers. After notice and an opportunity for a hearing, the OES removed this hearing officer from its list.

As noted by DERC, untimely decisions serve to undermine confidence in the grievance process and hearing officer system. When decisions are not rendered in a timely manner, there are impacts to the agency and grievant. For example, if a grievant has been terminated, he or she may be without an income source pending the outcome of the hearing. For an agency, a late decision could result in additional expense to the agency because it may be directed to provide back pay if that employee is reinstated. Further, the agency must continue operating with a vacant position while awaiting the decision.

Other problems identified with hearing officer decisions concern their consistency with State policy or the grievance procedure. For example, of the 44 DERC rulings reviewed by JLARC staff, three of these ruled that the hearing officers inappropriately decided issues that DERC had not assigned to those hearing officers. Six hearing officers have had decisions remanded by DPT for decisions that failed to comply with various State policies.

In addition, evaluations by parties to grievances have described inappropriate conduct by some hearing officers. The grievance procedure was set up to allow employees (and agencies) to present their case without the need of legal representation. It appears, however, that some hearing officers structure their proceedings in a more legalistic manner than appropriate. For example:

Some hearing officers require the submission of legal briefs although this practice is discouraged in the Rules for Conducting Grievance

Hearings. In a grievance pertaining to a sexual harassment charge, a hearing officer requested both parties to submit legal briefs addressing the application of Title VII to the facts of the case. In another case a hearing officer required that the closing arguments be in the form of a brief.

Use of overly legalistic measures can be intimidating to the parties, and is counter to the overall purpose of the grievance procedure to provide an avenue for employees and management to resolve workplace disputes outside of the courtroom setting.

Other acts of inappropriate conduct that have been cited include improper ex parte communication and generally unprofessional behavior. For example:

Several party evaluations of a hearing officer noted unprofessional behavior. According to one evaluation, the hearing officer "was 1 ½ hours late for the hearing." Another evaluation noted, "Hearing officer appeared thirty minutes late and slept throughout the hearing. This exact same conduct occurred at the last hearing [this person] presided over." Yet another evaluation stated that the hearing officer "changed the hearing date and time 5 different times – agency finally decided not to move forward with the hearing."

This same hearing officer was also cited for issuing untimely decisions in nine of the 11 cases assigned, and for issuing decisions that were inconsistent with law and policy. DERC has removed this hearing officer from its list of hearing officers eligible to hear grievance cases pending the OES' decision regarding reappointment.

Additional quotes from party evaluations stated the following:

[Hearing officer] was very rude and sometimes out of line. Sometimes he made awful and humiliating statements which made people laugh. I didn't think he was funny. I felt rushed and he made me feel as if I was wasting his time. He even finished a couple of my sentences for me.

* * *

After the hearing, the hearing officer and the director of the facility went out to lunch together. Therefore, I feel the hearing officer had his mind made up before the hearing, just going through the process.

While these examples do not represent the performance of hearing officers as a group, they do show that the individual performance of some hearing officers is lacking. It is important for hearing officers to be held accountable for their performance, because ultimately, poor work by individuals reflects negatively on the entire hearing officer system. The next section discusses oversight of hearing officers by the State.

STATE OVERSIGHT OF GRIEVANCE HEARING OFFICERS

Section 2.1-116.03 – 6 of the *Code of Virginia* gives the following authority to DERC:

...establish a process to select, on a rotating basis, hearing officers from the list maintained by the Executive Secretary of the Supreme Court; train and assign such hearing officers to conduct grievance hearings; and evaluate the quality of their services to determine eligibility for continued selection.

Consistent with the outcome of a recent federal district court case, this language gives DERC authority to modify the Executive Secretary's list of hearing officers for its own purposes. DERC has made use of this authority in the past year through the development of a new selection policy and removal of some hearing officers from the list of those who may hear grievance cases. It appears that the modifications to the list have been implemented based on sound practices, including a critical evaluation of hearing officers' performance.

However, DERC's unfettered authority has led to concerns over the potential for abuse of the process – namely, “judge-shopping.” To minimize these concerns and to ensure DERC continues to follow sound practices, an oversight structure needs to be instituted. In particular, oversight roles have been identified for the OES regarding DERC's selection and removal authority.

Selection of Hearing Officers

Selection of hearing officers for grievance hearings involves appointment to the OES' list of hearing officers as well as selection for an individual case by DERC. Hearing officers are selected by the OES based on a set of minimum qualifications. JLARC staff examined these requirements in light of requirements imposed for hearing officers in other states and other agencies within Virginia. Virginia's grievance hearing officer requirements were found to compare favorably to these other systems' requirements. As such, it does not appear that changes are needed to the minimum requirements at this time.

Likewise, DERC's selection process for assigning individual cases to hearing officers appears appropriate. While documentation was not adequate to definitively rule out that any “judge-shopping” is occurring, the analyses conducted suggest that cases are assigned to hearing officers on a rotating basis. However, given the current selection authority granted to DERC, the potential for abuse of the process exists. To provide a level of assurance to employees and agencies that the process cannot likely be “rigged,” it appears appropriate to institute an oversight role for the OES.

Current Hearing Officer Requirements Appear to Be Adequate. In assessing the use of hearing officers for grievance hearings, JLARC staff examined the

adequacy of the qualifications to become a hearing officer. Prior to 1986, the only qualifications to be a hearing officer were that the person be a member of the Virginia State Bar in good standing for two years. However, in the mid-1980s the hearing officer system was examined as part of the Governor's Regulatory Reform Act. Based on this review, legislative changes were enacted in 1986 that gave the Executive Secretary of the Supreme Court responsibility for the hearing officer system and strengthened the requirements to become a hearing officer.

The current minimum qualifications have been in place since that time. As described in Chapter I, the current requirements include being a member of the Virginia State Bar in good standing, having actively practiced law for at least five years, and completing an annual training program.

As part of this review, JLARC staff compared the minimum requirements for grievance hearing officers to those of comparable positions in other states and to other hearing officer positions in Virginia. Based on this comparison, JLARC staff found that the requirements for grievance hearing officers are generally at least as or more stringent than those of other hearing officer positions. For example, position descriptions for most hearing officers in Virginia State agencies do not specifically require the hearing officers to have a law degree. In addition, many of the mandated requirements to become a hearing officer were less stringent in the other states that were surveyed. For example:

The Maryland Office of Administrative Hearings has administrative law judges (ALJs) to hear cases. ALJs are only required to have three years experience as a practicing attorney and be a member of the Bar.

* * *

The North Carolina Office of Administrative Hearings hires ALJs. They require only a minimum of two years of experience as a practicing attorney and that the attorney be licensed to practice law in the State. Prior arbitration experience is preferred.

* * *

The Pennsylvania State Civil Service Commission hires attorneys to hear grievance cases. The Commission only requires that applicants be attorneys and that they are members of the Bar.

* * *

The Kentucky Personnel Board contracts hearing officers on a part-time basis. The board only requires that they be an attorney.

The only requirement that was surpassed in some other states was the training requirement. The issue of training for grievance hearing officers is discussed in detail in Chapter III.

To examine whether these minimum requirements are in fact met, JLARC staff reviewed the appointment files for hearing officers maintained by the OES. JLARC staff found that the OES verifies that these requirements are met during the initial screening process. In addition, the OES reviews whether the hearing officer is still in good standing with the Virginia State Bar during the evaluation process that occurs triennially. Based on responses to the JLARC survey of hearing officers, JLARC staff found that most hearing officers far surpass the minimum law practice requirement. As a group, the hearing officers responding to the survey have practiced law for an average of almost 27 years. All of the hearing officers who responded to the survey have practiced law for at least nine years.

Current Grievance Hearing Officer Selection Process. Beyond the initial appointment to become a hearing officer, there is a selection process that determines the appointment of hearing officers to individual grievance hearings. Annually, DERC receives a list from the OES containing the names of hearing officers eligible to hear grievance cases. As needed, periodic updates to the list are also provided. DERC assigns the hearing officers to regions based on operational considerations. (*Code of Virginia* §2.1-116.06 mandates that the grievance hearing is held in the locality where the grievant is employed.)

DERC uses a system of rotation to select the hearing officer from the appropriate geographic region with the oldest previous DERC assignment. This hearing officer is evaluated for availability. According to DERC's *Hearing Officer Selection Policy*, items that deem a hearing officer unavailable include:

- the hearing officer has an assigned case from DERC in which he or she has not rendered a written decision (an exception is made if all other hearing officers within that region also have a current uncompleted case),
- the hearing officer fails to return DERC's call within 24 hours,
- the hearing officer is unable to meet the 30 calendar day requirement for conducting the hearing and issuing a written decision, or
- the hearing officer has a conflict of interest regarding the case.

If any of these situations exist, DERC will select the hearing officer with the next oldest previous DERC selection date from the appropriate region.

Once a hearing officer is determined to be available, his or her name is forwarded to the chief deputy director of DERC for approval. If approved, the chief deputy issues a letter of selection to the hearing officer and the parties involved in the grievance. The chief deputy reported that he reviews the selection in case there are any circumstances that he becomes aware of that would affect the selection. To date, the chief deputy has approved every selection submitted to him for approval.

Aside from the issue of availability, DERC also makes determinations as to which hearing officers from the OES list are eligible for active case assignment. The last two sections in this chapter address issues pertaining to DERC's removal of certain hearing officers from the list of those eligible to be assigned cases.

No Apparent Evidence of "Judge-Shopping," Although Lack of Documentation Prevents Definitive Conclusions. Questions have been raised as to whether DERC is engaging in "judge-shopping" in making its hearing officer assignments to grievance cases. The assertion has been made that current DERC management is "pro-agency management" and therefore selects hearing officers who are likely to decide in favor of agencies. JLARC staff examined this issue as part of its review of the grievance hearing process.

DERC's automated database keeps track of all hearing officer assignments. However, DERC staff do not maintain documentation concerning hearing officers who were unavailable to take an assignment. Therefore, it was impossible for JLARC staff to determine definitively whether assignments followed the proper rotation in all cases. Instead, JLARC staff examined the distribution and chronology of case assignments and followed up with DERC staff on any assignments that appeared unusual. For instance:

There were several cases in which hearing officers were assigned multiple cases in one day. Most of these examples stemmed from the consolidation of several grievances from the same person. According to the DERC staff, grievances can be consolidated when it is mutually agreed to by both parties or by way of a compliance ruling by DERC.

* * *

Another example included a situation in which a hearing officer was assigned four cases in the same day for four different grievants. DERC staff were able to document that this was a situation in which the four grievants had requested one hearing because they had all been cited for the same conduct.

As an additional check, JLARC staff also examined the decision records of hearing officers who have received an above-average caseload. This review did not reveal any patterns in the decision records of the hearing officers who have received relatively more case assignments. Based on these analyses, it appears that DERC assigns hearing officers to grievance cases on a rotating basis, consistent with its *Hearing Officer Selection Policy*.

However, as long as DERC has absolute selection authority without any means for external oversight, there will always be questions about possible judge-shopping. Avoiding the appearance of and minimizing the potential for actual judge-shopping were major reasons why the OES was given responsibility for administering the hearing officer system for State government. Further, the 1995 Task Force report (Senate Document 16) that led to the use of hearing officers in grievance cases reported re-

ceiving comments on “whether neutrality could be maintained if DERC, as an executive branch agency, had total control of the hearing officer selection and training.” The Task Force recommended the Supreme Court’s involvement “in response to the suggestion that DERC should not have total control in the selection and training of hearing officers.” The Task Force was composed of State line-level employees, managers, and human resources personnel. It appears, therefore, that the OES should play a role in overseeing the selection of hearing officers by DERC.

An efficient way to implement this oversight role would be to consolidate the hearing officer lists of the OES and DERC into the same automated database. In this manner, the OES could directly monitor DERC’s selection decisions. The OES would maintain its role as the “keeper” of the list, but DERC could be granted direct access to make the hearing officer selections for grievance cases. As with DERC’s current system, DERC could make eligibility decisions according to its selection policy. However, the OES would have an opportunity to follow up with DERC on any such decisions. In addition, steps could be taken to build into the joint system a mechanism for identifying the reason a hearing officer was “passed over” for selection (for example, he or she had a conflict of interest with the case). This would provide more accurate documentation that could be used to verify that hearing officers were selected on a rotating basis, as required by the *Code of Virginia*. As an added benefit, consolidation of the automated hearing officer lists would also serve to reduce redundancy in list maintenance activities and minimize mistakes in coordination that currently occur.

Recommendation (1). The General Assembly may wish to amend the *Code of Virginia* to specify that the Executive Secretary of the Supreme Court provide oversight of the Department of Employee Relations Counselors’ hearing officer selection process.

Recommendation (2). The General Assembly may wish to amend §2.1-116.03 – 6 of the *Code of Virginia* to require that the Department of Employee Relations Counselors use the Executive Secretary of the Supreme Court’s list of hearing officers through the use of a shared automated system. The Office of the Executive Secretary and the Department of Employee Relations Counselors should work together to develop a shared automated system for maintaining the list of hearing officers eligible to hear grievance cases and for selecting hearing officers for individual grievance cases.

Evaluation of Hearing Officers

Both DERC and the OES conduct evaluations of hearing officers. During the past year and a half, DERC has implemented an enhanced evaluation process designed to improve the accountability of hearing officers. JLARC staff found that this revised evaluation process appears to be a generally sound method for evaluating hearing officers. However, there are some additional modifications that are warranted to ensure that hearing officers are properly held accountable for their performance. In addition,

the OES needs to significantly revise its hearing officer evaluation process to better determine hearing officers' fitness for continued appointment.

Current Processes for Evaluating Hearing Officers. After a grievance hearing has been decided, DERC requests both parties to the grievance to complete an evaluation of the hearing officer. The evaluation form requests that the hearing officer be evaluated, using a five-point scale, on the following criteria (as prescribed by the OES): timeliness, professional demeanor, ability to conduct orderly hearing, temperament, knowledge, and administrative ability. At the end of the hearing officer's three-year appointment, DERC compiles the results from the individual parties' evaluations. In addition, DERC staff review the hearing officer's decisions, considering such factors as whether the decisions were timely and whether they were consistent with the Commonwealth's *Standards of Conduct* policy. DERC staff then prepare a summary narrative of the hearing officer's performance, concluding with a recommendation relating to whether the hearing officer should be reappointed to another term. This summary evaluation is submitted to the OES.

In addition to obtaining DERC's evaluation, the OES sends an evaluation form to every agency that has used the hearing officer for an administrative hearing during the previous three-year period. (Evaluations are not sent to agencies that have dealt with the hearing officer only in the context of the State grievance process.) Agencies are asked to rate the hearing officer on the same criteria used by DERC, with the addition of "character." The Executive Secretary of the Supreme Court then uses these evaluations in deciding whether to reappoint the hearing officer to another term. The total scores of the individual evaluations are averaged; an average score of at least 21 (out of a possible score of 35) results in the hearing officer being reappointed.

DERC's Evaluation Process Is Generally Sound, But Improvements Could Be Made. Approximately 18 months ago, DERC began conducting a more critical review of a hearing officers' performance at the conclusion of his or her three-year appointment. Prior to this time, DERC obtained evaluations from grievance parties but did not review the hearing officers' decisions in depth. The summary evaluation submitted to the OES contained little substantive information assessing the quality of the hearing officers' work and the problems identified by grievance parties or DERC. Further, DERC did not make a specific recommendation to the OES regarding reappointment.

Now, in addition to reviewing the party evaluations, DERC reviews each hearing officer decision. As stated in the summary evaluation, the decision is reviewed for timeliness, "demonstrated grasp of the issues, evidence, and applicable law and policies," and "whether the written decision conformed with law and policy." If problems are identified either in the decisions or from parties' evaluations, they are included in the summary evaluation. In addition, DERC specifically recommends to the OES whether the hearing officer should be reappointed.

As previously mentioned, JLARC staff reviewed a sample of hearing officer evaluations conducted by DERC, including all of the evaluations conducted under the

enhanced process. Of the approximately 47 evaluations conducted using this revised process, DERC has recommended that seven hearing officers not be reappointed. The predominant reason for these recommendations appears to be that these hearing officers have not been timely in conducting the hearings and preparing decisions. For example, one hearing officer evaluation stated the following:

[Hearing officer] conducted hearings in a professional manner. However, [hearing officer] failed to demonstrate the ability to effectively manage the hearing process as [the] hearings and decisions were extremely untimely. Of the twelve cases assigned during this term, [hearing officer] failed to complete ten of them within the 30 day time period prescribed by this agency. Of these cases, one was completed in 248 days, one in 120 days, one in 95 days, one in 93 days, four in 89 days, one in 88 days and one in 74 days. In these same ten hearings, [hearing officer] failed to conduct the hearing until 32 to 73 days after [hearing officers'] appointment. Further, the written decisions were not rendered in these cases until 28 to 175 days after the hearing. Such conduct is completely unacceptable.

As will be described in Chapter III, timeliness is an important goal of the grievance system and appears to be an appropriate performance measure for hearing officers. The other main concern noted in many of these evaluations was the lack of conformity of some of the decisions to the *Standards of Conduct*.

Concerns have been raised that DERC may be only recommending for reappointment hearing officers who have a record of predominantly deciding in favor of agency management. To check for bias in DERC's assessment of hearing officers, JLARC staff reviewed the decision records of hearing officers who were recommended for reappointment compared to those who were not. JLARC staff found no indication that hearing officer decision outcomes impacted DERC's evaluation of the hearing officers as there was no clear distinction in the decision records of those recommended for reappointment compared to those who were not.

While DERC's recommendation decisions generally appear to be based on relevant facts, there do appear to be some inconsistencies in the ratings of hearing officers. According to DERC's chief deputy director, DERC does not have a required minimum rating such that any hearing officer who was rated below a certain score is not recommended for reappointment. However, he reported that he has begun using a minimum score of "20" (out of a possible score of 30) as a general guide. In the evaluations conducted under the revised process, there were three ratings that appear inconsistent in relation to DERC's recommendation regarding reappointment and the chief deputy director's general rating guide. One hearing officer was rated a "23" but was not recommended for reappointment. In contrast, two hearing officers were rated a "19" but were recommended for reappointment.

DERC needs to develop a written policy regarding its rating system to ensure consistency between its ratings and reappointment recommendations. This would en-

able DERC to better defend its assessment to the OES, which ultimately determines whether the hearing officer will be reappointed.

Further, DERC needs to collect additional information on the timeliness of hearing officers' work to aid its assessment of hearing officers. Currently, DERC tracks the date the hearing officer is appointed to a case and the date of the decision, among other information. As previously noted, hearing officers are supposed to issue a decision within 30 calendar days of the date they receive written notice of their appointment. While hearing officers are responsible for ensuring the overall timeliness of the process, it appears that excessive time between the hearing officers' appointment to a case and the date of the hearing is usually due to scheduling difficulties between the grievance parties rather than due to the fault of the hearing officer. They have most control over the time period between when the hearing was held and when the written decision was rendered. However, DERC does not routinely track the date of the hearing.

By tracking the hearing date, DERC would be able to identify any problems with timeliness earlier during the hearing officer's appointment period and could bring the problem to the attention of the hearing officer immediately. Also, it appears to provide a truer measure of a hearing officer's timeliness.

Recommendation (3). The Department of Employee Relations Counselors should develop a written policy describing its evaluation process and rating system. It should follow this policy in future evaluation ratings of hearing officers.

Recommendation (4). The Department of Employee Relations Counselors should begin tracking the date of grievance hearings. In assessing the timeliness of hearing officers' work, it should specifically examine the time between the hearing date and the date of the written decision.

OES Evaluation Process Needs Revision. In administering the hearing officer system, the Executive Secretary of the Supreme Court makes the final determination regarding the reappointment of a hearing officer for another term. The OES uses its hearing officer evaluation process to make this determination. There are a number of problems with this process for evaluating hearing officers that need to be addressed.

First, the OES only solicits the views of the government agencies involved in the hearing in determining the performance of the hearing officer. While soliciting agencies' views appears appropriate, to ensure fairness the OES should also seek the views of the other parties involved in the hearings. As the parties' views could be affected by the outcome of the hearing officer's decision, obtaining the views of both parties to the hearing would help provide balance in the evaluation.

Another problem with the OES' evaluation process is that it only asks for evaluations at the end of the hearing officer's three-year term. This presents difficul-

ties for an agency that only dealt with that hearing officer at the beginning of the hearing officers' term. In fact, some evaluations could not be completed because there was no one still at the agency who had been involved in hearings conducted years before. One OES evaluation respondent noted, "This was so long ago it was difficult to recall details." The OES could correct this problem by sending out an evaluation form shortly after each hearing is conducted. At that time, respondents would be better able to assess hearing officers' performance.

Another concern pertains to the meaning attached to each numerical rating. From review of the evaluations submitted to the OES, it was evident that there were inconsistencies in the way different reviewers used the rating scale. Since the OES uses a straight average in determining a hearing officers' final score, it does not account for differences in a reviewer's rating system. One way to address this inconsistency would be to directly ask reviewers whether they recommend the hearing officer for continued service. This would provide a clear indication of the reviewer's opinion of a hearing officer's overall performance.

Further, given the clear problems that have been identified with the performance of some hearing officers, it is questionable whether the required minimum score used by the OES (21 out of a possible score of 35) is sufficient to eliminate hearing officers with poor performance. In practice, the OES has always reappointed a hearing officer who desires to be on the list, although it has temporarily delayed the appointments of a few hearing officers who received relatively low ratings. The OES should conduct an in-depth review of its evaluation scale to assess the appropriateness of its required minimum rating. In doing so, it should solicit the views of user agencies.

Finally, while most of the criteria the OES uses on its evaluation form appear appropriate in addressing hearing officer performance, one criterion – "character" – does not appear to add any value to the assessment. Moreover, it appears that almost all reviewers consistently rate the category the same way. Therefore, the OES should consider removing it from its evaluation form.

Recommendation (5). The Office of the Executive Secretary of the Supreme Court should conduct a review of its hearing officer evaluation process. In part, the process should be revised to incorporate the views of all parties to a hearing concerning the hearing officer. Further, the Office of the Executive Secretary should obtain the individual evaluations on a more timely basis. In addition, the Office should consider revising the evaluation form to directly ascertain each party's views of the hearing officers' continued service. Finally, the Office of the Executive Secretary should reassess the required minimum score used in making reappointment decisions.

Removal of Hearing Officers

Hearing officers can be removed from the list of those qualified to hear grievance cases by the OES and by DERC. The OES has the option not to reappoint a

hearing officer at the end of his or her three-year term or to remove a hearing officer at any time for cause. DERC also can remove hearing officers from the list of those qualified to hear State grievance cases based on its internal review process.

Since inadequate hearing officer performance can negatively impact the grievance process, it appears appropriate for DERC to make removal decisions based on the performance measures it has developed. However, to ensure the independence of the system, it may be necessary for the OES to serve as an independent appeal to these decisions. To give the appropriate authority to both the OES and DERC, changes to the *Code of Virginia* will be necessary.

The reappointment process has been delayed by both DERC and the OES. Initially, DERC did not submit hearing officer evaluations to the OES on a timely basis. Subsequently, the OES delayed making final decisions concerning reappointments. Currently, there are decisions pending on 49 hearing officers due for reappointment since August 1998. This has created confusion and concern among hearing officers and needs to be remedied.

Removal Process for Grievance Hearing Officers Needs to Be Revised and Clarified in the Code of Virginia. Both DERC and the OES can remove hearing officers from consideration for assignment to grievance hearings. The Administrative Process Act gives the Executive Secretary of the Supreme Court the authority in §9-6.14:14.1 D and E. Part D allows for the hearing officer to be removed from the rotation list if the hearing officer has not rendered a decision within 90 days, and then does not respond within 30 days to a written notice that the decision is due. Part E provides the following process for removal:

The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after notice in writing and a hearing. When there is a failure by a hearing officer to render a decision as required by subsection D, the burden shall be on the hearing officer to show good cause for the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive Secretary for reconsideration, followed by judicial review in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).

In the past five years the OES has removed only one hearing officer for cause. The Executive Secretary's authority for the removal process has been in effect since 1986.

Hearing officers can also be removed by not being reappointed to another term based on their evaluation results. If the OES decides not to reappoint a hearing officer to the list, it provides the hearing officer with an opportunity for a hearing.

A recent federal district court case (*Kennedy v. McPhie*, Eastern District Court case number 3:99CV358) supports the DERC director's position that DERC also has authority to remove hearing officers from use in grievance cases. DERC's selection policy states that the director of DERC may remove a hearing officer from its "active"

list based on concerns with the quality and timeliness of the hearing officer's work, the fitness of the hearing officer from the standpoint of professionalism, temperament, and demeanor, or because of a pending recommendation from DERC to the OES to have the hearing officer removed from the OES list.

Based on these factors, eight hearing officers have been removed from hearing DERC grievance cases during the past year. Seven of these were due to a pending recommendation for their removal from the OES list. An additional hearing officer was removed by the DERC director based on a DERC ruling that the conduct of that hearing officer was unprofessional relative to a grievance case. Another hearing officer was removed from hearing cases by the previous DERC director in 1996. In addition, there are a number of hearing officers who have voluntarily removed themselves from the list temporarily (for example, due to medical reasons).

According to DERC's selection policy, hearing officers removed from the DERC list by the director are notified in writing of that action and are provided an opportunity to meet with the director to discuss any concerns. After this step, the director of DERC will then issue a final decision as to whether the hearing officer will become eligible to hear additional grievance cases. However, four of DERC's removal decisions were made prior to the establishment of this formal selection policy in August 1999. As such, these hearing officers have not been notified of their removal from the list and have not been given an opportunity to meet with the DERC director.

The dual process for removal of hearing officers from consideration for grievance hearings and the lack of notification by DERC to some of the removed hearing officers has caused some confusion among the hearing officers and resulted in questions about the fairness of the respective removal processes. To clarify both the OES' and DERC's roles in the removal process, the *Code of Virginia* should be modified to more clearly define DERC's authority to remove hearing officers from the list of those eligible to hear grievance cases. However, to preserve the independence of the system, hearing officers should be able to appeal the decision to the OES. On appeal, the OES could provide a hearing if requested, and make the final determination regarding the hearing officer's removal from the list of hearing officers qualified to hear grievance cases.

Recommendation (6). The General Assembly may wish to amend §2.1-116.03 of the *Code of Virginia* to explicitly authorize the Department of Employee Relations Counselors to remove hearing officers from the list of hearing officers qualified to hear grievance hearings. In addition, the General Assembly may wish to amend the *Code of Virginia* to provide for an appeal of a hearing officer's removal to the Executive Secretary of the Supreme Court.

OES Reappointment Process Has Been Delayed. There are several factors that have contributed to delays in the OES' reappointment process. First, DERC has not completed on a timely basis evaluations on the 46 hearing officers due for reappointment between August and December 1998. The evaluations are generally due to the OES by the date the hearing officer's appointment expires. By the spring of

1999, DERC had completed 30 evaluations for hearing officers with appointment expiration dates of August through October 1998. In addition, one evaluation was completed in August 1999 and eight were completed in September 1999. (All had expiration dates of September 1998.) As of November 1, 1999, DERC still had not completed five of the evaluations with expiration dates of September and October 1998. DERC cites the time required for a more thorough evaluation process as the cause for the delays. This revised process was described in the preceding section of this report.

The OES has also been slow in completing evaluations and acting on reappointments. Even after DERC's summary evaluations were provided to the OES, it has not acted quickly to make reappointments. For example, the OES has not acted on any appointments that have expired since August of 1998, although it has had 65 percent of DERC's evaluations since May 1999. In addition, it has failed to request the evaluations for all hearing officers due for reappointment in 1999.

Because DERC has cited some of the hearing officers for poor performance, the OES should act on these evaluations as soon as possible. Under the current process, these hearing officers are still hearing non-grievance administrative cases. The number of cases heard by these hearing officers should be minimized in case the OES concludes that the performance of these hearing officers is inadequate. Other agencies should not have to be subjected to poor hearing officer performance due to the OES' tardiness in making reappointment decisions. Therefore, the OES should take the necessary steps to address the backlog of hearing officer evaluations and reappointments.

***Recommendation (7).* The Office of the Executive Secretary of the Supreme Court should take immediate action to address the evaluation and reappointment of hearing officers as soon as possible.**

III. System-Wide Assessment of the Current Grievance Hearing System

Virginia's use of part-time hearing officers to resolve employment disputes provides for some inherent strengths and weaknesses. Foremost among the strengths is the independence of the hearing officers. This independence is important to the system, as it helps ensure neutral arbitrators to provide administrative due process to grievants. The major weakness of the current system is that it does not promote consistency in written decisions of the hearing officers. This lack of consistency presents difficulties to agencies in interpreting and carrying out State and agency policies, and may lead to a perception that the process is unfair.

JLARC staff have identified a number of steps that could be taken to address the deficiencies of the current system. These steps include reducing the number of hearing officers, developing a consensus on the role of hearing officers, enhancing training and communications between hearing officers and the Department of Employee Relations Counselors (DERC), improving the timeliness of DERC rulings pertaining to grievances, and providing a mechanism for conforming decisions to agency policies. The added value of instituting an appeals process to enhance consistency and revise incorrect decisions is also examined.

ABILITY OF CURRENT SYSTEM TO MEET GRIEVANCE SYSTEM GOALS

JLARC staff identified general goals of an employee grievance system, and then assessed the current grievance system in terms of how well it meets each of the goals. Identification of the strengths and weaknesses of the current system provides a measure of the extent to which the system needs to be modified. Based on this analysis, the major strengths of the current system are its ability to provide independent, impartial adjudicators for employee grievances. The major shortcoming of the current system is that it does not promote consistency in grievance decisions.

Goals of the Employee Grievance System

Based upon a review of the *Code of Virginia*, arbitration literature, and interviews with Virginia and other state grievance administrators, JLARC staff identified six goals for a grievance hearing system. These goals include impartiality, independence, consistency, expertise, timeliness, and cost-effectiveness. These goals are all necessary components for a quality grievance system. When the Virginia Personnel Act was amended in 1973 to establish the grievance procedure, the stated purpose of the grievance procedure was to "...afford an immediate and fair method for resolution of disputes between an Agency and its employees" (1973 Va. Acts, Ch. 7). Thus, fairness, or impartiality, and timeliness are easily identified as goals of the hearing officer system. Independence is labeled as an important goal in several publications pertain-

ing to employment dispute hearings and was also identified as an important goal in interviews conducted by JLARC staff. Consistency and expertise were identified as important goals by DERC staff and staff responsible for administering grievance systems in other states. Cost-effectiveness is a goal of any public policy. These goals, as they relate to an employee grievance system, are defined below.

Impartiality. The hearing officer system should provide fair, unbiased adjudicators for conducting grievance hearings. Impartial adjudication is a necessary component in providing administrative due process to those affected by government actions. The hearing officers need to disclose any special relationships they may have with either party to a grievance. In addition to individual hearing officers being impartial, the system also should be impartial in the manner in which hearing officers are assigned to a case. Due to the necessity of impartiality in providing the Constitutional right of due process, it appears that the goal of impartiality of hearing officers and the hearing officer system should be given highest priority.

Independence. Nearly as important as impartiality itself is the appearance of impartiality. Independence of the hearing officers from either the agency or the employee is necessary for maintaining the appearance of impartiality. The system must be perceived as fair and equitable by both parties in order to be effective at resolving disputes. Any relationship between the hearing officers and either party reduces the perception that the system is unbiased, which could erode confidence in the system, reduce morale in the workforce, and lead to further disputes between employees and agency management.

There are several levels of independence that hearing officers may have in relation to the parties of a grievance. The least independent system would be one in which the hearing officer is employed by the same agency as the grievant. Hearing officers employed by a separate agency within the executive branch enjoy a much greater level of independence, but still could be subjected to influence by budget actions and political appointments. Hearing officers outside the executive branch of government afford the highest level of independence when ruling on classified employee disputes.

Consistency. It is important that interpretation of policies be applied in a consistent manner. Consistency of rulings for similar grievances promotes equity across individuals and increases confidence in the system. Consistency increases understanding of State and agency policies and may eventually lessen the need for the use of hearing officers to settle some disputes. If policies are interpreted in a consistent manner, both parties to a grievance will have a good idea of how the hearing officer will rule, which could lead to more cases being settled before the final step of the grievance process.

Expertise. As hearing officers gain more experience hearing grievance cases, the quality and consistency of their decisions will generally improve. In addition, the hearings are likely to be conducted in a more professional and proficient manner. If the parties to a grievance perceive that the hearing officer has knowledge of the appropriate laws and policies and expertise in dispute resolution, they will have more confi-

dence in the system and acceptance of the decision. Expertise of the hearing officers adds stability and continuity to the interpretation of State policy.

Timeliness. It is very important to both employees and agencies that disputes are settled in a timely manner. Lengthy delays in dispute resolution may cause undue hardships to grievants who have been wrongfully terminated or disciplined. Agencies also suffer from lengthy delays as they are forced to proceed with the business of the State and their personnel matters under an air of uncertainty. Alternative dispute resolution systems, such as the hearing officer system in Virginia, are designed to provide a speedy and less burdensome resolution to disputes than the courts would offer. If decisions are not produced in a timely manner, the effectiveness and justification for the arbitration process is put into question. Because of the hardships placed on parties to a grievance, a process that is not timely may not be fair.

Cost-effectiveness. Grievance cases should be resolved in an efficient manner so that they do not place an undue financial burden on the State, agencies, and grievants involved. One rationale for having an administrative hearing process is that it is more cost-effective than pursuing the matter in the courts. However, while cost-effectiveness is a goal, it must be secondary to the need for due process. Due process requires that certain procedures be followed that necessarily lengthen the process and make it more costly. Cost-effectiveness should be a goal within the boundaries of due process.

Assessment of the Current System's Achievement of the Goals

JLARC staff examined the current grievance system to assess how well it meets each of the goals considered important. The current system appears to meet three of six goals well, but needs improvement relative to three other goals (Figure 7). The clearest strength of Virginia's current hearing officer system is its ability to provide independent hearing officers in an impartial manner. The hearing officers, being private attorneys contracted to settle public employment disputes, are independent of any State agency. This independence allows them to conduct hearings and issue decisions in an impartial manner, without the personal concerns a State employee may have when rendering decisions. While the impartiality of certain hearing officers may be questioned due to their decisions on past grievances, the system is impartial as long as the hearing officers are selected on a rotating basis. The independence of hearing officers and the impartial selection of hearing officers for grievance cases help ensure that both parties to a grievance are equally likely to receive a fair hearing.

The part-time hearing officer system in Virginia also provides ample flexibility to the State for adjusting to changing workloads and producing timely and cost-effective resolutions. Given the number of hearing officers on the list, the system is able to accommodate a large number of grievance hearings in any given time period. Conversely, State resources are not used inefficiently in times when the workload is lower. Since the hearing officers are not State employees, the State is not responsible for covering their benefits, which provides further cost savings to the State. However,

Figure 7

Assessment of the Grievance Process in Meeting Goals of the System

Goal	Assessment
Impartiality of Hearing Officers	✓
Independence of Hearing Officers	✓
Consistency of Decisions	✗
Expertise of Hearing Officers	○
Timeliness of Decisions	○
Cost-effectiveness of Process	✓

Key: ✓ = Meets goal ○ = Meets goal but needs improvement ✗ = Does not meet goal

Source: JLARC staff analysis.

the infrequency of case assignments may cause grievance resolutions to be more time-consuming and costly. A more experienced corps of hearing officers would be able to dispatch grievances more quickly, particularly if they had a case log of past decisions available to them. With the combined experience of past decisions, they would not have to “reinvent the wheel” for each grievance hearing.

The clearest weakness of the current system is the lack of consistency in hearing officer decisions, which is in part a function of the lack of expertise of hearing officers with regard to State policy and conducting grievance hearings. Due to the large number of hearing officers on the list and the lack of available past decisions to rely on, inconsistent rulings for similar cases are likely to occur. Inconsistent rulings leave both agencies and employees in doubt of the interpretation of the policy. Due to the relatively few number of cases assigned to each hearing officer, it is difficult for the hearing officers to gain the experience needed to conduct grievance hearings in a proficient manner and to keep current on the various agency policies. Hearing officers also receive only a minimal amount of training each year, which is another contributing factor in inconsistent decisions.

During the course of this review, agencies provided a number of examples of decisions they believe demonstrate inconsistencies in hearing officer decisions. For example:

The Department of Mental Health, Mental Retardation, and Substance Abuse Services cited inconsistencies pertaining to grievances in pa-

tient abuse cases. Staff reported that some hearing officers interpret the policy as requiring the intent of the employee to abuse the patient, and have therefore reinstated employees based on their lack of intent. Other hearing officers interpret the policy to mean that intent is not required in patient abuse cases, and have upheld agency terminations.

* * *

An example provided by DERC pertains to the Department of Transportation's drug policy. Two employees were terminated by the department in separate incidents for testing positive for the use of marijuana. The grievances were decided by different hearing officers. One employee was reinstated while the other's termination was upheld due to different interpretations of the agency policy.

* * *

The Department of Corrections also cited an inconsistency in decisions pertaining to its drug policy. Staff provided an example in which a hearing officer reinstated an employee, after having tested positive for drugs, based on an interpretation of agency policy that a positive drug test must be "tied to use, impairment or endangerment in or on the workplace." Department staff reported that this interpretation is different than that of other hearing officers who have had similar cases.

While some perceived inconsistencies could be due to the consideration of different mitigating circumstances or to unclear agency policies, others cannot be readily explained. These inconsistencies can undermine agency policies and negatively affect the fairness of the grievance process. The next section discusses actions that could be taken to minimize the weaknesses in the current system.

ACTIONS NEEDED TO BETTER MEET GRIEVANCE SYSTEM GOALS

There are a number of steps that could be taken to address the concerns noted with the grievance hearing process and hearing officer system. First, the number of hearing officers who hear grievance cases should be reduced. This would enable the remaining hearing officers to gain more experience, which in turn could help minimize inconsistencies and errors in hearing officer decisions. In addition, the role of hearing officers in deciding grievances needs to be identified and explained to all hearing officers, agencies, and other interested parties. Currently, inconsistencies arise out of a lack of clear consensus on what the role of hearing officers is, particularly in disciplinary cases.

Improvements are also needed in preparing hearing officers for their responsibilities regarding grievances. In particular, DERC needs to modify and enhance its

annual training for hearing officers. It also needs to maintain an ongoing dialog with hearing officers, providing them with access to information throughout the year that will enable them to perform their duties well.

DERC also needs to address delays in the grievance process resulting from untimely DERC rulings. The average length of time DERC takes to issue rulings has increased considerably in the past two years, placing an unreasonable burden on both grievants and agencies.

Finally, a mechanism needs to be instituted to enable review of hearing officer decisions for consistency with agency policies. While the current hearing officer system in general appears sound, instituting these steps would result in an improved system that better meets the needs of State agencies and employees alike.

Number of Hearing Officers Should Be Reduced

In 1998, there were 121 DERC qualified hearing officers who were assigned 296 grievance cases. This was an average of only 2.4 grievance cases assigned to each hearing officer in 1998. This small grievance caseload limits the ability of hearing officers to maintain expertise in State personnel policy and law. Further, the likelihood for inconsistent decisions is increased due to the large number of hearing officers issuing decisions.

As mentioned in Chapter II, hearing officers are selected for individual cases on a rotating basis from the particular region in which they live. Slight regional differences exist in the number of cases that hearing officers typically receive. This stems from differences in the number of hearing officers and number of grievance hearings in each region. Table 2 shows the number of hearing officers, the number of grievance hearings, and the average number of grievance hearings per hearing officer for each region for 1998.

Table 2

Hearing Officer Caseload, 1998			
Region	Number of Hearing Officers	Number of Grievance Hearings	Average Number of Hearings per Hearing Officer
1	44	146	3.3
2	27	52	1.9
3	30	51	1.7
4	14	35	2.5
5	3	6	2.0
6	3	6	2.0

Source: JLARC staff analysis of DERC database.

Many of the hearing officers are concerned about not hearing enough cases in a given year. As part of the JLARC survey of administrative hearing officers, hearing officers were asked, "Do you believe that the current number of grievance cases that you are assigned is adequate to maintain expertise in State personnel issues?" Approximately 60 percent of the respondents answered that they do not believe that the current number of cases is adequate to maintain expertise. Specific comments provided by hearing officers included the following:

Owing to the size of the hearing officer pool, I receive an appointment about every three months. With so few cases, one loses expertise in the handling of the cases and writing decisions that are clear, concise, and fair to all parties.

* * *

Increase number of hearings. No amount of training can train hearing officers to competently do what we only do once or twice a year.

* * *

Most hearing officers must reacquaint themselves with the law and procedures appropriate each time they are assigned a case. That is inefficient. If more cases were assigned, expertise would be developed and remembered - that requires fewer hearing officers.

* * *

We are not assigned cases often enough to maintain proficiency.

Hearing officers also expressed opinions about how many cases they thought hearing officers should hear to be able to maintain expertise in State personnel issues. As mentioned previously, approximately 60 percent of the JLARC survey respondents did not believe that the current number of cases assigned was adequate to maintain expertise in State personnel issues. On average, these respondents felt they needed approximately eight cases per year to maintain expertise in State personnel issues. This is significantly larger than the overall average of 2.4 grievance hearing assignments per hearing officer in 1998.

In addition, all survey respondents were asked, "How many grievance cases would you like to be assigned per year?" On average, hearing officers wanted to hear approximately 9.6 grievance cases per year. This reflects a willingness on the part of hearing officers to hear at least as many cases as necessary to maintain expertise.

In addition to the hearing officers themselves, staff members at DERC expressed concerns about the low number of cases that hearing officers receive in a year. DERC staff reported that having fewer hearing officers would allow those hearing officers to gain the needed expertise in State personnel issues by hearing more cases,

and this would lead to more consistent decisions. This sentiment was shared by several of the State agencies interviewed during the course of this review.

To address concerns with expertise, it appears clear that there needs to be a reduction in the number of hearing officers on the Office of the Executive Secretary of the Supreme Court (OES) list who are eligible to hear grievance cases. (While this report only addresses the use of hearing officers in grievance cases, the number of hearing officers was also raised as a concern pertaining to their assignment to special education cases, administered by the Department of Education.) To effect this reduction, three issues have to be addressed.

The first issue that needs to be addressed pertains to the OES' authority to place limits on the number of hearing officers on the list. Section 9-6.14:14.1A of the *Code of Virginia* states that, "The Executive Secretary shall have the power to promulgate the necessary rules for the administration of the hearing officer system." The Executive Secretary of the Supreme Court does not believe that this authority extends to setting a cap on the number of hearing officers. Therefore, clarification of the law is needed to specifically give the OES the authority to set a limit on the number of hearing officers in each region as part of its duties in the administration of the list of hearing officers.

The second area to be addressed concerns the need to identify a target number of hearing officers per region. The OES and DERC need to formulate a plan identifying a range in the number of hearing officers that they think should be available to hear grievance cases in each region. The plan should consider the minimum caseload needed to be able to maintain expertise in grievance issues. Because some regions have very few grievances each year, the plan should also identify a minimum number of hearing officers per region that would be necessary to ensure that a hearing officer would be available whenever needed.

Based on current caseload data and responses to the hearing officer survey, JLARC staff developed some suggested ranges for the number of hearing officers needed in each region. Table 3 provides the suggested range of hearing officers per region based on the number of grievance hearings the hearing officers want to hear in a year and the number of cases the majority of the hearing officers responding to the survey felt were necessary to maintain expertise. This analysis is an example of one way to determine what the appropriate number of hearing officers per region should be. Based on the caseload data from the survey, this would result in the elimination of approximately two-thirds of the hearing officers currently on the list.

The final issue that needs to be addressed concerns developing a strategy for reducing the number of hearing officers. Again, DERC and the OES should work together to determine how best to reduce the number of hearing officers while still having a minimal number available in each region. Possible ways that should be considered to reduce the number include closing the current rolls, not reappointing lower rated hearing officers, eliminating hearing officers who are unwilling to hear a set

Table 3

Suggested Range of Hearing Officers per Region Based on Caseload

<u>Region</u>	<u>Suggested Target Range of Hearing Officers</u>
1	15-18
2	5-7
3	5-6
4	3-4
5	*
6	*

Note: The lower number of the range is based on the average number of cases the hearing officers would like to be assigned and the higher number of the range is based on the average number of cases they reported needing to maintain expertise.

* The number of cases in these regions for 1998 would suggest less than one hearing officer for the region. However, a minimum number of hearing officers would be needed. This minimum number should be decided by DERC and the OES.

Sources: JLARC staff analysis of responses from the JLARC Survey of Administrative Hearing Officers, September 1999, and DERC database.

minimum number of cases, and eliminating hearing officers who cannot routinely participate year round.

Recommendation (8). The General Assembly may wish to consider amending §9-6.14:14.1 of the *Code of Virginia* to give the Executive Secretary of the Supreme Court specific authority to set a limit on the number of hearing officers in each region.

Recommendation (9). The Office of the Executive Secretary of the Supreme Court, in coordination with the Department of Employee Relations Counselors, should develop a plan to reduce the number of hearing officers in those regions where there are currently too many hearing officers. The plan should include consideration of caseload trends and the minimum number of hearing officers needed in each region.

Role of Hearing Officers in Deciding Cases Needs to Be Defined

A prerequisite to having consistent decisions is a clear understanding by all parties as to the role of hearing officers in the grievance hearing process. Currently, there are differences of opinion as to their role in deciding grievance cases, particularly those involving discipline. Identifying a clear set of ground rules for basing decisions in disciplinary cases would result in increased consistency of decisions and provide a mechanism against which DERC could appropriately evaluate a hearing officer's performance.

The *Code of Virginia* identifies some of the specific duties of hearing officers but does not identify the parameters of the hearing officer's authority in deciding a grievance case. For example, it does not specify whether the hearing officer is to independently decide what disciplinary action is warranted based on the facts of the case and any mitigating circumstances, or rather, is to review agency management's action for reasonableness and consistency with State policy. By default then, DERC is given the responsibility to identify the role of the hearing officer.

The *Grievance Procedure*, issued by DERC, states that hearing officers have the authority to "determine the grievance based on the evidence . . . and provide appropriate relief." DERC's *Rules for Conducting Grievance Hearings* further states that, "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." This language implies that the hearing officer is essentially supposed to substitute his or her judgment for that of agency management.

This interpretation is supported by comments provided from hearing officers to JLARC staff. For example, one hearing officer stated that, "I don't see how you can't to some extent substitute your views for management. It's the reason hearing officers exist." Another hearing officer noted, "Some agencies think they don't make mistakes, but that's the reason for this process – because there's another side."

However, current DERC management has stated that some hearing officers overstep their authority by usurping the role of agency management in disciplining its employees. DERC staff have recently begun identifying decisions in which they believe the hearing officer has "substituted his judgement for that of agency management." In these cases, DERC staff have either brought the matter to the attention of the hearing officer through a hearing appointment letter or have included the concern in the hearing officer evaluation submitted to the OES. For example:

In a recent hearing officer evaluation submitted by DERC to the OES, the evaluation stated that "Decisions also reflected a willingness by [hearing officer] to substitute his judgement for that of management in determining what acts by employees constituted violations under SOC [Standards of Conduct] policy."

Not surprisingly, this view is shared by some State agencies. For example, in one hearing officer evaluation completed by an agency, the agency representative wrote, "The hearing officer's decision in this case is a good example of how hearing officers substitute their judgment for that of the manager who takes a particular action." The hearing officer in this case had modified the agency's disciplinary action from a "Group III with termination" to a "Group III with a 30-day suspension."

According to DERC staff, their interpretation of the hearing officer's role is premised on §2.1-116.06 of the *Code of Virginia*, which states that "Management reserves the exclusive right to manage the affairs and operations of state government."

However, this excerpt is contained within a section that discusses the types of grievances that may or may not proceed to a hearing. It is not clear that this language is intended to identify parameters for a hearing officer's decision on a grievance qualified for a hearing. Further, this distinction drawn by DERC is not identified in any written documents supplied to hearing officers, nor was it discussed in the most recent annual training for hearing officers provided by DERC.

It appears, therefore, that hearing officers may be receiving mixed, or at least unclear, signals from DERC concerning their role in deciding grievances. For example:

In a recent hearing officer evaluation submitted by DERC to the OES, the evaluation stated that "it is arguable but not certain that [the hearing officer] inappropriately substituted his judgment for that of agency management. . . . Hearing officers do not sit as 'super-personnel officers' and are not to substitute their judgment for that of agency management." In one of the cases referenced, a lack of uniform enforcement of policy was cited in the hearing officer's decision to reduce the disciplinary action. However, as described in DERC's Rules for Conducting Grievance Hearings, one mitigating circumstance that hearing officers can consider is whether there has been "consistent application" of policy.

It may be inappropriate to criticize hearing officers for usurping agency management's authority when the role of hearing officers has not been clearly identified.

Further, under these circumstances it is reasonable to expect that hearing officers would also have differences of opinion as to their role. These differences would likely manifest in inconsistencies in hearing officer decisions. For example, two hearing officers may both decide that an employee committed a certain violation of policy. However, a hearing officer who believes that her role is to decide whether the agency's disciplinary action was within the range allowed by the *Standards of Conduct* may decide differently than a hearing officer who believes her role is to order the level of discipline that she thinks is reasonable under the circumstances.

Ultimately, a decision needs to be made as to what the role of hearing officers is to be in deciding cases involving discipline. It appears appropriate that the General Assembly should be responsible for articulating this policy, given its far-reaching implications for employee grievance outcomes. This policy should then be prominently stated in DERC's *Rules for Conducting Grievance Hearings* and should be emphasized in the annual training for hearing officers.

Recommendation (10). The General Assembly may wish to consider identifying in statute the role of hearing officers in deciding cases, particularly those involving employee discipline imposed by an agency. Factors to consider would include whether the hearing officer should independently determine an appropriate discipline for the misconduct taken or whether the hearing officer should only review the agency's discipline imposed for consis-

tency with policy, and whether hearing officers should consider mitigating circumstances in arriving at their decisions.

***Recommendation (11).* The Department of Employee Relations Counselors should modify its hearing officer guidance documents to reflect the General Assembly's definition of the role of hearing officers in grievances. It should also routinely explain this role at the annual hearing officer training.**

DERC's Hearing Officer Training Needs to Be Enhanced

As noted in Chapter I, hearing officers are required to have eight hours of DERC training annually to be eligible to hear grievance cases. In addition, new hearing officers who wish to hear grievance cases are required to attend an orientation session. These training sessions are held in conjunction with the OES' fall training conference for hearing officers.

JLARC staff assessed the training provided by DERC through review of all DERC training materials from the past three years, attendance at the most recent hearing officer training, responses to the JLARC survey of hearing officers, review of hearing officer evaluations of DERC's training, and interviews with DERC and other State agency staff. Review of this information suggests that DERC needs to expand its training for new hearing officers and modify its annual training to better meet the training needs of hearing officers. To do so, DERC will need to commit more time and effort to its training program for hearing officers.

Training for New Grievance Hearing Officers Should Be Expanded. New grievance hearing officers are provided a two-hour orientation to the grievance hearing process by DERC. The most recent orientation session included a description of the grievance procedure and basic hearing officer responsibilities, a brief overview of the *Standards of Conduct*, and a discussion of DERC's hearing officer selection and evaluation processes. In addition, a current grievance hearing officer provided some practical tips for administering hearings.

While the information provided was important and useful, it does not provide all the information necessary to adequately prepare a new hearing officer to hear grievance cases – particularly given that hearing officers are private sector attorneys who, in many cases, may not have had prior exposure to State personnel policies and issues before. For example, DERC does not discuss with new hearing officers the types of cases they may expect to be assigned. As one hearing officer stated in evaluating the orientation:

Give us a list of what cases are heard: police, mental health workers, etc. What agencies are involved?

Further, DERC does not provide detailed information concerning what basic information should be contained in a decision and what would be considered a "good"

decision format. In contrast, the hearing officer training provided by the Department of Education (DOE) for special education cases includes an in-depth discussion of previous case decisions. In addition, DOE provides hearing officers with a detailed listing of the items that should be contained in all decisions.

Some examples of the types of information that new grievance hearing officers should be provided include:

- key DPT personnel policies besides the *Standards of Conduct*,
- the existence and use of formal DPT interpretations of policies,
- the relationship between agency policies and DPT policies,
- agency policies that are most commonly involved in grievances, and
- discussion of the role of hearing officers in deciding disciplinary cases.

Providing this information would better prepare new hearing officers for grievance hearings. However, it would likely require expanding the length of time spent training new hearing officers.

Recommendation (12). The Department of Employee Relations Counselors should expand its training for new grievance hearing officers to more comprehensively orient the hearing officers to State personnel policies as well as the types of cases they can be expected to hear.

Annual Training Needs to Be Enhanced. The annual hearing officer training provided by DERC is generally well received by the hearing officers. Of hearing officers responding to the JLARC survey, three-fourths reported that DERC's training was good. In addition, the training evaluation forms completed by hearing officers at the close of the training reveal general satisfaction with the training sessions.

However, there are two primary concerns that have been frequently raised about DERC's training. First, hearing officers reported that the relevance of much of it to the grievance cases hearing officers commonly hear is not readily apparent. For example, a lot of time in the most recent training was spent explaining various federal laws, such as the Americans With Disabilities Act (ADA). A number of hearing officers questioned the applicability of that training, as the following quotes from hearing officers state:

It seems to me that rarely do cases appear that involve issues of Title VII or the ADA or other similar civil rights statutes. Most cases seem to involve discipline. Yet hours of each year's training focuses on civil rights laws. I find that more real life hearing issues should be addressed – like case examples and discussion of what should have been done.

* * *

The annual DERC training misses the point. All too often the morning session lacks content . . . Give us a solid 1.5 hours on hearing officers nuts & bolts – administrative and substantive problems and be prepared to answer them. Yesterday [at this fall's training], DERC tried to duck questions by saying "it's in the statutes." That's fine, but the seminar was the chance to educate 120 officers about the statutes. All too often the seminars spend 3 or more hours on complex federal employment law issues (ADA, FMLA, Title VII). We should have some of this, but no hearing officer I spoke to yesterday has ever seen such claims. Usually it's whether an employee was late, joyrode with the agency car, etc.

* * *

I have yet to have a grievant plead any of the sophisticated federal body of employment law on which we spent close to 2 hours.

* * *

Recent training included discussion of the Americans with Disabilities Act and the Family Medical Leave Act. Based on audience reaction, I am convinced that there is great confusion concerning the applicability of those and other federal and state laws. Could DERC devise a handbook or promote training to clarify the parameters of applicability?

* * *

The practical application of the training to the grievance cases typically heard by hearing officers is not readily apparent.

Second, the training lacks an applied component in that hearing officers do not get to discuss, or even hear about, actual cases that have gone before hearing officers or practical/procedural issues that arise during hearings. Some of the suggestions and comments provided by hearing officers include:

Take a decision and have a panel pick it apart and/or have a mock hearing with evidentiary issues.

* * *

I would like to hear more about pragmatic problems that will in time affect all hearing officers – privacy of records, power to have records produced, in camera examination of documents, effective approaches to pre-hearing conferences.

* * *

The speaker mentioned . . . that he had read the hearing officers' opinions, and he discussed problems in general terms. It would have been much more helpful if he would have shown samples of h.o. [hearing officer] opinions and how he would suggest those be improved....I want to write good opinions. Showing how to correct poorly written opinions would be helpful.

* * *

Presenting some actual cases, with which there have been some problems, would be helpful. It seems that many people in the audience have some cases which were unusual, or they have solved some problems that others have experienced. Let folks tell these stories, and ask questions or help sort out issues in front of the audience.

Providing this type of information may require revising the training format to include small group meetings in which a dialog can be generated between the hearing officers and with DERC.

Further, the training could provide a forum for DERC to discuss specific concerns it has with hearing officer decisions. For example, DERC has stated that some hearing officer decisions improperly "rewrite" agency policies. The annual training would be an appropriate time to identify examples of this problem and to discuss why those decisions are incorrect. As mentioned by hearing officers:

Would be helpful to receive copies of state policy which is/are frequently applicable in hearings. Would be more interesting if actual cases were referenced by speakers. Use actual decisions by HO [hearing officer] which properly and improperly apply policy.

* * *

If [the DERC Director] is unhappy with our decisions – content, procedure, etc., please have him delineate, more clearly, a "correct" decision.

Three policy areas in particular appear to warrant in-depth training by DERC – policies on drug use, patient abuse, and sexual harassment. Several State agency representatives cited problematic decisions in these areas. By revising its training to encompass more practical aspects of a hearing officer's responsibilities, DERC would be more directly addressing deficiencies identified in hearing officer performance.

Recommendation (13). The Department of Employee Relations Counselors should revise its training program to better address the types of cases

hearing officers hear most often. Further, opportunities should be provided at the training to discuss actual examples of case decisions and procedural issues that periodically arise.

Hearing Officers Need Access to Grievance-Related Information on a Routine Basis

Currently, hearing officers are provided few resources to assist them in hearing grievance cases and writing decisions. New hearing officers are provided copies of DERC's *Rules for Conducting Grievance Hearings and Grievance Procedure* and DPT's *Standards of Conduct for State Employees*. However, as previously described DERC provides little information concerning the types of complaints raised in grievance hearings and how these complaints have been addressed by hearing officers. Further, there is no opportunity provided for hearing officers to discuss common issues that arise in the course of grievance hearings and to learn from each other's experiences. As a result, each hearing officer must "reinvent the wheel" concerning many procedural issues that arise as well as in determining the proper interpretation of agency policies.

There are steps DERC could take to facilitate the exchange of information to and among hearing officers besides enhancing the annual training. Specifically, DERC could provide hearing officers with access to redacted versions of past grievance decisions. In addition, DERC could provide opportunities for increased information-sharing through the use of periodic newsletters and an interactive internet web site. Implementation of these actions should serve to increase the consistency of hearing officer decisions.

Access to Redacted Past Decisions Should Be Available for Hearing Officers. Currently, hearing officers are not privy to any grievance decisions except the ones they have written. Since there are 124 hearing officers who hear grievance cases, this results in a wide range of approaches to deciding cases and writing decisions.

When asked as part of the JLARC survey of administrative hearing officers, "What additional assistance, if any, would you like to receive from DERC?" a number of hearing officers expressed an interest in having access to past grievance decisions. Responses from hearing officers included the following:

Access to previous hearing officer's decisions. If not all, then publish an "edited" compilation every year – edited by an objective outsider who will include representative opinions that reflect both sides as the prevailing party.

* * *

Publish decisions and index on the Internet.

* * *

Summaries of statewide opinions to develop a body of law for hearing officers and improve consistency among hearing officers. Summaries could be anonymous as to agency and personnel.

Access to past decisions could be particularly useful to new or less experienced hearing officers. For example, a new hearing officer could look at past decisions before writing his or her first decision to ascertain what length and format appear to be acceptable. All hearing officers could benefit from reviewing past decisions to identify the laws and policies taken into account in similar cases and the typical discipline imposed for different types of offenses.

DERC management also favors providing hearing officers access to past decisions. Citing inconsistencies in the outcomes of cases with similar facts, they reported that having past decisions available may help minimize these inconsistencies. They also suggested that the inherent peer review of decisions would encourage sound, well-written decisions.

Several of the State agency representatives interviewed reported that it would be beneficial for agency human resources staffs to also have access to redacted decisions. They reported that access to this information would help agency management in responding to grievances during the resolution steps and in deciding the appropriate discipline to impose under various circumstances. They also believe that it would increase consistency of decisions.

While allowing access to past hearing officer decisions appears to have significant benefits, an issue that would need to be addressed is the privacy of grievance records. Grievance proceedings are considered part of an employee's personnel record. As such, they are protected from disclosure by the Privacy Protection Act (PPA) and Freedom of Information Act (FOIA). However, from review of the PPA and FOIA, it does not appear that the use of grievance hearing decisions would be prohibited if all identifying information were deleted from the decisions before disclosure. DERC currently makes available to the public redacted versions of its grievance compliance rulings. Hence, there appears to be precedent for DERC to be able to provide redacted information pertaining to grievances.

However, to ensure that DERC has the authority to provide the decisions, additional language could be added to FOIA that would give DERC explicit authority to provide non-active redacted hearing officer decisions. There are similar provisions for other agencies in the exclusions section of FOIA which state that the exclusion does not prohibit release of some information as long as it does not identify specific individuals. For example, §2.1-342.01 of the *Code of Virginia* (FOIA) states:

Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Personnel and Training. However, nothing in this section

shall prohibit the disclosure of information taken from inactive reports in a form which does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

A section could be added stating that grievance matters are not excluded from being released as long as the information comes from an inactive hearing decision and it does not reveal the identity of the parties involved.

Recommendation (14). The Department of Employee Relations Counselors should provide hearing officers with access to redacted grievance hearing decisions.

Recommendation (15). The General Assembly may wish to consider amending §2.1-342.01 of the *Code of Virginia (Freedom of Information Act)* to specify that the exclusion of personnel information does not prohibit the Department of Employee Relations Counselors from providing prior hearing officer decisions in a redacted format.

Additional Avenues for Communication Between DERC and Hearing Officers Should Be Pursued. Currently, there is very little interaction between DERC and the hearing officers besides the annual training and setting up individual case assignments. Some hearing officers will call DERC directly if they have questions concerning the grievance procedure. However, there is no communication with all the hearing officers on a routine basis.

As part of the JLARC survey of administrative hearing officers, some hearing officers responded that they would like additional information provided to them. When asked what additional assistance they would like from DERC, some examples of comments included:

A quarterly newsletter with updates on cases that are germane to the cases we hear; discussion of problems encountered by other hearing officers; review of especially outstanding opinions; and other information pertinent to employee grievances.

* * *

Some sort of ongoing information. Perhaps a quarterly newsletter-type format to advise of issues and policy changes or reminders.

DERC staff cited the need for additional training of hearing officers. Use of a newsletter would be a prime opportunity for DERC to provide ongoing education to hearing officers throughout the year. A newsletter could provide information that could not be covered in the annual training. For example, hearing officers could be kept abreast of changes in applicable laws and State policies. Particularly relevant excerpts from the annual training sessions could be included as well. Further, it could

be used to follow up on questions raised during the training. Hearing officers could also submit topics of interest as well as questions to which DERC staff could respond. Finally, DERC could use the opportunity to educate hearing officers relative to common problems it sees with hearing officer decisions.

A newsletter could be sent electronically to those hearing officers with e-mail and through the mail for those who do not have this type of access. The current and past newsletters could also be posted on DERC's web site so that the hearing officers could refer to them as needed.

In addition, DERC's web site could be used to provide a forum for hearing officers to discuss issues among themselves. For example, a new hearing officer with less experience could seek advice on how to manage the participants in a hearing. Questions could be posted on an electronic bulletin board so that hearing officers could answer each other's questions.

By providing more information, DERC could expand the hearing officers' knowledge base regarding employee grievances and State policies and laws. This could help to bolster hearing officers' expertise and lessen concerns about consistency in decision writing.

Recommendation (16). The Department of Employee Relations Counselors should provide opportunities for additional communication and information sharing between the department and the hearing officers. For example, the department could provide periodic newsletters to the hearing officers.

Recommendation (17). The Department of Employee Relations Counselors should provide a medium through which the hearing officers could have more interaction with each other. For example, the department could provide an electronic bulletin board so that the hearing officers could respond to questions posed by their peers.

DERC Needs to Issue Rulings in a More Timely Manner

During the course of this study, questions concerning the timeliness of DERC rulings were brought to the attention of JLARC staff. Complaints regarding the length of time between challenges to DERC and DERC rulings were raised by several sources, including State agencies, an employee association, and a grievant's attorney. Review of data on the length of time taken by DERC to issue rulings substantiated these concerns. This lack of timeliness by DERC negatively impacts the goal of the grievance process to provide timely resolution of grievances.

The following case study provides an example of the concerns raised about the amount of time taken by DERC to issue rulings:

An agency terminated an employee in February 1999. The employee subsequently grieved the termination. In July 1999, the hearing officer issued a decision upholding the grievant's group III notice but with a suspension rather than termination. The agency challenged the decision in July, but had not yet received a ruling from DERC when the agency representative spoke with JLARC staff in late September. Both the agency and the grievant were in limbo, as the agency has had to keep the job vacant since February, and the grievant has still not been reinstated. An agency representative stated that the delay caused by DERC "is not fair to anyone," and said that the agency is being blamed for the delay. The grievant's attorney in this case also voiced concerns about the delay since his client has been out of work pending a DERC ruling.

As the example illustrates, excessive delays in the grievance process cause hardships to both agencies and grievants, especially in termination cases. Agencies may be unable to fill the positions and grievants may be unable to return to work until they receive the ruling from DERC.

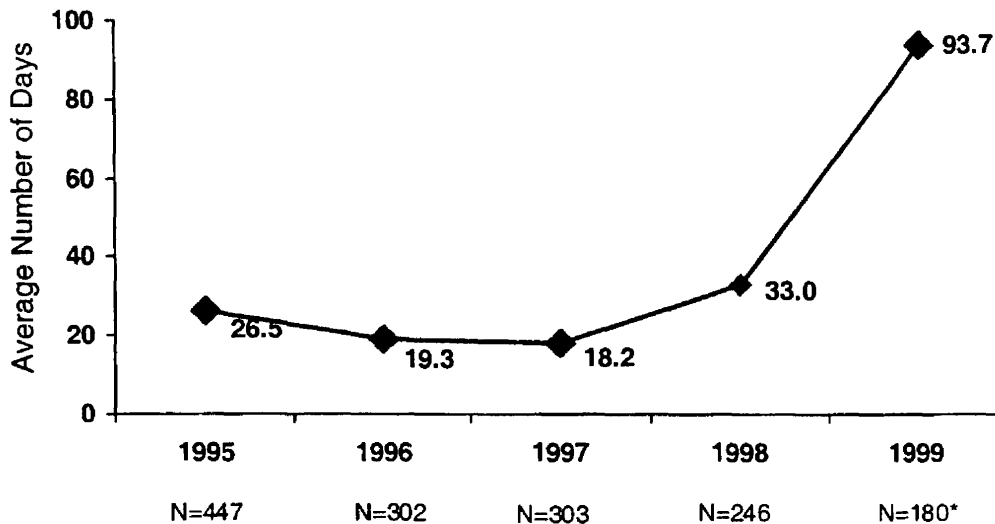
To assess the timeliness of DERC rulings, JLARC staff calculated the number of calendar days between the date each ruling request was received by DERC and the date each ruling was mailed to the parties of the grievance for all rulings issued since 1995. Figure 8 shows the average number of days DERC took to issue rulings for each of the past five years. The data show a sharp increase in the amount of time taken by DERC to issue rulings beginning in 1998. The average number of days for all DERC rulings (including compliance, qualification, access, interpretation, reprisal, and other rulings) increased from 18.2 in 1997 to 93.7 in 1999 – an increase of more than 400 percent.

DERC rulings were also analyzed by the type of ruling requested and the issue raised in the compliance challenge. The majority of rulings requested of DERC relate to qualification and compliance. (As mentioned in Chapter I, qualification rulings address whether the grievance may proceed to the hearing stage if not resolved at the agency level. Compliance rulings concern whether the parties to the grievance and/or the hearing officer have properly followed the *Grievance Procedure*.) Within the compliance challenges, the majority of rulings requested of DERC pertain to adherence to pre- and post-hearing procedures (for example, whether a required action was taken within the maximum number of days allowed by the *Grievance Procedure*), the conduct of the hearing, and the hearing decision. Figure 9 (page 60) shows the average number of days taken by DERC to issue qualification rulings and rulings on the different types of compliance issues.

The largest increase in the length of time taken by DERC was in the area of qualification rulings. In 1999 (through November 23, 1999), the average length of time for a DERC qualification ruling was 135.9 days – an increase of more than 500 percent from the 1997 average length of 21.5 days. On average, grievants and agencies in 1999 had to wait four and one-half months to learn if the grievance would be allowed to be decided by a hearing officer. While compliance rulings took less time than qualification

Figure 8

Average Number of Days Taken by DERC to Issue Rulings, 1995-1999



*Rulings through November 23, 1999

Note: Rulings are included in the year in which DERC issued the ruling.

Source: JLARC staff analysis of DERC rulings database.

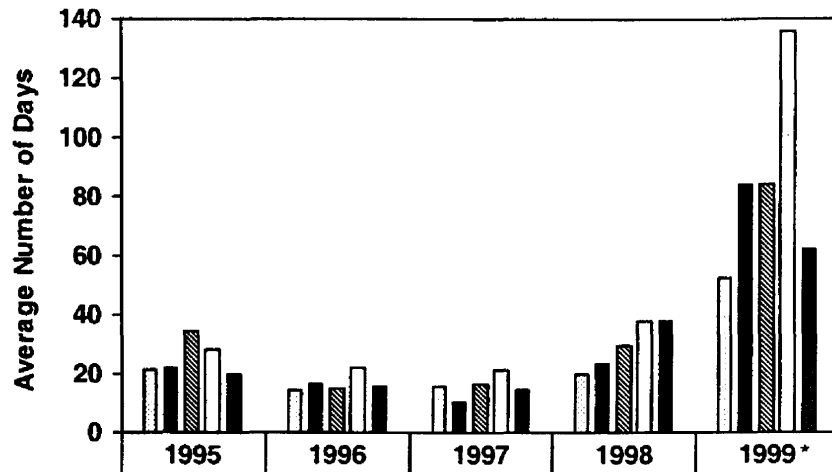
rulings, the average length of time for compliance rulings still increased substantially. In 1999, DERC rulings on pre- and post-hearing procedural issues took 52.5 days on average, while conduct of hearing and hearing decision rulings took 84 days on average.

As of November 23, 1999, there were 109 outstanding challenges awaiting a ruling from DERC. Some of these challenges date back to the fall of 1998. Since DERC has not yet ruled on these cases, they are not included in the 1999 yearly average. Thus, the average number of days for DERC rulings in 1999 is actually understated, as this number will increase once DERC eventually issues rulings on these cases.

DERC staff stated that they are aware of the problem and have been working to reduce the backlog of requested rulings. According to DERC staff, the major reason for the backlog is a staff shortage that began in the summer of 1998. DERC has nine counselor positions which have responsibility, in part, for preparing rulings. At one time, however, only three of these positions were filled. DERC has since hired additional counselors and now has seven full-time counselors and one part-time counselor to issue rulings. DERC staff believe that the backlog of cases will decrease as the new counselors gain more experience and become more efficient at making rulings.

Figure 9

DERC Rulings by Type of Ruling, 1995-1999



	1995	1996	1997	1998	1999*
□ Compliance (Pre and Post Hearing)	21.4	14.5	15.8	19.9	52.5
■ Compliance (Conduct of Hearing)	22	16.6	10.5	23.6	83.9
▨ Compliance (Hearing Decision)	34.8	15.3	16.4	29.5	84.1
□ Qualification	28.6	22.1	21.5	37.9	135.9
■ Other	20.2	15.8	14.5	37.7	62.1

*Rulings through November 23, 1999

Note: Rulings are included in the year in which DERC issued the ruling.

Source: JLARC staff analysis of DERC rulings database.

Although DERC has recently taken steps which should eventually reduce the backlog of cases awaiting rulings, the increase in the amount of time it takes for DERC to issue a ruling has reached unacceptable levels. Substantial delays in qualification and compliance rulings diminish the fairness of the grievance procedure and could affect the efficiency of State agency administration. Thus, DERC needs to place a higher priority on addressing the problem of lengthy delays in grievance procedure rulings.

Recommendation (18). The Department of Employee Relations Counselors should place a higher priority on reducing the backlog of cases awaiting rulings from the agency, and ensure that rulings on future cases are issued in a timely manner similar to levels achieved in 1997.

Grievance Process Needs Mechanism for Reviewing Hearing Officer Decisions for Consistency with Agency Policies

As previously mentioned, the *Code of Virginia* states that hearing officer decisions are final and binding if consistent with law and policy. Under the grievance procedure, parties to the grievance may challenge the decision of the hearing officer on the grounds that the decision is inconsistent with policy. The Department of Personnel and Training (DPT) is the agency responsible for administering State personnel policy, and the director of DPT is responsible for making final rulings on these challenges. If the director determines the decision is inconsistent with State policy, the decision is remanded to the hearing officer for revision.

DPT administers the State Human Resource Policy and conveys this policy to State agencies through the *Policies and Procedures Manual*. The manual specifies guidelines for standards of conduct, equal employment opportunity, sexual harassment, drug and alcohol abuse, performance evaluation, compensation, and benefits. The manual also sets guidelines for corrective action in cases of unacceptable conduct. The policies set forth in the manual provide considerable flexibility to State agencies in determining the severity of disciplinary actions and in developing their own agency policies for standards of conduct.

In issuing rulings concerning challenges to policy, DPT makes a distinction between policies promulgated by individual agencies and those promulgated by DPT. Currently, it will only rule on the consistency of a hearing officer's decision with the policies issued by DPT. This practice stems from the fact that DPT no longer reviews and approves all agency policies. Prior to 1993, DPT routinely approved agency policies, and subsequently would issue rulings concerning the consistency of grievance decisions with those policies.

This change in practice has resulted in a gap in the review of grievance decisions since many of the decisions pertain to agency rather than DPT policies. Now, there is no recourse to correct decisions that are inconsistent with agency policies. This was cited by several agencies as a concern with the current grievance hearing process. DPT staff reported that they have been aware of this problem for awhile. However, no action has been taken to correct this gap in the process. DPT should examine this issue and develop a plan for correcting the identified deficiency.

***Recommendation (19).* The Department of Personnel and Training should study possible options for ensuring that hearing officer decisions are consistent with agency policies. It should report on its findings and any subsequent action taken to the House and Senate General Laws Committees by July 1, 2000.**

ASSESSMENT OF THE NEED FOR AN APPEALS PROCESS

A final step that could be taken to address consistency in the resolution of employment disputes would be to implement an appeals process, whereby hearing officer decisions could be overturned by a higher authority. As hearing officer decisions are filtered through an appeals body with the authority to overturn decisions, greater consistency would likely result in the final decisions. However, an appeals process will lengthen the grievance procedure and would make it more costly. Based on an examination of the advantages and disadvantages of an appeals process, this report concludes that an appeals process does not appear warranted at this time.

While no formal appeals process currently exists in Virginia, hearing officer decisions may be challenged by either party. These challenges may be made to DPT (as described in the preceding section), DERC, or the hearing officer who made the initial decision. The parties to a grievance may also petition the circuit court for an order requiring implementation of the hearing officer's decision. The roles of these authorities are briefly reviewed before assessing the need for a formal appeals process. Both administrative and judicial appeals structures are assessed.

Current Structure

Currently, there are three authorities to which parties to a grievance may challenge the hearing officer's decision. Within five days of the hearing officer's initial decision, parties may appeal the decision to the hearing officer for reconsideration of the decision. The hearing officer may or may not reconsider the decision. Upon receiving the hearing officer's final decision, parties to the grievance may challenge the decision on the grounds that the decision is inconsistent with State personnel policy, or on the basis that the decision is not in compliance with the *Grievance Procedure*. As previously discussed, challenges on the basis of inconsistency with State policy are made to DPT. Challenges on the basis of noncompliance with the *Grievance Procedure* are made to DERC. In the 1999 General Assembly Session, DERC was also given authority to rule on a decision's consistency with law in Department of Mental Health, Mental Retardation and Substance Abuse Services cases involving patient abuse. Either DPT or DERC may remand the decision to the hearing officer if they find the challenge to be valid. DPT rarely rules that the decision was inconsistent with policy. Similarly, DERC infrequently rules that the decision was not in compliance with the *Grievance Procedure*.

After the final rulings from the hearing officer, DPT, and DERC, the parties are expected to comply with the decision. In cases in which one of the parties does not comply with the hearing officer's decision, either party may petition the circuit court in the locality of the grievance for an implementation order. In actuality, the petitioner is almost always the employee, as the agency is the party ordered by the hearing officer

to implement the decision. Petitions to the circuit court arise out of the agency not implementing the decision of the hearing officer.

The circuit court will review the case on the record and determine if the hearing officer's decision was carried out properly. The court may award attorneys' fees to a party if it prevails on the merits of the case. Implementation orders by the circuit court may be appealed to the Virginia Supreme Court, which has discretion to hear the appeal. Parties do not have the right to appeal the circuit court's decision through the Court of Appeals.

The *Code of Virginia* and prior Supreme Court decisions are unclear on the issue of whether or not the circuit court has the authority to apply judicial review to a grievance in order to reverse a hearing officer's decision. The *Code of Virginia* simply states that parties may petition the court for an order requiring implementation of the hearing officer's decision. There is no explicit direction in the *Code of Virginia* giving the court the authority to reverse or modify the hearing officer's decision. In a recent Virginia Supreme Court decision (*Virginia Department of Environmental Quality v. Wright*, 256 Va. 236 (1998)), the Court stated:

Thus, a circuit court's authority, according to the statute, is limited to the act of implementing, or refusing to implement, the hearing officer's ruling. A circuit court lacks authority to consider the grievance *de novo*, to modify the hearing officer's decision, to substitute the court's view of the facts for those of the hearing officer, or to invoke its broad equitable powers to arrive at a decision that the court may think is fair; the court may only "implement."

While this language provides some clarity regarding the authority of the circuit court, it does not identify the basis on which the court may refuse to issue an implementation order. Section 2.1-116.07:D of the *Code of Virginia* enables parties to a grievance to petition the circuit court for an order requiring implementation, but it does not contain any language enabling the circuit court to apply judicial review to reverse or modify the hearing officer's decision.

However, despite the Supreme Court ruling in *Wright v. DEQ* and the absence of clarifying language in the *Code of Virginia*, the circuit court has reversed a hearing officer's decision in at least one case known to JLARC staff. The following case study illustrates that the courts have exercised the authority to reverse egregious decisions by hearing officers.

A hearing officer ordered the reinstatement of an employee who was terminated for sexual harassment, even though the hearing officer concluded that the employee was guilty of harassment. Upon a challenge, DPT ruled that the decision was inconsistent with State policy and applicable federal law. The decision was not modified to be consistent with State policy or law; therefore, the agency was directed by

DPT to not implement the decision. The grievant petitioned the circuit court for an implementation order, and the court ruled that the agency did not have to reinstate the employee. Accordingly, the employee has not been reinstated.

Therefore, despite the absence of an appeals process, it appears that the court has been used indirectly to overturn a hearing officer's decision. The following section examines the advantages and disadvantages of a formal appeals process for grievance hearings.

Assessment of Alternative Appeals Processes

There are two basic types of appeals processes: administrative appeals and judicial appeals. An administrative appeals process would give a person or group of persons in the executive branch, such as an agency director or appeals board, the authority to overturn hearing officer decisions. A judicial appeals process would give the courts the authority to overturn hearing officer decisions. A judicial appeal could follow an administrative appeal. With either appeals process, consistency in rulings will likely result, but at the expense of timeliness and cost-effectiveness. Administrative and judicial appeals are examined separately below.

Administrative Appeals. Three of the eight states reviewed by JLARC staff offer an administrative appeal to the hearing officer's decision: Kentucky, North Carolina, and Tennessee. The federal government also has an administrative appeals process. In each case, the appeal is decided by a board, which is comprised of at least three members. Tennessee has the largest appeals board with nine members. One commonality among these appeals boards is that the members are appointed by the chief executive officer (except in Kentucky, where two of the seven members are state employees elected by state employees). Another commonality is that they are appointed to set terms.

The principal advantage of an administrative appeals board is that decisions on grievances are likely to be more consistent. Since the same board decides all appeals, similar rulings will result from similar cases. By staggering the appointments to the board, continuity is assured over time. Hearing officer decisions that are inconsistent with prior appeals board rulings are likely to be overturned by the board when challenged. The appeals board can rely on their experience gained in ruling on past decisions to correct occasional mistakes made by hearing officers.

The principal disadvantages of an administrative appeals process are that the grievance process is lengthened and more costly. In practice, very few hearing officer decisions are overturned on appeal in the other states or the federal government. For every decision that is overturned, there are many more that must go through the appeals process before the original hearing officer's decision is finalized. The added time and expense of the appeal present a hardship on both grievants and agencies.

Depending on the nature of the appeals process, other disadvantages may be evident. Appeals boards composed of citizen members may not be as knowledgeable regarding personnel matters as the hearing officer who made the initial decision. Also, they may not be perceived as impartial. For example, the North Carolina Civil Service Commission, to which all hearing officer decisions are automatically appealed, routinely overturns decisions in favor of the employee but practically never overturns decisions in favor of the agency. This practice has caused some concern about the impartiality of the commission.

One suggestion raised during the course of this review was that parties to a grievance should be able to appeal hearing officer decisions to DERC. While DERC clearly has expertise in employment law and State personnel issues, placing the agency in the role of deciding cases on the merits of the grievance would substantially change its function as a neutral overseer of the grievance process. Should DERC be placed in the role of adjudication, employee perceptions of DERC as a neutral facilitator of the process would likely be diminished.

Judicial Appeals. Appeals to the judiciary generally have the same advantage of greater consistency and disadvantages of a more time-consuming and expensive process. However, they are more likely to be perceived as impartial than administrative appeals. Also, they are likely to be more time-consuming and expensive than administrative appeals. All of the states reviewed by JLARC staff, and the federal government, have judicial review for administrative decisions of grievance cases. In the North Carolina and federal government grievance systems, appeals are made directly to the appellate courts. Pennsylvania has a special appellate court for administrative process rulings, including those by the Pennsylvania Civil Service Commission. In the other state grievance systems reviewed by JLARC staff, appeals are made to the trial courts.

Appeals to the judiciary may not result in greater consistency unless the circuit courts' rulings can be appealed to the appellate courts. Circuit court rulings are not published or otherwise generally available to other judges for the establishment of precedence. Without published rulings from the appellate courts, there is no mechanism to bring consistency across judges in the different circuits. However, if parties had the right of appeal to the appellate courts for all circuit court rulings, the process would be even more time-consuming and expensive.

Practical Considerations Raise Questions About the Current Necessity of an Appeals Process

In considering the appropriateness of a formal appeals process in Virginia, it is necessary to weigh the importance of consistency with the goals of timeliness, cost-effectiveness, and fairness. While consistency would be enhanced by an appeals process, it could also be enhanced by better training of hearing officers, by providing hearing officers the opportunity to gain more experience in hearing grievances, and by

making past written decisions available to the hearing officers. Timeliness, however, could only be impeded by the implementation of an appeals process. Fairness could be enhanced or impeded by an appeals process, depending on the nature of the appeals body. For the appeals body to be both impartial and be perceived as impartial, it must be independent and free from political constraints. It must also be noted that fairness to either party may be impeded if the process becomes too costly or lengthy.

Considering that the other administrative hearing systems reviewed during the course of this study all have an appeals process, it may seem reasonable to have an appeals process in Virginia. However, while consistency and the ability to correct poor hearing officer decisions are important to the grievance process, implementation of an appeals process in Virginia would constitute a major change to the current system. In order for a fundamental change to be justified at this time, a fundamental deficiency in the current system must exist. Current indications are that the system has some deficiencies, but that these deficiencies do not represent fundamental problems that could only be addressed through an appeals process. Moreover, an appeals process would be costly, especially for employees. The additional cost of an appeal could put employees at a disadvantage in comparison to a State agency, which could draw upon considerable resources for an appeal.

Agencies interviewed by JLARC staff stated that the current hearing officer system generally works well, and that hearing officer decisions are generally good. Employee associations also reported that employees are generally satisfied with the hearing officer system. Their opinions on the need for an appeals process are mixed. For example, while DERC staff have indicated the necessity of an appeals process, staff at the Department of Corrections (which is the largest single user of the grievance hearing process) has stated that it does not want an appeals process. An agency representative for the Department of Corrections stated that grievances need resolution, and further appeal would only delay this resolution. If an appeals process were in place, it is reasonable to assume that agencies and grievants would use it. This extra step to the grievance process would increase costs and time to both the State and grievants.

Finally, based on interviews with agencies, most concerns with hearing officer decisions are based on perceived inconsistencies with policy, not law. It is unknown how many decisions are inconsistent with law, but it appears that the court already has the ability, through implementation suits, to correct these decisions in egregious cases. Further, since the hearing officer system was instituted in 1995, very few decisions have been remanded by DPT or DERC on the basis of inconsistency with policy or procedure, which indicates that hearing officers' decisions are generally consistent with State personnel policy and in compliance with DERC's *Grievance Procedure*. As previously discussed, one area that does need to be addressed is the review of decisions for consistency with agency policies. Implementation of this review would likely alleviate much of the concerns with hearing officer decisions voiced by State agencies.

Based on a consensus that the current system is generally sound, and on the belief that weaknesses in the system may be addressed through the implementation of recommendations made in this report, it appears that the introduction of a formal appeals process is not warranted in Virginia at this time.

IV. Alternative Structures for a Grievance Hearing System

One of the issues prompting this JLARC study was a proposal by the Department of Employee Relations Counselors (DERC) to move toward a full-time hearing officer system for grievances in Virginia. In assessing the appropriateness of a full-time model, JLARC staff examined alternative grievance structures in place in other states and the federal government. These alternative grievance structures fall into three broad categories for the dispatching of grievances: (1) full-time hearing officers, (2) part-time or contract hearing officers, and (3) grievance panels.

This chapter provides a brief summary of the state and federal grievance structures within each category, and assesses the strengths and weaknesses of the alternative types based on their likely abilities to achieve the various goals described in Chapter III. The report concludes with a comparison of the strengths and weaknesses of Virginia's current system of part-time hearing officers with the alternative systems.

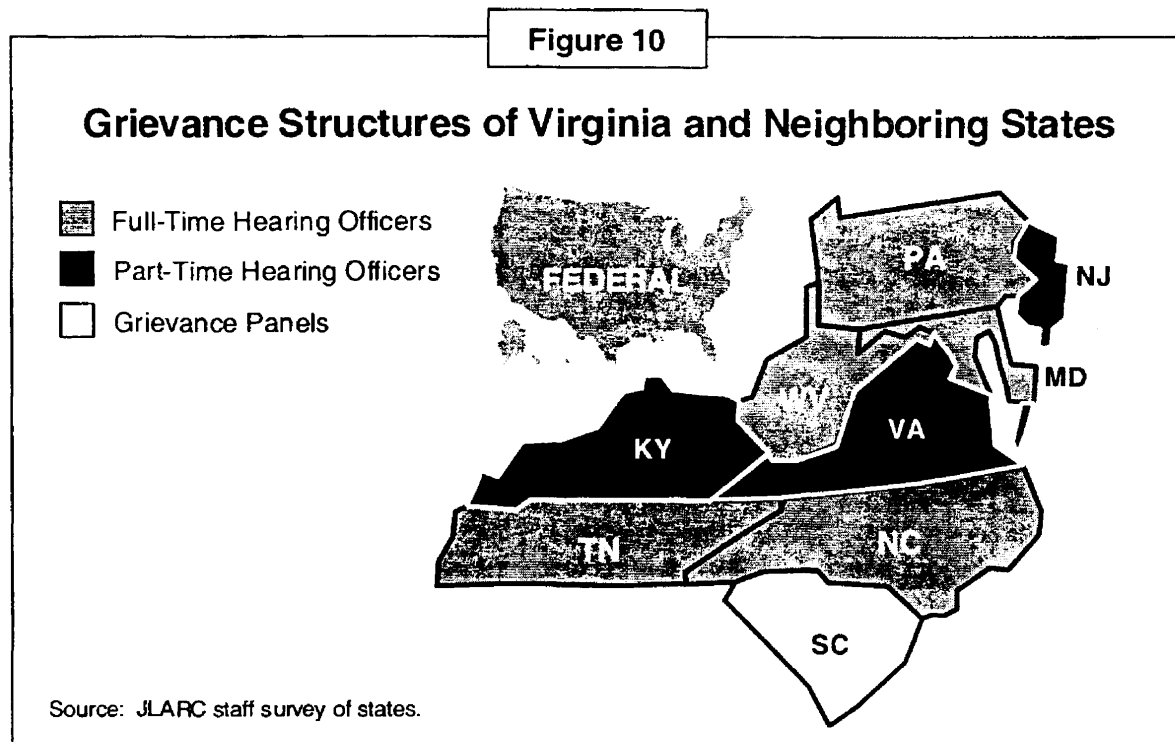
OTHER PUBLIC EMPLOYEE GRIEVANCE SYSTEMS

For this report, JLARC staff conducted interviews with the hearing offices of eight states and the federal government. The states reviewed were Kentucky, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, and West Virginia. These states were chosen for review because of their geographical proximity to Virginia and the range of alternative grievance structures in place in these states. Regardless of the structure, there are certain cross-cutting issues that define the nature of the hearing officers and the grievance system, including the hearing officers' qualifications, their appointment, and their authority.

The grievance structures of these states are summarized below and grouped by type. Five of the states and the federal government use full-time hearing officers or administrative law judges to hear grievances. Two of the states use part-time or contracted hearing officers, as does Virginia. One state uses grievance panels to hear and decide grievance cases. Figure 10 shows the breakdown for the states by type of grievance structure used.

Full-time Administrative Law Judges

Five of the eight states surveyed by JLARC staff have a full-time corps of professional staff (variously called hearing officers, administrative law judges, arbitrators, or attorneys) who are employed by the state. The federal government also uses a full-time corps of professional staff. Their sole or primary responsibility as a state or federal employee is to conduct administrative hearings and issue either final decisions on a case



or make recommendations to a higher authority. Despite similarities among these systems, major differences exist in terms of the number of hearing officers employed, how they are hired and appointed, and whether their decisions are final or advisory.

Maryland. The Maryland Office of Administrative Hearings is an independent agency within the executive branch of state government. The office handles a broad range of administrative hearings in addition to personnel grievance matters. The chief administrative law judge (CALJ) administers the office and is appointed by the governor to a six-year term. The CALJ hires additional administrative law judges (ALJs) to hear cases. New ALJs must have at least three years experience as a practicing attorney and be a member of the Bar. Currently, there are 58 ALJs who are cross-trained to hear cases for all administrative matters. For personnel grievance cases, the ALJ makes the final administrative decision. ALJ decisions may be appealed to the circuit court.

North Carolina. The North Carolina Office of Administrative Hearings is also a separate agency within the executive branch of state government. About one-third of the cases heard by the office are personnel grievances. The chief administrative law judge administers the office and is appointed to a four-year term by the Chief Justice of the North Carolina Supreme Court. The CALJ hires and supervises eight additional ALJs. The ALJs must have at least two years experience as a practicing attorney and be licensed to practice law in North Carolina. Although not a prerequisite for employment as an ALJ, prior arbitration experience is preferred. ALJs issue recommendations on grievances to the State Personnel Commission, which is a seven-member citizen board appointed by the governor. Each party to the grievance may

issue a written response to the recommendation and argue for 15 minutes before the commission. The commission makes the final decision. A senior ALJ with the North Carolina Office of Administrative Hearings informed JLARC staff that ALJ recommendations in favor of the agency are routinely upheld by the commission, but recommendations in favor of the employee are often overturned. Decisions of the State Personnel Commission may be appealed to the superior court in the county of the dispute.

Pennsylvania. The Pennsylvania State Civil Service Commission is an independent office within the executive branch of government. The commission is comprised of three members appointed by the governor and confirmed by the senate to six-year terms. The commission hires attorneys to hear grievance cases. There are no special qualifications for the attorneys other than being members of the Bar. Currently, there are five attorneys who advise the commission through written recommendations. The commission makes rulings on all cases at its monthly meetings. Commission decisions may be appealed within 15 days to the Commonwealth Court of Pennsylvania, which is a special appellate court for administrative matters.

Tennessee. The Tennessee Civil Service Commission is a citizen board of nine members appointed by the governor. While technically an independent body, it is staffed by the Department of Personnel. The Commissioner of the Department of Personnel acts as the Secretary of the Civil Service Commission. The commission assigns ALJs to grievance cases on a rotating basis. The ALJs are hired by the Secretary of State and conduct administrative hearings for many agencies, including the Civil Service Commission. While there is no statutory requirement, the Secretary of State has determined that ALJs must have at least three years experience as a practicing attorney. Tennessee has twelve ALJs who hear cases and issue an initial order. Parties to the grievance may appeal the ALJ decision to the commission. Less than five percent of the cases are appealed to the commission, and very few are overturned by the commission. Decisions of the commission may be appealed to the chancery courts, which are equivalent to the circuit courts in Virginia.

West Virginia. The West Virginia Education and State Employees Grievance Board is a division of the West Virginia Department of Administration. It is composed of three members appointed by the governor and confirmed by the senate to three-year, staggered terms. The board hires ten full-time ALJs to hear cases. The ALJs are assigned to one of eight Regional Education Service Agencies across the state. The ALJs must be attorneys and members of the Bar. There is no statutory requirement for years of experience as a practicing attorney, but the board looks for applicants with at least five years experience in administrative law. The ALJs issue final decisions, which may be appealed to the circuit court. Twenty-three percent of the ALJ decisions were appealed to the circuit courts in 1998.

U.S. Merit System Protection Board. The U.S. Merit System Protection Board (MSPB) is responsible for administering grievance hearings for all federal classified employees. Full-time administrative law judges hear cases in ten regional or field offices throughout the country. Depending on the region, there may be between three and 15 ALJs that hear cases in the region. The ALJs are all attorneys and

members of the Bar. The MSPB tries to find applicants with experience in labor and personnel law. ALJs issue decisions on grievances, which may be appealed to the MSPB. The MSPB is comprised of three members appointed by the President and confirmed by the Senate to staggered seven-year terms. No more than two of the members may be of the same political party. About one-fourth of the roughly 8,000 cases per year are appealed to MSPB. The MSPB will hear appeals when it is established that new significant evidence is available, or if the ALJ's decision was based on erroneous interpretation of law or regulations. Decisions of the MSPB may be appealed to the federal appeals court in the appropriate circuit.

Part-time Hearing Officers

Part-time grievance systems are similar to Virginia's in that hearing officers or arbitrators are independent of state government and are used on a contractual basis. However, key differences exist between the states in terms of the number of hearing officers used, their qualifications, the process by which they are appointed to a case, fees charged, and their authority.

Kentucky. The Kentucky Personnel Board administers the grievance procedure in the state and contracts hearing officers for grievances. The hearing officers must be attorneys, but there is no requirement for years of experience. Currently, there are eight hearing officers who contract through the Personnel Board. Hearing officers are paid \$60 per hour plus a modest reimbursement for travel time. While they are not full-time employees of the state, they generally work a full-time load hearing grievances for the state. On average, each hearing officer hears over 50 cases per year. The hearing officers issue findings of fact that are presented to the Personnel Board. The Personnel Board makes the final decision on all cases. The board is composed of seven members who serve four-year terms. Two of the members are state employees elected by state employees. The other five members are appointed by the governor and confirmed by the senate. Personnel Board decisions may be appealed to the circuit court.

New Jersey. The New Jersey Public Employment Relations Commission (PERC) is responsible for maintaining a list of qualified arbitrators to hear grievance cases. PERC selects only well established arbitrators with extensive prior arbitration experience. The director of PERC stated that the qualifications are very similar to those for the American Arbitration Association (for example, ten years experience, excellent reputation among peers). Currently, there are about 90 arbitrators on the list maintained by PERC. The parties to the grievance are responsible for paying the arbitrator's fee, which is about \$800 per day. The cost is divided between the union and the employer. PERC sends a list of arbitrators to the parties, and one is selected from the list by mutual agreement among the parties to the grievance. On average, the arbitrators hear about ten cases per year, although there is a lot of variation depending on the reputation and availability of the individual arbitrators. The arbitrators issue final and binding decisions on over 90 percent of the cases; the other ten percent are advisory if the labor contract specifies this. Arbitrator decisions may be appealed to the circuit court.

Grievance Panels

Of the states reviewed by JLARC staff, only South Carolina uses a panel system for resolving employee grievances. The panel system employed in South Carolina is unique from the other state systems. Grievance hearings are conducted by a panel of peers, as opposed to a professional arbitrator or hearing officer. The South Carolina Office of Human Resources (OHR) is a division within the South Carolina Budget and Control Board. OHR employs full-time mediator-arbitrators to hear and decide minor personnel grievances, and it appoints members to the State Employee Grievance Committee to hear more severe grievances (such as terminations, demotions, and suspensions of more than ten days).

The Grievance Committee is composed of 18 to 24 full-time state employees from other agencies within the state. The members are nominated by their respective agencies and selected for three-year terms by the State Human Resources Director. Each grievance is heard by a panel of five committee members, with one member appointed as the chair and a staff attorney providing guidance on interpretation of law and policy. The panel issues a final decision on the grievance. Employees may appeal the panel's decision to the circuit court. Agencies must have the approval of the Budget and Control Board in order to appeal a decision to the circuit court.

ASSESSMENT OF FULL-TIME HEARING OFFICER STRUCTURES

The states and the federal government reviewed for this report have each developed different methods of resolving employee grievance disputes. Certain aspects of the alternative grievance structures may have important ramifications on the quality and fairness (actual or perceived) of the decisions rendered. These aspects are examined in this section, as they relate to alternative full-time hearing officer models.

Two alternative full-time hearing officer models were assessed in terms of how well they promote the goals of impartiality, independence, consistency, expertise, timeliness, and cost-effectiveness. Taken together, these separate goals are essential for promoting the ultimate goal of a quality system for resolving employment disputes. The full-time models were also compared to the current part-time system. The grievance panel system utilized in South Carolina is not assessed here, as this structure was in place in Virginia prior to the use of part-time hearing officers and was found to be ineffective in meeting the demands of the Commonwealth.

The two full-time hearing officer models assessed for this study are the administrative and judicial models. In the administrative model, full-time hearing officers would be employed in a separate agency within the executive branch. This is the model that was proposed as a budget amendment in the 1999 legislative session. The amendment proposed a pilot program of two full-time hearing officers, employed by DERC, who would hear all grievances in the Richmond area. In the following assessment, the administrative model is assumed to be a full-time hearing officer system staffed by DERC. In the judicial model, full-time hearing officers would perform the

same duties and have the same authority as in the administrative model, but they would be employed by the Virginia Supreme Court. Each of the systems is assessed below for how well it promotes each of the goals identified in Chapter III.

Impartiality

Impartiality relates to the fairness of the hearing officer in conducting hearings and issuing decisions. Given the proper standards for professional conduct, hearing officers in either of the full-time models or the current part-time system should be relied upon to conduct a hearing in an impartial manner. Within any of the systems, procedures could be put in place to evaluate hearing officers' conduct and to remove or discipline hearing officers who did not conduct hearings in an impartial manner. In addition to individual hearing officers being impartial, the alternative systems can all maintain the integrity of the process by assigning hearing officers impartially, such as on a rotating basis.

However, while the hearings may be conducted impartially under any system, there is a potential problem of bias in the administrative model. This problem arises not in the initial hearing, but with challenges by a party concerning consistency with the grievance procedure. DERC is responsible for ruling on challenges concerning conduct of the hearing officers and consistency with the grievance procedure. Since DERC would have a direct relationship with the hearing officers, this could make it difficult to render impartial rulings on challenges.

Independence

The independence of the hearing officer system from the agencies and employees is important for maintaining actual and apparent impartiality. Based on the use of private-sector attorneys as hearing officers, the current system provides the most independence, while the administrative model provides the least. Although the hearing officers in the administrative model would be part of a separate agency, they may still be subjected to political pressure from budget actions and political appointments. The judicial model enjoys more independence than the administrative model, but the hearing officers would still be state employees. However, the judicial branch has safeguards to insulate it from outside political pressure, so the judicial model would generally enjoy the same level of independence as the current system.

Consistency

Both full-time hearing officer models promote the goal of consistency to a greater extent than the current part-time system, at least as the current system is now structured. The full-time models use a much smaller number of hearing officers to hear grievances, which results in the hearing officers hearing a much larger number of cases. The full-time models enhance consistency in interpretation of policy in two

ways: (1) by having fewer hearing officers issue decisions, and (2) by fostering collegial relationships among co-workers who are able to seek the advice of their peers and develop consensus within the agency.

Because of the large number of hearing officers in the current part-time system, consistency is not promoted. The hearing officers hear less than three grievances per year on average. In addition, there are few opportunities for hearing officers to discuss employment disputes with each other or to seek the advice of their colleagues. The part-time hearing officers may be unaware of decisions rendered in preceding cases.

Expertise

Both of the full-time hearing officer models promote the goal of expertise to a greater extent than the current part-time system. By hearing more cases, the full-time hearing officers are able to keep up-to-date with policies and procedures while gaining valuable experience conducting numerous hearings and writing numerous decisions. Hearing officers in the current part-time system, by contrast, hear less than three cases per year. Most agency representatives interviewed for this study believe that, in order to keep up-to-date with changes in employment law and policy, hearing officers need to be assigned to hearings with more frequency.

Initially, the administrative model would have an advantage over the judicial model in terms of the expertise of the hearing officers. DERC administers the grievance procedure and deals with personnel matters on a daily basis, and hearing officers housed within DERC could draw on the experience of the staff. Over time, however, hearing officers housed within the judiciary would gain this expertise.

Timeliness

Both the administrative and judicial models should be able to conduct hearings in a proficient manner. Initially, the administrative model may produce more timely results due to the prior experience of DERC staff in administering the grievance procedure. After an initial learning curve, the judicial model should be equally as capable as the administrative model in resolving disputes in a timely manner. One advantage both full-time models have over the current part-time system is that the hearing officers are likely to be able to conduct hearings and render decisions in less time as they gain more experience. The current system does not enable hearing officers to hear enough cases. Without the prior experience and past decisions to rely on, hearing officers must “reinvent the wheel” for each case.

However, one advantage the current system has over the full-time models is the flexibility to accommodate changes in the caseload. The current system may be less prone to backlogs than the full-time models, simply because there is a much larger number of hearing officers on the rotating list. When heavy caseloads occur, DERC can appoint more part-time hearing officers to meet the demand. Given resource con-

straints, the full-time models would most likely be staffed to accommodate the average caseload. When large increases occur, a backlog will likely result, and dispute resolutions will be delayed.

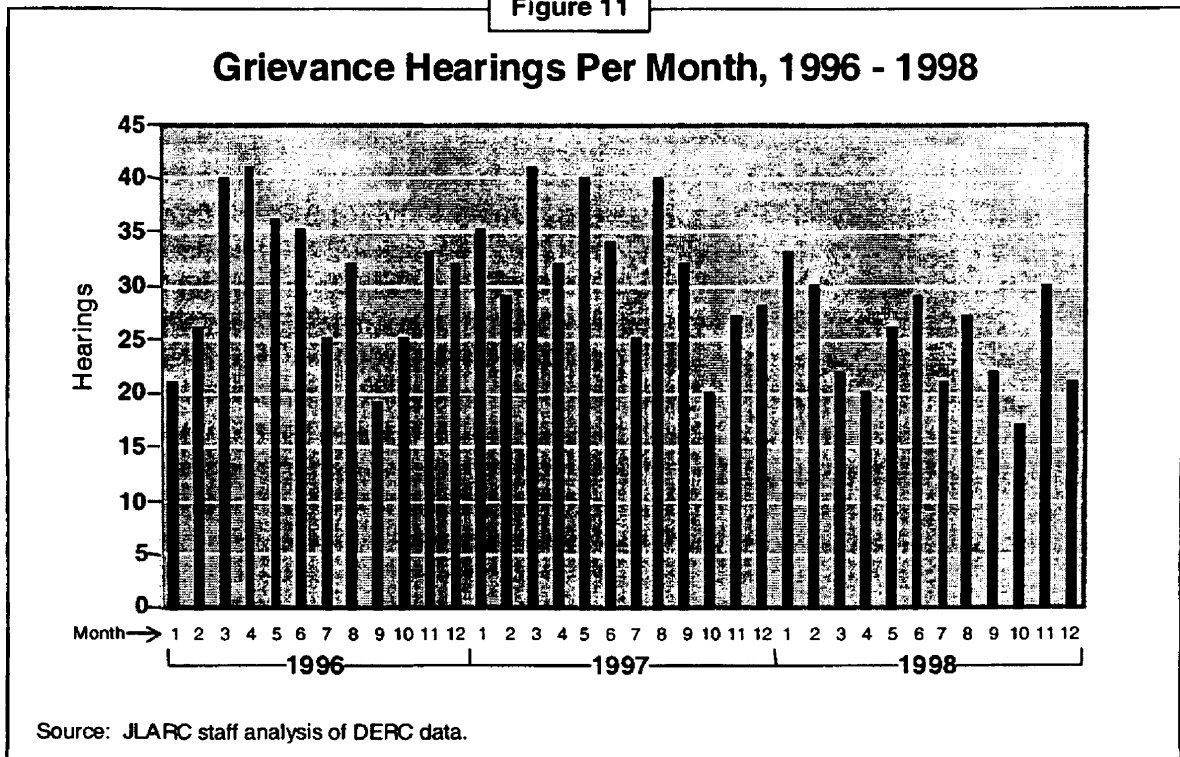
JLARC staff analyzed the number of hearings assigned by DERC over a three-year period from 1996 to 1998. The number of hearings per month ranged from 17 to 41, with the average being approximately 29. Figure 11 shows considerable fluctuation over time in the number of hearings per month.

Unless the hearing officers are underutilized in the full-time models, any significant fluctuation is likely to cause some delays in the grievance process. On five occasions over the three-year period, the number of hearings assigned in the month exceeded the average by more than 33 percent.

Cost-Effectiveness

As with timeliness, both the administrative and judicial full-time models should be equally cost-effective. In order to compare the cost-effectiveness of the full-time models with the current system, it is necessary to estimate the number of full-time hearing officers required to meet the caseload in Virginia, and to estimate the cost of employing the hearing officers. The estimate for the number of hearing officers required to staff a full-time unit is based on DERC's estimate that full-time hearing offic-

Figure 11



Source: JLARC staff analysis of DERC data.

ers would be able to accommodate one and one-half hearings per week. Assuming the unit is staffed by first-time classified employees who would take their allotted annual, holiday, personal, and sick leave, a full-time hearing officer would be able to hear 67.8 grievance cases per year. (The 67.8 hearings per year for each full-time hearing officer is consistent with other states, as West Virginia ALJs hear about 50 cases per year, Kentucky hearing officers hear between 50 and 75, and North Carolina hearing officers hear about 80 cases per year.) The average number of hearings per year between 1996 and 1998 was 348.7. Therefore, slightly more than five hearing officers would be needed to accommodate the caseload. This estimate is conservative, as it does not recognize geographical distances between localities in which hearings are held.

The current average salary for hearing officers and staff attorneys employed in the executive branch is \$38,365. The median salary is \$35,539, which is also the minimum salary for a "Grade 13" State employee. The starting salary for a Staff Attorney is \$32,510, which is the minimum salary for "Grade 12." The total cost to the State in terms of salary and benefits is estimated using a range of five to six hearing officers at grades 12 and 13. (Benefits are calculated at 34.54 percent of the cost of salary for FY 2000.) Table 4 shows the salary and benefits cost estimates given the number of hearing officers and the starting salary.

The State spent approximately \$256,350 on grievance hearings in 1998. This analysis shows a range of \$218,696 for five hearing officers at "Grade 12" to \$286,887 for six hearing officers at "Grade 13." Based on the range of salary and benefits costs for a full-time hearing officer staff, the costs of the alternative systems appear to be about the same.

However, several factors would likely make the actual cost of a full-time hearing officer unit more expensive than indicated in the range above. One major factor is that administrative and facilities costs are not taken into account. The costs for office

Table 4

Salary and Benefit Cost Estimates for a Full-Time Hearing Officer System		
Grade (Salary + Benefits)	Number of Full-Time Hearing Officers Required	
	5	6
12 (\$43,739)	\$218,696	\$262,436
13 (\$47,815)	\$239,073	\$286,887

Source: JLARC staff analysis.

space, office equipment, and travel will add to the figures above. Another factor that may increase the number of hearing officers required is the geographical locations of the hearings. The Richmond area alone requires nearly three full-time equivalent (FTE) hearing officers. The areas of Central, Western and Southwest Virginia require less than one FTE combined. The State may need to hire additional full-time hearing officers in order to reduce travel time for hearings. Finally, the cost estimates are conservative for the full-time unit in that the hearing officers are assumed to be first-time State employees with minimum annual and sick leave benefits. Considering all of these factors, there are unlikely to be any direct cost savings resulting from moving to a full-time hearing officer unit. In fact, it appears that the full-time hearing officer unit would likely cost more than the current system.

With Improvement, Current Grievance System Should Be Retained

While the use of full-time hearing officers may present advantages over the current system in the areas of consistency and experience, the loss of independence and subsequent appearance of bias could seriously erode trust in the grievance system. Certain procedures would need to be put in place to insulate the hearing officers from the influence of other administrative agencies, such as the method of hiring and appointing hearing officers and the method of evaluating their performance. One method used by other states to insulate the hearing officers and preserve their appearance of impartiality is to have them appointed by the Supreme Court rather than the Governor. Another method would be to have them elected to their positions.

The current structure in Virginia already provides for the impartiality and independence of hearing officers in the grievance process. It appears that the goals of greater consistency and expertise across the system could be achieved without adopting a full-time hearing officer structure. Chapters II and III of this report provide several recommendations to improve consistency, expertise, and the overall quality of decisions of hearing officers within the current structure. These recommendations include a reduction in the number of hearing officers, better oversight by DERC and the Office of the Executive Secretary of the Supreme Court to make the hearing officers more accountable, more extensive training for hearing officers, and the establishment of a database of prior decisions and an online forum to assist the hearing officers in interpreting policies and issuing decisions.

The employee association representatives and most agency representatives interviewed for this study believe that the current administrative hearing officer system is generally sound. Instead of changing the basic structure, most representatives identified actions that could be taken to simply improve the deficiencies of the current system. Adoption of the recommendations in this report would result in a grievance hearing structure that adequately meets the goals identified for a sound hearing system.

Appendixes

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Appendix A

Item 16 O – 1999 Appropriation Act

Utilization of Hearing Officers in Grievance Hearings

The Joint Legislative Audit and Review Commission shall conduct a review of grievance hearings, in particular the utilization of hearing officers, and report its findings to the General Assembly by December 1, 1999.

Appendix B



COMMONWEALTH OF VIRGINIA
Joint Legislative Audit and Review Commission
of the Virginia General Assembly

A Survey of Administrative Hearing Officers

The Joint Legislative Audit and Review Commission (JLARC) has been directed by the Virginia General Assembly to conduct a review of State grievance hearings. This mandate specifically requests that the use of hearing officers be examined. The purpose of this questionnaire is to obtain your views on various aspects of the hearing officer system and the grievance process. A copy of the study mandate is attached to this survey.

Your responses to the questions are very important to the study, and we appreciate your time and effort. Your answers will assist us in providing the information requested by the General Assembly. We hope you will be frank in your response. The data will be reported in aggregate form only. **No identifying information will be given or shared with any State agency.** If you have any questions about the questionnaire, please direct them to April Kees at (804) 819-4578 or Linda Ford at (804) 819-4568. Please return your completed questionnaire in the attached, postage-paid envelope by October 1, 1999. Alternatively, you may fax a copy of the survey to (804) 371-0101.

Name of Hearing Officer: _____

Telephone Number: _____ **Date:** _____

General Information

The following questions request general information about you in relation to the hearing officer system. Please write in the information requested or select the applicable box or boxes.

(1) How many years have you been a practicing attorney? (n = 83)

_____ year(s) **average: 26.78**

(2) What is the total length of time that you have served as an administrative hearing officer for the Commonwealth of Virginia? (n = 83)

_____ year(s) **average: 9.26**

(3) Please identify your current employment status. (*Please check only one box.*) (n = 81)

- 0 Full-time federal administrative law judge
- 5 Retired federal administrative law judge
- 0 Full-time state employee
- 0 Retired state employee
- 67 Full-time private sector attorney
- 5 Retired private sector attorney
- 4 Other (*please specify*):

(4) Please list any special areas of practice that you provide.

Hearing Officer Appointments

The following questions request your opinions concerning the appointment of hearing officers. Please write the information requested or select the applicable box or boxes.

(5) Do you believe that the current requirements to become an administrative hearing officer are adequate? (n = 82)

59 Yes

23 No *If no:* What changes should be made to the requirements?

(6) Do you believe that there are too few, too many, or about the right number of administrative hearing officers in your region? (n = 82)

0 Too few 51 Too many 31 About the right number

If you responded "too few" or "too many," please explain your response. What would be an appropriate number of administrative hearing officers for your region?

(7) What factors do you think should be used in evaluating a hearing officer for continued service?

(8) Do you think there should be term limits for hearing officers? (n = 82)

19 Yes *If yes: What would be an appropriate term limit?*

63 No

Caseload and Fees

The following questions request information about the number of grievance cases that you hear and the fees that you receive for your services. Please write in the information requested or select the applicable box or boxes.

(9) On average, about how many grievance cases are you assigned each year?
(n= 83)

_____ cases per year **average: 2.99**

(10) Do you believe that the current number of grievance cases that you are assigned is adequate to maintain expertise in State personnel issues?
(n = 81)

33 Yes

48 No *If no:* About how many cases per year do you believe would be adequate to develop and maintain the needed expertise? (n = 51) (note: includes three who answered yes)

_____ cases per year **average: 7.93**

(11) How many grievance cases would you like to be assigned per year?
(n = 83)

_____ cases per year **average: 9.59**

(12) Do you believe that the current hourly fees for grievance cases are adequate? (n = 82)

25 Yes

57 No *If no:* What should the fees be?

(13) What is the average length of time that you spend on a grievance case?
(n = 75)

_____ hours **average: 15.59**

Oversight and Technical Assistance

The following questions request information about the technical assistance and oversight that you receive from the Department of Employee Relations Counselors (DERC) and the Supreme Court. Please write in the information requested or select the applicable box or boxes.

(14) To what extent do you agree or disagree with the following statements about technical assistance and oversight? (For each statement please check only one box.)

	<u>STRONGLY AGREE</u>	<u>AGREE</u>	<u>DISAGREE</u>	<u>STRONGLY DISAGREE</u>	<u>NO OPINION/ UNDECIDED</u>
a. Technical assistance provided by DERC is useful and timely. (n = 81)	18 <input type="checkbox"/>	54 <input type="checkbox"/>	5 <input type="checkbox"/>	1 <input type="checkbox"/>	3 <input type="checkbox"/>
b. Technical assistance provided by the Supreme Court is useful and timely. (n = 83)	18 <input type="checkbox"/>	47 <input type="checkbox"/>	7 <input type="checkbox"/>	1 <input type="checkbox"/>	10 <input type="checkbox"/>
c. The hearing officer evaluation process used by the Supreme Court is appropriate. (n = 82)	11 <input type="checkbox"/>	33 <input type="checkbox"/>	16 <input type="checkbox"/>	2 <input type="checkbox"/>	20 <input type="checkbox"/>
d. The hearing officer evaluation process used by DERC is appropriate. (n = 78)	4 <input type="checkbox"/>	26 <input type="checkbox"/>	17 <input type="checkbox"/>	8 <input type="checkbox"/>	23 <input type="checkbox"/>
e. The training provided by the Supreme Court is good. (n = 83)	25 <input type="checkbox"/>	47 <input type="checkbox"/>	8 <input type="checkbox"/>	2 <input type="checkbox"/>	1 <input type="checkbox"/>
f. The training provided by DERC is good. (n = 83)	15 <input type="checkbox"/>	47 <input type="checkbox"/>	16 <input type="checkbox"/>	4 <input type="checkbox"/>	1 <input type="checkbox"/>

Please describe the reason(s) for any “disagree” or “strongly disagree” responses. (If additional space is needed, please use the last page of the survey or attach additional sheets.)

(15) What additional assistance, if any, would you like to receive from DERC?

(16) What additional training, if any, would you like to receive concerning grievance cases?

(17) Do you think that the Department of Personnel and Training's (DPT) personnel policies are clear? (n = 78)

63 Yes

15 No *If no:* Please cite examples of problems with DPT's personnel policies.

(18) Are there any State agencies for which you have heard grievance cases that you think have unclear personnel policies? (n = 78)

14 Yes *If yes: Please identify the agency(ies) and cite examples of the problem(s).*

64 No

(19) What difficulties, if any, do you encounter in performing your duties as an administrative hearing officer?

Other

The last few questions ask for your opinions concerning the need for changes to the hearing officer system and the grievance process. Please write in the information requested or select the applicable box or boxes.

(20) Do you think that a party to a grievance should be allowed to appeal a hearing officer's decision? (n = 83)

20 No

63 Yes *If yes: To whom should a party in a grievance case be allowed to appeal? (Please check only one box.)*
(n = 60)

29 Circuit Court

4 Court of Appeals

20 Panel of Hearing Officers

7 Other

(please specify):

(21) Do you think that any changes are needed to the hearing officer system for grievance cases? (n = 78)

47 Yes *If yes:* What changes are needed? Why are these changes needed?

31 No

(22) Do you think that any changes are needed to DERC's administration of the hearing officer system for grievance cases? (n = 78)

39 Yes *If yes:* What changes are needed? Why are these changes needed?

39 No

The following space is provided for additional comments you may have about the hearing officer system, DERC, the Supreme Court, or any topic you feel may be related to this study. (*Attach additional sheets if necessary.*)

THANK YOU FOR YOUR TIME AND ASSISTANCE.

PLEASE RETURN THE COMPLETED SURVEY
BY OCTOBER 1, 1999 TO:

JLARC
SUITE 1100, GENERAL ASSEMBLY BUILDING
RICHMOND, VIRGINIA 23219

ATTENTION: APRIL KEES

(FAX: 804-371-0101)

Appendix C

Agency Responses

As part of an extensive data validation process, State agencies involved in a JLARC assessment effort are given the opportunity to comment on an exposure draft of the report. Appropriate technical corrections resulting from the written comments have been made in this draft of the report. Page references in the agency responses relate to an earlier exposure draft and may not correspond to page numbers in this version.

This appendix contains responses from the Department of Employee Relations Counselors and the Executive Secretary of the Supreme Court.

DEC - 8 1999



COMMONWEALTH of VIRGINIA

Department of Employee Relations Counselors

Neil A. G. McPhie
Director

One Capitol Square
830 East Main Street
Suite 400
Richmond, Virginia 23219

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FAX - (804) 786-0111
administrator@derc.state.va.us

December 8, 1999

Mr. Philip A. Leone
Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, VA 23219

Phil
Dear Mr. Leone:

Enclosed for your review are three copies of this Department's Comments on the exposure draft of the JLARC staff report, *Review of the Use of Grievance Hearing Officers*. We believe the draft report contains useful information that will assist us all in providing quality services to state employees and agency management involved in grievance hearings.

I look forward to the opportunity to present our comments personally to the Commission at its December 13 meeting. Meanwhile, please let me know if you or your staff would like additional information or have any questions about our Comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Neil A. G. McPhie".

Neil A. G. McPhie, Esq.

NAGM

Enclosures

cc: The Honorable G. Bryan Slater
Secretary of Administration

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYEE RELATIONS
COUNSELORS**

**COMMENTS ON EXPOSURE DRAFT
of
Joint Legislative Audit and Review Commission Staff Report:
*Review of the Use of
Grievance Hearing Officers***

December 8, 1999

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The Department of Employee Relations Counselors (“DERC”) welcomes the opportunity to comment on the November 30, 1999, Exposure Draft of the Joint Legislative Audit and Review Commission (“JLARC”) staff report, *Review of the Use of Grievance Hearing Officers*. We are also appreciative of the useful information and perspectives contained in JLARC's draft report. As discussed further in our comments, DERC has already begun implementing many aspects of JLARC's recommendations – indeed, in some cases, our efforts began before the JLARC review commenced.

**I. DERC's Oversight Of Hearing Officers
Is Fair and Unbiased.**

According to JLARC, its study was requested in response to isolated accusations that the agency was “judge-shopping” – in other words, manipulating hearing officer selections and removals in an attempt to ensure pro-management outcomes in grievance hearings. (JLARC Staff Report: Review of the Use of Grievance Hearing Officers (“Report”) pp. 29, 44.)

DERC welcomed the investigation and cooperated fully with JLARC staff. The report found no evidence of “judge-shopping.” We are gratified that after months of study and review, JLARC's draft report exonerates DERC and its staff of those charges by concluding that (i) “DERC appears to select hearing officers based on a rotational basis and does not engage in judge-shopping;” (Report, p. 9) and (ii) “[i]t appears that [DERC's] modifications to the [hearing officer] list have been implemented based on sound practices, including a critical evaluation of hearing officers' performance.” (Report, p. 39.)

A. Legislation Establishing A Heightened Role By The OES Is Not Warranted At This Time.

DERC agrees that it should continue to work cooperatively with the Office of the Executive Secretary of the Supreme Court ("OES") to manage the hearing officer selection process. As suggested in JLARC's **Recommendation 2**, the development of a shared automated system for the selection of grievance officers, accessible to both DERC and OES , merits a closer look. A Code revision is not necessary to effectuate this Recommendation, however, and in fact could hinder the flexibility needed by DERC and OES management in devising a system that best meets the needs of those agencies and their constituents.

We would caution against the proposed Code revision in **Recommendation 1**, giving the OES a greater oversight role in DERC's selection process. We do not believe that the suggested amendment is warranted in light of the unfounded isolated claims of judge shopping, DERC's acknowledged expertise and experience in administering the grievance procedure, as well as JLARC staff's conclusion that DERC's selection, evaluation and removal actions are soundly based.

B. DERC Agrees That Its System For Evaluating Hearing Officers Is Sound, But Could Be Improved.

JLARC noted that DERC's current management has implemented an enhanced evaluation process designed to improve the accountability of hearing officers. (Report, pp. 46-48.) The system has worked well. We agree with

JLARC staff's assessment that the prior system was woefully inadequate. We are grateful that after an in-depth review, the JLARC study team concluded that the revised evaluation process was a generally sound and unbiased method for evaluating hearing officers. JLARC staff specifically checked for bias in DERC's assessment of hearing officers' performance. JLARC reviewed DERC's decision records of hearing officers who were recommended for reappointment compared to those who were not. JLARC found no bias. (Report at p. 50.)

Any system, however fair and unbiased, could still be improved. DERC agrees with JLARC's **Recommendation 3** that it should develop and follow a written policy on its evaluation process, rating system, and reappointment recommendations to OES, including a tracking mechanism that examines the timeliness of hearing decisions in light of the hearing date (not just the assignment date), as described in **Recommendation 4**. DERC's Director has already established and published a policy which includes provisions for an informal reconsideration by DERC of its selection, removal or reappointment decisions upon a hearing officer's request. In addition, DERC's Director has instructed DERC staff to reexamine that policy for compliance with the Recommendations.

Finally, we are appreciative of JLARC's suggestion that DERC begin to document when and why a hearing officer in the rotation was "passed over" for selection (e.g., unavailability, conflict of interest with a party to the grievance). Frankly, this kind of documentation had not occurred to us before. We must acknowledge, however, the value in being able to "prove a negative," in our case,

to be even better able to justify our selection actions and allay judge-shopping claims, however isolated and unsubstantiated such claims may be. In fact, at the instruction of DERC's Director, agency staff have already begun to implement JLARC's suggested documentation.

C. Hearing Officers Who Are Removed From Hearing Grievance Cases Should Not Be Entitled To A Due Process Hearing.

We agree with JLARC's **Recommendation 6** that a statutory amendment is needed to explicitly authorize DERC to remove hearing officers from the grievance hearing list. As a federal court in Richmond recently ruled, the private sector attorneys selected to serve as hearing officers in grievances do not have any property interest in continued selection for grievance hearings, nor do they have any corresponding due process rights. In DERC's opinion the Commonwealth should not bestow such a property interest to private attorneys by legislating the right to formally appeal a removal decision by DERC, as suggested in JLARC's **Recommendation 6**. A right of appeal would simply create another grievance procedure for the private sector attorneys who serve as hearing officers in state employee grievances. And in view of JLARC's **Recommendation 9** that the hearing officer list be substantially pared down, if a right of appeal is passed, DERC and possibly OES would become embroiled in ongoing removal hearings advanced by private sector attorneys taken off the list, draining scarce resources away from DERC's core constituents – state employees and their employing agencies.

II. The General Assembly Should Consider A Full Time Hearing Officer System.

DERC has reviewed with interest JLARC staff's analyses and conclusions regarding alternative hearing officer systems. We commend JLARC's study team for its research and the ideas that its research generated. We agree that the six criteria JLARC staff used – impartiality, independence, consistency, expertise, timeliness, and cost-effectiveness – are key attributes that quality hearing officer systems share. (Report, p. 113.) Indeed, DERC has made every possible effort to foster those qualities within our current system.

We also agree that DERC and OES should work together in reducing the current number of private sector hearing officers so that those remaining can obtain more assignments, and as a result, gain more experience, expertise, and efficiencies in adjudicating state employment disputes. (Report, p. 68.) Significantly, the hearing officers themselves appear to support a reduction in their numbers. Well over half of the hearing officers responding to JLARC staff's survey opined that there are too many hearing officers and they are not assigned enough grievance cases to maintain the desired expertise. (Report, Appendix B, pp. 3 and 5.)

In addition, DERC believes that a full time hearing officer system has strong merits as well. As recognized in JLARC's draft report, full time systems could promote the qualities of consistency, expertise, and timeliness. (Report, pp. 115-118.) DERC believes that timely and high quality decisions would in turn promote the interests of cost-effectiveness for the parties to a grievance. Significantly, full time systems are used (i) in all but one of the other states

JLARC staff surveyed (see Chart 1 attached to these Comments); and (ii) in several of the Commonwealth's own agencies (e.g., the Virginia Employment Commission, the Workers' Compensation Commission, the Department of Motor Vehicles, and the Department of Medical Assistance Services).

DERC acknowledges JLARC staff's concern that a full time administrative model could have the potential for bias, in that in-house hearing officer decisions could be challenged before the DERC Director, who would then be called upon to review a decision rendered by a DERC employee. We must point out, however, that similar appeals are routinely filed within at least two Virginia administrative agencies that adjudicate disputes between state employees and employers – the Virginia Employment Commission and the Worker's Compensation Commission – apparently without any significant problems. And, several of the states surveyed by JLARC report a similar model where decisions by a hearing officer are reviewed within the same agency. In addition, a subsequent right of appeal to a court, discussed next in these Comments, would also alleviate concerns of any type of bureaucratic bias, real or perceived. For those reasons, DERC would urge the General Assembly to consider a system of full time hearing officers.

III. The General Assembly Should Consider an Appeal Procedure.

JLARC found that the “clearest weakness of the current system is the lack of consistency in hearing officer decisions” (Report, p. 65), and that this lack of consistency is a “major shortcoming of the current system.” (Report, p. 60.) JLARC determined that “[t]hese inconsistencies can undermine agency policies

and negatively affect the fairness of the grievance procedure.” (Report, p. 66.) Accordingly, JLARC reasoned that a step that “could be taken to improve consistency in the resolution of employment disputes would be to implement an appeals process, whereby hearing officer decisions could be overturned by a higher authority. As hearing officer decisions are filtered through an appeals body with the authority to overturn decisions, greater consistency would likely result in the final decisions.” (Report, p. 95.) Furthermore, JLARC found that “[a]ll of the states reviewed, . . . and the federal government, have judicial review for administrative decisions of grievance cases” (Report, p. 101), and that three of these eight states, and the federal government, afford an administrative appeal prior to the judicial review. (Report, p. 99.) (See Chart 2 attached to these Comments). Finally, JLARC determined that “[c]onsidering that the other administrative hearing systems reviewed during the course of this study all have an appeals process, it may seem reasonable to have an appeals process in Virginia.” (Report, p. 102.)

JLARC found DERC staff in agreement with those findings. (See, e.g., Report, p. 103.) According to JLARC’s survey of hearing officers, the vast majority of hearing officers also think that an appeal should be provided. In this survey, JLARC asked whether “a party to a grievance should be allowed to appeal a hearing officer’s decision.” Out of 83 responses, 63 hearing officers (76%) responded “Yes”, there should be an appeal. (Report Appendix B, p. 8.) Likewise, a DERC survey found that nearly all executive branch agencies recognize the need for appeals from hearing decisions and support an appeal

process. Similarly, through a focus group conducted by DERC, which included non-management state employees, employees who have utilized the grievance procedure, and representatives from employee associations, the consensus emerged that an appeal process should be created.

Despite its findings that an appeals process could provide greater consistency in hearing decisions, JLARC decided that “the introduction of a formal appeals process is not warranted in Virginia at this time.” (Report, p. 104.) The abundant evidence cited by JLARC of this “clearest weakness” in the grievance system – the lack of consistency in decisions – leads to the opposite conclusion. Accordingly, DERC recommends that the General Assembly consider adding an appeal procedure to the current grievance system.

JLARC reasoned that “an appeals process does not appear warranted at this time” because such a “process will lengthen the grievance procedure and would likely make it more costly.” (Report, p. 95.) DERC agrees with these conclusions but believes: (i) that these disadvantages are heavily outweighed by the problems caused by not having an appeal; and (ii) that these disadvantages can be minimized.

A. The disadvantages created by an appeals process are outweighed by the disadvantages caused by not having an appeals process.

The major problem caused by not having an appeals process is the lack of consistency in hearing officer decisions. (Report, pp. 60, 65.) This problem was appropriately documented by JLARC and discussed above.

Potentially worse than the undisputed lack of consistency, however, are the severe repercussions within the Commonwealth's workplace when even a single egregious hearing decision takes effect. Some examples include:

- A hearing officer found that a State Trooper, while off-duty and unauthorized, improperly confiscated a patrol car for a Sunday afternoon joyride, operated the vehicle while **intoxicated**, at excessive speeds, in the middle of Northern Virginia traffic with an unauthorized passenger (his girlfriend) during which the Trooper "rolled" the car in the middle of the road, causing damage to the police vehicle, another car, himself, his passenger and others. Inconsistent with State Police policy, and contrary to the agency's action, the hearing officer reinstated the police officer to his employment as a State Trooper. This action serves to undermine the trust in the State Police and jeopardizes the safety of the public.
- In another case, after finding that a Correctional Officer had tested positive for marijuana, a hearing officer returned the Officer to work with the inmate population, on the grounds that the agency could not show that any harm had occurred in the workplace. In that same decision, the hearing officer concluded that marijuana was not a controlled substance under state and agency policy.

DERC believes that the Commonwealth cannot ignore such hearing results, regardless of their number. Such decisions have a demoralizing affect on other state employees, pose clear safety risks to the public and in the workplace, and must not be tolerated.

B. The disadvantages caused by an appeals process can be minimized.

DERC shares JLARC staff's concern that an appellate process could lengthen the time required to conclude a grievance. That concern can be allayed, however, through setting safeguards such as time parameters on appellate actions. DERC supports such time parameters.

Additional constraints could be imposed on the appeal process, thus reducing the time required for an appeal. JLARC points out the need to have an appeal go beyond the circuit court level. (Report, pp. 101-02.) DERC concurs with this recommendation and JLARC's reasoning. To reduce the time required for the appeal, and due to the undisputed need to go to an appellate court, the circuit courts could be bypassed altogether by appealing a decision of DERC directly to the Court of Appeals. Further limitations could be set on the cases heard by the Court of Appeals by making an appeal by petition, rather than by right. Other state systems surveyed by JLARC may also provide insights into ways to curtail the time needed to appeal grievance decisions. For example, JLARC cites the South Carolina grievance system as providing for an appeal as of right for an employee but requiring the approval of an administrative body before a state agency may appeal a grievance decision.

In short, the current system is inadequate to address the severe problems noted above. Neither the right to "challenge" a hearing decision administratively on the basis of policy or compliance with the grievance procedure, nor the right of an employee to petition a circuit court for an implementation order can substitute for a clear right for either party to appeal errors of law and egregious abuses of discretion in a hearing decision. Accordingly, an appeal process should be considered.

IV. DERC Must Alleviate Its Backlog of Rulings.

We fully agree with JLARC's **Recommendation 18** that DERC must reduce its rulings backlog. Without question, severe staffing shortages have adversely affected the agency's ability to investigate and draft rulings as quickly as in past years when the agency was fully staffed. We have now replaced all but two full time counseling vacancies, and have hired a part-time counselor as well.

Reducing our backlog is and has been our highest priority. Our strategy has involved a three-pronged approach. First, we established earlier this fall a "strike force" of counselors to concentrate on the backlog. Second, we have begun more formalized in-service training on rulings topics than in the past, in order to bring all of our recently hired counselors up to speed as soon as possible. Third, we have begun the development of new ruling templates so as to minimize the need for repeated legal research and analyses on similar issues. We continue to aim for rulings that are clear, focused and legally sound. Thus, our goals for rulings will always include quality as well as speed. Under this approach, most of DERC's backlog of rulings will be eradicated by December 31, 1999.

V. Hearing Officers Must Be Better Trained.

DERC values JLARC's recommendations for enhancing the training and development of its current hearing officers, and for clarifying their specific role in reviewing agency management actions. We agree that a clearer role will allow

for more focused training, which in turn will result in clearer decisions of higher quality. In addition, while our training sessions are generally well received (Report, p. 80), we concur that training should focus more on the practical issues that hearing officers will most likely face. Training sessions should also be more interactive, with increased small group discussions instead of primarily using a lecture format. Further, as JLARC has also pointed out, the knowledge base and skills of new and experienced DERC hearing officers can also be strengthened through ongoing communications and access to past hearing decisions. (Report, pp. 78–83.)

While we agree with the study team’s observations, we must caution that DERC’s current budget and staffing constraints could prevent the implementation of some of the recommendations, certainly if DERC were to be the only source of funding. Nevertheless, we view JLARC staff’s recommendations with enthusiasm, will explore them fully, and expect that hearing officer training and development will strengthen as a result.

**Chart 1:
Use of Full-Time Hearing Officers**

	Full-time Hearing Officers:	Part-time Hearing Officers:	Notes:
Virginia		X	Non-state employees.
Kentucky	✓		Contract employees who generally work full-time load hearing grievance cases for the state.
Maryland	✓		
New Jersey		X	Uses arbitrators.
North Carolina	✓		
Pennsylvania	✓		
South Carolina	✓		
Tennessee	✓		
West Virginia	✓		
Federal Government	✓		

Source: JLARC's draft report.

**Chart 2:
Use of Appeals in Grievance Procedures**

	Appeal Allowed:	No Appeals:	Notes:
Virginia		X	
Kentucky	✓		Has administrative and judicial appeal.
Maryland	✓		Has judicial appeal.
New Jersey	✓		Has judicial appeal.
North Carolina	✓		Has administrative and judicial appeal.
Pennsylvania	✓		Written recommendations of hearing officers reviewed by administrative board. Has judicial appeal from final rulings.
South Carolina	✓		Has judicial appeal.
Tennessee	✓		Has administrative and judicial appeal.
West Virginia	✓		Has judicial appeal.
Federal Government	✓		Has administrative and judicial appeal.
Georgia	✓		Has administrative and judicial appeal.
Indiana	✓		Has administrative and judicial appeal.
Utah	✓		Has administrative and judicial appeal.

Source of all information other than that regarding Georgia, Indiana and Utah:
JLARC's draft report.

Source for all other information:
DERC staff research.

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December 6, 1999

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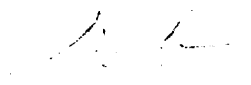
via facsimile: 371-0101

Dear Phil:

Thank you for your letter of November 30, 1999 and the enclosed exposure draft of the JLARC staff report, Review of the Use of Grievance Hearing Officers. I have reviewed the report and the recommendations of staff. In my opinion, the report is well done, and I have no disagreement with the information included. Likewise, if the recommendations are adopted, our office would be happy to move forward with their implementation. Again, congratulations on a thorough report.

With kind regards and best wishes,

Very truly yours,



Robert N. Baldwin

RNB:mlr

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