JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of Radford University
Ruling Number 2023-5558
June 27, 2023

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11916, which addresses a grievance with Radford University (the "university" or "agency"). For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 11916, as found by the hearing officer, are as follows:[1]

> The grievant served as a maintenance worker for the school at all relevant times. In October 2022 he had been employed at the school for approximately 4 years. He had performed capably in his tasks and received annual evaluations of "contributor." He is of slight stature and suffers from mild persistent asthma and a learning disability. He had previously received from the school a Group I Written Notice on September 13, 2021. That notice was for failing to follow written policy and disruptive behavior; it remained active in October 2022.
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> In October of 2022, the department in which the grievant served had a staffing shortage. The grievant overheard a private discussion among higher level employees on October 12 regarding the plan to reassign certain employees to different work sites on the campus. The following day, October 13, the grievant's Supervisor and a housekeeping manager went looking for the grievant to tell him that he was being reassigned to a different building, commencing the following week. They located the grievant at the desk of a fellow employee, looking at something on a computer. They asked him to come with them to a more private room. Once they were in this separate room, they informed him of the pending reassignment, telling him that it was based on the business needs of the school. The manager explained that it was beneficial to the grievant as it would take him away

[1] Decision of Hearing Officer, Case No. 11916 ("Hearing Decision"), May 1, 2023, at 3-5.

from a supervisor and one other individual in the building where he was then assigned. He had a contentious relationship with those people.

The grievant reacted strongly to this news. He stated that the decision was a political one being made by the Associate Vice President for Facility Management. He stated that the Associate Vice President was in trouble and that it was a well-known fact. He threatened to report the administrator to "Richmond." By his words and gestures he indicated that he would not accept the decision to reassign him to a different building. He threatened legal action against unspecified individuals.

The meeting ended abruptly with the grievant indicating he would be going to the office of the Director of Housekeeping Services to discuss the reassignment. As the two women and the grievant went in the direction of that office, the grievant disappeared. He contacted the police department for the school while the women preceded further to locate the director. The grievant was next seen outside the office of the Associate Vice President with a school police officer. The officer asked the ladies whether they had been bullying the grievant and had called him "stupid." The women denied that allegation. The grievant was escorted to meet with the human resources manager. After a discussion with him, she asked him to leave the school that day, even though his scheduled shift had not formally ended. Instead of immediately vacating the premises, the grievant proceeded to drive through a parking lot as though he was looking for something or someone. He did leave the campus shortly thereafter.

The grievant was then placed on administrative suspension and the due process steps commenced. The process culminated with the issuance of the Written Notice on December 5, 2022. The disciplinary action cited him for two Group I level offences, abuse of state time and disruptive behavior. He was also cited for failing to follow instructions or policy as a Group II level offence. He received a Group Level III offence citation for interference with state operations.

On December 5, 2022, the university issued to the grievant, all on a single Written Notice form, a Group I Written Notice for disruptive behavior and abuse of state time, a Group II Written Notice for failure to follow instructions and/or policy, and a Group III Written Notice for interfering with state operations for eavesdropping, all of which cumulatively resulted in termination.[2] The grievant timely grieved the disciplinary action, and a hearing was held on April 19, 2023.[3] In a decision dated May 1, 2023, the hearing officer determined that the agency presented sufficient evidence for the "disruptive behavior" Group I offense but not for the "abuse of state time" offense, that the agency presented sufficient evidence for two separate Group II offenses, and did not present sufficient evidence for the Group III offense.[4] Consequently, because DHRM Policy 1.60 allows for termination when two Group II offenses accumulate, the hearing officer upheld the grievant's termination.[5] The grievant now appeals the decision to EDR.

[2] Agency Ex. D at 1-3.
[3] *See* Hearing Decision at 2; Agency Ex. A at 4.
[4] Hearing Decision at 6-10.
[5] *Id.* at 10.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant has disputed the hearing decision and hearing officer's assessments primarily for reasons of bias, discrimination, and assertions that the agency's witnesses lied under oath. Fifteen days after submitting his appeal, the grievant submitted new evidence as an addendum. Shortly thereafter, the university responded with a rebuttal, arguing that the submitted new evidence was untimely, and even if it was considered timely, the new evidence was not relevant.

Newly Discovered Evidence

As a preliminary matter, the grievant appears to have submitted new evidence that was not included in the original exhibits. The evidence is a letter written by the grievant detailing certain work-related issues between a supervisor and another coworker. The agency argues in its rebuttal that regardless of relevancy, the new evidence should not be admitted into the record because the grievant did not "immediately" submit the evidence (within five workdays), citing to EDR's Notice of Receipt of Ruling Request. Whether or not this new evidence is considered timely, EDR cannot find the evidence material to the grievant's case.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[9] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[10] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new

[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[10] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> outcome if the case were retried, or is such that would require the judgment to be amended.[11]

The grievant has not demonstrated that the submitted addendum meets these factors. For example, nothing indicates that the evidence is likely to produce a new outcome if the case were retried. The evidence surrounds a conversation the grievant had with another coworker and that coworker's experience with her supervisor, including some information the grievant argues addresses the credibility of a witness. The evidence, at best, can be described as potentially pertaining to impeaching information. The addendum does not elaborate on the events giving rise to the October 13 incident. Therefore, there is no basis for EDR to re-open or remand the hearing for consideration of any new evidence submitted by the grievant on appeal.

Credibility of Witnesses

The grievant claims that, among other things, the agency witnesses lied under oath, implying that the hearing officer's findings of fact are inaccurate. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[14] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[15] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Further, nothing in the record supports the implication that any of the agency's witnesses lied during their testimony. Likewise, in the grievant's appeal, he cites to no particular evidence that supports that implication. The hearing officer also noted in his decision that he found the testimony of two of the agency witnesses more credible than that of the grievant.[16] For the reasons given, EDR adheres to the hearing officer's findings of fact and does not find any abuse of discretion. Accordingly, EDR will not disturb the hearing decision on these grounds.

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[11] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[15] *Grievance Procedure Manual* § 5.8(2).
[16] Hearing Decision at 7.

Hearing Officer Bias

The grievant argues on appeal that the hearing officer himself was showing bias and "favoritism" for the agency, and for that reason, issued an unfair ruling. The grievant asserts that the hearing officer "should be removed from office because of his discrimination, racism, 'favoritism', lying, and 'weaponizing' my job, and differences against me." The grievant also alleges that the hearing was unfair because he was left "alone" without representation and was being intimidated by the security officer in the room.

The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[17]

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[18] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[19] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[20] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[21]

After reviewing the hearing recording, EDR cannot find any instances reflecting bias or favoritism by the hearing officer. Throughout the hearing, the hearing officer remained impartial, allowing both sides to fully ask and answer questions appropriately, and did not interject when the grievant was presenting his case. The grievant cites to no evidence to support his allegations of bias and, therefore, has not carried his requisite burden. As to the other allegations, EDR has made clear that parties have the option to be represented by a person of their own choosing or to represent themselves, and the grievant apparently made the choice to represent himself. As to the security officer, the hearing officer has the authority to determine whether observers may be present during the hearing,[22] and the grievant made no objection to the officer's presence in the hearing. EDR's own review of the record also does not suggest that the security officer's presence or behavior

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[17] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[18] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

[19] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

[20] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[21] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[22] *Rules for Conducting Grievance Hearings* § IV(A).

affected the hearing. For these reasons, the grievant has not demonstrated evidence of hearing officer bias and, accordingly, EDR will not disturb the hearing decision on these grounds.

Discrimination

The grievant alleges on appeal that his supervisors engaged in discrimination against him in the workplace, particularly based on his learning and medical disabilities, his age, physical size, and having friends of different races. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, genetics, or disability."[23] While law and policy prohibit discrimination, the grievant had the burden of proof to establish a claim of discrimination.[24] The hearing officer made note in his decision that the grievant brought discrimination and harassment claims on the basis of his disabilities and physical condition, and found that "the evidence did not show that his misconduct was a manifestation of his alleged disabilities."[25] EDR has also not found any evidence that would support a finding of discrimination. The exhibits the grievant provided include a doctor's certification regarding a health matter, but nothing related to his learning disability.[26] The agency testified in the hearing that they provided an accommodation regarding the wearing of his mask for the health matter; the grievant also confirmed on cross-examination that the attempted reassignment would not have affected his health matter.[27] Finally, the written statements of the supervisors who informed the grievant of reassignment stated that the agency was reassigning multiple staff members due to business needs, and the agency witness who initiated the reassignment stated that the grievant was one of the "three or four" who were being reassigned.[28]

In consideration of the evidence presented at hearing, the hearing officer determined that he could not find that the termination was based on "discriminatory or improper motives."[29] EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Considering that the grievant bore the burden to prove discrimination by a preponderance of the evidence,[30] EDR will not disturb the hearing decision on this basis.

Hearing Officer's Decision

The primary matter to discuss in this review is the hearing officer's final determinations made in the hearing decision. Specifically, there is some ambiguity regarding which disciplinary

[23] DHRM Policy 2.05, *Equal Employment Opportunity*, at 1.
[24] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).
[25] Hearing Decision at 9.
[26] Grievant Ex. 1. This does not necessarily imply that the grievant does not have a learning disability – only that there is no documentation to support it in the record.
[27] Hearing Recording at 1:33:50-1:34:40 (Agency witness testimony), 3:33:15-3:34:00 (Grievant testimony).
[28] Agency Ex. E; Agency Ex. F; Hearing Recording at 2:19:50-2:21:45 (Agency witness testimony).
[29] Hearing Decision at 9.
[30] *See Rules for Conducting Grievance Hearings* § VI(B)(1). EDR's analysis of these claims is based on a review of the evidence admitted into the hearing record by the hearing officer.

action(s) were issued to the grievant, and what the hearing officer determined to uphold and/or rescind.[31] The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[32] Reviewing the record, it appears that while the agency issued a single physical Written Notice, the discussion on the form indicates that the grievant was issued a Group I, a Group II, and a Group III Written Notice.[33] The agency cited two offense codes for the Group I, one code for the Group II, and one code for the Group III Written Notice.[34] Specifically, the agency cited "abuse of state time" and "disruptive behavior" as the Group I level offenses, "failure to follow instructions and/or policy" as the Group II level offense, and "interfering with state operations" as the Group III level offense.[35] This was all verified by the agency via witness testimony in the hearing.[36]

The discrepancy in what was issued versus what the hearing officer upheld appears upon reviewing the hearing decision. The decision states that the Written Notice "cited [the grievant] for all three levels of offences"; specifically, he noted that the disciplinary action "cited him for two Group I level offences," "cited for failing to follow instructions or policy as a Group II level offence," and "a Group III level offence citation for interference with state operations."[37] However, later in the decision, the hearing officer states, "I have found that the grievant committed, and was properly cited for, two Group II level offences."[38] This is significant because DHRM Policy allows for discharge to occur for an accumulation of two Group II level offenses,[39] and since the hearing officer did not find evidence to support the Group III level offense,[40] he upheld the grievant's termination solely on the accumulation of two Group II level offenses, despite only one Group II being cited in the original Written Notice.[41] Further, it is unclear from the hearing decision what misconduct supports two separate Group II Written Notices. It would appear that the hearing officer has described the grievant's failure to accept the reassignment and the manner in which he behaved in the meeting as separate behaviors, but it is unclear.[42] For example, the hearing decision creates confusion by stating that "the second Group II offence noted in the Written Notice is for the refusal to accept the reassignment to a different building," despite previously stating that the first Group II offense was for the same behavior.[43] For the foregoing reasons, EDR respectfully requests that the hearing officer reconsider his decision in order to provide clarity regarding the Group I, Group II, and Group III Written Notices that were issued via the agency's single Written Notice form.

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[31] While this issue was not specifically raised in the grievant's appeal, the potential concern is so fundamental to the question of the ultimate outcome of this matter that it cannot be ignored in this review.
[32] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[33] Agency Ex. D at 3.
[34] *Id*. at 1.
[35] *Id*. at 3.
[36] *See* Hearing Recording at 11:45-12:45, 2:53:45-2:54:30.
[37] Hearing Decision at 2, 5.
[38] *Id*. at 10.
[39] *See* DHRM Attachment A: Policy 1.60, *Standards of Conduct*, at 2.
[40] Hearing Decision at 9.
[41] Agency Ex. A at 3.
[42] Hearing Decision at 7-9.
[43] *Id*. at 7, 9.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, EDR finds that the hearing decision must be reconsidered by the hearing officer in order to clarify what disciplinary actions were issued, which of those disciplinary action(s) the hearing officer upholds, and whether the upheld disciplinary action(s) in fact lead to a dismissal. The factors relied upon by the hearing officer to reach the result that two separate Group II level offenses were supported by the agency and subsequently a termination were not clearly identified or supported by the record. Therefore, the matter is remanded to the hearing officer for further consideration and application of the relevant state and agency policies consistent with this ruling.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[44] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[45]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[46] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[47] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[48]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[44] *See*, *e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[45] *See Grievance Procedure Manual* § 7.2.
[46] *Id.* § 7.2(d).
[47] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[48] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).