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COMPLIANCE RULING

In the matter of the University of Virginia
Ruling Number 2023-5564
June 6, 2023

This ruling addresses the grievant's attorney's compliance ruling request in grievances filed against the University of Virginia (the "agency" or "university"), which are currently pending for a hearing (Case Nos. 11948, 11971). The grievant is challenging the hearing officer's letter to the parties, dated May 25, 2023, which responded to allegations made by the grievant and his attorney.

In email correspondence, the grievant's attorney made the following requests of the hearing officer: 1) find that the university "has violated [*Grievance Procedure Manual* § 1.9] and applicable laws, regulations, and other policies and procedures, and thus the writeups that [the university] has filed against [the grievant] are immediately rescinded"; 2) the university "be ordered to grant the relief that [the grievant] requested" in an email attachment; and 3) the university "be referred to proper authorities for their criminal transgressions." In a letter to the parties explaining the hearing officer's authority to issue sanctions, the hearing officer provided the following response:

Grievant makes several allegations against the University of Virginia including that the University "unlawfully altered [the grievant's] personnel file." The University has not yet offered its proposed exhibits and it is unclear whether the University intends to offer altered documents. Documents that are "altered" but not presented to the Hearing Officer cannot affect the outcome of the hearing decision so as to materially undermine the hearing process. Accordingly, there is no basis for the Hearing Officer to impose sanctions against the University.

The Hearing Officer has not witnessed any crimes and will not make any criminal referrals. If [the grievant's attorney] or [the grievant] have witnessed crimes, there is nothing in the Grievance Procedure that would prohibit them from taking appropriate action to have those crimes addressed.

The grievant's attorney has appealed the hearing officer's determinations and seeks this ruling from EDR.

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The grievant's request concerns his argument that the university has altered records in his personnel file. The grievant and his attorney identify the existence of an unsigned Written Notice, apparently located in his personnel file,¹ which has been described by the grievant as a "Fraudulent, Unsigned Group Notice," and the university has described as a draft version that was never issued to the grievant. The university states that the final version of the Written Notice was ultimately given to the grievant and is the subject of the upcoming hearing. The university states that it does not plan to offer this unsigned, draft version as an exhibit at hearing and that steps will be taken to remove the draft version from the grievant's personnel file. The hearing officer appears to have appropriately addressed this issue in finding that documents not presented as evidence to the Hearing Officer can have no impact on the outcome of the hearing or materially undermine the hearings process. As such, EDR cannot find that the hearing officer has abused his discretion in making this assessment at the pre-hearing stage. While the grievant's attorney asserts that the hearings process has been undermined by the existence of this unsigned Written Notice, EDR is aware of no reasonable argument that the hearings process has been so impacted. It is not unreasonable to believe that draft versions of Written Notices exist. To the extent that such a draft version should not have been in the grievant's personnel file, it appears that the appropriate step to take to address such a mistake is to remove the draft version from the file, which the university states it will do.² Accordingly, we can find no basis to dispute the hearing officer's assessment of this matter.

The grievant has identified other records in his personnel file³ he alleges have been altered. The grievant states that a performance review for the 2020-21 period was completed by a supervisor that did not work for the university during that performance period. In reviewing the document provided by the grievant, it is unclear what this document is. The document also includes a comment by the supervisor stating "no ability to evaluate this any longer (way past due)" and "[n]o ability to evaluate at this point – way overdue evaluation," suggesting that this record was created after the 2020-21 performance period. The document is not dated, appears incomplete, and is unclear in its application or purpose. The grievant also identifies a performance evaluation purportedly for calendar year 2022, which the grievant states should have been completed by a different evaluator. The evaluation appears to have been completed after the grievant's termination and was not delivered to the grievant. While the existence of these documents may raise questions, we do not agree with the grievant's assessment of them being "fraudulent" or evidence of wrongdoing without more information or evidence being provided. Further, the grievances at issue do not challenge the grievant's performance evaluations. Given that these records appear to have no material relatedness to the case (as yet), and they have not been presented as evidence, it is unclear how the existence of these records undermines the hearings process in any reasonable way

¹ Because the university appears to confirm that this record may have been included in the grievant's personnel file, we will assume for purposes of this ruling only that the record was in the grievant's personnel file.

² The grievant's attorney disagrees with the university's approach and states that the removal of the record "does not absolve [the university] of their transgressions." However, EDR can find no indication of any way in which the grievant has been impacted or unduly prejudiced by the existence of this draft Written Notice in his personnel file. Accordingly, simply removing the record from the file seems to be the most direct way to correct any mistake that has occurred.

³ EDR has not been presented with information confirming one way or another that the records described below were in the grievant's personnel file. For purposes of this ruling only, and because the university has not offered a contrary representation, we will assume that the records were in the grievant's personnel file.

that would lead the hearing officer to make a different determination as in his letter to the parties. Consequently, we have no basis to find that the hearing officer has erred in his handling of the matter thus far.

The grievant's attorney additionally asserts that the hearing officer "is willfully turning a blind eye to evidence suggesting that [the university] has committed crimes in this case." The grievant's attorney states that the university's "unlawful alterations to [the grievant's] personnel file constitutes criminal activities, which violate more than just a grievance and hearing process. It is disallowed under Federal, State, and local laws, regulations, and [the university's] policies and procedures." In support of this accusation, he has cited to an attachment to DHRM Policy 1.60, *Standards of Conduct*, and its discussion of intentional falsification of state records, which refers to a federal regulation⁴ the grievant's attorney asserts "makes clear that state employees tampering with personnel files is illicit conduct."⁵ While we do not disagree that falsification of a state record by a state employee could subject that employee to disciplinary action under applicable state or agency policy, EDR has not reviewed information supporting such a claim here, much less that there is evidence suggesting that a crime has occurred in violation of a criminal statute yet to be identified by the grievant. Accordingly, even if it was within this Office's authority to make a criminal referral as the grievant has requested, EDR has no information on which to base such a referral. Therefore, we concur in the hearing officer's assessment in the letter to the parties.

The grievant and his attorney assert that relief must be granted as a result of the university's alleged misdeeds described above. The grievant seeks reinstatement and the immediate rescission of all disciplinary actions challenged. Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,⁶ we favor having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party.⁷ The agency's actions here, if they can be considered noncompliance, do not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction of awarding substantive relief in favor of the grievant at this time. Similarly, EDR has reviewed nothing that would support the hearing officer ordering the relief sought at this pre-hearing stage as a sanction.⁸ EDR concurs with the hearing officer's assessment of the matter at this stage. Accordingly, the relief requested by the grievant is denied.

EDR's rulings on compliance are final and nonappealable.⁹ To the extent determined relevant by the hearing officer, the grievant or his attorney may wish to present evidence about the records discussed in this ruling and/or related claims of falsification at the hearing in this matter.

⁴ 31 C.F.R. § 0.211. This section appears to be part of the U.S. Department of Treasury rules for employee conduct.

⁵ The grievant has also cited to the university's Code of Ethics.

⁶ Va. Code § 2.2-3003(G).

⁷ See, e.g., EDR Ruling Nos. 2021-5202, 2021-5227; EDR Ruling No. 2018-4718.

⁸ See *Rules for Conducting Grievance Hearings* § III(E).

⁹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

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