

Issue: Compliance – Grievance Procedure (Hearings); Ruling Date: March 16, 2017;
Ruling No. 2017-4519; Agency: Virginia Commonwealth University; Outcome:
Hearing Officer in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

COMPLIANCE RULING

In the matter of Virginia Commonwealth University
Ruling Number 2017-4519
March 16, 2017

Virginia Commonwealth University (the “University” or the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) in relation to an order from the hearing officer addressing the burden of proof in an upcoming grievance hearing.

FACTS

The grievant received an overall rating of “Unsatisfactory Performer” on his annual performance evaluation. He filed a grievance with the University challenging the performance evaluation. The grievant was subsequently terminated from employment with the University, after his work performance was again found to be unsatisfactory after a three-month re-evaluation period. The grievant filed a dismissal grievance with EDR challenging his termination. In EDR Ruling Number 2017-4488, EDR qualified the grievance challenging the grievant’s annual performance evaluation for a hearing and consolidated it with the dismissal grievance disputing the grievant’s termination due to unsatisfactory performance.

After a hearing officer was appointed, the University requested clarification regarding which party would have the burden of proof at the hearing. The hearing officer issued a ruling on March 6, 2017, stating that the University should present its evidence first, that the “Grievant has the burden of proving that his annual performance evaluation was arbitrary or capricious or otherwise issued contrary to State policy,” and that “the Agency has the burden of proving that Grievant’s dismissal was in accordance with State policy and that his re-evaluation was not arbitrary or capricious.” The University has now requested a compliance ruling to EDR, arguing that the grievant should have the burden of proving “that both the evaluation and re-evaluation were arbitrary and capricious” because his termination was “non-disciplinary in nature,” and that the grievant should be required to present his evidence first at the hearing.

DISCUSSION

In support of its position, the University asserts that no disciplinary action was issued to the grievant and that it “simply followed the evaluation process” required by DHRM Policy 1.40, *Performance Planning and Evaluation*. The grievance procedure explicitly provides that, [i]n disciplinary actions and dismissals for unsatisfactory performance, the agency must present its

evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances.”¹ The grievant’s termination was effectuated through a re-evaluation that found his performance unsatisfactory, i.e., a dismissal for unsatisfactory performance. Accordingly, EDR finds no error in the hearing officer’s conclusion that the University bears the burden of proving that the grievant’s termination through the re-evaluation was warranted and appropriate.

The *Rules for Conducting Grievance Hearings* further state that “the grievant bears the burden of proof for grievances regarding non-disciplinary actions.”² The grievant’s overall rating on his annual performance evaluation, while related to the re-evaluation that resulted in his termination, is not a disciplinary action and did not, by itself, result in his termination. Accordingly, EDR finds no basis to overturn the hearing officer’s determination that the grievant has the burden of proving that his performance evaluation was arbitrary, capricious, or otherwise improper.

While the University’s desire that the grievant should present his evidence first is understandable, the hearing officer’s order that the University should presents its evidence first is reasonable in this case and not an abuse of discretion. Where both parties have the burden of proof with respect to certain issues, one party must, of necessity, present its evidence first. As the hearing officer noted, “[n]either party’s burden of proof changes based on which one presents first or second,” and “the Agency will retain the opportunity to present rebuttal evidence regarding the re-evaluation.”

Accordingly, and for the reasons set forth above, EDR declines to disturb the hearing officer’s ruling advising the parties of their burdens of proof in this case. EDR’s rulings on matters of compliance are final and nonappealable.³



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¹ *Grievance Procedure Manual* § 5.8(2); *Rules for Conducting Grievance Hearings* § IV(C).

² *Rules for Conducting Grievance Hearings* § VI(C); see *Grievance Procedure Manual* § 5.8(3).

³ Va. Code § 2.2-3003(G).