Issue: Administrative Review of Hearing Officer's Decision in Case No. 11137; Ruling Date: September 25, 2018; Ruling No. 2019-4771; Agency: Virginia Commonwealth University; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2019-4771
September 25, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11137. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11137, as found by the hearing officer, are as follows:[1]

> Virginia Commonwealth University employed Grievant as a Pre-Award Research Manager/Grant & Clinical Trials Budget Analyst/Regulatory Coordinator. She had been employed by the Agency for over 17 years. She earned a Certificate for Research Administration in December 2008. When Faculty applied for grants, Grievant's Unit helped them obtain funding. Grievant had prior active disciplinary action. On August 25, 2017, Grievant received a Group II Written Notice for failure to follow instructions.
>
> The Supervisor began working for the Agency in June 2015. Eleven divisions were under her supervision. Her Department was responsible for getting and coordinating grants. The Supervisor earned a Certificate for Research Administration in 2016. The Supervisor directly supervised Grievant from August 2016 until November 3, 2017.
>
> Ms. S was the Grant & Fiscal Manager. Ms. S reported to the Supervisor. Ms. S was not Grievant's Supervisor but the Supervisor would delegate responsibilities to Ms. S that would involve giving instructions to employees. When Ms. S needed to have something done, Ms. S had the Supervisor's authority to act. Grievant was aware she was expected by the Supervisor to comply with Ms. S's instructions.
>
> . . . .

[1] Decision of Hearing Officer, Case No. 11137 ("Hearing Decision"), August 9, 2018, at 2-3, 6-13 (citations omitted).

The Agency had a shared computer drive (T drive) accessible to all unit employees including Grievant. Each employee including Grievant had a separate personal drive (U drive) that only the employee had authority to access. Grievant kept her work on her U drive and if other employees needed access to Grievant's work product, they had to request Grievant to send them a copy of a document she kept in her personal drive. This created a delay when other employees needed access to Grievant's work documents.

Agency managers created a New Folder Structure because Grievant kept documents in her personal computer drive that other staff needed to access. Those staff had to contact Grievant to obtain the necessary documents. In order to eliminate the need to contact Grievant to obtain documents, Agency managers decided that Grievant's documents should be contained in a shared drive. Agency managers reviewed the folder structures of other institutions such as the National Institute of Health to determine the best structure for the Agency. Agency managers consulted with Agency research coordinators who would use the new folder structure and with Grievant. Using input provided by Grievant and others, the Agency developed a new folder structure.

Grievant and other employees received training regarding the new folder structure. On July 20, 2017, the Supervisor, Ms. S, Grievant and several other employees met to discuss the new folder structure. Grievant was asked for her input on the completed new folder system. Grievant asked for a regdocs folder to be created. This folder was added to the system.

On July 24, 2017, the new folder structure was finalized and implemented. As of July 25, 2017, all of the Unit's documents including Grievant's documents were to be placed in the new folder system. Ms. L was responsible for moving documents to the new folder structure.

On August 21, 2017, the Supervisor sent Grievant an email regarding a New Folder Structure:

> I am writing in response to your email regarding your concern with the new folder structure. To provide you with training, [Ms. S] will meet with you on Friday August 25, 2017 at 3 p.m. so that you can adhere to the newly established folder structure.
>
> I wanted to provide you with the following information:
>
> The folder structure project was started as the GI coordinators were unable to locate the CT files in the current folder structure and contacted you for many documents. In an effort to reduce the number of queries you were receiving and to help GI research coordinators locate their own study documents we embarked on designing a new folder structure for all clinical trial documents.

A lot of the planning and consideration went into the development of the current folder structure including following the NIH and NCI folder recommendations, input from the research coordinators and input and suggestions from you. This included your suggestion on July 20 of adding a folder called regdocs.

In addition, as the first folder of documents were migrated to the new folder structure final input and recommendations from you were included and [Ms. S], you and [name] met on July 20, 2017 and agreed to move forward with migrating the files.

You are expected to adhere to the new centralized folder structure and not keep duplicate systems.

I understand that using a new system can be challenging and therefore I have arranged training as indicated above. You are expected to participate in the training provided by [Ms. S] on August 25 and use the new centralized folder structure effective immediately.

Grievant responded to the Supervisor's August 21, 2017 email, in part:

They chose not to use the folders. Wasn't any more difficult than the new structure. This was discussed at every meeting. You can create any folders you want, but I am not a study coordinator, so I have no need for them. My folders are my work resource and product, which I have spent the past 6 years building and working from. ***

RegsDocs folders are empty and have been totally stripped. Even project still in pre-award have been stripped. Study Coordinators and post award personnel have zero effort in the pre-award stage and the work is entirely different. *** My files contain the original documents in draft form, which I then edit and/or print for signature. I scan/upload and distribute the partially executed forms to the appropriate central offices for full execution and upload to official systems. My folders contain actionable items which are my responsibility and study coordinators do not need them during preaward. *** I built my folders based on the work I was doing, out of my own creativity and need over the past six years, substantially longer than you spent building your folders with the help of NIH and NCI recommendations. *** All my files have or are being stripped, even those that I have repopulated have been stripped again, which is indicated of you either doing it or asking someone else to. Wasting even more time and further demonstrating how much of a bully you are. You are deliberately making it impossible for me to do my work and destroying evidence of work already done and in progress, since you have

now discovered how and where it is very easy to seem the multitude of work I have and continue to do and the load I carry. I believe your goal is and has always been to find reason to fire me, but no matter what you do to me, how much you interfere, without information, etc. I have continued to get my work done. ***

I will re-create all folders that are in pre-award in hopes that I capture all the details that need my attention. The way the "new folders" are set up make absolutely no sense and are totally inappropriate in some cases, demonstrating a complete lack of understanding of research administration and related documents and systems; i.e. purpose behind and function of. ***

In order that I perform duties I was hired to do, I need to keep my folder structure for pre-award. ***

I will keep my folders as pre-award, which is my responsibility and you may create and populate new post award folders for study coordinator and post award use. I must repeat the documents currently in the folders, do not belong there. My working documents can be copied onto whatever folder you feel they belong in for study coordinators to edit and reprint as necessary. These folders are also representative of my effort, my work, my IP, my responsibility. ***

Post award document should be pulled down from their official system and put into the folders by either the post award personnel at award as part of their post award set up responsibilities or by study coordinators as they receive documents from the sponsor, not for my files. If someone else is assigned some of GI's projects in pre-award, they may do whatever they need to perform their duties, but I have created the folders I used to serve me in the completion of my assigned duties. They are accessible by anyone who needs to look there for any reason, but shall remain my work product and tool as long as I serve in this position.

On August 24, 2017, the Supervisor sent Grievant an email stating:

Thank you for sharing your thoughts regarding the transition to the new filing system. I've considered the information you provided, however, the transition to the new system is necessary. As I informed you, all files have been transferred to the system.

As you are aware I've scheduled training in the use of the new system for use with [Ms. S]. You are required to attend this training on Friday, August 25 at 3 pm and begin using the new folder structure effective immediately.

On August 25, 2017, Grievant met with Ms. S and the Supervisor. Ms. S discussed each folder with Grievant to make sure Grievant understood the system. Grievant indicated she understood the new folder system. The Supervisor agreed Grievant could keep some of the documents in her personal folder as long as she first placed them in the shared folder. Grievant agreed to begin using the regsdoc folders and creating a shadow drive for her copies.

Sometime in September 2017, Grievant spoke with Ms. S and told Ms. S that having to save documents to two different drives caused delays. Grievant told Ms. S because of the delay, Grievant would keep everything on the U drive. Ms. S smiled and said she understood how that would be an issue.

On October 2, 2017 at 3:04 p.m., Ms. S sent Grievant an email stating:

> I don't' see a file for the [H study] in [name] centralized folder structure. Has one been created yet?

Grievant replied at 3:27 p.m.:

> Yes and some of my folders moved to the U drive are now missing: [name]
> I will contact IT again to have it restored. There was another one for her that was a potential study as well.
> What do you need for [H study]?

Ms. S replied at 3:29 p.m.:

> I'm putting the copies of the index request forms in the folders for the study so it can go somewhere off my desktop. I just want to file it.
>
> Make sure everything we need is on the shared drive since we cannot get to your U.

On October 2, 2017 at 3:54 p.m., Grievant sent Ms. S an email regarding the subject "New folder structure issues/questions":

> What is it you need? I don't have any of the projects [name] works on in the shared drive folder for GI and I don't see anyone else's work on the shared drive. Only reports or other information when they have been away or left the university.
>
> These are my working folders created by me for me. I put them out there in good faith for others use and asked that the study coordinators put documents in the folders and that post awards put them in the appropriate folders, but no one ever did and now a few folder system has been created for them, which stripped my working folders. If these folders are for them and post award

> management, then at the hand off juncture between pre-award management and post award is the appropriate time for me to place documents into the new folders.
>
> As GI Pre-Award Research Manager and Regulatory Coordinator, I can provide documents, if IM needs them.
>
> Coordinators should not be sending regulatory documents to sponsors before the appropriate time i.e. OSP has reviewed and approved the project, so I don't think they need to be there until after that point in time.
>
> If you can provide me with guidelines for my responsibilities within the new folders structure, I would appreciate it.
>
> As previously stated, I only have some regulatory documents provided by sponsor, which coordinator also receive, and only the ancillary agreements are fully executed.
>
> Given that, I would say I can put my working documents in the new folder, as well as fully executed regulatory documents once OSP has reviewed/approved and they are released to the sponsor.
>
> There are usually additions/corrections to the regulatory documents, so the question of do you want all or only the final approved versions in the new folders needs to be addressed.
>
> I can place the signed ancillaries in the new folders as I receive them and return them to SOMCT and service areas.
>
> I can place the regulatory documents received from the sponsor in the folders: RegDocs that were stripped bare in the new folder structure from this point forward, copying from those on my U drive.
>
> Otherwise, I do not use the new folders. I would only be placing finalized documents there for post award management. Documents other than those mentioned are not within my purview as pre-award manager.

On October 3, 2017, the Supervisor learned that Grievant was moving all the pre-award grant files to her U drive and the files were not visible to the research administration team. Grievant was using the shadow folder to do her daily work. She would then copy documents from the shadow folder to the shared drive.

On October 4, 2017, the Supervisor, [Ms. S], and Grievant met to discuss Grievant's failure to use the new folder structure. The Supervisor said they

needed to talk about Grievant not using the new folder structure and the problems that were caused by Grievant using the U drive. Grievant was removing documents from the shared drive and placing them in her U drive. Grievant said that her work was her personal property and nobody was entitled to access one's personal property. Grievant said she would use her personal drive since they took away her work by converting it to the new folder structure. Grievant said that she was protecting her personal property i.e. the pre-award document she worked on for the grants to VCU by putting all the items on her U drive and would manage who gets them from there. Grievant discussed the difficulty of keeping track of what files were on the shared drive and what files were on the U drive. Grievant said she did not keep track of where she was putting things and had to compare them side by side to see what documents were where and keep them both up to date. Grievant said she had difficulty working out of two systems. The Supervisor agreed that it was difficult to work out of two systems and said that was why Grievant needed to be working primarily out of the shared drive folder structure.

Grievant was informed that her job would be to start the folders on the shared drive when she received documents from the sponsor. Grievant claimed that the coordinators receive them at the same time and they should create the folders. The Supervisor instructed that Grievant would be expected to put all documents in the shared drive as the primary place. If Grievant chose to copy them into another folder for her to work on, that was fine; but all documents were to be in the shared drive first and foremost. Towards the end of the October 4, 2017 meeting, Grievant agreed to use the new folder system. Ms. S, however, was not sure Grievant had agreed to do so.

After the October 4, 2017 meeting, the Supervisor observed that Grievant was not exclusively using the new folder system.

On October 11, 2017 at 12:20 p.m., the Supervisor sent Grievant an email stating:

> Please ensure all [Dr. S's] U01 proposal documents are stored on the shared drive under Pre award by 3 p.m. today. Please send me an email to confirm where they are located on the shared drive when this is complete.

On October 11, 2017 at 1 p.m., Grievant sent a Systems Analyst an email stating:

> Can you copy the entire ACTIVE Projects folder from my U drive … back to the [Unit] Share drive ….
>
> It will be much faster that way. [The Supervisor] stripped many of them, so I moved them to my U drive to project my work.
>
> She is now demanding that I put them back on the shared drive by 3 p.m. today. I just received her email.

The Systems Analyst replied at 1:47 p.m.:

> I will start this copy in a few minutes.
> I am going to create a folder named [name].
> Since it is a ton of files, it may take a bit to copy over.
> I'll let you know when it's finished.

On October 11, 2017 at 5:28 p.m., the Supervisor sent Grievant an email stating:

> Just a reminder please make sure that you have put [Dr. S's] UO1 proposal documents on the shared drive and let me know where they are located so [Ms. S] can review the documents.

On October 12, 2017, Grievant sent the Supervisor an email informing her that she had the Systems Analyst copy the Active Project folders back to the T drive.

On November 3, 2017, the grievant was issued a Group II Written Notice for failure to follow instructions and terminated from employment with Virginia Commonwealth University (the "University") due to her accumulation of disciplinary action.[2] The grievant timely grieved the disciplinary action, a hearing was held on February 20, 2018, and the hearing was continued to June 5, 2018, for the presentation of additional evidence by the parties.[3] In a decision dated August 9, 2018, the hearing officer concluded that the University had presented sufficient evidence to show that the grievant failed to follow the Supervisor's instructions and upheld the issuance of the Written Notice and the grievant's termination.[4] The grievant now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[6]

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[2] *Id.* at 1; DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[3] Hearing Decision at 1.
[4] *Id.* at 14-17. The Written Notice contained another charge that the hearing officer determined was not supported by the evidence in the record. *Id.* at 13-14. Neither of the parties has timely challenged that hearing officer's findings on that issue and, as such, it will not be discussed in this ruling.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

University's Rebuttal

In response to the grievant's request for administrative review, the University submitted a rebuttal document that, in part, appears to dispute some of the hearing officer's factual conclusions. The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EEDR within 15 calendar days of the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in the hands of a delivery service."[7] Further, the August 9, 2018 hearing decision clearly advised the parties that any request they may file for administrative review must be received by EEDR within fifteen calendar days of the date the decision was issued.[8] However, EEDR received the University's rebuttal on August 31, 2018, well beyond the fifteen calendar-day deadline, which expired on August 24, 2018. Accordingly, the University's apparent challenge to the hearing officer's findings of fact is untimely and will not be considered. To the extent the University's submission rebuts the grievant's challenge to the hearing officer's conclusions in relation to the Group II Written Notice, the submission will be considered as rebuttal only. Those matters are discussed more fully below.

Hearing Officer's Consideration of the Evidence

In her request for administrative review, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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 upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and determined that "[t]he Supervisor repeatedly told Grievant to use the new folder system to keep her work documents on the shared computer drive," and that the grievant had permission to "keep some of the documents in her personal folder as long as she first placed them in the shared folder." [13] The hearing officer went on to find that:

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[7] *Id.* § 7.2(a).
[8] Hearing Decision at 17-18.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 14.

> Grievant did not see any merit in using the new folder structure. She repeatedly rejected the new folder structure. She repeatedly questioned the need for the new folder structure. She repeatedly stated that her work product belonged to her and other employees could contact her if they needed any information. Grievant repeatedly complained that her documents were being "stripped" by someone (including the Supervisor). The Agency attempted to accommodate her concerns by allowing her to keep copies on a shadow drive of the work she performed on the shared drive. Instead of doing her work on the shared drive and keeping copies on the U drive, Grievant resumed her practice of keeping her work on the U drive and putting copies on the shared drive.[14]

Based on this analysis, the hearing officer concluded that the "Grievant did not comply with the Supervisor's instruction to keep her work on the shared drive" and "did not keep all of her work on the shared drive after the new folder system was implemented on July 25, 2017."[15] In addition, the hearing officer considered the grievant's contention that "other employees were 'stripping' her files from the shared drive," stating that "the Agency attempted to accommodate her concerns by permitting her to copy documents from the shared drive to a shadow drive so that she would have a copy of her completed work."[16] The hearing officer found that the grievant nonetheless continued to "perform[] her work on computer drives other than the shared drive and then copied that work to the shared drive instead of copying work from the shared drive."[17]

Evidence regarding the grievant's use of the New Folder Structure

EEDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's factual findings regarding the grievant's failure to use the New Folder Structure as directed. The Supervisor and Ms. S both testified that the purpose of the New Folder Structure was to allow University employees other than the grievant to access documents as needed.[18] Ms. S unequivocally stated the grievant was instructed to perform work on documents using the New Folder Structure for that reason,[19] and clarified that the grievant was not permitted to work on or keep documents only on her U drive, where others were not able to access them.[20] Moreover, while the grievant testified that she did not directly refuse to follow the Supervisor's instruction to use the New Folder Structure,[21] the University presented evidence to show that the grievant acted contrary to that instruction. More specifically, the University offered documents showing the grievant's activity within the New Folder Structure on the T drive and within the shadow drive on her U drive.[22] The Supervisor and Ms. S both testified that these documents confirmed the grievant worked on files in her U drive and then saved copies to the

[14] *Id.* at 14-15.
[15] *Id.* at 15.
[16] *Id.* at 16.
[17] *Id.*
[18] Hearing Recording at Track 1, 35:25-37:00 (testimony of Supervisor), 2:42:48-2:43:42 (testimony of Ms. S).
[19] *See, e.g., id.* at Track 1, 1:57:07-1:57:53 (testimony of Supervisor), Track 2, 1:08:29-1:10:08 (testimony of Ms. S).
[20] *Id.* at Track 1, 2:49:16-2:49:37, 3:29:50-3:30:32 (testimony of Ms. S).
[21] *Id.* at Track 1, 6:44:34-6:45:12 (testimony of grievant).
[22] *See* Hearing Officer Exhibits A, B.

New Folder Structure, after she had been instructed not to do so.[23] Weighing the evidence and rendering factual findings on issues of this nature is squarely within the hearing officer's authority, and EEDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[24]

EEDR has considered the grievant's remaining arguments and finds that there is evidence in the record to support a conclusion that the grievant was required to save and perform work on all documents in the New Folder Structure, regardless of her objections and concerns. For example, the evidence in the record demonstrates that the grievant reported someone had deleted files from the T drive after the New Folder Structure was implemented.[25] The Supervisor and Ms. S, however, explained that documents had been migrated to the New Folder Structure rather than deleted.[26] The grievant also testified that the New Folder Structure did not allow her to complete work as she had done previously.[27] While Ms. S stated that the grievant was permitted to keep a shadow drive in her U drive for copies of documents if she wished to do so, the grievant could not work directly in her U drive.[28] 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.

In summary, and although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR will not disturb the hearing decision on the bases cited by the grievant.

Evidence of retaliation and/or workplace harassment

The grievant further asserts that the hearing officer erred in concluding that the discipline was not issued as a form of retaliation. In the hearing decision, the hearing officer assessed the evidence and stated that the "Grievant engaged in protected activity because she filed a grievance to challenge a prior reduction in her pay band," and that she "suffered an adverse employment action because she received disciplinary action," but there was not "sufficient credible evidence to show a causal link between Grievant's protected activity and the disciplinary action."[29] The

[23] Hearing Recording at Track 2, 37:08-37:46 (testimony of Ms. S), 2:39:46-2:50:52 (testimony of Supervisor); *see id.* at Track 1, 2:21:40-2:22:05 (testimony of Supervisor).
[24] *See, e.g.*, EDR Ruling No. 2014-3884.
[25] *E.g.*, Hearing Recording at Track 1, 1:54:54-1:55:22 (testimony of Supervisor).
[26] *E.g.*, *id.* at Track 1, 1:53:34-53:56 (testimony of Supervisor), Track 2, 51:41-53:17 (testimony of Ms. S).
[27] *E.g.*, *id.* at Track 1, 6:47:46-6:48:37, 7:12:53-7:13:56 (testimony of grievant).
[28] *Id.* at Track 1, 3:28:10-3:29:21 (testimony of Ms. S), Track 2, 1:08:29-1:10:08 (testimony of Ms. S).
[29] Hearing Decision at 17.

hearing officer further stated that the disciplinary action "was not a pretext for retaliation."[30] In support of her position, the grievant contends that the Supervisor engaged in "retaliation and bullying" because she "refused to do illegal actions," reported work-related issues to human resources, and otherwise disagreed with the Supervisor's decisions.

Although a state agency may not discipline an employee because she engaged in protected activity, an employee's exercise of protected activity does not serve to insulate her from disciplinary action that is warranted and appropriate if the discipline does not have a causal connection to the protected activity.[31] In this case, the hearing officer determined that evidence did not support a conclusion that the University's decision to issue the disciplinary action had a causal connection to her protected activity, and that the discipline "was not a pretext for retaliation."[32] While the hearing officer did not explicitly discuss all of the evidence in the record that could have supported her claim of retaliation, there is no requirement under the grievance procedure that a hearing officer specifically discuss every piece of evidence in the hearing record. Thus, mere silence as to some of the evidence does not necessarily constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. In the absence of witness testimony or other evidence to corroborate the alleged retaliation cited in the documents or to demonstrate how the evidence supported a conclusion that the Written Notice was retaliatory in nature, it would appear that the hearing officer did not discuss that evidence in the hearing decision because he determined that it was not credible and/or persuasive.

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer's decision with regard to this issue. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, there is evidence in the record to support the hearing officer's conclusion that the University's decision to issue the discipline did not have a retaliatory motive,[33] and EEDR has not reviewed anything to indicate that the hearing officer's analysis of the evidence regarding the University's motive for the discipline was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case. Accordingly, EEDR will not disturb the hearing decision on this basis.

Other factual disputes

In addition to her more specific arguments regarding the hearing officer's factual findings about the New Folder Structure and her allegation of retaliation, the grievant generally disputes the hearing officer's conclusions and assessment of the evidence. In support of these claims, the grievant has provided EEDR with a lengthy document refuting nearly all of the hearing officer's factual findings and conclusions. Hearing officers must make "findings of fact as to the *material issues* in the case"[34] and determine the grievance based "*on the material issues* and grounds in

[30] *Id.*
[31] *See, e.g.*, Laing v. Fed. Express Corp., 703 F.3d 713, 719-22 (4th Cir. 2013).
[32] Hearing Decision at 17.
[33] *See supra* notes 18-29 and accompanying text.
[34] Va. Code § 2.2-3005.1(C) (emphasis added).

the record for those findings."[35] EEDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence were either not material or are simply factual findings on which the grievant disagrees with the hearing officer's conclusions or the impact of his findings. As a result, EEDR cannot find that remanding the case to the hearing officer for reconsideration or clarification on the specific factual issues alleged by the grievant would have an effect on the ultimate outcome of this case. Furthermore, the hearing officer clearly assessed the evidence presented by the parties and found that the University had met its burden of showing that the grievant had engaged in the conduct described in the Written Notice, that her behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. As discussed above, EEDR's review of the hearing record indicates that there is evidence to support those findings.

Newly Discovered Evidence

Finally, the grievant has offered additional evidence for EEDR's consideration on administrative review, none of which appears to be part of the hearing record. Among other things, this evidence appears to consists of summary documents prepared by the grievant, copies of emails, and records showing the status of projects assigned to the grievant. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[36] 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.[37] 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 outcome if the case were retried, or is such that would require the judgment to be amended.[38]

In this case, the grievant has provided no information to support a contention that the additional information she has offered should be considered newly discovered evidence under this standard. The grievant has presented nothing to indicate that she was unable to obtain this evidence prior to the hearing. For example, all of the email records offered by the grievant appear to be dated before the hearing took place, and thus would have been in her possession prior to the hearing. The grievant had the ability to offer all relevant evidence and call all necessary witnesses at the hearing. It was the grievant's decision as to what evidence she should present. Although the grievant may now realize she could have provided additional evidence to

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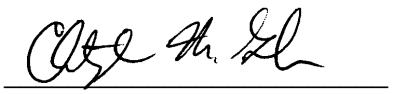
[35] *Grievance Procedure Manual* § 5.9 (emphasis added).
[36] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[37] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[38] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

support her contention that she did not fail to follow the Supervisor's instructions with regard to use of the New Folder Structure, this is not a basis on which EEDR may remand the decision.

Moreover, even assuming that the grievant could satisfy all of the other elements necessary to support a contention that the evidence in question should be considered newly discovered evidence under this standard, the grievant has not demonstrated that the information she has offered would have any impact on the outcome of this case. While it is apparent that the grievant disagrees with the hearing officer's decision, there is evidence in the record to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy, as discussed more fully above. EEDR has reviewed nothing to suggest that the additional evidence offered by grievant would have any have any impact on the hearing officer's findings. Accordingly, there is no basis for EEDR to re-open or remand the hearing for consideration of this additional evidence.[39]

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[40] 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.[41] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[42]



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[39] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.
[40] *Grievance Procedure Manual* § 7.2(d).
[41] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[42] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).