

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11255; Ruling No. 2019-4813; Ruling Date: December 14, 2018; 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 2019-4813
December 14, 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 11255. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11255, as found by the hearing officer, are as follows:¹

Virginian Commonwealth University employs Grievant as a Driver of a vehicle as part of the RamSafe program. He has been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant typically worked from 11 p.m. until 8:15 a.m.

The RamSafe program is intended to provide safe transportation within campus boundaries for VCU faculty, staff, and students. The program relies on a software application accessible on cell phones to schedule trips on VCU buses. The application allows the rider to request a bus ride and to track the location of the bus as it arrives.

When a bus driver approaches the location of a rider, the bus driver uses the application to “honk”. The honk sends a text notification to the rider through the application to indicate the driver is approaching. The text reads:

VCU RamSafe – Your ride is waiting outside!

The driver is supposed to make the last honk as the driver is “immediately approaching” the pickup point.

¹ Decision of Hearing Officer, Case No. 11255 (“Hearing Decision”), Nov. 5, 2018, at 2-4.

If the rider does not enter the bus within approximately three minutes after receiving the honk signal, the bus driver can go to the next rider. The bus driver would send the rider a signal:

VCU RamSafe – Your ride has been canceled. Please try again.

RamSafe has a Dispatcher who can make and receive telephone calls with riders and bus drivers.

On March 15, 2018, the Student called for a ride. He wanted to be picked up at Address 311. His address was in the middle of a block. The Dispatcher notified Grievant to pick up the Student at Address 311. Grievant drove his bus to pick up the Student but stopped the bus at the corner of the block and waited. The Student used the application and determined the bus was at the corner and not moving. The Student called the Dispatcher and indicated the bus was not at his address. The Dispatcher told the Student the bus was at the corner. The Student objected to being picked up at the corner. He told the Dispatcher that other drivers picked him up at Address 311 and not the corner. The Dispatcher apologized to the Student and told him Grievant would pick him up at Address 311.

The Dispatcher called Grievant and told Grievant the Student did not want to be picked up at the corner but instead wanted to be picked up at Address 311. Grievant believed the Student was complaining about being singled out to be picked up at the corner instead of Address 311.

The Dispatcher called the Student and told the Student to remain at Address 311 and he would be picked up there.

On March 15, 2018 at 6:23:22 a.m., the Student entered Grievant's bus and sat in a seat in the front row closest to Grievant. No other passengers were inside the bus. Grievant began talking to the Student once he sat down and continued talking to the Student as he drove. Grievant did most of the talking with the Student also talking. This conversation lasted until approximately 6:25:45 a.m. when the bus reached the Student's stop and the Student stepped out of the bus onto the street. The Student turned around and faced Grievant as Grievant continued to talk to the Student. At approximately 6:31:19 the conversation ended, Grievant shut the bus door and the Student walked away.

During their conversation, Grievant repeated his statements and opinions and minimized the Student's request. The first thing Grievant told the Student was "You can file a complaint if you want." The Student explained that other drivers did not pick him up at the corner. Grievant explained that the Student was not the only one he picked up at the corner. Grievant asked the Student if he wanted to be picked up at Address 311 even though it was clear that the Student wanted to be

picked up at Address 311 and not at the corner. Grievant told the Student he would tell the other drivers to pick the Student up at Address 311 instead of the corner. The Student said that other drivers stopped in front of his building and not at the corner. When Grievant told the Student he could file a complaint, Grievant's demeanor was such that the Student interpreted Grievant to be saying the Student could file a complaint but it would be meaningless. The Student perceived Grievant's demeanor as expressing anger and that Grievant's tone was rude.

After the Student walked away, he called the Dispatcher and said Grievant was angry and yelling at him and telling the Student he would speak with to other drivers.

As a result of his interaction with Grievant, the Student attempted to avoid taking the RamSafe bus if he believed Grievant was the driver. If he saw a particular bus number, he would cancel the ride because he believed Grievant was the driver. The Student learned later from the Dispatcher that the bus number did not mean Grievant was driving the bus since several drivers drove each bus. The Student later began riding in the bus with Grievant as the driver.

On April 25, 2018, the grievant was issued a Group I Written Notice for unsatisfactory work performance.² The grievant timely grieved the disciplinary action and a hearing was held on October 15, 2018.³ In a decision dated November 5, 2018, the hearing officer found that the University had presented sufficient evidence to demonstrate that the grievant's interaction with the Student constituted unsatisfactory performance and upheld the issuance of the Group I Written Notice.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 The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 4-6.

⁵ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁶ *See Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of the Evidence

In his request for administrative review, the grievant argues that the hearing officer's findings of fact, based on the weight and credibility he accorded to testimony presented at the hearing, are not supported by the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and the grounds in the record for those findings."⁹ 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.¹⁰ 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.¹¹ 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.

Grievant's Interaction with the Student

In the hearing decision, the hearing officer assessed the evidence and concluded that the "Grievant confronted the Student and persisted in advancing his opinions," that "[h]is tone was confrontational, arrogant, and abrasive towards the Student," and that he "failed to provide proper respect towards one of the Agency's customers."¹² In his request for administrative review, the grievant argues that the Student was difficult to understand, that there was background noise on the bus, and that he did not raise his voice when speaking to the Student. The hearing officer considered these arguments and found that the "Grievant's conversation with the Student was more than a dissemination of useful information to the Student."¹³ The hearing officer specifically noted that the "Grievant engaged in a prolonged debate with the Student that caused the Student to feel mistreated and become fearful," and that the grievant "continued to debate unnecessarily with the Student for over five minutes" after the Student had stepped off the bus.¹⁴

EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant's interaction with the Student was properly considered unsatisfactory work performance. At the hearing, for example, the Student testified that the grievant was angry, shouted at him in a rude voice, and said that the Student could

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Decision at 4.

¹³ *Id.* at 5.

¹⁴ *Id.*

complain in a tone that suggested nothing would be done with the complaint.¹⁵ One of the University's witnesses further testified that the grievant's conduct toward the Student was not good customer service, that the grievant raised his voice, and that the grievant behaved in a confrontational and threatening manner.¹⁶ The witness acknowledged that there would have been some background noise because of the bus, but stated that he believed the grievant was yelling at the Student regardless of any background noise and further clarified that the grievant's inappropriate interaction with the Student began when the Student entered the bus.¹⁷ While the grievant denied that he was disrespectful to the Student and testified that there was background noise on the bus that caused him to speak loudly,¹⁸ conclusions as to the credibility of witnesses 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. Weighing the evidence and rendering factual findings 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.¹⁹

In addition, the grievant contends that the issuance of the Written Notice was inconsistent with DHRM Policy 1.60, *Standards of Conduct*, because he was counseled by University management about his interaction with the Student before the Written Notice was issued. At the hearing, the grievant argued that his behavior during the interaction with the Student had already been addressed, and that the University later issued the Written Notice after receiving another complaint about the grievant from the Second Student.²⁰ The hearing officer considered this argument and found that it was "not persuasive because agencies can both counsel and discipline employees for the same behavior."²¹ The *Standards of Conduct* does not expressly state whether an agency may both counsel an employee and issue disciplinary action to him for the same event, though it also does not explicitly prohibit an agency from doing so.²² EEDR need not address this general proposition, however, because the evidence in the record is insufficient to show what, if any, counseling actually occurred before the issuance of the Written Notice in this case. Neither the grievant nor any other witness testified about this matter and, other than the grievant's assertion during the management steps that he discussed the incident with

¹⁵ Hearing Recording at 23:59-25:34, 40:20-41:40 (testimony of Student).

¹⁶ *Id.* at 1:05:11-1:07:06, 1:11:30-1:12:20, 1:13:52-1:14:07 (testimony of Witness H).

¹⁷ *Id.* at 1:07:13-1:08:11 (testimony of Witness H).

¹⁸ *Id.* at 2:37:32-2:38:09 (testimony of grievant).

¹⁹ See, e.g., EDR Ruling No. 2014-3884.

²⁰ Hearing Recording 2:35:25-2:36:48. It appears the grievant offered this argument as the purported testimony of Witness J, a University employee who was ordered to attend the hearing but did not appear. The grievant explained that he believed Witness J was sick. See *id.* When an employee has been ordered by the hearing officer to attend the hearing as a witness and the agency fails to require the employee to appear, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances. *Rules for Conducting Grievance Hearings* § V(B). The grievant does not appear to have asked the hearing officer to draw an adverse inference based on Witness J's nonappearance. Moreover, EEDR has not identified anything to show that the University failed to fulfill its obligations under the grievance procedure, and the grievant has not raised any such argument on administrative review.

²¹ Hearing Decision at 5.

²² See DHRM Policy 1.60, *Standards of Conduct*.

management,²³ there appears to be no documentary evidence in the record regarding corrective action that may have taken place before the grievant received the Written Notice. Accordingly, EEDR finds no basis to conclude that the University's issuance of the disciplinary action to address the grievant's interaction with the student was inconsistent with the *Standards of Conduct*.

Finally, the grievant asserts that University management issued the Written Notice as a form of retaliation. EEDR has not, however, reviewed any evidence in the record to suggest that the grievant identified any exercise of protected activity to support such a claim. Indeed, the grievant does not appear to have argued that retaliation was the basis for the discipline prior to submitting his request for administrative review. In the absence of any record evidence to support such a claim, EEDR finds no error in the hearing decision in relation to this issue.

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 declines to disturb the decision on this basis.

Other Charges Presented at the Hearing

In addition, the grievant appears to dispute the hearing officer's factual findings regarding a second charge on the Written Notice: that the "Grievant should be disciplined for activating the honk signal too far away from the Library when picking up a Second Student on March 22, 2018."²⁴ The hearing officer assessed the evidence on this issue and found that the evidence was insufficient to show that the grievant engaged in misconduct that would support the issuance of the Written Notice on that basis.²⁵ EEDR has thoroughly reviewed the hearing record and finds that the errors alleged by the grievant in the hearing officer's assessment of the evidence regarding the incident with the Second Student are not material because, regardless of the incident with the Second Student, the hearing officer found that the disciplinary action was warranted and appropriate on a separate basis. As discussed above, the hearing officer clearly assessed the evidence presented by the parties about the grievant's interaction with the Student 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 his behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. As a result, remanding the case for

²³ *E.g.*, Agency Exhibit 2 at 8, 10.

²⁴ Hearing Decision at 5.

²⁵ *Id.* As discussed above, however, the hearing officer upheld the discipline based on the grievant's behavior during the interaction with the Student.

reconsideration of the specific factual issues alleged by the grievant in relation to the incident with the Second Student would not have any impact on the ultimate outcome.

The grievant further argues that two additional witnesses were present at the hearing and would have testified about their practice for activating the honk signal. At the hearing, the Dispatcher testified that there was no standard procedure directing drivers when to activate the honk signal, and that each driver had his or her own practice.²⁶ When the grievant offered to call the two witnesses who did not testify, the hearing officer asked if they would testify consistently with the Dispatcher about the honk signal.²⁷ The grievant confirmed that they would and gave a proffer of their testimony.²⁸ EEDR finds that the proffered testimony of these two witnesses, if accepted as true, would have had no impact on the outcome of the case, as they would not have necessarily presented any testimony different from what was already in the record. Accordingly, EEDR declines to disturb the decision based on the alleged issues raised by the grievant in relation to the incident with the Second Student.

Witness Issue

Finally, the grievant argues that Witness W, a former University employee, was involved in the issuance of the Written Notice and did not testify at the hearing. EEDR's *Rules for Conducting Grievance Hearings* state that it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.²⁹ In the absence of evidence of extenuating circumstances preventing the agency employee from attending the hearing, when an agency fails to require the employee to appear for the hearing, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances.³⁰ In this case, the hearing officer did not issue an order for Witness W to appear as a witness. At the hearing, the University's advocate indicated that Witness W was no longer employed by the University.³¹ As such, the University would have been unable to compel Witness W's attendance at the hearing or otherwise make him available to testify, even if the hearing officer had issued an order for Witness W's appearance. While the grievant's concerns are understandable, EEDR has not identified anything to show that the University failed to fulfill its obligations under the grievance procedure. Under these circumstances, EEDR has no basis to remand this case for the hearing officer to further address any issues with the appearance and/or testimony of Witness W. Accordingly, EEDR declines to disturb the decision on this basis.

²⁶ Hearing Recording at 2:11:50-2:12:37 (testimony of Dispatcher).

²⁷ *Id.* at 2:24:43-2:25:32 (testimony of Dispatcher).

²⁸ *Id.*

²⁹ *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

³⁰ *Id.* § V(B) ("Although a hearing officer does not have subpoena power, he or she has the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EEDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process.").

³¹ Hearing Recording at 2:22-2:28. While a hearing officer has no specific authority to compel testimony or to hold a witness in contempt, an agency presumably can, in most cases, compel an employee to provide testimony in a grievance hearing just as it can require an employee to participate in an investigation.

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.³² 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.³³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁴



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

³² *Grievance Procedure Manual* § 7.2(d).

³³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).