

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10024; Ruling
Date: April 15, 2013; Ruling No. 2013-3575; Agency: Norfolk State University;
Outcome: Hearing Officer in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of Norfolk State University
Ruling Number 2013-3575
April 15, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 10024. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10024 are as follows:¹

Norfolk State University employs Grievant as an Administrative and Program Specialist III. She has been employed by the Agency since 1994.

Grievant had prior active disciplinary action. On June 30, 2011, she received a Group I Written Notice for disruptive behavior.

On August 23, 2012, the Construction Manager asked Grievant for receipts in order to reconcile his credit card account. Grievant said that the report was not due yet so why did he need them. The Construction Manager said that they were due and that he had the bank statements in his hands. The Construction Manager walked towards Ms. J who had worked with him on the log sheets. He entered her office. Ms. J’s office had a half door and open window to enable Ms. J to provide customer service. As the Construction Manager and Ms. J were talking, Grievant came to the half door and said the Construction Manager’s name and said that she had his receipts and the next time he needed Grievant to do something, he should ask her and not someone else to do it. The Construction Manager said “I don’t need you to do it, [Ms. J] is helping me with it; all I need is receipts.” Grievant leaned into the office through the door window and said loudly, “What is wrong with you; are you on your period?” The Construction Manager was standing approximately six or seven feet away from Grievant and

¹ Decision of Hearing Officer, Case No. 10024 (“Hearing Decision”), March 22, 2013 at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

heard Grievant's comment clearly. He was annoyed by Grievant's insult, but he resumed his discussion with Ms. J who also heard the comment.

Following her interaction with the Construction Manager, Grievant met with the Director and said she had a conversation with the Construction Manager and that he was yelling and rude to her. She said she was thinking of filing charges against him because he continued to be rude and disrespectful to her. The Director had known the Construction Manager for four years and knew that the Construction Manager was not the type of person who yelled in the office. The Director was surprised by Grievant's allegations.

The Construction Manager met with the Director and the Director asked what had happened with his interaction with Grievant because Grievant said she "may have to take harassment charges on" the Construction Manager. The Construction Manager was upset at being accused of something he did not do. The Director said, "Let's see what happens" regarding whether Grievant would file charges.

On August 24, 2012 at 11:55 a.m., the Director sent Grievant an email stating:

Concerning a reported incident that occurred yesterday August 23rd, between yourself and [Construction Manager], I am directing once again to refrain from using unprofessional language and maintaining a professional attitude. In my discussion with you, you stated that [Construction Manager] was rude, loud, crude and yelled at you during a discussion concerning records needed. [Construction Manager] has relayed to me that he was not rude, crude, and did not yell. Your accusation that he was "on his period" was totally inappropriate and is not to be tolerated. I have verified with a witness that [Construction Manager] was not rude and did not yell. Additionally this incident occurred at the front desk in the main lobby which the public access the Facilities building. This has been a problem in the past and cannot continue.

On August 24, 2012, at lunchtime, Grievant walked into the Construction Manager's office and said, "What are you trying to do; get me fired?" The Construction Manager asked, "What do you mean?" The Construction Manager said that Grievant had gone to the Director and said she was considering filing harassment charges against him. Grievant became argumentative and was upset and continued to accuse the Construction Manager of trying to get her fired. Grievant left the Construction Manager's office and then returned while being very upset and continued to express her displeasure with the Construction Manager. The Construction Manager asked her to calm down and said he was not trying to get her fired. Grievant left and then returned to his office against upset

and “got into the face” of the Construction Manager. The Construction Manager felt threatened by Grievant’s behavior. After Grievant left his office, the Construction Manager went to Mr. K’s office and said that he could not continue to work at the office because Grievant kept “barging” into his office while being mad at him. Mr. K told the Construction Manager to go home and send him an email about what had happened.

In a March 22, 2013 hearing decision, the hearing officer upheld the agency’s issuance of the Group II Written notice with ten day suspension.² The grievant now seeks administrative review from EDR.

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.”³ 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 a party; the sole remedy is that the hearing officer correct the noncompliance.⁴

The grievant’s request for administrative review asserts that she was denied due process at the grievance hearing because, upon her arrival, she was “advised by the hearing officer that her advocate representative . . . would not be able to represent her and that his role would be reduced to merely an observer.” Due process is a legal concept appropriately raised with the circuit court, and ultimately resolved by judicial review. Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.⁵ Post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.⁶ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.⁷

² *Id.* at 5.

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ See *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (“Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person’s rights to liberty or property.”).

⁶ See *Garraghty v. Comm. of Virginia*, 52 F.3d 1274, 1284 (4th Cir. 1995) (holding that “[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity’ for a full hearing, which includes the right to ‘call witnesses and produce evidence in his own behalf,’ and to ‘challenge the factual basis for the state’s action.” (citation omitted) *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-61 (4th Cir. 1983) (Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee’s behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, and (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision).


⁷ See Va. Code § 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony

In this case, the grievant's assertion that she was denied the opportunity to have representation at the grievance hearing has no basis in the record. First, we see no evidence that the grievant indicated that she had representation by an advocate during any pre-hearing communication. Upon the grievant's arrival at hearing, she indicated that she had brought someone with her to the hearing, specifically a "person that [she] wanted to be in here during these proceedings."⁸ The hearing officer asked the grievant directly if that person was representing her and the grievant said no, further stating that the individual was an observer, to help her communicate with an attorney after the hearing.⁹ Counsel for the agency also sought to clarify that the person in question was not representing the grievant, and once again, the grievant replied in the negative.¹⁰ Additionally, the hearing officer later asked the individual brought in by the grievant if his role was that of an observer, and this individual answered affirmatively.¹¹

Thus, the grievant herself, as well as the individual in question, classified his role as an observer rather than as a representative. A review of the record demonstrates that the grievant's allegation that the hearing officer "reduced" the role of an intended representative to that of an observer is clearly inaccurate. In this case, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity for representation if she had so chosen. Accordingly, we find no due process violation under the grievance procedure.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹² 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.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴



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and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. See Va. Code §§ 2.2-3005, 3006; see also *Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

⁸ See Hearing Record at 23:44 through 24:02.

⁹ See Hearing Record at 24:50 through 25:30.

¹⁰ See Hearing Record at 25:30 through 26:09. Counsel for the agency raised no objection to the individual's presence at the hearing as an observer only.

¹¹ See Hearing Record at 01:05:21 through 01:05:33.

¹² *Grievance Procedure Manual* § 7.2(d).

¹³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).