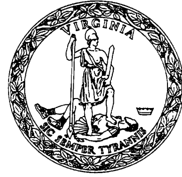
Issue: Administrative Review of Hearing Officer's Decision in Case No. 10236; Ruling Date: February 6, 2014; Ruling No. 2014-3801; Agency: Virginia Commonwealth University; Outcome: Decision is in Compliance.



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

# ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2014-3801
February 6, 2014

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 10236. For the reasons set forth below, EDR will not disturb the hearing decision.

## FACTS

The relevant facts as set forth in Case Number 10236 are as follows:[1]

> The two Group II Written Notices deal with a UPS meter that was improperly printing receipts. This meter caused a blank line to be drawn vertically down the receipt and resulted in parts of addresses being eliminated. I heard testimony from the Grievant's first-line supervisor that she pointed this out to the Grievant on October 2, 2013. There is some dispute as to whether or not she advised the Grievant to fix the problem then, immediately, or to simply fix the problem as one of his items of work. On October 3, 2013, the Grievant did not call UPS to seek a solution to the problem. The Grievant testified that he had been in touch earlier with UPS and had been sent a cleaning kit in order to clean various parts of the meter to remedy the problem. He had done that once and was under the belief that the problem had been solved. On October 4, 2013, the Grievant's second-line supervisor's boss discovered this problem and instructed the Grievant to fix it immediately. The Grievant testified that he was at another location that day and he did not call UPS to order a new meter. Subsequently on the following Monday, while the Grievant was out on sick leave, the Grievant's first-line supervisor called UPS and ordered a new meter which was delivered.
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> The Grievant's first-line supervisor was essentially brand new in her role as supervising the Grievant. The testimony before me was that she had been his supervisor for less than a month and perhaps no more than a week when this event

[1] Decision of Hearing Officer, Case No. 10236 ("Hearing Decision"), January 16, 2014 at 4-6 (some references to exhibits from the Hearing Decision have been omitted here).

with the UPS meter came to a head. The Grievant's testimony was that he felt that he had a solution to the problem, the cleaning kit, and that he did not recognize that it was an issue of some immediacy.

In considering the testimony of the Grievant, his first-line supervisor and his second-line supervisor, I find that the testimony of the second-line supervisor was clear that she directed the Grievant to call UPS immediately and he did not. Accordingly, I find that the Grievant did, in fact, fail to follow her instruction.

Regarding the second Group II Written Notice that arises from this incident, when the first and second-line supervisors talked to the Grievant pursuant to the due process policy, they testified that the reason he stated that he did not work on this matter on October 3, 2013, was that he spent most of the day investigating a lost book matter. Under oath, the Grievant denied making such a statement. His second-line supervisor testified that she had looked at some productivity metrics that were available to her and determined that the Grievant's productivity for October 3, 2013, was lower than normal. No evidence was presented to me as to the relative amount that productivity was decreased for this day, nor was any evidence presented to me as to why productivity was decreased for this day. No witness was presented before me to testify that he or she witnessed that the Grievant was spending most of his day dealing with a lost book issue. I find that this Group II Written Notice is a gratuitous add-on to the first Group II Written Notice for "failure to follow instructions" and that the Agency has offered no compelling evidence that the Grievant "abused state time" dealing with a personal issue.

Regarding the Group III Written Notice for "falsifying records"; that issue involves an inter-library book loan. The Agency involved has arrangements with various other libraries across the country to lend and borrow books. On or about July 9, 2013, the Grievant utilized this inter-library lending ability to obtain a book from the library of another university. That book was due to be returned on or about August 29, 2013. In point-of-fact, the Grievant had loaned that book to a friend. First and second overdue Notices were sent by this Agency to the Grievant and simultaneously, the lending library notified the Agency that the book was overdue. The notification of the lending library was received by the Agency on September 16, 2013. On September 17, 2013, the Grievant told his immediate supervisor where the book was. On September 18, 2012, the Grievant told his second-line supervisor that he thought he had returned the book. On September 19, 2013, the Grievant's first-line supervisor called the lending library requesting information on the book and was told that the book was not back with the lending library. On September 23, 2013, the Agency's timeline indicates that the Grievant told his first-line supervisor that he had the book and was returning it that day. As it turns out, the friend to whom the Grievant had lent the book, returned it directly to the library and it was received by that lending library on September 23, 2013.

> At 3:52 p.m., on September 23, 2013, the Grievant made an entry into the tracking computer system indicating that the lost book was now in the lending institution's possession. He included an internet link that would show the book was in fact at the lending institution. This entry was made under his own name. Pursuant to that entry, the tracking system for the Agency stopped tracking this book and indicated a status of "finished."
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> The Agency's belief is that the Grievant made the entry into the tracking system for the sole purpose of avoiding a lost book fine. At the time he made his entry, no invoice had been generated for a lost book; no one from the Agency had said to the Grievant that he would be responsible for a lost book fine; and, indeed, the book was returned on September 23, 2013, and subsequently, the lending library acknowledged that the book was back in its possession.
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> Black's Law Dictionary defines "falsified" to mean, to make something false; to counterfeit or forge. Merriam-Webster defines "falsified" as, to make something false; **to change something in order to make people believe that it is not true.** The entry that the Grievant made into the tracking system was in fact completely accurate. I find that the Grievant did not falsify any record. The Agency is disgruntled because the entry that he made stopped the tracking process. If this book was returned in what the Agency deems as the proper manner, it would have been received back into the Agency's library and that library would have forwarded it to the lending library. That way the tracking system would have followed the book from A to B and would have indicated receipt. In this case, when the Grievant's friend directly mailed the book to the lending library, the tracking system was effectively aborted. The Grievant put a true statement in the system to indicate that the book was back in the proper hands. He falsified nothing. It is quite possible that he did not follow proper procedure, but nothing was falsified. Indeed, when an invoice finally was issued for an overdue book, the Grievant promptly paid that invoice. Because the book was not lost and the book was returned, there never was a lost-book fee. It is interesting to note that, even when the Agency was fully aware that the book was not lost, in its due-process letter to the Grievant, it continued to act as if the book was lost, some several weeks after the book was returned. Accordingly, I find that there was no "falsifying records" in this matter.

In the January 16, 2013 hearing decision, the hearing officer upheld the agency's issuance of a Group II Written Notice for failing to follow a supervisor's instructions, but rescinded the Group II Written Notice for abuse of state time as well as the Group III Written Notice for falsifying records.[2] The agency now seeks administrative review from EDR.

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[2] *Id.* at 6.

## 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]

In this case, the agency argues that the hearing officer exceeded his authority by rescinding the Group II Written Notice for abuse of state time, asserting that this particular Written Notice was not grieved and thus not properly before the hearing officer. In response, the grievant disputes the agency's claim that he did not grieve the Written Notice regarding abuse of state time, and indicates that he grieved all three Written Notices incident to his dismissal. EDR has reviewed the hearing file in its entirety and cannot conclude that the hearing officer abused his discretion by considering the Group II Written Notice for abuse of state time.

The agency asserts that it objected at hearing to the inclusion of the Written Notice for abuse of state time, as it did not consider that Written Notice properly grieved. To this, the hearing officer found that:

> [i]n the Grievant's Form A… he grieved issues regarding "falsifying records" and "failure to follow instructions." He did not specifically set forth an issue of "abuse of state time." However, it is clear that the Grievant was grieving his termination and it begs logic to think that his intent was to grieve two Written Notices that terminated him and not the third. The Agency, in each of the three Written Notices indicates that the Written Notice resulted in a termination. I find that the Written Notice regarding "abuse of state time" is inextricably linked with the Written Notice regarding "failure to follow instructions." Accordingly, all three of the Written Notices are properly before me.[5]

Based upon a review of the hearing file in this matter, there exists sufficient evidence to support the hearing officer's determination that all three Written Notices were properly before him for consideration at hearing. In this instance, the grievant was issued three separate Written Notices on the same day, each indicating that it accompanies a termination effective the following day. The grievant then filed a dismissal grievance to challenge his termination. Thus, the hearing officer's determination that the grievant's challenge to this termination challenged all disciplinary actions related thereto is a reasonable reading of the grievance and an appropriate exercise of authority.

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[3] Va. Code § 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Hearing Decision at 3-4.

Further, the agency listed all three Written Notices on the Form B – Request for Appointment of a Hearing Officer as the "Issue" in this matter and submitted that form to EDR. Having done so, it put the parties and the hearing officer on notice that all three Written Notices were at issue, and it cannot now fairly be said that it considered only two of those Written Notices as qualified for hearing. The hearing officer did not abuse his discretion in considering all three Written Notices as having been at issue in this instance.[6]

To the extent that the agency's request for administrative review also challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing, we will not disturb the decision on this basis. The agency asserts that with respect to the Written Notice for falsifying records, the grievant manipulated the system to show that the missing book had been returned, when in fact it had not, and that this action constituted falsification. To this, the hearing officer found that the grievant "put a true statement in the system to indicate that the book was back in the proper hands. He falsified nothing. It is quite possible that he did not follow proper procedure, but nothing was falsified."[7]

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 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

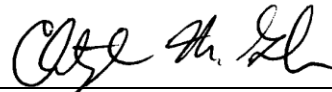
In this case, the hearing officer considered the grievant's conduct alongside the definition of "falsified" and found that the evidence did not support the issuance of a Group III offense for falsification of records, as the grievant's entry into the agency's system was completely

[6] The University also appears to argue that because it thought the "abuse of state time" grievance was not at issue, it did not present evidence to support that Written Notice. During the hearing, the University's representative took the position that this Written Notice was not at issue, but the hearing officer indicated that he would have to rule on the issue later and the parties should proceed with their evidence. Hearing Recording at 16:13 – 21:04. If the University did not present any evidence on the "abuse of state time" Written Notice in hopes that its position would be upheld, that choice was made at its peril. It could have avoided that risk by making an objection but still presenting evidence in case the objection was not sustained.
[7] Hearing Decision at 5.
[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.

accurate.[12] Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

## 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.[13] 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.[14] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[15]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[12] Hearing Decision at 5.
[13] *Grievance Procedure Manual* § 7.2(d).
[14] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[15] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).