

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10240; Ruling
Date: February 28, 2014; Ruling No. 2014-3812; Agency: Old Dominion University;
Outcome: Hearing Officer and Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2014-3812
February 28, 2014

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 10240. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10240, as found by the hearing officer, are as follows:¹

Old Dominion University employed Grievant as a Housekeeper. No evidence of prior active disciplinary action was introduced during the hearing.

The Manager held a staff meeting beginning at approximately 6:30 a.m. on October 16, 2013. Approximately ten to fifteen employees attended the meeting. Some staff were sitting around a rectangular table with the Manager standing at the head of the table. The Manager was standing with his back to the door. Grievant was seated at the table several feet away from the Manager. Several staff were sitting or standing against the walls of the room as they listened to the Manager speak. The Manager discussed various work items and then asked for comments from staff. Grievant said he wanted the days of his shift to change. He was speaking on behalf of himself and several other employees working the same shift. The Manager told Grievant that he would deny Grievant’s request to change shifts but that an employee could always speak with an employee on another shift and then agree to switch shifts. he Manager said that there was a State policy supporting what he said. Grievant did not like the Manager’s answer and continued to re-state his question. Grievant demanded “Show me the policy.” The Manager said “We can go to the office after the meeting so I can look it up.” Grievant continued to speak in a confrontational and disrespectful tone and said, “This was a meeting.” The Manager said “We can meet in the office so I can look it up.” The Manager did not like how he was being spoken to during the meeting

¹ Decision of Hearing Officer, Case No. 10240 (“Hearing Decision”), January 28, 2014, at 2-3.

so he said, "I am tired of being insulted when I am trying to help people." He offered some examples of changes he had initiated. Grievant continued to state his displeasure with the Manager's response. The Manager slapped his notebook on the table and said the meeting was over. He picked up the notebook, put it under his arm and turned to leave the room. He walked out the door and into a vestibule between the meeting room and the hallway. Staff began standing up and leaving the room. Grievant continued to argue loudly with the Manager and asked why his concerns were not addressed. The Manager heard Grievant continuing to argue. The Manager was angry at and frustrated with Grievant. The Manager turned around and re-entered the room and said, "What is going on? Why are you acting like that? Let's go into the office and talk." Grievant was angry and said he was going to go to the Human Resource office. Grievant began moving in the direction of the Manager. Grievant displayed anger through his facial expressions and body movements. Several staff believed that Grievant was going to physically confront the Manager. The Housekeeping Supervisor stood up and positioned himself to protect the Manager and block Grievant's advance. The Housekeeping Manager told Grievant to "calm down." The Housekeeping Manager did not touch Grievant. Grievant told the Housekeeping Manager that he would punch the Housekeeping Manager in the face. Grievant told the Housekeeping Manager to shut up and that he meant it. The Housekeeping Manager became concerned that Grievant would harm him. Another employee, Mr. D, grabbed Grievant to block his advance towards the Manager. Mr. D pushed Grievant away from the Manager.

After the meeting ended, the Housekeeping Manager told the Manager that he wanted to file a complaint against Grievant because of Grievant's behavior.

On October 25, 2013, the grievant was issued a Group III Written Notice with termination for threatening a co-worker.² In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had threatened a co-worker, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with removal.³ The grievant now appeals the hearing decision to 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."⁴ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

² Agency Exhibit 1 at 2.

³ *Id.* at 3-5.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁵

Agency's Production of Documents

The grievant's argues in his request for administrative review that he was prejudiced as a result of the University's failure to produce certain documents. Specifically, the grievant requested a report from the University Police Department relating to a "violent incident" from October 16, 2013, and a list of "the name(s) of the employee(s) who investigated the incident, along with the names of who they interviewed . . . , and a copy of their complete statements." The hearing officer issued an order requiring the University to produce these documents on December 19, 2013. The grievant claims that the University did not produce the documents.

In cases where a party fails to produce relevant documents, hearing officers have the authority to draw an adverse inference against that party if it is warranted by the circumstances.⁶ The grievant, however, did not notify the hearing officer of the University's failure to produce the documents before the hearing, and, based on a review of the hearing recording, did not object or otherwise bring this issue to the hearing officer's attention during the hearing.⁷ By failing to make a claim to the hearing officer that the University was not in compliance with the grievance procedure because it had not produced documents pursuant to the hearing officer's order, the grievant has now waived any claim to challenge those allegations of party noncompliance on administrative review. Accordingly, EDR will not disturb the decision on this basis.

Agency's Failure to Make Witnesses Available

The grievant claims that two agency employees, Witness W and Witness S, did not attend the hearing even though they were ordered to appear as witnesses by the hearing officer. Pursuant to the *Rules*, it is the agency's responsibility to require the attendance of agency employees who, as in this case, are ordered by the hearing officer to attend the hearing as witnesses.⁸ In this case, the hearing officer ordered eighteen witnesses to attend the hearing. The two witnesses who did not appear at the hearing were current agency employees and thus the orders were issued to them at the agency's address.⁹

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ *Rules for Conducting Grievance Hearings* § V(B).

⁷ Additionally, "[a] party shall not be required to create a document if the document does not exist." *Grievance Procedure Manual* § 8.2. At the hearing, the grievant questioned the Housekeeping Supervisor about why incident for which the grievant was disciplined was not reported to the University Police Department. See Hearing Recording at 14:45-17:42. It appears from the Housekeeping Supervisor's testimony that no such report was ever filed. It is possible, therefore, that the grievant did not receive those documents because they do not exist.

⁸ *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.").

⁹ See *id.* ("Orders should be issued in the name of the hearing officer and sent by the hearing officer to the appropriate individual(s), with a copy to each party.").

A review of the hearing record indicates that, when the grievant attempted to call Witness W, he was not present.¹⁰ The agency advocate explained that Witness W had received the order to appear, but could not account for his absence.¹¹ In response to a query from the hearing officer, the grievant proffered that Witness W's testimony "would probably have been about the same" as the other witness called by the grievant.¹² The grievant did not attempt to call Witness S; the agency advocate indicated that Witness S was "on vacation."¹³ The grievant later proffered that Witness S would have testified that he sat next to the grievant at the meeting, but the grievant was not certain what Witness S would have said.¹⁴ If warranted by the circumstances, hearing officers have the authority to draw an adverse inference against a party if that party fails, "without just cause, . . . to make available relevant witnesses as the hearing officer . . . had ordered."¹⁵

It appears the hearing officer did not draw an adverse inference in this case, as there is no discussion about it in the hearing decision. It is clear from the hearing record, however, that the agency advocate explained the reason for the two witnesses' absence and the hearing officer accepted from the grievant a summary of what their testimony would have been. Essentially, the grievant believed that Witness W and Witness S would have further corroborated the testimony of the other witnesses who testified on his behalf.¹⁶ Even if the hearing officer had determined that an adverse inference was warranted in this case, the purported testimony of Witness W and Witness S, if accepted as true, would appear to have had no effect on the outcome of the case as they would not have necessarily presented any testimony different from that already in the record. The hearing officer explicitly assessed the testimony of the witnesses who did not hear the grievant threaten anyone in the hearing decision and concluded that it "[did] not establish that Grievant did not make a threat."¹⁷ There is no reason to conclude that similar testimony from two additional witnesses would have an effect on the hearing officer's decision here. Accordingly, we decline to disturb the decision on this basis.

Hearing Officer's Questioning of Witnesses

The grievant argues that the hearing officer improperly questioned the Manager and the agency advocate at the hearing about another witness's testimony in a way that showed "partiality" and "discredit[ed] the witness's statement." The *Rules for Conducting Grievance Hearings* (the "Rules") provide that "the hearing officer may question the witnesses."¹⁸ The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."¹⁹ Based on a review of the record, we

¹⁰ See Hearing Recording at 3:09:25-3:09:38.

¹¹ *Id.* at 3:09:40-3:09:46.

¹² *Id.* at 3:55:51-3:56:01.

¹³ *Id.* at 3:56:33-3:56:35.

¹⁴ *Id.* at 4:30:08-4:30:14.

¹⁵ *Rules for Conducting Grievance Hearings* § V(B).

¹⁶ Hearing Recording at 4:40:25-4:40:36.

¹⁷ Hearing Decision at 4.

¹⁸ *Rules for Conducting Grievance Hearings* § IV(C).

¹⁹ *Id.*

find the hearing officer's questions of the Manager to be relevant and reasonable. Indeed, it seems the hearing officer was merely attempting to understand the apparent inconsistency of one witness's testimony with that of all the other witnesses.²⁰ Both parties had the opportunity to further inquire of the Manager about the matter of the witness's credibility. Consequently, we find nothing inappropriate with the hearing officer's conduct in questioning the Manager about the possible bias or prejudice of another witness, to the extent that the Manager possessed relevant information that may have explained the discrepancy.

Hearing Officer's Consideration of the Evidence

The grievant asserts that the hearing officer (1) failed to consider witness testimony that the grievant did not threaten a co-worker; (2) improperly evaluated the relevance of several voicemail recordings presented by the grievant; and (3) did not consider the grievant's "original answer to the allegations" prior to the issuance of the Written Notice. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²¹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."²² 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.²³ 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.²⁴ 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, there is sufficient evidence in the record to support the hearing officer's conclusion that the "Grievant threatened to physically injure the Housekeeping Supervisor" on October 16, 2013.²⁵ Four witnesses testified at the hearing that they heard the grievant say he would punch the Housekeeping Supervisor in the face.²⁶ One witness stated that she heard the grievant threaten to "pop" the Housekeeping Supervisor in the mouth, rather than "punch" him in the face.²⁷ The grievant denied threatening the Housekeeping Supervisor²⁸ and several other witnesses explained that they did not hear the grievant make any threats.²⁹ In the hearing decision, the hearing officer noted that, "[a]lthough some employees did not hear what Grievant

²⁰ See Hearing Recording at 4:14:31-4:17:05.

²¹ Va. Code § 2.2-3005.1(C).

²² *Grievance Procedure Manual* § 5.9.

²³ *Rules for Conducting Grievance Hearings* § VI(B).

²⁴ *Grievance Procedure Manual* § 5.8.

²⁵ Hearing Decision at 3.

²⁶ Hearing Recording at 6:42-7:13, 46:21-46:39, 1:01:56-1:02:00, 3:11:57-3:12:09.

²⁷ *Id.* at 4:02:20-4:03:02.

²⁸ *Id.* at 3:48:02-3:48:13.

²⁹ See, e.g., *id.* at 1:54:19-1:54:28, 2:30:27-2:30:39, 3:07:00-3:07:22.

said to the Housekeeping Supervisor, this does not establish that Grievant did not make a threat.”³⁰ It is clear, therefore, that the hearing officer considered the testimony of the grievant and of the witnesses who did not hear the grievant threaten the Housekeeping Supervisor and determined that this evidence either was not credible or did not prove the grievant did not make a threat.

Weighing the evidence and rendering factual findings is squarely within the hearing officer’s authority, and EDR 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.³¹ Because the hearing officer’s findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

With respect to the grievant’s claims that the hearing officer failed to consider the voicemail recordings and original written statement, it does not appear that the hearing officer’s evaluation of this evidence was in any way deficient or improper. At the hearing, the grievant played the voicemail recordings and had the opportunity to explain why he believed they were relevant.³² The recordings were admitted into evidence.³³ Likewise, the grievant’s written statement was entered into evidence by both the agency and the grievant.³⁴ It is within the hearing officer’s authority to weigh the evidence presented by the parties and make findings of fact. While the grievant may not agree with the hearing officer’s conclusion as to whether and to what extent the evidence he introduced was relevant or persuasive, there is nothing in the hearing recording or the hearing decision to indicate that the hearing officer abused his discretion in assessing the relative persuasive weight of these pieces of evidence. Accordingly, EDR cannot disturb the hearing officer’s decision on this basis.

The grievant further asserts that the hearing officer has “rewritten the original [W]ritten [N]otice . . . by adding aggressive adjectives and overtones.” For example, the hearing decision states that the grievant spoke “in a confrontational and disrespectful tone” at the meeting and “displayed anger through his facial expressions and body movements.”³⁵ It appears that the grievant mistakenly believes these factual findings in the hearing decision somehow alter the original Group III Written Notice that was issued. This is not the case. The hearing decision contains the hearing officer’s findings of fact that relate to the conduct for which the grievant was disciplined, but does not modify the Written Notice in any way. That document remains unchanged as it was originally issued. While the grievant may disagree with the hearing officer’s characterization of the grievant’s conduct, there is no indication that the hearing officer’s findings of fact, as stated in the hearing decision, are not based on the evidence in the record. We decline to disturb the decision on this basis.

³⁰ Hearing Decision at 4.

³¹ *See, e.g.*, EDR Ruling No. 2012-3186.

³² *See* Hearing Recording at 3:24:00-3:31:30.

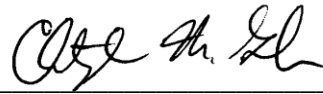
³³ *See* Grievant’s Exhibit 4.

³⁴ *See* Agency Exhibit 1 at 3-4; Grievant’s Exhibit 1 at 12-13.

³⁵ Hearing Decision at 2-3.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.³⁶ 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.³⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁸



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³⁶ *Grievance Procedure Manual* § 7.2(d).

³⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).