Issue: Administrative Review of Hearing Officer's Decision in Case No. 10485; Ruling Date: February 20, 2015; Ruling No. 2015-4096; Agency: University of Virginia; Outcome: Hearing Decision in Compliance.

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

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia
Ruling Number 2015-4096
February 20, 2015

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 10485. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10485, as found by the hearing officer, are as follows:[1]

> The University of Virginia employs Grievant as a Buyer Specialist. He has been employed by the Agency for approximately eight years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant worked in a position that required him to have a college degree. He had completed most of the credits required for a degree but needed some additional credits. Rather than removing Grievant from his position, the Agency chose to let Grievant take the additional coursework to obtain his degree. The Agency also agreed to assist Grievant financially with his studies.
>
> On June 21, 2012, Grievant and the Agency entered into an Educational Studies Contractual Agreement ("Agreement") stating, in part:
>
> > The Employee is enrolled in an Educational Studies Program ("academic program"); an academic program previously approved by the Employee's Department. The University is willing to make certain payments to or for the benefit of the Employee who agrees to repay the University these amounts with interest at the rate of three percent (3%) per annum, calculated from the date the monies are paid or credited to the Employee, unless the Employee successfully completes the academic program and serves as an employee with the University for a period of 12 months after the Employee's completion of the academic program, which should occur no later than December 31, 2012.

[1] Decision of Hearing Officer, Case No. 10485 ("Hearing Decision"), January 23, 2015, at 2-7 (citations omitted).

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> The University agrees to pay the cost of tuition and fees as stated in Attachment A, (Tuition Payment Schedule), not to exceed a total of $9,900.The tuition payments are necessary to permit the Employee to complete the Bachelors of Science in [major] from [University J].
>
> The Employee agrees to furnish to the University a copy of the courses for which the Employee is registered. Furthermore, the Employee agrees to furnish the Employee's Department at the end of the academic program a copy of the school's transcript showing the titles of the courses taken, the number of credit hours, and the grades received, or a notation of progress achieved in the courses.
>
> The Employee hereby authorizes the school in which the Employee is enrolled to disseminate any information concerning the Employee to the University in order to determine whether the Employee is complying fully with this Agreement. In addition, the Employee agrees to supply the University with any other pertinent information which it may request of him/her prior to the complete discharge of his/her obligation under this Agreement in order to allow the University to determine whether the Employee is complying fully with this Agreement.

Grievant and the Director signed the Agreement on June 21, 2012. The Chief Human Resource Officer signed the Agreement on June 26, 2012.

Grievant received money from the Agency but did not take classes in the fall of 2012 with University J. He did not obtain his bachelor's degree by December 31, 2012 as promised under the Agreement. He took classes beginning in the Spring 2013 term and ending in the Spring 2014 term.

On August 16, 2013, the Director sent Grievant a memorandum stating, in part:

> My review of your FY 2013 evaluation appeal has revealed that several terms of your Education Studies Contractual Agreement ("Agreement") have not been fulfilled. The Agreement states that you are to complete your Bachelor's degree by December 31, 2012; to date you have provided no evidence that you have completed your degree. This Memorandum serves to remind you of the unfulfilled terms of that Agreement and invokes its provisions to request the following documents:
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> Proof that the amount of $9,900 you received under the terms of the Agreement was used to pay tuition at [University J] in the form of an invoice sent directly from [University J];

> An official transcript from [University J];
> A certificate of good standing from [University J];
> A complete list of requirements that remain to be met before the degree can be conferred.
>
> Please be advised that these documents must be sent directly from [University J] to PSDS. Kindly request these documents from [University J], provide [University J] with any and all authorizations or permissions to release forms required, and request that the above-listed documents be sent directly to:
>
> [Business Manager]
> [Address]
>
> Please provide these documents on or before September 2, 2013.

Grievant did not comply with the Director's August 16, 2013 instruction.

Agency staff contacted University J staff about obtaining documents relating to Grievant. The University J staff indicated Grievant would have to sign certain releases. The Agency provided Grievant with releases and instructed him to complete the releases. On October 29, 2013, the Executive Assistant sent Grievant an email asking, "When can I expect return of the signed forms?" Grievant responded to her email by asking questions.

On October 30, 2013, Grievant sent the Executive Assistant an email stating, in part, "I was under the impression from our brief meeting last Wednesday that you were going to be following up with me (not the other way around) – My impression was that you were going to look into the status of the Agreement as it related to additional authorizations (as you have done below), and let me know what you found out. My apologies for the confusion."

On October 30, 2013, the Executive Assistant replied to Grievant's email stating, in part:

> I don't understand the source of the confusion. My notes from our meeting last Wednesday confirm that you declined to sign the authorization in order to give yourself the opportunity to consult the contract. If you have questions as to whether the contract required your cooperation in this regard, it is your responsibility to investigate the matter for yourself. It makes no sense to place the onus on me to do the investigation, as it is self-evident that UVA has already determined your obligation by virtue of the face that we presented you with the authorization to sign. Indeed, General Counsel affirms you have an obligation in this matter.

On November 13, 2013, Grievant sent the Executive Assistant an email stating, in part:

> With respect to your most recent request for me to execute the attached [University J] Authorizations, I am going to respectfully decline. As I detailed in my November 1st e-mail (a copy of which is below):
>
> > "other than the authorization already included in the Agreement, I have not found any other language in the Agreement that would require me to execute additional authorizations. By all means, if I am mistaken (and other language in the Agreement details such a responsibility) please let me know."

On January 16, 2014, the Director sent Grievant a Demand Letter informing Grievant that he was in breach of the Agreement and giving him three options. The first option was to return the money paid by the Agency pursuant to the Agreement. The second option was to make arrangements with the Agency's Payroll department to repay the money by payroll deduction. The third option was:

> Present satisfactory evidence to me [Director] by January 28, 2014, that you have requested that the following documents be sent directly from [University J] to me to be received by February 28, 2014.
>
> 1. Certified Transcript.
> 2. Certificate of Good Standing.
> 3. Listing of courses and/or requirements needed to complete Bachelor's Degree.
> 4. Statement of Accounts showing amounts paid to [University J] for the time period from June 2011 to the present.
>
> In addition, please provide to me a signed release allowing [University J] to correspond directly with employees of University of Virginia Human Resources.

Grievant was given until January 28, 2014 to notify the Agency which of the three options he would select.

> On April 4, 2014, Grievant sent the Director an email stating, in part:
>
> I wish to inform you of the completion of my Bachelor's Degree from [University J]. Attached is a copy of my diploma. *** Furthermore, in keeping with your previous requests, I have directed [University J] to send an "official" transcript directly to you ([University J's] system shows that it was mailed out today.) If you do not receive that document in the upcoming few days, please let me know.

On April 8, 2014, the Director received an official transcript from University J confirming Grievant's completion of the degree requirements.

On April 25, 2014, the Vice President sent Grievant a letter stating, in part:

> On April 8, 2014, [Director] received your official transcript from [University J] confirming that you have completed the requirements for your degree. Even though it was received beyond the deadline stipulated in the demand letter this satisfies the request in-part, but the request for information relating to payments made to [University J] remains outstanding. To satisfy this remaining issue, the University requests that you provide written consent for [University J] to provide this information directly to UVa. I believe this is a legitimate request of the University give the financial support we have provided for your education.

On May 27, 2014, the grievant was issued a Group II Written Notice for insubordination.[2] In the hearing decision, the hearing officer determined that the evidence in the record did not demonstrate that the grievant had been insubordinate.[3] The hearing did, however, conclude that the grievant had failed to follow a supervisor's instructions and upheld the agency's issuance of the Group II Written Notice on that basis.[4] 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."[5] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[6]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

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[2] *See* Agency Exhibit 2 at 1-3.
[3] Hearing Decision at 6-8.
[4] *Id.* at 6-9.
[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).

Substitution of Charge

In this case, the grievant argues that the hearing officer erred because he upheld the Group II Written Notice on a basis other than that asserted by the University. The grievant claims that it is outside the hearing officer's authority to "substitute a charge of failure to follow supervisor's instructions for the [University]'s charge of insubordination . . . ." Section VI(B) of the *Rules for Conducting Grievance Hearings* (the "*Rules*") provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[8] EDR's rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[9]

In this case, the description of the offense in the Written Notice included the following:

> On June 21, 2012[,] [the grievant] signed an Educational Studies Agreement which required him to complete his BA from [University J] by December 31, 2012. . . . . The Agreement specifically states "the Employee agrees to supply the University with any other pertinent information which it may request." December 2012 came and went and [the grievant] provided no information as to the status of his progress. By letters dated August 16, 2013, October 29, 2013, and January 16, 2014, Management requested [the grievant] provide official documentation from [University J] in order to verify the status of his degree. [The grievant] did not provide the information requested, refused to sign the necessary release forms for the University to acquire the information and didn't respond to the final request.[10]

The Written Notice further characterized the grievant's misconduct as "insubordination."[11] In the hearing decision, the hearing officer determined that the grievant had failed to comply with a supervisor's instructions as described on the Written Notice form above and upheld the disciplinary action on this basis.[12] The hearing officer further stated that "[t]he Agency presented evidence showing that Grievant repeatedly failed to comply with a supervisor's instructions" and "mistakenly referred to this as 'insubordination.'"[13]

While the Written Notice itself does not explicitly refer to the grievant's behavior as "failure to follow a supervisor's instructions," it does clearly state that the grievant was directed to provide information on at least three occasions, that he failed or refused to comply with those instructions, and that the discipline was issued for that reason.[14] The hearing officer assessed the evidence and reached the same conclusion, noting that

> [r]efusing to comply with a supervisor's instruction is not, in itself, insubordination. Only if the refusal is accompanied with some additional behavior

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[8] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) .
[9] *See, e.g.*, EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.
[10] Agency Exhibit 2 at 1.
[11] *Id.*
[12] Hearing Decision at 6-9.
[13] *Id.* at 8.
[14] *See* Agency Exhibit 1 at 1.

> doubting the legitimate or [sic] authority of the supervisor does the refusal also constitute insubordination. In this case, the distinction is not material. Insubordination and refusal to comply with instructions are both Group II offenses. The Agency presented overwhelming evidence to show that Grievant repeatedly disregarded the Agency's instructions to provide information from University J. The Written Notice clearly identifies a basis for taking disciplinary action was Grievant's refusal to provide requested information.[15]

Based on the description of the alleged misconduct set forth on the Written Notice, there can be little question that the grievant had adequate notice of the behavior for which he was being charged and the agency's theory for its disciplinary action. The hearing officer upheld the Written Notice based on the conduct described on the Written Notice form. Whether characterized as insubordination or a failure to follow a supervisor's instructions, the underlying facts relied upon by the agency were the same. Neither charge is that dissimilar from the other such that the grievant was somehow prevented from adequately defending against the charges. As the hearing officer noted, "[i]nsubordination and refusal to comply with instructions are both Group II offenses."[16] As such, EDR can find no error with the hearing officer's determination that the agency had met its burden to prove the grievant's conduct, as described on the Written Notice form, warranted a Group II charge.[17]

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer erred by "ignor[ing] a previous EDR ruling that was directly relevant." EDR Ruling Number 2014-3909 states, in relevant part, that

> disputes relating to the enforcement of a contractual agreement between an employing agency and an employee . . . do not fall within the types of cases that qualify for hearing as enumerated under the grievance statutes and the grievance procedure. This dispute involves questions of law more properly determined by a legal proceeding in a court of appropriate jurisdiction than through the grievance procedure.[18]

Based on this language, the grievant asserted at the hearing that disciplinary action was not appropriate because the grievance procedure does not provide a remedy for contractual disputes.[19] In his request for administrative review, the grievant argues that "[t]he agency has

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[15] Hearing Decision at 8.
[16] Hearing Decision at 8. See Section B(2)(b) of DHRM Policy 1.60, *Standards of Conduct* and Attachment A to the *Standards of Conduct*, which classify insubordination and failure to follow a supervisor's instructions as offenses that "significantly impact" agency business operations and justify the issuance of a Group II Written Notice.
[17] To the extent the grievant has challenged the substitution of the charge issue as a question of due process, EDR finds no error as a matter of the grievance procedure. The grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings.* Whether any alleged due process violation supports a contention that the hearing decision is contrary to law is a question that can be raised in a legal appeal to the appropriate circuit court. *See* Va. Code §2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[18] EDR Ruling No. 2014-3909 (citation omitted). This ruling was admitted into the hearing record as Grievant's Exhibit 24.
[19] *See*, *e.g.*, Hearing Recording at 2:10:09-2:12:04 (testimony of Manager M).

other potential avenues of recourse" to resolve the situation for which he was disciplined, and appears to assert that the hearing officer erred in not concluding as much and rescinding the discipline.

As discussed above, the evidence in the record shows that the grievant was disciplined for refusing to comply with three requests from University management to authorize the release of information relating to his enrollment and status at University J.[20] In the hearing decision, the hearing officer stated that, regardless of the grievant's obligations under the Agreement, "[t]he Agency's managers also had the inherent authority to instruct Grievant to provide documents."[21] The hearing officer clearly determined that University management had the authority to direct the grievant to authorize the release of information absent any obligation contemplated in the Agreement. Therefore, even assuming that EDR Ruling Number 2014-3909 could or should have had any effect on the hearing officer's consideration of the Agreement's enforceability, the University retained the authority to direct the grievant to authorize the release of information relating to his status at University J and the grievant was obligated to comply with such a directive. As a result, there is nothing to indicate that the hearing officer's consideration of EDR Ruling Number 2014-3909 and its impact, if any, on his decision constituted error or was in any way an abuse of discretion. Accordingly, we decline to disturb the hearing decision on this basis.

Mitigation

The grievant also appears to challenge the hearing officer's decision not to mitigate the disciplinary action on the basis that the University delayed the issuance of the discipline for an extended period of time. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[22] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[23] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[24]

Thus, the issue of mitigation is only reached if the hearing officer first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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[20] *See* Agency Exhibit 2 at 1-2.
[21] Hearing Decision at 7.
[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id.* § VI(B)(1).

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[25] EDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant appears to assert that the hearing officer should have mitigated the disciplinary action because of the delay between the time period during which the misconduct occurred and the time the grievant was disciplined. Although it cannot be said that a delay in issuing discipline is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. In this case, the grievant alleges that the University delayed issuing the discipline from August 16, 2013, the date when he was first directed to provide information to the University, and May 27, 2014, the date the disciplinary action was issued—a period of approximately nine and a half months. During that time, the grievant received two additional directives to provide information, on October 29, 2013 and January 16, 2014. That the University chose to provide the grievant with additional opportunities to comply with its directives before issuing discipline does not, by itself, render the delay in the issuance of the disciplinary action unreasonable. Based on the evidence in the record, it also appears that other circumstances outside of the University's control may have contributed, in part, to a delay in the University's issuance of the discipline.[27] Under these facts and circumstances, EDR cannot conclude that a delay of this length renders the agency's disciplinary action outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.[28] Accordingly, EDR will not disturb the hearing officer's decision.

Alleged Witness Intimidation

Finally, the grievant alleges, in effect, that the University's advocate engaged in witness intimidation before the hearing by meeting with several witnesses that he called to testify. He further asserts that the University's advocate unfairly manipulated the scheduling of dates for the hearing and for the exchange of exhibits in order to gather information from his witnesses.

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[25] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[26] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[27] For example, there is evidence in the record which suggests that the due process meeting prior to issuance of the Written Notice was "delayed several times at [the grievant]'s request." Agency Exhibit 2 at 1; *see* Agency Exhibit 1 at 10-11. Furthermore, it appears that the grievant filed several grievances during the time period between August 2013 and May 2014, which may have limited the University's ability to issue disciplinary action while the grievances were resolved. *See* Grievant's Exhibits 18, 21, 24.

[28] *See* Hearing Decision at 8-9.

The *Rules* do not prohibit either party from speaking with any of the witnesses who may be called to testify at a grievance hearing. If, however, an agency or its advocate were to question a potential witness with the intention of intimidating that witness and preventing a full and fair grievance hearing, such an action would clearly not be permitted under the grievance procedure. For EDR or a hearing officer to make such a determination, there must be evidence to show that the meeting or interrogation was not for a legitimate purpose, but rather was intended to intimidate and/or dissuade the witness from testifying truthfully. Like any other factual determination, there must be evidence in the record to support such a finding. The party alleging intimidation bears the burden of proof.[29]

In this case, the grievant has not demonstrated that the University's actions constituted witness intimidation or otherwise prevented a fair and impartial hearing. There is no evidence to suggest that the University's advocate met with potential witnesses for the purpose of encouraging them to provide false testimony. It would appear instead that the University's advocate simply met with potential witnesses to gather information about the issues that were the subject of the hearing. There is nothing inherently prejudicial or improper about an advocate's choice to gather information in this way. Furthermore, the grievant has not presented any information to show that the scheduling of dates for the hearing and for the exchange of exhibits between the parties was somehow intended to prevent the grievant from fully presenting his case at the hearing or that the schedule set by the hearing officer had any effect on the outcome of the case.[30] In the absence of any indication that witness tampering, intimidation, or other improper conduct occurred here, there is no basis to conclude that the University's actions caused any material prejudice to the grievant that would justify remanding the case to the hearing officer on this issue. Accordingly, EDR declines to disturb the decision on this basis.

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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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[29] *Cf.* EDR Ruling No. 2009-2300.
[30] Indeed, it would be reasonable to assume that, had the dates for the hearing and for the exchange of exhibits been sooner, the University's advocate would have simply met with the same individuals at an earlier time.
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).