

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10548; Ruling
Date: April 29, 2015; Ruling No. 2015-4127; Agency: College of William and Mary;
Outcome: Remanded to AHO.



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

ADMINISTRATIVE REVIEW

In the matter of the College of William and Mary
Ruling Number 2015-4127
April 29, 2015

The College of William and Mary (the “College”) 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 10548. For the reasons set forth below, EDR remands this matter to the hearing officer for action consistent with this ruling.

FACTS

The hearing in Case Number 10548 was scheduled to commence on March 12, 2015.¹ The College states that, two days before the scheduled hearing, it learned that its primary witness did not wish to testify because of threats allegedly made against her.² The College met with the witness and contacted the police in an attempt to assess the reported threats. On March 10, 2015, the College contacted EDR to discuss whether the hearing could be continued to allow for a more thorough investigation of the alleged threats. According to the College’s request for administrative review, the College was advised that continuances were generally disfavored but that it could make a written request to the hearing officer. As the College believed there was little likelihood of success of any motion for a continuance and was concerned about providing information to the grievant about the witness’s allegations, the College proceeded with the hearing as scheduled. The witness did not appear at the hearing on March 12, 2015. Based on the witness’s failure to testify, the hearing officer concluded that the College had failed to carry its burden of proof and reinstated the grievant.³

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

¹ Decision of Hearing Officer, Case No. 10548, March 13, 2015 (“Hearing Decision”), at 1.

² The College also notes that the witness was eight months pregnant, the pregnancy was apparently high risk, and the witness’s doctor advised her to avoid stressful situations.

³ The hearing officer wrote, “If [primary witness] had appeared at the hearing and testified credibly to the facts she alleged in the statement, there would have been sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. The absence of [primary witness]’s testimony renders the Agency’s case unsustainable.” Hearing Decision at 3.

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 award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁵

This case presents a unique and unusual situation. Fortunately, cases in which there are serious allegations of witness tampering are rare, and therefore both parties and hearing officers lack experience in addressing these concerns. The College argues, in effect, that the hearing officer erred in moving forward with the hearing on March 12, 2015, given the pending issues regarding the alleged threats toward the witness. While the rationale for the College’s decision not to submit a formal request for continuance (however detailed it could have been at the time) prior to the hearing is not clear, we nevertheless agree that additional measures are and were needed to address the concerns raised by the College. In reaching this conclusion, we note that EDR and the hearing officer were made aware of the alleged threats in a general way prior to the hearing and steps could have been taken at that time to inquire about, address, or resolve the matter. Further, while the College bears some responsibility for apparently not requesting a continuance or adjournment at the time the hearing began or more fully laying out what the specifics of its concerns were, given the severity of the allegations presented by the College, it is unclear why the hearing officer did not make a greater effort at hearing to address and explore the reasons for the witness’s absence.

Accordingly, EDR finds that given the unique facts and circumstances of this case, remand of the hearing decision is appropriate to allow additional exploration of the concerns raised by the College, as well as any arguments made or evidence submitted by the grievant in response. On remand, the hearing officer must open the record to allow the admission of evidence from the College regarding the alleged threats made against the witness, as well as evidence of the witness’s medical condition at the time of the hearing and/or other reasons for her absence from the original hearing. The grievant will also have the opportunity to present evidence and argument on these matters. The hearing officer must consider whether the grievant or her representatives took any action to threaten the College’s witness, and if so, what actions are necessary to address the conduct and its impact on the case.⁶ In addition, the hearing officer must consider whether either the witness’s belief that threats had occurred and/or her medical condition justified her absence from hearing on March 12, 2015,⁷ and if so, reopen the hearing to

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

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

⁶ See, e.g., *Grievance Procedure Manual* § 1.9 (setting forth the grievance procedure’s Code of Conduct and Civility); *Rules for Conducting Grievance Hearings* § III(E) (discussing the hearing officer’s authority to issue orders and sanctions).

⁷ It should be noted that an agency presented two days prior to a hearing with a witness who allegedly believes she is being threatened, a lack of time to adequately investigate said threats, and where the witness is also in the late stages of a high-risk pregnancy under a doctor’s orders not to be involved in stressful situations is in a unique and exceedingly difficult position. If these facts were in existence, a decision not to direct an employee to attend a hearing under such circumstances might appear to be prudent. However, EDR is unable to definitively examine all of these factors as it is not clear what evidence exists in the record of these issues. Consequently, the remand will allow the hearing officer a sufficient opportunity to review any such documentation or testimony as to these concerns as presented by both parties.

allow the College another opportunity for her to testify through an appropriate means on a date and time agreeable to the parties.

CONCLUSION

For the foregoing reasons, we remand the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision). Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.⁸

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.⁹ 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.¹⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁸ See *Grievance Procedure Manual* § 7.2(a).

⁹ *Id.* § 7.2(d).

¹⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹¹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).