

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10755; Ruling
Date: May 25, 2016; Ruling No. 2016-4357; Agency: Virginia Commonwealth
University; Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2016-4357
May 25, 2016

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 10755. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10755, as found by the hearing officer, are as follows:¹

Virginia Commonwealth University employs Grievant as a Grounds Foreman. She has been employed by the University for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 23, 2015, the Superintendent of Grounds counseled Grievant regarding the importance of courtesy and respect when dealing with other employees.

The President had a reserved parking space behind a set of buildings. The Driver was responsible for driving the University President to various locations for meetings. To get to the reserved parking space, the Driver had to drive his vehicle from the public street down a driveway, turn left and drive a short distance to the end of the parking lot where a Building was located. A handicapped parking space was on the left side of the reserved space. Once the vehicle was near the end of the parking lot and facing the back of the Building, the Driver had to turn the vehicle to his left to enter the parking space with the front of the vehicle facing the Building.

The University President had a meeting scheduled for 10 a.m. on August 24, 2015 at the Building. The University President entered the sport utility vehicle in the front passenger seat. The Driver sat in the driver’s seat and they drove from one part of the campus towards the Building. The Driver entered the driveway to go to the reserved parking space. He passed several parking spaces to his left and to his right. He turned the vehicle to his left and drove past three more parking

¹ Decision of Hearing Officer, Case No. 10755 (“Hearing Decision”), May 2, 2016, at 2-3.

spaces on his left and his right. Those spaces were filled with vehicles except the reserved parking space on his left. On the right side were two service vehicles that were not in parking spaces and were parked perpendicular to the parking spaces containing vehicles. The positioning of the services vehicles created a pathway that was too narrow for the Driver to turn his vehicle into the reserved parking space.

Two or three construction workers were working on the concrete near the Building. Grievant was watering plants in front of the reserved parking space. One of the two service vehicles was assigned to Grievant.

The Driver positioned the SUV to the left of the reserved parking space. The Driver opened the vehicle door and stepped on the running board and looked towards Grievant. Grievant said towards the construction workers, "I'm not moving my vehicle anymore." The Driver asked, "Can you move your vehicle so I can get into my assigned parking spot?" Grievant said, "You can park back there" while pointing away from the parking space. The Driver said, "No, Ma'am that is my assigned parking spot." The University President asked the Driver if it was ok to exit at that time. The Driver said, "Yes, sir" and the University President exited the vehicle. Grievant looked at the President and said loudly to the Driver, "I don't care who you are hauling, you don't have to be rude to me!" The University President continued walking and entered the Building.

Grievant then walked to her vehicle. She got inside and moved the vehicle backwards a sufficient distance to enable the Driver to put his vehicle into the reserved space. She drove the vehicle backwards at a fast pace.

The Driver felt Grievant was rude and disrespectful to him. He was not rude to Grievant and did not yell at her even though Grievant yelled at him.

On or about September 14, 2015, the grievant was issued a Group I Written Notice for unprofessional and disruptive behavior.² The grievant timely grieved the disciplinary action³ and a hearing was held on March 2, 2016.⁴ In a decision dated May 2, 2016, the hearing officer determined that the agency had presented sufficient evidence to show the grievant's actions constituted unsatisfactory work performance and upheld the issuance of the Group I Written Notice.⁵ 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."⁶ If the hearing

² Agency Exhibit 1.

³ Agency Exhibit 2.

⁴ See Hearing Decision at 1.

⁵ See *id.* at 4-5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

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.⁷

In her request for administrative review, the grievant asserts that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. 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 the 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 the hearing decision, the hearing officer assessed the evidence and concluded that the "Grievant's job duties included being respectful to other employees" and that "[s]he had been counseled regarding this obligation on July 23, 2015."¹² Based on the evidence presented by the parties, he determined that the "Grievant said she did not care who the Driver was hauling, he did not have to be rude to her" when the Driver asked her to move, which "was disrespectful and demeaning to the Driver" and justified the issuance of a Group I Written Notice for unsatisfactory performance.¹³ In her request for administrative review, the grievant broadly disputes the hearing officer's decision, claiming that "the driver was the one who was disrespectful" during the incident, that the Driver did not testify truthfully at the hearing, and that she did not use the phrase "I don't care who you are hauling," when she spoke to the Driver.¹⁴ The grievant further asserts that the counseling she received on July 23, 2015 was "not about [her]," but was prompted by issues she was having with a coworker at the time.

There is evidence in the record to support the hearing officer's conclusion that the grievant's actions constituted unsatisfactory work performance. The agency presented evidence to show that the grievant was required by policy to "respect individuals, diversity, and the rights of others" in the workplace,¹⁵ and to "[d]emonstrate respect for the agency and toward agency coworkers"¹⁶ At the hearing, the Driver described his interaction with the grievant during

⁷ See *Grievance Procedure Manual* § 6.4(3).

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.

¹² Hearing Decision at 4.

¹³ *Id.*

¹⁴ See Hearing Decision at 3, 4.

¹⁵ Agency Exhibit 6 at 6.

¹⁶ Agency Exhibit 5 at 2; Agency Exhibit 6 at 6.

the incident on August 24, 2015, testified that she told him “I don’t care who you are hauling, you don’t have to be rude to me,” and explained that he believed her behavior was disrespectful and inappropriate.¹⁷ The Driver also stated that he did not yell at the grievant or raise his voice when speaking to her.¹⁸ While the grievant provided a different account of the incident and asserted that the Driver was rude to her,¹⁹ conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. EDR finds no basis to disturb the hearing officer’s conclusion that the Driver’s testimony about the particulars of the incident on August 24, 2015 was credible.

Furthermore, we do not disagree with the grievant that she was counseled on July 23, 2015 in relation to an issue with a coworker. The Superintendent testified at the hearing that he had counseled the grievant about displaying respectful and courteous behavior before the incident on August 24.²⁰ When questioned by the grievant, the Superintendent confirmed that the conversation on July 23 was not corrective in nature in that it was not prompted by any specific action of the grievant’s, but stated that he did provide her with guidance regarding her interactions with coworkers to reinforce his expectations for her behavior.²¹ Though the grievant disputes the hearing officer’s characterization of the July 23 counseling, there is evidence to support his conclusion that she had been counseled by the Superintendent about her interactions with others in the workplace on that date.

While the grievant may disagree with the hearing officer’s decision, there is nothing to indicate that his consideration of the evidence regarding the grievant’s interaction with the Driver was in any way unreasonable or not based on the actual evidence in the record. 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.²² Because the hearing officer’s findings in this case 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

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.²³ Within 30 calendar days of a final hearing decision, either party may appeal the

¹⁷ *E.g.*, Hearing Recording at 14:59-16:21, 18:13-18:45, 36:23-37:53, 41:34-42:31, 44:13-46:32 (testimony of Driver); *see* Agency Exhibit 3.

¹⁸ *Id.* at 16:41-16:54, 22:34-23:54 (testimony of Driver).

¹⁹ *E.g.*, *id.* at 2:23:19-2:23:39, 2:27:51-2:28:33, 2:31:45-2:32:09 (testimony of grievant).


²⁰ *Id.* at 1:21:24-1:23:21 (testimony of Superintendent).

²¹ *Id.* at 1:31:42-1:32:40 (testimony of Superintendent).

²² *See, e.g.*, EDR Ruling No. 2012-3186.

²³ *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



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²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).