Issue: Administrative Review of Hearing Officer's decision in Case No. 10311; Ruling Date: July 11, 2014; Ruling No. 2014-3914; Agency: Virginia Community College System; 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 Virginia Community College System
Ruling Number 2014-3914
July 11, 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 10311. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10311, as found by the hearing officer, are as follows:[1]

> The Virginia Community College System employed Grievant at one of its colleges as its Director of Admissions and Records. She began working for the Agency in 2008. Grievant received favorable performance evaluations. Grievant had prior active disciplinary action consisting of a Group II Written notice issued June 21, 2012.
>
> Grievant reported to Ms. G who reported to Mr. S.
>
> The Agency employed a part-time Graduation Coordinator to assist with its graduation procedures and practices. Ms. M served as the part-time Graduation Coordinator. She was competent in her duties and well-liked and respected by Agency managers. Ms. M reported to Grievant. The Agency decided to hire a full time Graduation Coordinator. The full time position would report to Grievant. Ms. M wanted to be the full time Graduation Coordinator and assumed that if she did not get the position, the need for her part-time position would end. Grievant had given Ms. M numerous favorable evaluations and had requested continuance of Ms. M's services at the end of her contract period with the Agency.
>
> The Agency advertised the new position using websites including the DHRM job website. Ms. M had an existing electronic application on the DHRM website that included Ms. G and Mr. S as references. Ms. M asked Ms. G and Mr. S if she could use them again as references for her application for the full time Graduation Coordinator position. They agreed. Ms. M submitted her application for employment to the Agency.

[1] Decision of Hearing Officer, Case No. 10311 ("Hearing Decision"), June 2, 2014, at 2-7 (citations omitted).

Ms. S was working at neighboring University with more students than the College and had experience with registration and graduation. Ms. S applied for the full time Graduation Coordinator position.

Grievant was the Hiring Manager and placed in charge of selecting employees for the committee to interview candidates. She selected four other employees to assist her with the interviews.

The Agency's human resource staff screened the online applicants and narrowed the list of candidates to approximately 16. The list was sent to Grievant and the selection committee who reviewed the candidates and narrowed the list to six candidates to be interviewed. One of the applicants had a PhD. Another was a retired Dean.

Interviews were scheduled for November 12, 2013. Several days prior to the interviews, Ms. M approached Grievant and asked for the status of the selection process for the full time position. Grievant asked Ms. S if she had been contacted by the human resource staff. Ms. S said "no." Grievant said that one of the applicants had a PhD and another was a former Dean.

The interview committee interviewed the six candidates using predetermined questions. The committee members evaluated each candidate and concluded that Ms. S should be hired as the full time Graduation Coordinator. The decision was unanimous that Ms. S was the best suited for the position. Grievant did not attempt to manipulate the outcome of the selection process or encourage committee members to avoid selecting Ms. M as the successful candidate.

On November 14, 2013, Grievant received an email from the HR Manager indicating that an offer could be made pending a background check. Grievant emailed the background check and applicant data forms to Ms. S. On November 15, 2013, Ms. S delivered the forms to the Human Resource Office.

Ms. M was surprised and disappointed that she was not selected for the full time job. She had been performing the duties of the position on a part-time basis for many months and expected to be selected for the full time position. Ms. S complained to Ms. G and Mr. S. She questioned the quality of the individuals on the selection committee.

On November 18, 2013, Ms. G and Mr. S met to discuss the interview questions and the selection process followed by the committee.

On November 19, 2013 at 8:38 a.m., the HR Analyst sent Grievant an email saying that the background check for Ms. S "has cleared" and saying, "You may proceed with the next steps in the hiring process." Grievant replied by sending an email at 8:46 a.m. to the HR Analyst with a copy to the HR Manager asking, "Is it ok to make [Ms. S] an offer now?" The HR Manager responded, "No, we are not to make a job offer at this time." Grievant was unsure why she could not make an offer at that time.

On November 19, 2013, Grievant met with Ms. F, Ms. G, and Mr. S. Mr. S expressed his concern about the interview process and outcome. Mr. S said he knew that Ms. M had been doing the job well for a year and a half and was concerned that she was over the age of 40 but not selected for the job. He indicated that because Ms. M was in a protected class she might have grounds for suing the Agency. Mr. S told Grievant not to contact Ms. S until he had reviewed the committee's questions and the information the Committee had gathered about Ms. M and Ms. S. Mr. S told Grievant that second interviews would be conducted.

On November 19, 2013 at 10:39 a.m., Grievant sent Ms. S an email stating:

> Your background check came back fine. I was informed today that my supervisor, [Ms. G] and [Mr. S], the Vice President for Academic Affairs and Student Services will be contacting you to conduct a second interview with yourself and another candidate which is already working in the position. Normally our interview committee makes the final say so but in this case our recommendation has been intercepted and they will decide. Maybe by the grace of God they will select you but the other candidate is also a friend of theirs.

On November 19, 2013 at 2:46 p.m., Ms. S sent Grievant an email asking additional questions. At 3:19 p.m., Grievant responded:

> I was told by our HR Manager that as long as [the College] did not use them as her [Ms. M's] reference it was okay that they meet with her. I am completely dumb-founded. We are not using them as reference only to meet me with our top candidates to decide who gets the job? I would recommend waiting to see the outcome before contacting [the College President] or the [Department of Human Resource Management]. I am so sorry about this complete mess. I did ask the girl working in the position if they contact her yet for the second interview and she said they had not. I don't know what they are up to. Maybe they just want to meet with you now. Please don't let them know I shared with you that they know the other applicant etc. Just come in and be as professional as possible and give the same information you did during your first interview. I am going to pray this will all work out in your favor.

Agency managers reviewed the hiring process and concluded that Ms. S was appropriately selected as the best suited for the Graduate Coordinator position. On December 6, 2013, the HR Manager sent Grievant an email stating, "Please proceed with offering [Ms. S] the position of Graduation Coordinator …." Ms. S was hired as the Graduation Coordinator.

> In 2006, a Student was enrolled in high school and was also receiving credit at the College. He was "duel enrolled." The Student dropped out of high school and did not complete the class. He obtained his GED. In January 2014, the Student called Grievant and told her he did not complete or attend the class and received a grade of "F". Because of his low grade, he was unable to obtain financial aid and enroll in the College. Grievant believed the Student and accessed the Agency's computer data base to delete the grade from the Student's record. This enabled the Student to become eligible for financial aid. Grievant did not retain any documents showing the Student's transcript before and after she removed the grade. She did not retain any documents showing she had authorization to remove the grade. She intended to contact the local high school to obtain documents regarding the Student's enrollment in the high school's class. When she informed Ms. G that she intended to contact the high school, Ms. G told her it was too late and that it was not necessary for Grievant to contact the high school.
>
> . . . .
>
> An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.
>
> Grievant engaged in protected activity when she filed a grievance to challenge disciplinary action she received in 2012. Grievant suffered an adverse employment action because she received disciplinary action and was removed from employment. Grievant has not established a connection between her protected activity and the adverse employment action she suffered. The Agency took action against Grievant because of her behavior in 2013 and not because she filed a grievance to challenge your disciplinary action in 2012. The Agency's disciplinary action in this case was not a pretext for retaliation.

In the hearing decision, the hearing officer considered whether the grievant had failed to follow a supervisor's instruction by contacting Ms. S, finding in the affirmative.[2] The hearing officer further assessed the evidence as to whether the grievant had failed to follow policy by modifying the student's record, finding in the negative.[3] Although he concluded the agency did not prove that the grievant had violated policy, the hearing officer concluded that the grievant's failure to follow her supervisor's instructions was sufficient to support the issuance of a Group II

[2] *Id.* at 5-6.
[3] *Id.* at 6.

Written Notice.[4] The hearing officer upheld the grievant's termination based on her accumulation of two active Group II Written Notices.[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 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: (1) the agency did not present sufficient evidence to prove that she was instructed not to contact Ms. S; (2) the hearing officer erred in concluding that the agency's issuance of the Group II Written Notice was not a form of retaliation; and (3) the hearing decision states she was hired by the agency in 2008,[8] when she was actually hired in 2006. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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.

Sufficiency of Evidence

In this case, the hearing officer found that "Mr. S was within Grievant's chain of command," that she was "obligated to comply with his instructions," and that, "[o]n November 19, 2013, Mr. S instructed grievant not to contact M. S while the agency evaluated" the selection process.[13] The hearing officer further concluded that the grievant "contacted Ms. S several times

---

[4] *Id.*
[5] *Id.* at 7; *see* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] *See* Hearing Decision at 2.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 5.

and discussed the status of her employment with the Agency" on November 19, after being instructed not to do so by Mr. S.[14] There is evidence in the hearing record to show that Mr. S was one of the grievant's supervisors,[15] that he instructed her not to contact Ms. S about her potential employment with the agency in a meeting on November 19,[16] and that the grievant contacted Ms. S after receiving that instruction.[17] While the grievant testified that that she was not instructed to refrain from contacting Ms. S,[18] weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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.[19] 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.

Retaliation Issue

The grievant further alleges in her request for administrative review that the hearing officer erred in concluding that the Group II Written Notice was not a form of retaliation. Specifically, the grievant asserts that she "addressed concern" to the agency and to DHRM "about discriminatory hiring practices" surrounding the selection process and the agency retaliated against her for doing so by issuing the Written Notice.[20] The hearing officer found the grievant "engaged in protected activity when she filed a grievance to challenge disciplinary action she received in 2012," but that she had "not established a connection between her protected activity" and the Written Notice sufficient to prove a claim of retaliation.[21] The grievant correctly notes that the hearing officer did not specifically address the evidence that she reported her concern about the selection process to agency management and DHRM as to the retaliation claim allegedly arising from that report. However, in finding that there was no evidence of a causal link between the grievant's prior grievance activity and the Written Notice, the hearing officer necessarily would have assessed whether there were any indications of an improper or alternative motive for the disciplinary action. In denying the grievant's retaliation claim, the hearing officer determined that the Written Notice was based on the grievant's conduct in contacting Ms. S and was not a pretext for retaliation.[22] EDR has not reviewed anything to suggest that the hearing officer disregarded evidence relating to the grievant's claim of retaliation or that the hearing officer's analysis of her retaliation claim was somehow flawed. Further, on EDR's review of the hearing record, we cannot find any testimony or documentary evidence providing anything in support or even raising a question of a causal link between the grievant's report of concerns to agency management and DHRM and the Written Notice. To the extent the hearing officer erred by not considering the grievant's report to agency management and DHRM as protected activity, the only remedy available to EDR would be to remand the

[14] *Id.*
[15] *See* Agency Exhibit 1 at 1.
[16] Hearing Recording at Track 1, 54:43-56:00. 1:48:14-1:48:48.
[17] *See* Agency Exhibit 13 at 3-4; *see* Hearing Recording at Track 1, 1:49:43-1:49:58.
[18] Hearing Recording at Track 2, 31:43-32:04, 59:27-59:57.
[19] *See, e.g.,* EDR Ruling No. 2012-3186.
[20] The grievant sent an email to agency management and DHRM that she was "concerned" about the selection process and that she "[did] not feel [it was] being handled correctly." Grievant's Exhibit 6 at 7.
[21] Hearing Decision at 7.
[22] *Id.*

hearing decision for further consideration and clarification of the evidence of this retaliation claim. Because there is essentially no material evidence on this issue for the hearing officer to consider, remanding this case for further consideration of this portion of the grievant's retaliation claim would have no effect on the outcome. Consequently, there is no need to remand this case on this basis.

Incorrect Date

Finally, it appears the grievant correctly argues that the hearing decision contains a factual error regarding her length of service with the agency. The hearing decision states that the grievant "began working for the Agency in 2008."[23] The evidence in the record to shows that the grievant began working for the agency in 2006.[24] However, this apparent factual error regarding the grievant's length of employment with the agency did not have any effect on the result in this case. Hearing officers must make "findings of fact as to the *material issues* in the case"[25] and to determine the grievance based "*on the material issues* and grounds in the record for those findings."[26] The grievant's length of service with the agency was not a material issue in this case. It appears instead that the hearing officer provided the grievant's date of hiring as a means of providing background information about her employment with the agency. Remanding this case to the hearing officer for reconsideration on this issue would have no effect on the outcome. As a result, we decline to disturb the hearing 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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[23] Hearing Decision at 2.
[24] *See* Hearing Recording at Track 2, 19:58-20:11.
[25] Va. Code § 2.2-3005.1(C).
[26] *Grievance Procedure Manual* § 5.9 (emphasis added).
[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).