

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10490; Ruling Date: October 6, 2015; Ruling No. 2016-4221; Agency: Virginia Community College System; 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 Community College System
Ruling Number 2016-4221
October 6, 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 10490. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as the Financial Aid Supervisor for a community college.¹ On August 4, 2014, the grievant was advised that her position was being eliminated effective September 15, 2014.² The grievant grieved the decision to abolish her position, and a hearing was subsequently held on March 13 and 24, 2015.³ On August 14, 2015, the hearing officer issued a decision denying the grievant’s request for relief.⁴ The grievant has now requested administrative review of the hearing officer’s decision.

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 State and Agency Policy

Fairly read, 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

¹ See Decision of Hearing Officer, Case No. 10490 (“Hearing Decision”), August 14, 2015, at 2; Grievant’s Exhibit 47.

² Hearing Decision at 14; Grievant’s Exhibit 38.

³ See Hearing Decision at 1.

⁴ *Id.* at 17.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

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 addressed in this review.

Findings of Fact

The grievant's request for administrative review also appears to challenge the hearing officer's finding that the decision to eliminate the grievant's position was not retaliatory.⁸ 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 grounds in the record for those findings."¹⁰ In cases involving non-disciplinary actions such as a layoff, the hearing officer reviews the facts *de novo* and the grievant has the burden of proving his or her claim by a preponderance of the evidence.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 this case, the grievant appears to argue that because the hearing officer found that her conduct in challenging the audit findings impacted the College's decision to eliminate her position, the hearing officer should also have found that the College's actions were retaliatory. EDR is not persuaded by this argument. The hearing officer did not conclude that the College took action against the grievant because she engaged in protected activity. Rather, the hearing officer found that the grievant's failure either to understand the magnitude of the audit findings or to accept ownership of her need to correct the audit findings caused an understandable loss of confidence in the grievant's ability to operate the financial aid office.¹² These findings are supported by record evidence and the hearing officer's assessment thereof.¹³ 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. Because 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. Accordingly, we decline to disturb the decision on this basis.

Evidence Regarding Co-Worker

The grievant also asserts that the hearing officer erred in denying her request at hearing for a co-worker's personnel file. She argues that she was unaware of this co-worker prior to

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Hearing Decision at 17.

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(C); *Grievance Procedure Manual* § 5.8.

¹² See Hearing Decision at 5-11, 15-16.

¹³ See, e.g., Grievant's Exhibit 14; Agency Exhibits 7, 9.

hearing, and that she should have been given the personnel file in order to rebut the College's representation that this co-worker was not similarly situated.

The grievant had the opportunity prior to hearing to request that the College provide documentation regarding possible comparators, and it was incumbent upon the grievant to seek relevant documentation *prior* to hearing, rather than *during* the hearing. The grievant does not allege that she requested documentation regarding comparator employees prior to hearing and that the College improperly failed to provide documentation responsive to such a request.

Further, EDR's review of the hearing recording does not support the grievant's contention that the hearing officer denied a request for the co-worker's personnel file, although it is possible that a conversation regarding the file took place outside the recording.¹⁴ Even assuming, however, that the grievant made such a request, she has not shown that access to the contents of the file would have affected the outcome of her hearing. The hearing officer concluded that the co-worker was not similarly situated because the decision to discipline the co-worker was made by a different decision-maker; the magnitude of the problems identified in the audit involving the co-worker were not as severe; and the grievant responded in a different manner to her audit than the co-worker responded to hers.¹⁵ The grievant has not demonstrated that any information likely contained in the co-worker's personnel file would have had an impact on these findings or the hearing officer's conclusion that the co-worker and the grievant were not similarly situated. As the grievant did not suffer any material harm from the non-disclosure, to the extent it even was inconsistent with the grievance procedure, no remand or other relief is warranted to address the matter under the grievance procedure.

Burden of Proof

The grievant also argues that the hearing officer erred in placing the burden of proof on her. She alleges that because the decision to eliminate her position was disciplinary in nature, under Section 5.8 of the *Grievance Procedure Manual*, the College had the burden of proof.

In this case, the grievant's position was eliminated and she was laid off pursuant to DHRM Policy 1.30, *Layoff*.¹⁶ While the grievant may argue that the layoff was merely a pretext for disciplinary action, the means by which the College terminated her employment was through layoff, rather than a disciplinary action or a dismissal for unsatisfactory performance.¹⁷ Section

¹⁴ The grievant asserts that "[d]uring the hearing, the Hearing Officer requested the Agency provide him with documents from [co-worker's] files." EDR's review of the hearing recording indicates that during the hearing, the parties and hearing officer agreed that the hearing officer would conduct an *in camera* review of an unredacted copy of Grievant's Exhibit 30 (also Agency Exhibit 10). Hearing Recording at Disc 2, 3:35:31-3:38:26. The College provided the requested unredacted copy of the document to the hearing officer on March 27, 2015 and provided a copy of its cover letter to the grievant's representative. The redacted text did not refer to the co-worker. EDR's review does not indicate that any documents from co-worker's personnel file were requested by the hearing officer for *in camera* review.

¹⁵ Hearing Decision at 16.

¹⁶ See, e.g., Grievant's Exhibit 38.

¹⁷ The grievant's claims regarding the appropriateness of the College's actions under the layoff policy will be addressed by DHRM, as noted previously.

5.8 of the *Grievance Procedure Manual* provides that in all actions other than disciplinary actions or dismissals for unsatisfactory performance, the grievant bears the burden of proof. Accordingly, there is no basis to conclude the hearing officer erred in designating the grievant as bearing the burden of proof in this case.

Newly-Discovered Evidence

In her request for administrative review, the grievant appears to argue that the hearing record should be reopened to allow for the admission of “newly discovered evidence.” Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”¹⁸ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.¹⁹ However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.²⁰

In this case, the grievant asserts that “matters . . . were brought to her attention after the hearing” and that this evidence should now be considered as part of her grievance. Specifically, the grievant alleges that she has now learned that the College’s reorganization plan was “fundamentally flawed,” and that she should have been allowed to “bump” her subordinate, as he was a probationary employee.

As an initial matter, the grievant has not shown that she exercised due diligence to discover this alleged new evidence prior to hearing. However, even if EDR were to assume, for the sake of argument, that this information has only been recently discovered by the grievant despite her own due diligence, the grievant has not met her burden of showing that the evidence is material or that it would likely produce a different outcome. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.


¹⁸ Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

¹⁹ See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

²⁰ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).