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**ADMINISTRATIVE REVIEW**

In the matter of Old Dominion University  
Ruling Number 2020-4971  
September 6, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)<sup>1</sup> administratively review the hearing officer’s decision in Case Number 11358. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11358, as found by the hearing officer, are as follows:<sup>2</sup>

Old Dominion University employs Grievant as a BI Analyst. Grievant utilized handicapped parking at the University. She has a telework agreement with the University allowing her to work from her home two days per week. Her work performance has been satisfactory to the University.

Faculty, staff, and students parking in the University’s parking lots must have ODU issued parking permits. Drivers wishing to use handicapped parking spaces on University lots must have handicapped parking stickers displayed.

The University determined the number of handicapped parking spaces in a parking lot based on a formula provided by the Federal government. The Transportation Parking Services (TPS) Director described to process as a “math formula based on the size of the parking lot.” None of the University’s parking lots failed to satisfy the Federal guidelines.

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

<sup>2</sup> Decision of Hearing Officer, Case No. 11358 (“Hearing Decision”), July 31, 2019, at 2-5 (citations omitted).

There are handicapped parking spaces in front and on the side of the Building where Grievant worked. The University authorized Grievant to begin her shift at 6:30 a.m. to allow her to arrive at work before most other employees arrived in order to obtain a handicapped parking space. Student classes started after 8 a.m.

When the University opened a new building, TPS sometimes had to move handicapped parking spaces to accommodate the new building. This sometimes affected the number of handicapped spaces near adjoining buildings. When Lot 23 closed, Grievant asked the TPS Director on December 8, 2018:

Where will the other 5 handicapped spots go to? They are used almost all, and that's with me and others parking up at the building. There are at least 2 people who park there continuously. I've seen both back spots near Webb Center billed and I and possibly one other person park in front of the building.

The TPS Director replied on December 10, 2018:

When a capital building projects takes ADA parking away, the spaces must be added back to the campus inventory in addition to the new spaces required based on the square footage of the new building. In the case of the New Chemistry Building, there will be additional ADA spaces marked in Lot 38 (south of Oceanography Building) and in Lot 10 (between Tennis Center and Jim Jarrett Athletic Administration Building.)

University TPS employees began patrolling University parking lots at 7 a.m. Approximately eight or nine employees would go to University parking lots to determine if vehicles are improperly parked. If a vehicle was parked in a handicapped space without displaying a handicapped parking tag, the employee wrote a citation. Parking enforcement ended at 10 p.m. After 10 p.m., the ODU Police responded to parking enforcement problems.

Grievant regularly notified the University's parking enforcement section when she observed vehicles improperly parked. For example, on January 29, 2019, Grievant sent an email to several people including the ODU Police and the TPS Director stating:

I have someone parked in the handicapped spots that is over the blue line into my area. If I didn't have my vehicle on the white lines, I'd have trouble getting in the car. Can someone have the person parked in the 2<sup>nd</sup> space next to [license plate] move their car into the parking space appropriately please?

Also, I keep getting vans parked illegally on the white line next to the first space. That is usually me. This makes it hard to get out and see but it is not patrolled. I have had it most days. In addition, that means I have trouble getting into my car on the right hand side. Why aren't we ticketing vans that park on the white lines?  
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There was already all the handicapped parking spaces filled. This means we do not have enough (as I indicated) for the people working in this area unless we still have people parking here that need to move to other areas because ODU refuses to match people to spaces.

Grievant sought enforcement by the ODU Police, TPS Director, and others in an email dated February 9, 2018:

On 2/8/18 at approx. 8 pm, I had a car blocking multiple handicapped spaces on the side of the Rec Center. I honked several times, so I could park, and no response. I had to make an oddball way in to park astride multiple spaces to park. Then the person got out. I reported the license plates, and the car drove out and circled back, at which time the driver, a female and a passenger male got out. During the time I was on the phone with the dispatcher, I was cursed at. It is obviously that those behaviors were intimidating and threatening.

NO OFFICER was dispatched. I told them EXACTLY where I would be. \*\*\*

On February 9, 2018, the Police Captain responded:

Thank you for taking the time to contact the ODU Police Department with your concerns. Part of my duties as the Captain of the ODU Police Department is to conduct administrative investigations into the conduct of ODU Police Department personnel when complaints are received by the community. As such, I am considering your email as a complaint regarding the reported lack of service provided to you when you contacted our office. This issue will be formally investigated and a written response will be provided to you upon completion.

In order to conduct the investigation, I will need to make arrangements to meet with you and interview you regarding the incident. I will also interview the employees involved, review the calls to our communication center, and review any video footage

that may be available. Please provide me with a number I may contact you at so we can make arrangements to meet.

On February 9, 2018, Grievant replied to the Police Captain:

Sorry too many problems with you all, all of this is in writing. You will be sent a bill for private protection once that is in the works. I have it down to expect potential threatening harassing, being cursed at and blocking of my rights to parking spaces as being something I am required to live with.

Grievant advocated for the handicapped at the University. For example, Grievant sent an email on August 24, 2018 to the Office of Institutional Equity and Diversity asking:

Why is there nothing for the handicapped people on campus, especially a group for the F/S handicapped? I was told yesterday that the ok was given to block/make it harder to get out of certain handicapped spaces by the lady in the parking kiosk near Lot 23. I have gotten an answer almost promptly in regards to the F/S decal purchase, but not even an acknowledgement to handicapped parking concerns or statements.

The Office of Institutional Equity and Diversity replied:

Currently, there is no ODU employee group for just individuals with disabilities. If you are interested in leading the formation of this type of organization, the Office of Institutional Equity and Diversity can assist you. One option is to connect you with the President's Task Force on Inclusive Excellence to identify other employees with an interest in forming a resource group for employees with disabilities. Please let us know, and we can certainly explore ways for you to become involved.

On January 30, 2019, the grievant initiated a grievance with Old Dominion University (the "University" or the "agency") challenging alleged "problems with handicapped parking" and the University's "refusal to accommodate."<sup>3</sup> Following the management resolution steps, the agency head qualified the grievance for a hearing,<sup>4</sup> which was held on July 11, 2019.<sup>5</sup> In a decision dated July 31, 2019, the hearing officer concluded that the grievant had "not identified any law or policy violated by the University," and that he therefore could "not grant [her] request for relief."<sup>6</sup> The grievant now seeks administrative review from EDR.

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<sup>3</sup> Agency Ex. 1 at 3; *see* Hearing Decision at 1.

<sup>4</sup> Agency Ex. 1 at 5.

<sup>5</sup> Hearing Decision at 1.

<sup>6</sup> *Id.* at 6.

## 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 . . . .”<sup>7</sup> 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.<sup>8</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

### *Hearing Officer’s Consideration of Evidence*

In her request for administrative review, the grievant essentially challenges the hearing officer’s findings of fact in several areas, based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>10</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>11</sup> In support of her position, the grievant makes a number of arguments regarding the hearing officer’s findings of fact and the evidence in the record including, for example, that: (1) “[t]he amount of attention given to [University] handicapped [employees] is far lower and therefore less equitable than what other groups have”;<sup>12</sup> (2) the hearing officer “did not know how being physically handicapped works” because “[s]omeone in a wheelchair can actually be less disabled than [her]self or someone with a heart/lung condition,” so “even though we are all granted a handicapped parking tag, obviously the ability to get from a spot is different because of those different handicaps”;<sup>13</sup> (3) the hearing officer “erred in believing that the [U]niversity does not have control over illegal parking,” because the University’s “refusal to ticket handicapped parking violators is a part of [the] problem”;<sup>14</sup> (4) the hearing officer “erred in applying diversity to the many world wide cultures at [the University] and handicapped people” because the grievant has “written complaints before about having to go from one end of [her] floor to the another to the [one] handicapped stall in each bathroom” as a result of alleged misuse by employees who do not have disabilities;<sup>15</sup> and (5) the hearing officer erred in finding that the grievant’s “accommodation requests were handled” because her “request to have handicapped people in the lot closest to them, rather than another lot, was not considered.”<sup>16</sup>

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<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> Grievant’s Request for Administrative Review at 1.

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 4.

In the hearing decision, the hearing officer made the following conclusions based on the evidence presented by the parties:

Grievant sought improved communication between campus operational units including Transportation and Parking Services, ODU Public Safety and other groups. Grievant sought improved communication to faculty, staff, and students regarding the importance of respecting the appropriate use of handicapped parking spaces and restrooms. Grievant sought to improve enforcement of policies governing handicapped parking.

Grievant has offered numerous suggestions for improvement. It is clear to the Hearing Officer that the University has listened to Grievant's suggestions and attempted to implement those suggestions when University managers believed they could do so and that doing so was in the best interests of University's faculty, staff, and students. It is also clear that Grievant has been frustrated with the University's failure to fully implement her suggestions.

The Hearing Officer has no authority to compel the University to implement Grievant's suggestions unless Grievant can show that the University failed to comply with policy or law. If Grievant cannot show the University violated policy or law, then the decision to implement Grievant's suggest[ion]s falls within the University's exclusive right to manage its affairs and operations.

Grievant asserted the University should add additional handicapped parking spaces and locate them so as to better serve handicapped drivers. Grievant did not identify any policy or law violated by the University. There is no basis to conclude the University must change its practices governing handicapped parking spaces.

Grievant asserted the University should better enforce parking regulations and better respond to her requests once she identified parking violators. Grievant did not identify any policy or law violated by the University. The University enforces its parking regulations through TPS employees and ODU Police. There is no basis to conclude the University must change its practices governing parking enforcement.

Grievant asserted that the University should have a group devoted to disability rights. The Agency countered that it works with private disability rights groups and attempts to implement reasonable and logical proposals to help its disability community at the University. Whether the University should develop its own disability advocate group or rely on groups outside of the University is solely a management decision for which the Hearing Officer cannot interfere.<sup>17</sup>

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<sup>17</sup> Hearing Decision at 6.

As the hearing officer correctly noted, “[t]he grievant bears the burden of proof for grievances regarding non-disciplinary actions,”<sup>18</sup> which includes the matters at issue in this case relating to the University’s alleged disability discrimination and misapplication and/or unfair application of policy to the detriment of disabled employees. The hearing officer clearly determined that, while the grievant “sought improved communication” and “offered numerous suggestions for improvement,” she had not shown that the University discriminated against her because of her disability or failed to comply with applicable policy or law.

At the hearing, the grievant presented a binder consisting of 12 exhibits. She did not call any witnesses,<sup>19</sup> although she did cross-examine the University’s witnesses and called one of the University’s witnesses on rebuttal.<sup>20</sup> The University presented evidence that the grievant has a telework agreement to accommodate her disability and that there is handicapped parking available in front of the building where the grievant works that she may use.<sup>21</sup> The grievant’s supervisor testified that she has not complained to him about difficulties finding handicapped parking at her building.<sup>22</sup> Moreover, EDR has not identified evidence in the record to show that the grievant has requested an assigned parking space as a reasonable accommodation or otherwise indicated that she requires further accommodation to perform the essential functions of her position.<sup>23</sup> Moreover, the TPS Director testified that the University’s parking lots comply with federal parking regulations regarding the number of handicapped parking spaces to be provided, and further indicated that tickets have been issued for improperly parking in handicapped spaces.<sup>24</sup>

The grievant may have legitimately raised issues regarding her perspective about the underlying circumstances in this case. Indeed, some of the requests and suggestions she had made of University management to improve parking and other services for employees with disabilities may be reasonable and effective in achieving the University’s stated goal of promoting a diverse and inclusive work environment.<sup>25</sup> As stated above, however, it was the grievant’s burden to present evidence demonstrating that the University discriminated against her because of her disability or otherwise failed to comply with applicable policy or law. After reviewing the grievant’s arguments regarding the hearing decision, EDR must conclude that there is nothing to indicate the hearing officer abused his discretion when he found that the grievant had not met this burden; thus, remanding the case is not warranted. Where, as here, 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

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<sup>18</sup> *Rules for Conducting Grievance Hearings* § VI(C).

<sup>19</sup> Hearing Recording at 8:59-9:54.

<sup>20</sup> The grievant attempted to call a second rebuttal witness from the University’s witness list. The grievant raised this as an issue in her request for administrative review, and it will be discussed further below.

<sup>21</sup> *Id.* at 11:38-12:26, 17:12-18:32 (testimony of grievant’s supervisor).

<sup>22</sup> *Id.* at 17:44-18:32 (testimony of grievant’s supervisor).

<sup>23</sup> The grievant and University Management discussed accommodations that would allow her to use the University’s recreation center when she was not working; however, this matter appears to have gone unresolved due to the grievant’s rejection of the accommodations offered by the University. *See* Grievant’s Ex. 9 at 8.

<sup>24</sup> Hearing Recording at 25:30-26:20, 29:06-32:18 (testimony of TPS Director).

<sup>25</sup> *See generally* Grievant’s Ex. 6.

case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings and declines to disturb the decision on this basis.<sup>26</sup>

### *Alleged Witness Issue*

In addition, the grievant claims that one of the University's witnesses was unavailable when she attempted to call the witness to testify by phone at the hearing, and that the University "was allowed to have [the witness] refuse to answer their cell phone."<sup>27</sup> Pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.<sup>28</sup> If warranted by the circumstances, hearing officers have the authority to draw an adverse inference against a party if that party fails, "without just cause, . . . to make available relevant witnesses as the hearing officer . . . had ordered."<sup>29</sup> In this case, however, neither party requested orders compelling the attendance of witnesses at the hearing. The witness in question appeared on the University's list of potential witnesses; the grievant did not provide a list of witnesses, consistent with her decision to present only documents and no testimonial evidence.<sup>30</sup> Furthermore, based on the parties' discussion about the issue on the record, the witness may have retired from her position with the University by the date of the hearing.<sup>31</sup> Under these circumstances, it appears there was no basis for the hearing officer to draw an adverse inference against the University based on the witness's unavailability.

At the hearing, the grievant asked to call the witness on rebuttal, after the University's presentation of evidence.<sup>32</sup> The University's advocate attempted, unsuccessfully, to contact the witness.<sup>33</sup> In response to a query from the hearing officer, the grievant proffered that the witness would have testified about a University survey that allegedly reported a lower quality of life for people with disabilities as compared to members of other protected classes, and that she would have asked the witness questions about parking and other services for people with disabilities at the University.<sup>34</sup> Having considered the totality of the evidence presented by the grievant at the hearing, EDR has no reason to conclude that the witness's failure to testify at the hearing materially prejudiced the grievant's ability to prove that the University discriminated against her or failed to comply with an applicable law or policy. EDR has thoroughly reviewed the hearing

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<sup>26</sup> To the extent the grievant argues that the hearing officer did not address every piece of evidence that she presented, EDR will not disturb the decision for this reason. It is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or every exhibit admitted into the record. Mere silence as to a particular witness's testimony or other piece of evidence does not constitute a basis for remand in this case, especially when, as here, there would be no effect on the outcome of the case, based on this review.

<sup>27</sup> Grievant's Request for Administrative Review at 2.

<sup>28</sup> *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

<sup>29</sup> *Id.* § V(B).

<sup>30</sup> See Hearing Recording at 8:59-9:54.

<sup>31</sup> *Id.* at 1:35:06-1:35:51.

<sup>32</sup> *Id.* 1:05:30-1:06:46.

<sup>33</sup> *Id.* at 1:29:59-1:37:21.

<sup>34</sup> *Id.* at 1:37:25-1:41:41.



record and finds that there is nothing to show this additional evidence would have an impact on the hearing officer's decision, and declines to disturb the decision on this basis.<sup>35</sup>

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>36</sup> 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.<sup>37</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>38</sup>



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<sup>35</sup> To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

<sup>36</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>37</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>38</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).