



EMILY S. ELLIOTT
DIRECTOR

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

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2020-5070
April 16, 2020

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)¹ administratively review the hearing officer’s decision in Case Number 11469. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11469, as found by the hearing officer, are as follows:²

[George Mason University (the “University,” “GMU,” or the “agency”)] is a distributed university with regional campuses in Fairfax, Arlington and Prince William counties, and instructional sites in Loudon County, Herndon, Lorton, Woodbridge, Front Royal and Songdo, South Korea.

The GMU Police Department maintains a police presence on all its campuses. The actual number of police officers deployed to a campus varies depending on the size and call volumes. Each campus is managed by a Deputy Chief of Police.

The Chief of Police is highly educated and has an impressive record of serving in leadership law enforcement positions. He holds a law degree from Georgetown University Law School and is a member of the D.C. Bar. He has been the GMU Police Chief for approximately 4 years. He worked in the U.S. Marshall Office and the Federal Bureau of Investigation.

¹ 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.

² Decision of Hearing Officer, Case No. 11469 (“Hearing Decision”), February 23, 2020, at 3-10 (internal citations omitted).

As of September 12, 2019, when Grievant received the formal Counseling Letter, that is the subject of this grievance, he held a leadership position in the command structure of the GMU police department at two regional campuses. He had 12 years of service in law enforcement.

At the time Grievant received the September 12, 2019 counseling letter he had recently received one verbal counseling from his immediate supervisor, and two work performance counseling letters, the first on July 29, 2019 from his immediate supervisor and the second on August 2, 2019 from the Chief of Police.

The September 12, Counseling Letter revoked Grievant's access to body camera video and changed Grievant's working title. His pay band, pay, and official job title and code remained unchanged. Grievant's work site and authority was limited to one regional campus with a smaller police force. His immediate supervisor remained the same.

In both positions, Grievant was required to follow General Orders, Standard Operating Procedures, and other department, university, and state policies, and maintain a professional police appearance. Prior to the change in his duties, Grievant was required to "manage the operational side of police body worn and in-car camera program ensuring proper usage and controlling access to video evidence." Additionally, Grievant was specially trained in Internal Affairs procedures and prior to the counseling was "responsible for providing information directly to the Chief of Police in a timely, thorough, and efficient manner regarding Internal Affairs matters and complaints."

....

In January 2019, GMU police officers arrested an individual for [being] drunk in public. An authorized video of that arrest was captured on an officer's body camera and automatically uploaded to the official WatchGuard video system. In August 2019, approximately 8 months after the arrest, the officer that was wearing the body camera accessed the WatchGuard video system and made an unauthorized copy on his cell phone that he shared with others. The cell phone video violated General Order GO-T003.

Grievant was provided a copy of the WatchGuard video by his subordinate who got it from the only officer at the arrest wearing a body camera. That officer viewed the video multiple times in August 2019. Grievant accessed the WatchGuard video system multiple times in August 2019 and exported and copied the video. By so doing, Grievant violated GO - 52.

When the two videos surfaced and disrupted the GMU workplace in August 2019, Grievant was the Internal Affairs Investigator. In that role he had a duty to keep a potential excessive force complaint confidential and report it to the Chief of Police immediately. Instead, he and his subordinate (who testified at the hearing) viewed and discussed the videos and concluded that the GMU police officer in the video used excessive force during the arrest. The Grievant and his witness also reviewed the incident report, prepared by a rookie officer in field training and concluded that the report was false in order to cover up the alleged use of excessive force.

On August 12, 2019, Grievant sent an email to his supervisor (not the Chief) stating “a watchdog video was passed along to me regarding one of our officers from January. The report written regarding the incident does not follow the events that occurred on the video”. He suggested that the Virginia State Police investigate the incident. He also asked to relinquish his duties as the IA Investigator.

Grievant’s supervisor viewed the video on WatchGuard and concluded that the arresting officer’s conduct did not demonstrate excessive force. After some delay, he brought the video to the attention of his supervisor, the Police Chief and asked him whether he believed that the officer in the video used excessive force. He did not however tell the Chief of Grievant’s excessive force complaint and his suggestion to involve the State Police.

The Chief testified that he was of the impression that the video was flagged by Grievant as he performed Internal Affairs quality control by reviewing WatchGuard videos for problems.

The Chief viewed the video and concluded that excessive force was not used in making the arrest and therefore no further investigation was warranted. The Chief notified the Grievant and Grievant’s supervisor of his decision. Grievant informed his subordinate of the Chief’s decision. The subordinate was not a person authorized to receive or discuss confidential internal affairs matters.

Grievant’s subordinate testified at the Hearing that he provided an unauthorized copy of the cell phone video to GMU’s Human Resources Department. On or around August 21, 2019, the Chief of Police first became aware of Grievant’s accusations when he was asked to review the matter by the Director of Employee Relations. As a result, on August 22, 2019, the Chief immediately assigned the matter to the current Internal Affairs investigator, an experienced, 20-year veteran of the Police Force to pursue a comprehensive independent IA investigation. This investigator had replaced Grievant in the IA position.

The Chief identified three avenues of investigation as well as “any other issues of concern that may arise during your investigation, to their logical conclusion and let the chips fall where they may. You may also draw upon any departmental resources that you need to properly conduct the investigation(s). Since I am a potential witness in this case, you should not update or brief me on your progress until you conclude your investigation and prepare your findings. Take whatever time you need but please make this a priority.”

The investigator conducted an extensive investigation regarding the alleged use of excessive force and the alleged false incident report. He interviewed the Grievant and all the officers who participated and/or assisted in the arrest and who viewed and shared the videos. On September 12, 2019, he sent a written report to the Chief with his recommendations to discipline the Grievant and other officers at the Chief’s discretion. The Chief followed the investigator’s recommendations as set forth in counselling letter 3 below.

Counseling Letter 3

The Chief issued counseling letter 3 on September 12, 2019.³ The letter stated:

- You had improper and unauthorized conversations with [Officer G] regarding the facts of the excessive force inquiry.
- You shared with [Officer G] the content of my private communications to you about the case and discussed my decision making (sic) process with [Officer G]
- You displayed a lack of candor by falsely advising [the internal affairs investigator] that you came up with the idea of bringing in the Virginia State Police was entirely your idea. [Officer G] contradicted your statement and stated that the two of you discussed the VSP option.
- You displayed a lack of candor by falsely advising [the internal affairs investigator] that you only showed video of the alleged excessive force to [Officer G] (which itself was improper) but [Officer G] testified that you also showed the video to him.

The letter stressed that “One of the most basic tenets of Internal Affairs investigations is the necessity of maintaining the confidentiality of information that is received. To have [Grievant] the IA investigator engaged in common

³ The parties presented evidence about two previous counseling letters issued to the grievant, which were not the subject of the grievance in this case. The September 12, 2019 Counseling Letter (also referred to by the hearing officer as “counseling letter 3”) is the only management action that is challenged in the grievance. *See* Agency Ex. 1, at 4-6.

gossip while also disclosing the communications of the Chief of Police to a party who is not a part of the investigation is a serious breach of confidentiality and integrity. Add to that the apparent inability to provide testimony that is complete and truthful is simply unacceptable.

The letter continued “because of your profound breach of trust and integrity involved in your conduct in this matter and your two prior counseling, I am revoking your title change ... effective immediately. You will continue to report to [the same supervisor] but he would be responsible for the ultimate management of the Mason Police program at [another campus]. Your compensation will remain the same. Finally, your access to body camera video is revoked effective immediately.”

The Hearing Officer finds that the reasons given by the Chief for counseling letter 3 were based entirely on the Internal Affairs investigative report.

The Hearing Officer also finds that the investigator’s conclusions and recommendations were supported by the evidence contained in his report.

The Hearing Officer discerned no animosity by the Chief towards the Grievant. His testimony was professional, coherent and believable.

Grievant was incensed with the Chief’s conclusion and made an anonymous complaint on the fraud and abuse hotline to the Commonwealth of Virginia, Office of the State Inspector General (OIG) in Richmond, Va. That office investigated the complaint that “included a review of applicable policies and procedures, analysis of pertinent documents and video and interviews of witnesses.

OIG concluded that the GMU Police Officer who assisted in the arrest did not use excessive force and there was insufficient evidence to refute the officer’s accounts of the events in his/her report.

The report also noted that Grievant admitted he made a copy of the body camera video.

On or about October 11, 2019, the grievant initiated a grievance with the University challenging his receipt of the September 12 Counseling Letter.⁴ Following the management resolution steps, the agency head qualified the grievance for a hearing,⁵ which was held on January 31, 2020.⁶ In a decision dated February 23, 2020, the hearing officer concluded that the University had presented sufficient evidence to support the issuance of the Counseling Letter and

⁴ Agency Ex. 1, at 4-6; *see* Hearing Decision at 1.

⁵ Agency Ex. 1, at 8.

⁶ Hearing Decision at 1.

that there were no mitigating circumstances warranting reduction of the University's action.⁷ The grievant now seeks administrative review from EDR.⁸

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”⁹ 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.¹⁰ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Issues Before the Hearing Officer

In his request for administrative review, the grievant argues that “[t]he Hearing Decision falsely outlines the issues present in the Grievance and argued at the Grievance Hearing.”¹² More specifically, the grievant contends that the hearing officer did not properly address whether the September 12 Counseling Letter was an adverse employment action.¹³ The grievant also claims that the decision should have identified the University’s changes to his job title and duties and his allegation of retaliation as additional issues.¹⁴

In the hearing decision, the hearing officer identified the issues to be addressed as follows:

1. Whether Grievant engaged in the behavior described in the written counselling?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g. free of unlawful discrimination) and policy?

⁷ *Id.* at 13-17.

⁸ Although the grievant appears to argue that the decision is inconsistent with state law, Request for Administrative Review at 1, 5, EDR does not have the authority to address the grievant’s legal arguments, to the extent any are presented in his request for administrative review. A claim that the hearing decision is contrary to law may be raised in an appeal to the appropriate circuit court. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a). The “Conclusion and Appeal Rights” section of this ruling contains additional information about appealing to the circuit court.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ *See Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹² Request for Administrative Review at 9.

¹³ *Id.* at 9, 12.

¹⁴ *Id.* at 9-11.

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?¹⁵

This list is consistent with the framework identified in EDR's *Rules for Conducting Grievance Hearings* for determining whether a disciplinary action was warranted and appropriate.¹⁶

In addition, matters that qualify for a hearing under the grievance procedure must generally involve an adverse employment action:¹⁷ a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.¹⁹ Although the September 12 Counseling Letter was accompanied by a change in the grievant's job title and assigned duties,²⁰ it did not automatically qualify for a hearing because it was not a formal Written Notice of disciplinary action.²¹ Following the management steps, the agency head decided to qualify the grievance, acknowledging that the grievant had, at a minimum, raised a sufficient question as to whether the Counseling Letter was an adverse employment action.²²

At the hearing, the University did not appear to dispute that grievant's contention that the Counseling Letter (and the accompanying changes to the his work title and job duties) was adverse and disciplinary in nature. For example, the Chief described the Counseling Letter as “discipline” in his testimony.²³ While the hearing officer could have assessed whether the Counseling Letter was an adverse employment action in more detail, he appears to have simply accepted the grievant's argument that it was a disciplinary action—which was not challenged by the University—and addressed it as such using the framework provided in the *Rules*. EDR perceives no error in the hearing officer's decision to address the Counseling Letter in this manner.

EDR likewise finds no error in relation to the grievant's assertions about the change in his job title and assigned duties or his allegation of retaliation. While the grievant argues that the decision “falsely claims [his] official job title was not changed,”²⁴ the record is clear that the

¹⁵ Hearing Decision at 2.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹⁷ See *Grievance Procedure Manual* § 4.1(b).

¹⁸ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹⁹ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

²⁰ Agency Ex. 5.

²¹ See, e.g., EDR Ruling No. 2018-4714; EDR Ruling No. 2017-4443; EDR Ruling No. 2017-4434; EDR Ruling No. 2017-4419; see also *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

²² Agency Ex. 1, at 8; see *Grievance Procedure Manual* § 4.2.

²³ Hearing Transcript at 141:15-142:10, 168:2-14 (Chief's testimony). The grievant produced a transcript of the hearing, which he has provided to EDR and the University. [see **AR request email in EDR inbox, GMU is copied**] For ease of reference, this ruling will refer to the transcript rather than the recording of the hearing.

²⁴ Request for Administrative Review at 10.

grievant's Role Title and Pay Band were not impacted as a result of the Counseling Letter.²⁵ The evidence in the record shows that grievant's work title was changed from "Deputy Chief" to "Police Captain," and some of his job responsibilities were modified,²⁶ which the hearing officer accurately described in the decision.²⁷ Although the grievant further contends that the hearing officer should have specifically identified these matters as separate issues, they arose out of the issuance of the Counseling Letter, and thus were appropriately addressed by the hearing officer in the context of the misconduct identified in the Counseling Letter.

Similarly, the grievant's allegation of retaliation amounted to an assertion that the Counseling Letter was issued for an improper reason. Under the *Rules*, "[w]hen a disciplined employee asserts that the discipline was issued for an improper reason, the employee is deemed to be raising an affirmative defense"²⁸ EDR finds that the grievant's claim of retaliation and his arguments about the impact of the Counseling Letter on his position are adequately captured in the hearing officer's list of issues to be addressed under the disciplinary framework described in the *Rules*. There is no requirement under the grievance procedure that a hearing officer must exhaustively identify every argument or claim raised in the manner described by the grievant in his request for administrative review. Most importantly, and as discussed more fully below, the hearing officer appropriately addressed the evidence in the record regarding the issuance of the Counseling Letter, as well as the grievant's allegation of retaliation and other defenses, in the decision. For these reasons, EDR finds no error in the hearing decision with regard to the hearing officer's identification of the issues to be addressed, and will not disturb the decision on this basis.

Hearing Officer's Consideration of Evidence

In the majority of his request for administrative review, the grievant essentially alleges that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing, are not supported by the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²⁹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."³⁰ 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.³¹ 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

²⁵ Agency Exs. 9, 10.

²⁶ *Id.*

²⁷ Hearing Decision at 4.

²⁸ *Rules for Conducting Grievance Hearings* § VI(B)(1).

²⁹ Va. Code § 2.2-3005.1(C).

³⁰ *Grievance Procedure Manual* § 5.9.

³¹ *Rules for Conducting Grievance Hearings* § VI(B).

the facts and circumstances.³² 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.

Broadly, the grievant claims that hearing officer did not review the evidence *de novo*, but instead simply accepted the agency's conclusion that the grievant engaged in misconduct without assessing the underlying evidence.³³ The grievant has also identified multiple alleged factual errors on almost every page of the decision. For example, the grievant argues that the hearing officer confused the actions of the grievant, Officer G, and the officer who made a cell phone copy of the WatchGuard video;³⁴ that the hearing officer erred in stating that the grievant filed a complaint with the Office of the State Inspector General ("OSIG") because Officer G in fact made the complaint;³⁵ that the grievant appropriately made a copy of the official WatchGuard video and shared it with other officers as part of his investigation of the arrest;³⁶ and that the grievant was not responsible for reviewing officers' WatchGuard videos for quality control purposes.³⁷ Finally, the grievant contends that the hearing officer did not properly consider evidence that the Chief's decision to issue the September 12 Counseling Letter had a retaliatory motive.³⁸

Evidence of Misconduct

The September 12 Counseling Letter charged the grievant with engaging in the following behavior that the University deemed unacceptable:

- You had improper and unauthorized conversations with [Officer G] regarding the facts of the excessive force inquiry.
- You shared with [Officer G] the content of [the Chief's] private communications to you about the case and discussed [the Chief's] decision making process with [Officer G].
- You displayed a lack of candor by falsely advising [the internal affairs investigator] that you came up with the idea of bringing in the Virginia State Police was entirely your idea. [Officer G] contradicted your statement and stated that the two of you discussed the VSP option.
- You displayed a lack of candor by falsely advising [the internal affairs investigator] that you only showed video of the alleged excessive force to

³² *Grievance Procedure Manual* § 5.8.

³³ Request for Administrative Review at 25-26, 30.

³⁴ Request for Administrative Review at 12-14.

³⁵ *Id.* at 14.

³⁶ *Id.* at 15, 16.

³⁷ *Id.* at 15-16.

³⁸ *Id.* at 33-34.

[Officer G] (which itself was improper) but [Officer C] testified that you also showed the video to him.³⁹

The Counseling Letter further stated that “[o]ne of the most basic tenets of Internal Affairs investigations is the necessity of maintaining the confidentiality of the information that is received,” that the grievant’s actions were “a serious breach of confidentiality and integrity,” and that the grievant did not provide “complete and truthful” answers to the internal affairs investigator’s questions.⁴⁰

EDR has thoroughly reviewed the hearing record and finds that there is evidence in the record to support the hearing officer’s conclusions. Contrary to the grievant’s assertion, it is apparent from EDR’s review that the hearing officer assessed the evidence and made an independent determination that the grievant had engaged in the misconduct described in the Counseling Letter, that the behavior constituted misconduct in violation of University policy, and that the discipline was consistent with law and policy. For example, the hearing officer explicitly noted that his “de novo review of the evidence, including the testimony of witnesses at the hearing, . . . compel[led] the same conclusion” as the agency’s investigation: that the Counseling Letter was warranted because the grievant “should have used better judgment when dealing with sensitive and confidential information”⁴¹

At the hearing, both parties presented extensive evidence about previous counseling letters issued to the grievant, the arrest that prompted the events at issue in this case, other officers’ involvement in those events, and other matters. However, the arrest itself and the agency’s subsequent investigation were not the subject of the Counseling Letter; indeed, it is clear that the grievant was not present at the arrest and was not involved in the internal affairs investigation conducted by the agency after he reported his concerns about the arrest to his supervisor, except as a witness.⁴² The Counseling Letter instead addressed the grievant’s conduct after he learned about the arrest from Officer G, including the information he provided to the internal affairs investigator.

At the hearing, the grievant did not appear to dispute that he discussed the recording of the arrest and other details with Officer G.⁴³ The grievant further admitted to sending Officer G a copy of the Chief’s email stating that no investigation of the arrest was warranted.⁴⁴ In his testimony, the internal affairs investigator stated that he asked the grievant if he had discussed

³⁹ Agency Ex. 5.

⁴⁰ *Id.*

⁴¹ Hearing Decision at 15; *see id.* at 13; Agency Ex. 6 at 16. While the hearing officer also cites the OSIG investigation as concluding that the grievant’s actions were inappropriate, EDR’s review of the OSIG report indicates that it only addressed whether excessive force was used during the arrest and whether the officer who made an unauthorized copy of the WatchGuard video violated University policy. *See* Agency Ex. 8.

⁴² While the grievant was previously the University’s Internal Affairs investigator, he voluntarily relinquished that duty when he reported his concerns about the arrest to his supervisor. *See* Grievant’s Exs. 5, 7.

⁴³ Hearing Transcript at 224:4-16 (grievant’s testimony), 264:16-266:9 (Officer G’s testimony).

⁴⁴ *Id.* at 222:16-25 (grievant’s testimony).

the video with anyone else, and that the grievant said he had not.⁴⁵ The grievant, however, testified that he showed the WatchGuard video to Officer C,⁴⁶ which the internal affairs investigator had confirmed when he questioned Officer C.⁴⁷

The internal affairs investigator and the Chief both testified that the grievant, as the Internal Affairs investigator when he learned of the arrest from Officer G, should not have discussed matters about the investigation with other employees or shared the Chief's email with Officer G.⁴⁸ The Chief further explained that employees are expected to be truthful and candid when participating in internal affairs investigations, and that the grievant's answers to the investigator's questions about whether he had shown the video to anyone else (*i.e.*, Officer C), for example, were not complete.⁴⁹

Taken together, EDR finds that this evidence reasonably supports the hearing officer's conclusions that the grievant engaged in conduct that reasonably warranted the issuance of the Counseling Letter. While the grievant may disagree with the hearing officer's assessment of the evidence, conclusions as to the credibility of witnesses 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. 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.⁵⁰ Having reviewed the hearing record, EDR finds nothing to indicate that the hearing officer's consideration of the evidence, including his conclusion that the Counseling Letter was warranted and appropriate under the circumstances, was in any way unreasonable or not based on the actual evidence in the record.

Evidence of Retaliation

The grievant further alleges that the hearing officer did not consider evidence about the University's alleged attempt to "cover up" potential issues with the arrest, as well as the Chief's alleged "retaliatory motives" for issuing the Counseling Letter.⁵¹ EDR's review of the hearing record, however, shows that the hearing officer considered the evidence about these issues and explicitly addressed the grievant's contention that certain officers, including the grievant, were

⁴⁵ *Id.* at 96:5-97:5; *see* Agency Ex. 7, at 2.

⁴⁶ Hearing Transcript at 224:17-225:6 (grievant's testimony); *see* Agency Ex. 6, at 4.

⁴⁷ 97:9-20 (internal affairs investigator's testimony); *see* Agency Ex. 6, at 4.

⁴⁸ *E.g.*, Hearing Transcript at 98:5-19, 99:19-100:9 (internal affairs investigator's testimony), 143:14-145:20 (Chief's testimony).

⁴⁹ *Id.* at 146:19-147:24 (Chief's testimony).

⁵⁰ *See, e.g.*, EDR Ruling No. 2014-3884.

⁵¹ Request for Administrative Review at 33-34. Although the grievant further claims that the arrest "remains uninvestigated by any appropriate authority," *id.* at 33, OSIG conducted an investigation of Officer G's complaint and found that the force used during the arrest was not excessive. *See* Agency Ex. 8.

“targeted for retaliation.”⁵² The hearing officer found that the evidence about the Chief’s alleged improper motive was not persuasive to demonstrate that Counseling Letter was unwarranted⁵³ and, as discussed above, there is evidence in the hearing record to support that conclusion.

Furthermore, to the extent any aspect of the grievant’s evidence was not specifically addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss every argument made by a party or the testimony of each witness who testifies at a hearing. Thus, mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer’s discretion to determine the weight to be given to the testimony presented. Here, it would appear that the hearing officer did not address all of the grievant’s evidence in detail because he did not find it to be relevant, credible, and/or persuasive on the issue of whether he had engaged in the misconduct described in the Counseling Letter.

Other Factual Disputes

With regard to the remaining factual errors alleged by the grievant, EDR concludes that most of the alleged errors in the hearing officer’s assessment of the evidence were not material to the misconduct described in the Counseling Letter, or that the grievant simply disagrees with the hearing officer’s conclusions or the impact of his factual findings. Under the grievance procedure, hearing officers must make “findings of fact as to the *material issues* in the case”⁵⁴ and determine the grievance based “*on the material issues* and grounds in the record for those findings.”⁵⁵

For example, the grievant correctly notes that Officer G made the OSIG complaint, rather than the grievant.⁵⁶ As noted above, however, the OSIG complaint was not part of the University’s basis for issuing the Counseling Letter, which addresses the grievant’s failure to maintain the confidentiality of information relating to the University’s investigation of the arrest and not providing complete answers to the internal affairs investigator. Similarly, alleged issues with the hearing officer’s description of which officers copied and/or shared the WatchGuard video and in what manner, as well as the nature of the grievant’s job duties when he was the University’s Internal Affairs investigator,⁵⁷ were not material to the question of whether the grievant engaged in the behavior described in the Counseling Letter. Remanding the case for reconsideration of these and any other specific factual issues alleged by the agency would not have any impact on the ultimate outcome, as the hearing officer has already determined that the grievant engaged in the behavior charge in the Counseling Letter, that his behavior constituted

⁵² Hearing Decision at 16.

⁵³ *See id.* at 16-17.

⁵⁴ Va. Code § 2.2-3005.1(C) (emphasis added).

⁵⁵ *Grievance Procedure Manual* § 5.9 (emphasis added).

⁵⁶ *E.g.*, Hearing Transcript at 285:5-11 (Officer G’s testimony).

⁵⁷ EDR notes that the Chief testified the grievant had the authority to review WatchGuard videos for quality control purposes. Hearing Transcript at 144:1-6, 170:7-10, 178:17-179:7 (Chief’s testimony). Furthermore, the grievant himself admitted that he was authorized to review videos for quality control. *Id.* at 245:18-20 (grievant’s testimony).

misconduct, and that the discipline was consistent with law and policy.⁵⁸ Any error in the hearing officer's factual findings with regard to the matters challenged by the grievant, if such error exists, is therefore harmless.

In summary, and while it is clear that the grievant disagrees with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the grievant's misconduct was not based on the actual evidence in the record. 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, EDR declines to disturb the decision based on the grievant's arguments relating to the hearing officer's consideration of the evidence.⁵⁹

Alleged Improper Conduct at the Hearing

The grievant further argues that the hearing officer "improperly questioned witnesses" on multiple occasions during the hearing⁶⁰ and "improperly cut off cross-examination" by the grievant's counsel that resulted in the exclusion of relevant evidence.⁶¹ In addition, the grievant notes that the Chief was the University's party representative, and suggests that his presence during the hearing inhibited the witnesses' ability to testify fully and truthfully.⁶²

Hearing Officer's Conduct

The grievant alleges that the hearing officer "asked the Chief about his experience and background," used that information "to bolster the Chief's credibility,"⁶³ and generally engaged in improper questioning of witnesses about the internal affairs investigation.⁶⁴ The *Rules for Conducting Grievance Hearings* provide that "the hearing officer may question the witnesses."⁶⁵ The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."⁶⁶

⁵⁸ As discussed more fully above, EDR finds no error as to the hearing officer's determination that the issuance of the Counseling Letter was warranted.

⁵⁹ Although the grievant also contends that the hearing officer "interpreted . . . fact-finding cross-examination as claims of the Grievant which were disproved," Request for Administrative Review at 26, the basis for this argument is unclear. The hearing officer discussed the evidence elicited by the grievant on cross-examination in relation to his position that the Counseling Letter was improper. *See* Hearing Decision at 15-17; Request for Administrative Review at 27. The hearing officer appears to have merely been addressing the evidence in the record relating to the grievant's arguments, and there is no indication that the grievant suffered any prejudice as a result of this alleged error. To the contrary, the hearing officer is responsible for making "findings of fact as to the material issues in the case," Va. Code § 2.2-3005.1(C), which would include discussing the evidence presented by the grievant.

⁶⁰ Request for Administrative Review at 28.

⁶¹ *Id.* at 22.

⁶² *Id.* at 32-33.

⁶³ *Id.* at 28.

⁶⁴ *Id.* at 29-30.

⁶⁵ *Rules for Conducting Grievance Hearings* § IV(C).

⁶⁶ *Id.*

Based on a review of the record, EDR finds that the hearing officer's questions of the Chief and other witnesses were relevant and reasonable. It appears that the hearing officer's questions were intended to clarify the witnesses' personal knowledge of the events that led to the issuance of the Counseling Letter, as well as the reasoning behind their conclusions about the violations of policy that had occurred.⁶⁷ It further appears both parties had the opportunity to question the witnesses further about any matters raised by the hearing officer.

In addition, the grievant essentially claims that the hearing officer improperly excluded evidence, partly in response to the University's objections to the grievant's questioning of witnesses, on the basis that the witnesses had already testified to those matters during previous questioning.⁶⁸ The grievance statutes provide that the hearing officer has the authority to "[d]ispose of procedural requests" and "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations."⁶⁹ This includes addressing the parties' objections to evidence presented at the hearing. While the grievant disagrees with the hearing officer's rulings, it was within his authority and discretion to rule on such matters. EDR has identified nothing in the hearing officer's conduct at the hearing that was inconsistent with the *Rules*, showed bias in favor of the University, or was otherwise in error on any material matter. Accordingly, the grievant's request for relief with respect to these issues is denied.

University's Conduct

With regard to the Chief's presence at the hearing, the *Rules* provide that "[t]he agency may select an individual to serve in its capacity as a party."⁷⁰ Moreover, "[t]he fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import," and "[e]ach party may be present during the entire hearing and may testify."⁷¹ Nonetheless, behavior that is intended to intimidate witnesses and/or prevent a full and fair hearing are not permitted under the grievance procedure. For EDR or a hearing officer to make such a determination, there must be evidence that the action was not for a legitimate purpose, but rather was intended to intimidate and/or dissuade witnesses from testifying truthfully. Like any other factual determination, there must be evidence in the record to support such a finding.

In this case, the grievant has not demonstrated that the Chief's presence at the hearing constituted witness intimidation or otherwise prevented a fair and impartial hearing. The Chief is the supervisor of the University's police department where the grievant is employed, was involved in the events at issue in this case, and testified as a witness. There is nothing inherently unreasonable about the University's selection of such an individual as its party representative. Further, there is no evidence to suggest that the Chief engaged in improper behavior at the

⁶⁷ *E.g.*, Hearing Transcript at 131:7-133:9 (internal affairs investigator's testimony), 207:1-209:19 (Chief's testimony).

⁶⁸ *E.g.*, *id.* at 173:23-175:2 (Chief's testimony).

⁶⁹ Va. Code §§ 2.2-3005(C)(2), (5).

⁷⁰ *Rules for Conducting Grievance Hearings* § IV(A).

⁷¹ *Id.*

hearing that interfered with the testimony of any witness. In the absence of any indication that witness intimidation or other improper conduct occurred here, EDR perceives no basis to conclude that the Chief's presence caused any material prejudice to the grievant that would justify remanding the case to the hearing officer on this issue.

Exclusion of Grievant's Exhibit 3

The grievant additionally asserts that the hearing officer "made an incorrect preliminary order excluding" Grievant's Exhibit 3 from the hearing record.⁷² In his request for administrative review, the grievant describes the exhibit as a "video of an alleged excessive use of force" – in other words, a recording of the arrest that prompted the events leading to the issuance of the Counseling Letter.⁷³ The hearing officer excluded the video on the basis that it was not relevant to the issues in this case. In response, the grievant contends that the video was relevant because "the allegation of excessive force was a central motivating factor in . . . the agency's actions,"⁷⁴ and that exclusion of the video prejudiced his ability to present a defense to the charges in the Counseling Letter.⁷⁵

Having reviewed the evidence in the record and the parties' submissions, EDR finds no error in the hearing officer's decision to exclude Grievant's Exhibit 3. By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁷⁶ Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding,⁷⁷ and the technical rules of evidence do not apply.⁷⁸ EDR reviews a hearing officer's evidentiary rulings for abuse of discretion and/or other violation of the grievance procedure.⁷⁹

As discussed above, the grievant received the Counseling Letter based on conduct that is unrelated to the content of the video of the arrest. While the arrest prompted the investigation that led to the issuance of the Counseling Letter, the grievant was not involved in the arrest itself, was not charged with using excessive force, and did not conduct the internal affairs investigation of the incident. For these reasons, EDR cannot find that the hearing officer's evidentiary determination was an abuse of discretion or otherwise violated the grievance procedure.

⁷² Request for Administrative Review at 18.

⁷³ *Id.*

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 20-21. The grievant also appears to allege that the hearing officer's conduct during the pre-hearing conference to discuss evidentiary matters was inappropriate and biased. *Id.* at 21. As discussed elsewhere in this ruling, EDR has thoroughly reviewed the hearing record and found no evidence of misconduct or bias on the part of the hearing officer.

⁷⁶ Va. Code § 2.2-3005(C)(5).

⁷⁷ *Rules for Conducting Grievance Hearings* § IV(D).

⁷⁸ *Id.*

⁷⁹ See Va. Code § 2.2-1202.1(5); *Grievance Procedural Manual* § 7.2(a).

Alleged Procedural Issues

Moreover, the grievant alleges that the hearing officer's decision is not consistent with the requirements of EDR's *Rules for Conducting Grievance Hearings*. In particular, the grievant argues that the decision "incorrectly identifies the individuals [who were] present at the hearing,"⁸⁰ does not "match the format" required by the *Rules*,⁸¹ and was sent to the grievant's counsel, but not the grievant himself.⁸² The grievant further contends that "grammatical issues in the Decision hurt the factual findings" and make the decision difficult to understand.⁸³

Pursuant to the *Rules*, a hearing officer's decision must

contain a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified, and clearly listing all required actions.⁸⁴

In addition, a copy of the decision "must be provided to the grievant, the parties' advocates, and any other individuals identified on the Form B."⁸⁵

Although the grievant may dispute procedural and/or structural details in the decision, such as the hearing officer's manner of identifying the parties present and the format of the decision, EDR finds that these alleged errors, to the extent they exist, are harmless and do not warrant remand in this case. Similarly, any clerical or grammatical errors did not have a material impact on EDR's review or the outcome of the case such that correction of the decision is necessary. Finally, EDR notes that the grievant's advocate clearly received a copy of the decision because he submitted a timely request for administrative review to EDR on the grievant's behalf. For these reasons, EDR declines to disturb the decision based on the grievant's procedural arguments.

Alleged Bias

Finally, the grievant asserts that, based on the "body of the evidence and the records," the hearing officer's decision was "inherent[ly] bias[ed]" against him.⁸⁶ The *Rules for Conducting Grievance Hearings* provide that a hearing officer is responsible for avoiding the appearance of bias and:

⁸⁰ Request for Administrative Review at 32.

⁸¹ *Id.* at 35.

⁸² *Id.*

⁸³ *Id.* at 34.

⁸⁴ *Rules for Conducting Grievance Hearings* § V(C).

⁸⁵ *Id.*

⁸⁶ Request for Administrative Review at 31.

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in “Recusal,” § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by [EDR] Policy No. 2.01, Hearing Officer Program Administration.⁸⁷

The applicable standard regarding EDR’s requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.⁸⁸ The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”⁸⁹ EDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.⁹⁰ The party moving for recusal has the burden of proving the hearing officer’s bias or prejudice.⁹¹

The evidence presented by the grievant here is insufficient to establish bias or any other basis for disqualification. The mere fact that a hearing officer’s findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer’s findings of fact. Further, EDR perceived no evidence of bias or prejudice on the part of the hearing officer in its review of the hearing record. Accordingly, EDR declines to disturb the hearing decision on this basis.⁹²

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.⁹³ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

⁸⁷ *Rules for Conducting Grievance Hearings* § II; see also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if “a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself.”

⁸⁸ While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

⁸⁹ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

⁹⁰ *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

⁹¹ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

⁹² 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 is inconsistent with the grievance procedure or state policy such that remand is warranted.

⁹³ *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.⁹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁹⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁹⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).