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ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2020-5108
June 9, 2020

The agency (a college within the Virginia Community College System) has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11488. For the reasons set forth below, the matter is remanded for a new hearing.

FACTS

The relevant facts in Case Number 11488, as found by the hearing officer, are as follows:²

The Virginia Community College System employed Grievant as a Trades Technician III. He had been employed by the Agency since June 2014.

On April 10, 2020, the Hearing Officer sent the parties a letter confirming the hearing would begin by audio conference on May 14, 2020 at 9 a.m. The parties were notified of the telephone number to call and PIN number to enter to participate in the hearing.

On May 13, 2020, EDR [sic] sent the parties an email reminding them that the hearing would begin on May 14, 2020 at 9 a.m. by audio conference.

The hearing began on May 14, 2020 at 9 a.m. as scheduled. Grievant joined the hearing at 9 a.m. When the Agency did not appear at 9 a.m., two EDR staff called the Agency’s representative at approximately 9:05 a.m. The representative did not answer and the EDR staff left voice messages. At approximately 9:12 a.m., an EDR employee sent the representative an email asking the representative to call into the audio conference.

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. 11488 (“Hearing Decision”), May 14, 2020, at 2-3.

The Hearing Officer waited approximately 15 minutes as is his customary practice. The Agency did not appear. The hearing process began at 9:15 a.m.

The Agency submitted proposed exhibits in advance of the hearing but did not offer them as evidence during the hearing. The Agency did not present any testimony during the hearing.

Grievant presented an opening statement denying the Agency's allegations. Grievant presented his testimony denying the Agency's allegations. Grievant offered his proposed exhibits as evidence and those exhibits were accepted as evidence by the Hearing Officer.

The hearing ended at approximately 9:25 a.m. and the record was closed.

In a decision dated May 14, 2020, the hearing officer ordered the disciplinary action issued to the grievant to be rescinded and the grievant reinstated.³ The basis for this determination was that the agency advocate had failed to appear for the audio conference at the scheduled hearing time.⁴ The hearing officer denied the agency's request to reopen the hearing.

The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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 a party; the sole remedy is that the hearing officer correct the noncompliance.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

The hearing decision in this case is not based on the substantive merits of the grievance, but rather as a result of a procedural determination by the hearing officer. While such determinations are necessarily within the hearing officer's discretion,⁸ the hearing officer must exercise discretion in a manner consistent with the grievance procedure. EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance

³ Hearing Decision at 3.

⁴ *Id.*

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

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

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

⁸ *E.g.*, *Grievance Procedure Manual* § 5.5.

procedure.⁹ EDR will generally only disturb a decision within the hearing officer's discretion if (1) it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule, and (2) the objecting party can show prejudice.¹⁰ In this case, the agency has demonstrated prejudice in that the hearing officer denied its request to reopen the hearing and have its evidence considered, which resulted in rescission of the disciplinary action issued to the grievant. As such, EDR will assess whether the hearing officer abused his discretion or otherwise violated a grievance procedure rule.

This case essentially boils down to the fact that the hearing was scheduled for 9:00 a.m. by audio conference and the agency advocate appears to have mistakenly believed it was scheduled for 9:30 a.m., resulting in the agency's advocate missing calling into the hearing by 30 minutes at most.¹¹ The hearing officer apparently chose not to communicate with the agency advocate on the day of the hearing even though the advocate had reached out to EDR immediately upon learning of the mistake in an attempt to attend or reconvene the hearing. The agency's advocate also submitted a written request by email to reopen the hearing, which was addressed in the hearing officer's decision. The following discussion includes some of the reasons that the hearing officer's handling of this matter was an abuse of discretion and inconsistent with the grievance procedure.

The hearing officer determined that there was not just cause¹² to reopen the hearing.¹³ However, the hearing officer appears to have based this determination only on the abbreviated email that the agency's advocate submitted to request that the hearing be reopened upon learning that the hearing had been held and concluded minutes before.¹⁴ The hearing officer did not attempt to hold a conference to discuss the matter and evaluate the concerns and positions of the respective parties. Had such a conference call occurred, the hearing officer may have had a better understanding of the issues. To determine "just cause" in similar situations, hearing officers should weigh the relevant factors, including the potential for unreasonable delay, administrative impacts, and/or other prejudice.

Failing to attend a hearing is a significant issue of noncompliance with the grievance process. However, the reasons why such situations occur are not all equal and a sufficiently flexible approach is warranted to address them.¹⁵ Delayed attendance caused by traffic or technological

⁹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).

¹⁰ Cf. EDR Ruling No. 2013-3450; EDR Ruling No. 2012-3067.

¹¹ The agency represents that its advocate attempted to connect to the hearing in advance of the reported closure of the record at 9:25 a.m., indicating that its advocate was denied the ability to connect. There is no documented record of the timing of these events beyond the hearing officer's findings and the agency's representations. Based on the discussion below, however, this precise sequence has no bearing on the outcome of this ruling. As such, EDR need not determine precisely when the agency's advocate attempted to connect or whether he was denied entry to the audio conference.

¹² The grievance procedure defines "just cause" as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9.

¹³ Hearing Decision at 3.

¹⁴ *Id.*

¹⁵ For example, there are material differences between a party who mistakes the time of a scheduled hearing and arrives slightly late versus a party who does not appear at all and/or reaches out to the hearing officer or EDR days after the scheduled hearing to attempt to reschedule. In this case, the agency's advocate was ready and prepared to

impediment (for a hearing held by audio or video conference) would sufficiently explain untimely attendance; neither of these justifications exist in this case, however. The agency's advocate appears to have gotten the scheduled time wrong by 30 minutes. This is a mistake for sure, but one that is relatively minor and easily correctable. Had the hearing officer taken steps to reconnect with the parties on the day of the scheduled hearing (the day that all parties and witnesses already had set aside) this situation may have been avoided.¹⁶ No party has demonstrated material prejudice from reconvening the hearing 30 minutes late, and that would have been a reasonable and appropriate step for this case.¹⁷ EDR expects hearing officers to reach the same result regardless of whether it is the agency or the grievant who has made such a small mistake of time.

Due to the ongoing public health emergency, the parties had agreed to hold the hearing by audio conference. Had the hearing been held in person, the agency's advocate may well have been present at the hearing site before the hearing ever concluded and the situation could have been avoided. While EDR has given hearing officers guidance about conducting most hearings through audio or video conferencing during the emergency, it is important that the choice of medium not prejudice either party or materially impact the result. That this hearing was held by audio conference certainly played a role in the sequence of events. EDR expects hearing officers to be flexible in their approach to hearings held by audio and/or video conference in the current environment and to be understanding when situations occur that cause delays.

The hearing decision appears to rely on the unsuccessful attempts by EDR staff to contact the agency's advocate on the morning of the hearing.¹⁸ While it is unclear at what number EDR staff attempted to reach the agency's advocate, the agency states that it is unable to forward its office lines to another number. Due to the public health emergency, the agency's advocate is teleworking and, as such, calls to his office had no likelihood of successfully reaching him. When the initial contact information for this case was provided, there was no public health emergency and, so, the advocate's phone number on the Form B reasonably identifies his office number. An email submitted by the agency's advocate during the hearing process listed an alternate phone number, but it was not made explicit that he should be contacted at that number. Nevertheless, the changes to normal practices brought on by the public health emergency further underscore EDR's expectation of the caution needing to be exercised by hearing officers in this environment. A similar adjustment to normal practices to allow for missteps that may occur along the way is reasonable and required.

The hearing officer's determinations to refuse to reopen the hearing, to refuse to hear from the agency (in a conference and/or reconvened hearing), and to refuse to accept the agency's evidence are tantamount to a sanction for the agency's noncompliance. The *Rules for Conducting*

commence with the hearing on the scheduled date, just slightly late, and sought the hearing officer's approval to reconvene immediately.

¹⁶ Although the hearing officer had held a short hearing and closed the record, the hearing officer has the authority to reopen the hearing prior to the issuance of the decision.

¹⁷ A hearing held in-person may not allow for such an immediate resolution in similar situations. However, in this case, that everyone was connecting remotely and no travel was involved are relevant factors in determining the appropriate path forward.

¹⁸ Hearing Decision at 2.

Grievance Hearings provide guidance to hearing officers in ordering sanctions, specifically requiring hearing officers to consider the “seriousness of the conduct” including whether “the conduct was in bad faith rather than a simple mistake.”¹⁹ The agency advocate’s error was a simple mistake here and there is no indication of bad faith. On the other hand, the hearing officer’s sanction was severe, resulting in a determination against the agency without hearing its evidence. “The severity of any order of sanctions must be commensurate with the conduct necessitating the sanction.”²⁰ The hearing officer’s handling of the agency’s simple mistake in this case was not commensurate with the noncompliance. EDR accordingly finds that the hearing officer has not adhered to the grievance procedure.

CONCLUSION

For the reasons set forth above, EDR remands the case to the hearing officer for a new hearing. The hearing officer will issue a new decision following the hearing that replaces the original decision issued on May 14, 2020. EDR’s rulings on matters of compliance with the grievance procedure are final and nonappealable.²¹



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¹⁹ *Rules for Conducting Grievance Hearings* § III(E).

²⁰ *Id.*

²¹ *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).