

Issue: Compliance/Administrative Review of Hearing Decision #5711; Ruling date: July 17, 2003; Ruling #2003-124; Agency: University of Virginia; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of University of Virginia/ No. 2003-124
July 17, 2003

The grievant has requested that this Department administratively review the hearing officer's conduct in Case Number 5711. The grievant contends that the hearing officer (1) failed to address her claim of retaliation, (2) did not grant her adequate time to present her case at hearing, and (3) in upholding the disciplinary action against her, improperly relied on past misconduct.

FACTS

The grievant was an Administration/Office Specialist III with the agency until October 22, 2002, when she was issued a second Group II Written Notice with removal for failure to follow supervisor's instructions and failure to perform assigned work.¹ An attachment to the notice further described the charge as follows:

Despite repeated oral and written counseling, and a prior Group II and suspension for similar behavior, [grievant] refuses to follow the instructions of her management concerning the appropriate interactions and activities with patients in Dr. [A's] practice. Her actions jeopardize this practice and patient care. [Grievant] refuses to perform the routine, daily tasks that she has repeatedly been instructed by management are her responsibility as secretarial support to Dr. [A's] practice. She has been repeatedly instructed in the proper performance of her position, but chooses to do what she thinks she should do and not what her management has instructed her to do. She is recalcitrant and wholly resistant to any management direction. She has consistently, and often with vehement assertions of the correctness of her position, failed to follow supervisors' instructions and/or perform assigned work.²

The grievant filed a grievance on November 15, 2002, claiming that she was "discharged without just cause" and in "retaliation for engaging in a protected activity,

¹ The grievant had a prior active Group II Written Notice, issued May 17, 2002. That disciplinary action, also for failure to follow a supervisor's instructions, was upheld by a hearing officer on October 24, 2002. See Hearing Decision, Case No. 5514/5547, issued October 24, 2002.

² See Written Notice, dated October 22, 2002.

including whistleblowing.”³ The hearing took place on May 6, 2003 and the hearing officer issued his decision on May 15, 2003.

In his decision, the hearing officer concluded that from May 18, 2002 to October 17, 2002, the grievant repeatedly failed to follow her supervisor’s instructions. As such, he upheld the Group II Written Notice and termination of grievant’s employment.⁴ The grievant requested administrative review, citing several alleged errors in the hearing decision.⁵

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions in all matters related to procedural compliance with the grievance procedure.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁷

Failure to Address Retaliation Claim

The grievant asserts that the hearing officer only addressed her retaliation defense *generally* in his decision, but “failed to mention the most significant facts that tended to prove the claim of retaliation.”⁸ The grievance procedure requires that the hearing decision “contain findings of fact on the material issues and the grounds in the record for those findings.”⁹ In this case, the hearing officer addressed the grievant’s retaliation claim specifically, stating that the grievant “has not established any connection between [her engagement in a protected activity and her termination]. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for disciplining grievant.”¹⁰ Given that the hearing officer did not find that retaliation played a role in the agency’s decision to discipline and terminate the grievant, he is not bound to recite in

³ See Grievance Form A-Expedited Process, dated November 15, 2002.

⁴ Hearing Decision, Case No. 5711, page 10, issued May 15, 2003.

⁵ Requests for administrative review must be made and *received* by the reviewer within 10 calendar days of the date of the hearing decision. *Grievance Procedure Manual* § 7.2(a), page 18. In this case, this Department did not receive a request for administrative review until June 20, 36 days after the date of the hearing decision. However, the grievant timely requested administrative review from the Department of Human Resource Management (DHRM). DHRM informed the grievant that three of her challenges should have been raised instead with the EDR Director. This Department has held in the past that timely claims made to the wrong party may proceed. See EDR Rulings 2000-008 (grievance initiated timely with the wrong party) and 2000-131 (request for administrative review sent to wrong agency). Because the claims now before us were timely received by DHRM, and the grievant acted promptly to redirect those claims to this Department, we will consider them as timely for purposes of our review.

⁶ Va. Code § 2.2-1001(2), (3), and (5).

⁷ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁸ Request for Administrative Review to EDR Director, Case No. 5711, page 3, dated June 18, 2003.

⁹ *Grievance Procedure Manual* § 5.9, page 15.

¹⁰ Hearing Decision, Case No. 5711, page 8, issued May 15, 2003.

his decision all evidence proffered by the grievant that he ultimately deemed insufficient to establish a link between a protected activity and her termination. In other words, if a hearing officer concludes that a grievant has not provided sufficient evidence to establish an element of a claim, he has, in essence, stated the facts, or more to point, the lack thereof, that formed the basis of his decision. Moreover, it should be noted that the hearing officer did state in his decision the facts that he relied upon to conclude that the disciplinary action was warranted.¹¹ In sum, this Department finds no error regarding the manner in which the hearing officer dealt with the issue of retaliation in his hearing decision.

Inadequate Time at Hearing

The grievant claims that her grievance hearing was “unbalanced” because UVA was afforded nine hours for its case, while the grievant only had three hours to present her evidence. She further claims that, because of this uneven split in time, she was “rushed” and “was not afforded a full opportunity to present her claims and defenses.”¹² Specifically, the grievant argues that she was not allowed to testify about speaking to management on behalf of a coworker, which, she asserts, would have supported her retaliation claim.

The hearing officer is charged with the responsibility of “conducting the hearing in an equitable and orderly fashion.”¹³ In keeping with this responsibility, hearing officers have the duty to “[r]eceive probative evidence,” that is, evidence that “affects the probability that a fact is as a party claims it to be.”¹⁴ They may exclude evidence that is “irrelevant, immaterial, insubstantial, privileged, or repetitive.”¹⁵ Moreover, both parties must be afforded the opportunity to state their claims and to present their *relevant*

¹¹ For instance, the Written Notice (Attachment) states that the grievant refuses “to perform the routine, daily tasks that she has repeatedly been instructed by management are her responsibility as secretarial support to Dr. [A’s] practice” and “[s]he has been repeatedly instructed in the proper performance of her position, but chooses to do what she thinks she should do and not what her management has instructed her to do.” The Notice further states that [s]he has “consistently, and often with vehement assertions of the correctness of her position, failed to follow supervisors’ instructions and/or perform assigned work.” In his decision, the hearing officer cited the grievant’s failure to utilize the data collection form, her sporadic use of a daily telephone log, and her failure to record sufficient detail when taking telephone messages, as specific examples of facts supporting the charges against her. In addition, the hearing officer cited to the grievant’s failure to schedule some patients for follow-up visits by the date specified by the physician. The grievant’s inordinate amount of time reviewing patient medical records, writing summaries, and drawing her own conclusions about the patient’s medical status were also cited by the hearing officer as further evidence supporting the grievant’s discipline. Finally, the hearing officer found that the grievant interjected herself into patient affairs more deeply than is appropriate for someone who is assigned to provide secretarial and administrative support, and that she spent too much time on non-work related activities, particularly by involving herself in researching patient medical information beyond the scope of her job description. In sum, it appears that the hearing officer did provide sufficient specific facts to support his conclusion that the discipline was based on legitimate business concerns as opposed to retaliation.

¹² Request for Administrative Review to EDR Director, Case No. 5711, page 2, dated June 18, 2003.

¹³ *Rules for Conducting Grievance Hearings*, page 1.

¹⁴ Edward W. Cleary, *McCormick on Evidence* § 16, page 52 (1984).

¹⁵ *Rules for Conducting Grievance Hearings*, page 7.

evidence. In the example provided by the grievant, the hearing officer excluded testimony about the grievant's coworker on the grounds that it was not relevant.¹⁶ The hearing officer has considerable discretion in making determinations about the relevancy and admissibility of evidence, and this Department cannot substitute its judgement for that of the hearing officer. A hearing officer's ruling on the admissibility of evidence can be overturned only upon a showing of abuse of discretion and the grievant has not provided evidence of such an abuse here.

In this case and in other cases involving disciplinary actions, the agency had the burden to prove, by a preponderance of the evidence, that "the action was warranted and appropriate under the circumstances."¹⁷ It is reasonable that the party bearing the burden of proof would take more time at hearing to present its case. Further, during the University's presentation of evidence, the grievant spent a significant amount of time cross-examining University witnesses. Moreover, the disparity in time could be attributed to the fact that the University called three witnesses at hearing, while the grievant called only one. Therefore, in light of the above, it does not appear that the hearing officer interfered with the grievant's ability to present her case at hearing or otherwise abused his authority.

"Double Jeopardy"

The grievant asserts that the hearing officer relied on circumstances surrounding the grievant's earlier Group II Written Notice, resulting in "double jeopardy," in other words, that the grievant was punished twice for the same offense. The circumstances surrounding the two Written Notices were indeed very closely related. However, as the hearing officer noted, the notices were distinct: the May 17 Written Notice concerned the grievant's failure to follow her supervisor's instructions, while the October 22 Written Notice concerned the grievant's failure "to follow the *same* instructions" between May 18 and October 17.¹⁸ The hearing officer stated that, because the two Written Notices involve the same type of behavior, the two grievances challenging those disciplinary actions are "inextricably intertwined."¹⁹ It appears that, although evidence about the same *type* of behavior was introduced in the grievant's prior hearing, the hearing officer in this case upheld the University's second disciplinary action based on the grievant's *continued* misconduct, not on misconduct that occurred prior to May 17.

APPEAL RIGHTS

¹⁶ The hearing officer provided this information during this Department's investigation.

¹⁷ *Grievance Procedure Manual* § 5.8, page 14. See also *Rules for Conducting Grievance Hearings*, pages 7 and 11-12. "Preponderance of the Evidence" is defined as "[e]vidence which shows that what is sought to be proved is more probable than not; evidence that is more convincing than the opposing evidence." *Grievance Procedure Manual* § 9, page 24.

¹⁸ Hearing Decision, Case No. 5711, page 9, issued May 15, 2003 (emphasis added).

¹⁹ Hearing Decision, Case No. 5711, page 8, issued May 15, 2003.

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.²⁰ In addition to the grievant's request for a ruling from this Department, the grievant requested an administrative review from DHRM. That Department responded to the grievant on June 10, 2003. Therefore, the hearing decision in this case is now a final hearing decision. 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²² This Department's rulings on matters of procedural compliance are final and nonappealable.²³

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²⁰ *Grievance Procedure Manual*, § 7.2(d), page 20.

²¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

²² *Id.*

²³ Va. Code § 2.2-1001 (5).