

Issue: Administrative Review/charges that university improperly intimidated and dismissed witnesses – hearing officer conspired with agency; Ruling Date: May 26, 2005; Ruling #2005-974; Agency: Virginia Polytechnic Institute and State University; Outcome: hearing officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University  
Ruling No. 2005-974  
May 26, 2005

The grievant has requested that this Department administratively review the hearing officer's conduct in Case Nos. 7964 and 7965. The grievant contends that the hearing officer conspired with Virginia Polytechnic Institute and State University (the university or VT) to deny him the opportunity to present his case, by curtailing the length of the hearing on Case No. 7965 and by providing him with the wrong location for the hearing. In addition, the grievant alleges that the hearing officer failed to comply with the grievance procedure by allowing the director of his department to attend the hearing, and he charges that the university improperly intimidated and dismissed his witnesses. For the reasons set forth below, we find that the hearing officer's conduct was in compliance with the grievance procedure.

FACTS

The grievant was employed by the university as a video technician. On October 4, 2004, the grievant was issued two Group II Written Notices. The first of these notices charged the grievant with repeated counts of failing to follow a supervisor's instructions, as well as a single instance of failing to report to work as scheduled; the second notice charged the grievant with repeated instances of failing to perform assigned work. In conjunction with the two Group II Written Notices, the university terminated the grievant from employment effective October 5, 2004. The grievant subsequently initiated two grievances challenging the written notices, and the university qualified the grievances for hearing.

Separate hearings were held on the two notices on February 9 and 10, 2005. The first hearing (Case No. 7964) began the morning of February 9<sup>th</sup> and lasted approximately eight hours. The second hearing (Case No. 7945) began shortly after 5:00 pm on February 9<sup>th</sup> and continued until approximately 7:30 that evening. The hearing resumed at 8:00 am on the morning of February 10<sup>th</sup> and continued until noon, when the hearing officer ended the hearing to return to Richmond.

The hearing officer issued his written decisions in these two cases on February 14, 2005. In both cases, the hearing officer upheld the disciplinary action taken against the grievant. The grievant requested reconsideration of the decisions by the hearing officer, and on April 5, 2005, the hearing officer issued reconsideration decisions upholding his previous rulings. The grievant also requested administrative review of the hearing officer's February

14, 2005 decisions from this Department and the Department of Human Resource Management.<sup>1</sup>

### 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.”<sup>2</sup> 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.<sup>3</sup>

#### *Inadequate Time at Hearing*

The grievant alleges that the hearing officer improperly curtailed the second hearing, ending the hearing at noon rather than allowing the hearing to take a “full day.” The grievant suggests that the hearing officer’s actions were the result of a conspiracy with the university to deny the grievant an opportunity to present his case at hearing. Specifically, the grievant charges that the university notified the hearing officer of how long its witnesses would take, and then the hearing officer adjusted the length of the second hearing to prevent the grievant from having time to present his case. The grievant claims that as a consequence, he was unable to call and question witnesses and to introduce evidence.

The grievant admits, however, that these allegations are only his “assumption of what could have happened,” and he presents no evidence to substantiate his claims of collusion between the hearing officer and the university. Moreover, after reviewing the grievance hearing tapes, this Department cannot conclude that the grievant was in fact denied the opportunity to present his case. While the grievance procedure provides that hearings shall not generally last more than a full day, this does not entitle a grievant to eight hours of hearing on each grievance.<sup>4</sup> Rather, the grievant is only entitled to a reasonable opportunity to present his case, including the cross-examination of the agency’s witnesses.

Here, the grievant received such an opportunity. Over the course of two days, the hearing officer heard approximately fourteen hours of testimony, with the second hearing lasting for over six hours. While the majority of the second hearing was spent on the university’s case, at least half, if not more, of the time taken on university witnesses was actually spent on cross-examination of those witnesses by the grievant. Moreover, because the university had the burden to prove, by a preponderance of the evidence, that its actions

---

<sup>1</sup> To date, the Department of Human Resource Management has not issued a ruling in response to the grievant’s request.

<sup>2</sup> Va. Code § 2.2-1001(2), (3), and (5).

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

<sup>4</sup> See *Grievance Procedure Manual* § 5.4.

were “warranted and appropriate under the circumstances,”<sup>5</sup> it is reasonable that the university would take more time at hearing to present its case. With respect to the grievant’s claim that he was unable to call witnesses because of the abbreviated length of the second hearing, we note that the grievant failed in his request for administrative review to identify any witness he was precluded from calling. To the contrary, our review of the hearing tapes indicates that the grievant in fact presented two witnesses during his second hearing and that he did not proffer any additional witness testimony. Under these circumstances, it does not appear that the hearing officer interfered with the grievant’s ability to present his case at hearing or otherwise abused his authority.

#### *Location of Hearing*

The grievant also alleges that the hearing officer and the university conspired to hold the hearing in his absence. Specifically, the grievant asserts that the university changed the location of the hearing without providing him notice, to allow the hearing officer to conduct the hearing without the grievant present. With respect to this allegation as well, however, the grievant admits that it is just his “assumption of what could have happened.” Moreover, it is undisputed that the hearing was not in fact held in the grievant’s absence, and thus, regardless of any alleged motive in changing the hearing location, the grievant suffered no prejudice.

#### *The Department Director’s Attendance at the Hearings*

The grievant also challenges his department director’s attendance at the hearings, alleging that the director’s presence intimidated his co-workers who testified. At the beginning of the first day of hearing, the university designated the department director as its party, and the department director attended the hearings in this capacity. The grievant did not apparently object to this designation.

Under this Department’s *Rules for Conducting a Grievance Hearing*, “[an] agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify.” As the university was entitled to designate the department director as its party, this Department finds that the hearing officer did not violate the grievance procedure or otherwise abuse his discretion by allowing the department director to attend.

#### *Intimidation and Dismissal of Witnesses*

The grievant claims that the university intimidated his co-worker witnesses by requiring them to meet with university counsel and the department director prior to the hearings to discuss the substance of their testimony. In addition, he alleges that university

---

<sup>5</sup> *Grievance Procedure Manual* § 5.8. A “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.

counsel advised a former employee, who is now employed by another state university, that he did not have to appear as a witness for the grievant.

The grievant failed to raise the first of these allegations of party noncompliance to this hearing officer, and as a consequence, he has waived any claim regarding the alleged intimidation. Moreover, the alleged meetings between the grievant's witnesses and the university were not impermissible under the grievance procedure. While it would be clearly inappropriate for an agency to threaten employee witnesses or to attempt to change their testimony in a manner adverse to a grievant, the grievance procedure does not prohibit an agency from simply meeting with employees designated as witnesses by a grievant in order to learn what relevant information the witnesses possess.<sup>6</sup>

With respect to the grievant's allegations regarding the former employee, the grievant admitted at hearing that the former employee said that he had been advised by "counsel" that he did not have to attend, but did not specify whether this advice came from the university's counsel or his current employer's counsel. Moreover, the grievant admits in his request for administrative review that he has no evidence that the university's counsel advised the former employee that he did not have to testify, stating that he "can only assume" that it was VT's counsel that gave this advice. As the grievant has failed to present any evidence supporting his claim, this Department cannot conclude that the hearing officer violated any provision of the grievance procedure or otherwise abused his authority as to this issue.

#### CONCLUSION AND APPEAL RIGHTS

This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>7</sup> Therefore, this ruling may not be appealed. However, once DHRM issues its decision, the hearing officer's original decision will become a final hearing decision.<sup>8</sup> Within 30 calendar days of DHRM's issuance of its decision, either party may appeal the *final hearing decision* to the circuit court in the jurisdiction in which the grievance arose.<sup>9</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>10</sup>

---

Claudia T. Farr  
Director

---

<sup>6</sup> Likewise, an agency generally may not prohibit its employees from meeting or speaking with a grievant about his case, although an agency may limit such interactions to the extent they occur on work time. Further, it is unlawful for an agency to retaliate against an employee because of his or her testimony or involvement in a grievance proceeding. Va. Code § 2.2-3000(6).

<sup>7</sup> Va. Code § 2.2-1001 (5).

<sup>8</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>9</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a). If DHRM orders the hearing officer to revise his opinion, the decision becomes final and the 30-day timeframe begins when the hearing officer issues his revised opinion. Also, if the agency wishes to appeal to the Circuit Court, it must first seek approval from this Department within 10 days of the decision becoming final.

<sup>10</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

