Issue: Administrative review of Case #8116; Ruling Date: November 22, 2005; Ruling #'s: 2006-1099, 2006-1104; Agency: Old Dominion University; Outcome: hearing decision not in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

In the matter of Old Dominion University
Ruling Nos. 2006-1099, 2006-1104
November 22, 2005

The grievant and Old Dominion University (the agency or ODU) have each requested an administrative review of the hearing officer's decision in Case Number 8116.

FACTS

The grievant was employed by the agency as a Law Enforcement Officer II in its internal police department.[1] On February 23, 2005, Detective B reported that he had observed the grievant calling out several building checks from his car, without first physically checking the buildings.[2] The grievant was subsequently removed from employment effective March 22, 2005 after receiving a Group III Written Notice for making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department, and shirking official duty.[3]

On April 15, 2005, the grievant filed a grievance challenging the disciplinary action.[4] In his grievance, the grievant identified the following issues: (1) whether he was guilty of making a false official statement; (2) whether he was guilty of undermining the effectiveness of the department; (3) whether he was guilty of impairing the efficiency of the department; (4) whether he was guilty of shirking official duty; (5) whether his termination constituted "arbitrary, capricious, unjustified and/or excessive discipline"; (6) whether the department and/or any of its members have discriminated against him on the basis of his race; (7) whether the department and/or any of its members have violated his rights to due process; (8) whether the department and/or any of its members have violated his rights under the Virginia Law Enforcement Officer's Procedural Guarantees Act; and 9) whether he is entitled to an award of costs and expenses.[5]

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.[6] The hearing was held on July 14, 2005.[7] On

[1] Hearing Decision dated July 20, 2005 (Hearing Decision) at 2.
[2] *Id.* at 4. The grievant apparently admits that he did not physically secure the buildings in question, but argues that no agency policy required physical inspections and that visual inspections were customary and permissible. *Id.* at 4-6.
[3] *Id.* at 1.
[4] *Id.*
[5] Agency Hearing Exhibit 1.
[6] Hearing Decision at 1.
[7] *Id.*

July 20, 2005, the hearing officer issued a decision reducing the disciplinary action against the grievant to a Group I Written Notice and ordering that the grievant be reinstated to employment.[8] The hearing decision also found that the grievant had not proven that the Written Notice was issued as a result of discrimination.[9]

By letter dated August 2, 2005, the agency, through its counsel, requested an administrative review by this Department of the hearing officer's decision.[10] By letter dated August 4, 2005, the grievant's counsel also requested an administrative review by this Department. In addition, the grievant requested reconsideration of the decision by the hearing officer and an administrative review of the decision by the Department of Human Resource Management (DHRM).

The hearing officer issued his reconsideration decision on August 26, 2005.[11] In his decision, the hearing officer affirmed his earlier ruling and also awarded attorneys' fees to the grievant.[12] On September 1, 2005, the agency also requested a review of the reconsideration decision, with respect to that portion of the decision awarding attorneys' fees. By letters dated September 9, 2005, the grievant requested an administrative review by this Department and DHRM of the reconsideration decision. In addition, he asked the hearing officer for reconsideration of his reconsideration decision. The hearing officer subsequently denied the grievant's request for a second reconsideration, on the ground that he no longer had jurisdiction over the grievance.[13]

This ruling will address both parties' initial requests for administrative review, as well as the grievant's second request for administrative review. The agency's second request for administrative review, which is limited to the hearing officer's award of attorneys' fees to the grievant, will be addressed with the agency's other objections to the fee award (as stated in the agency's request for administrative review of the fees addendum) in a separate ruling.

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…on all matters related to procedural compliance with the grievance procedure."[14] 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.[15]

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[8] *Id.* at 1, 6.
[9] *Id*. at 4.
[10] The agency also appears to have requested an administrative review by the Department of Human Resource Management, although a copy of that request was apparently not provided to EDR.
[11] Reconsideration Decision dated August 26, 2005 (Reconsideration Decision) at 1.
[12] *Id.* at 1-5.
[13] The hearing officer issued his addendum decision addressing attorney's fees on September 12, 2005. By letter dated September 13, 2005, the agency requested an administrative review of this addendum.
[14] Va. Code § 2.2-1001(2), (3), and (5).
[15] *See Grievance Procedure Manual* § 6.4(3).

Grievant's Request for Administrative Review

In his request for administrative review, the grievant argues that the hearing officer failed to address fully all alleged discrimination. Specifically, the grievant asserts that the hearing officer improperly focused only on discrimination by a single employee, rather than also considering discrimination by other members of the police department and other agency representatives. The grievant also argues that the hearing officer erred by requiring him to prove his case by direct, rather than circumstantial, evidence of discrimination. Each of these arguments will be considered below.

Failure to Consider All Alleged Discrimination

The grievant asserts that the hearing officer erred by considering only alleged discrimination by Lieutenant D in his decision, while failing to make specific findings of fact regarding alleged discrimination by other members of the police department and the alleged failure of the agency to investigate and take appropriate action with respect to the grievant's claim of discrimination. In his reconsideration decision, the hearing officer disagreed with the grievant's contention, stating that the issue before him "was whether the Agency took disciplinary action against Grievant because of racial discrimination and not whether the Agency discriminated against Grievant by taking actions against him other than disciplinary action."[16] In his second request for administrative review, the grievant objects to the hearing officer's characterization of the issue qualified, arguing that '[t]he scope of the grievance clearly was not limited to [the grievant's] termination, but rather encompassed all race discrimination to which [the grievant] was subjected."

While the hearing officer is correct that the grievant's termination was the precipitating event for the grievance, the grievant's Form A broadly alleges a pattern and practice of racial discrimination by certain police department employees. Specifically, an attachment to the grievant's Form A lists as an issue grieved "[w]hether [the agency] and/or any of its members have discriminated against [the grievant] on the basis of his race (white) and, if so, the relief to be provided to [the grievant] for same." That same attachment includes the following requests for relief—a "[t]horough investigation of [the grievant's] allegations of race discrimination against [the grievant] and other white officers by certain individuals employed by [the police department], including but not limited to Lieutenant [D] and Detective [B]"; "[p]rompt and effective action to remedy past and present race discrimination against [the grievant] and other white officers by certain individuals employed by [the police department], including but not limited to Lieutenant [D] and Detective [B]"; and "[p]rompt and effective action to prevent future race discrimination against [the grievant] and other white officers by certain individuals employed by [the police department], including but not limited to Lieutenant [D] and Detective [B]." Finally, the attachment to the Grievance Form A incorporates by reference the facts set forth in a March 14, 2005 letter from the grievant's counsel to the

[16] Reconsideration Decision at 2.

agency. This letter charges that the disciplinary action against the grievant is "part of a pervasive pattern and practice of racial harassment against white officers and employee[s] by certain black members of the [police department]."

Moreover, these allegations were qualified by the agency head for hearing, and thus were before the hearing officer for determination. Under the grievance procedure, can do issues qualified by the agency head, the EDR Director or the Circuit Court must be decided by the hearing officer.[17] This Department has repeatedly held that in qualification decisions, the plain language of the Grievance Form A is determinative.[18] Indeed, the Grievance Form A is of paramount importance because the grievant, the agencies and this Department rely on the Form A to ascertain the intent of the parties. Here, the plain language of the Form A indicates that while the grievant's termination was the precipitating event for the grievance, his grievance also challenges what he alleges is a broader pattern and practice of racial discrimination. While the agency head could have limited her qualification of the grievance to the grievant's termination, she was required to do so through express and unequivocal language that would provide notice to the grievant. There is no evidence, however, that she did. Considered in its entirety, the fully-executed Form A is insufficient to give the grievant clear notice of any intent by the agency head to deny qualification of his more general claim of race discrimination.[19] The hearing officer therefore erred by concluding that the only issue before him was whether the grievant was disciplined because of his race.

Further, the hearing officer erred by limiting his inquiry to Lieutenant D's involvement. In the initial hearing decision, the hearing officer stated:

> Grievant contends the disciplinary action should be reversed because the [university police department] has engaged in racial discrimination against him and other employees of his race. Within the confines of this disciplinary grievance, however, the only issue before the Hearing Officer is whether the Police Department disciplined Grievant, in part, as a process of discriminating against Grievant because of his race. No credible evidence has been presented to show that the Police Department disciplined Grievant in order to discriminate against him because of his race. Grievant complained of a particular employee within the Police Department as the source of racial discrimination against him. That employee, however, had no involvement in the disciplinary action against Grievant.[20]

The hearing officer is correct that the grievant suggested that Lieutenant D was a driving force behind his discipline. But because the grievant alleges that other individuals in the department were also engaged in or permitted race discrimination, it

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[17] *See Rules for Conducting Grievance Hearings* §§ II, V.B; *see also* Ruling No. 2006-1117.
[18] *See* Ruling No. 2004-611; Ruling No. 2004-696.
[19] We note that had the grievant received notice that his discrimination claim was qualified only with respect to his termination, he could have appealed its qualification decision to this Department before it proceeded to hearing.
[20] Hearing Decision at 4.

was necessary for the hearing officer to consider not simply whether the grievant had shown that Lieutenant D was involved in the disciplinary action, but also whether those who were involved with the disciplinary action had acted out of a racially-discriminatory motive.[21]

The hearing officer is therefore ordered to reconsider his decision in accordance with this ruling.

Requiring Direct Evidence

The grievant also alleges in his August 10, 2005 request for administrative review that the hearing officer erred by requiring him to present direct evidence of the alleged discrimination. Specifically, he asserts that the hearing officer failed to analyze the evidence in the context of the *McDonnell Douglas* burden shifting framework.[22] Moreover, the grievant argues, his circumstantial evidence was sufficiently compelling that had the hearing officer applied the proper analysis, the hearing officer would have concluded that the grievant had proven discrimination.

The hearing officer did not expressly address or apply the *McDonnell Douglas* analysis in his initial decision. In his reconsideration, the hearing officer stated that he considered all the evidence presented by the grievant, but that the grievant had failed to meet his burden of showing he was disciplined because of his race.[23] The hearing officer noted that while the grievant had presented evidence that other officers engaged in similar conduct as that for which the grievant was disciplined, "no evidence was presented showing that Agency managers knew of this practice and tolerated it for those other officers."[24] Moreover, the hearing officer stated, the evidence presented by the grievant did not demonstrate that white officers were disciplined more harshly than officers of other racial groups.[25] The hearing officer then observed that even if it were assumed that the grievant had satisfied the *prima facie* case under *McDonnell Douglas*, the agency had presented a legitimate, non-discriminatory reason for its actions and the grievant had failed to demonstrate that the university's asserted reasons were merely a pretext for discrimination.[26]

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[21] We note that neither the hearing decision nor the reconsideration identifies the decision makers involved in issuing the Group III Written Notice to the grievant. While the hearing officer did consider certain allegations regarding Detective B and Lieutenant M on reconsideration, in the context of his pretext analysis, it is not evident that the hearing officer considered their roles, if any, in the decision to discipline the grievant or any other evidence presented by the grievant to support a finding of discriminatory animus with respect to these two employees. In reconsidering his decision in accordance with this ruling, the hearing officer is directed to clarify which agency employees were involved in issuing the discipline, and to make findings of fact with respect to each of those individuals in regard to the claimed discriminatory conduct. The hearing officer should then consider these findings in applying the *McDonnell Douglas* burden shifting framework on reconsideration.

[22] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[23] Reconsideration Decision at 2.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 2-3.

In his second request for administrative review, the grievant argues, in effect, that the hearing officer misapplied *McDonnell Douglas* in his reconsideration. Specifically, he asserts that the hearing officer erred in finding that the agency had a legitimate nondiscriminatory reason for terminating him. The grievant contends that the agency did not show it had a legitimate reason to fire him and therefore "failed to meet its burden of proof under *McDonnell Douglas.*" The grievant also argues that the hearing officer erred in finding that white employees were not disciplined more harshly than non-white employees.

Because the hearing officer addressed the grievant's claim that he failed to apply the *McDonnell Douglas* burden-shifting framework in his reconsideration, this claim is moot. Moreover, the grievant's argument that the agency had not met its "burden of proof" fails as a matter of law. The agency's burden under *McDonnell Douglas* was merely to articulate a legitimate, nondiscriminatory reason for its actions.[27] The agency did not have to prove that its asserted reason was in fact the reason for its action; rather, the grievant bore the burden of proving that the agency's asserted reason was false.[28] As the United States Supreme Court has explained, "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[29]

We nevertheless conclude that the hearing officer's application of *McDonnell Douglas* was flawed, however, because the hearing officer improperly limited his analysis of the grievant's discrimination claim to the discipline taken against the grievant. Therefore, on reconsideration, the hearing officer is directed to apply the *McDonnell Douglas* framework in light of all alleged discrimination for which the grievant presented evidence at hearing. In applying this framework, the hearing officer should consider evidence directly related to the grievant's termination as well as any other evidence of discrimination presented by the grievant. In this regard, we note that in considering the evidence presented by the grievant of disparate discipline[30], the hearing officer is not limited to considering only those examples, if any, where employees engaged in identical conduct as the grievant. Rather, the hearing officer may consider the discipline taken by the agency for misconduct of "comparable seriousness" to that allegedly committed by the grievant.[31] The weight, if any, to be accorded to this evidence is to be determined by the hearing officer, in his discretion.

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[27] *See, e.g.*, Hawkins v. PepsiCo, Inc., 203 F.3d 274, 278 (4th Cir. 2000); Mereish v. Walker, 359 F.3d 330, 334 (4th Cir. 2004)

[28] Hawkins, 203 F.3d at 278; Mereish, 359 F.3d at 335 ("To meet his production burden under the *McDonnell Douglas* framework, [defendant] is not required to persuade us that the proffered reason was the actual motivation for [the] decision. He must merely articulate a justification that is 'legally sufficient to justify a judgment' in his favor." (citations omitted)).

[29] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[30] *See* Grievant's Exhibit 31.

[31] *See* McDonnell Douglas, 411 U.S. at 803 (noting that evidence that employees of another race who engaged in conduct of "comparable seriousness" and were treated more favorably is "especially relevant" to a showing of pretext); Bluebeard's Castle Hotel v. Government of Virgin Islands, 786 F.2d 168, 171-72 (3d Cir. 1986); Johnson v. West, 218 F.3d 725, 733 (7th Cir. 2000); Green v. State of New Mexico, 420 F.3d 1189, 1194-95 (10th Cir. 2005). *See also* Bean v. UPS, 2005 U.S. Dist. LEXIS 17225, at *11 (D. Md.

Agency's Request for Administrative Review

Failure to Address All Charges

The agency asserts that the hearing officer failed to address all the charges set forth in the written notice—specifically, that the grievant's conduct "impaired the efficiency" of the police department. In his reconsideration decision, however, the hearing officer stated that the agency had failed to present any credible evidence to show that the grievant's actions had any significant or material impact on the efficient operations of the department such that a Group III Written Notice was appropriate.[32]

As previously noted, hearing officers are authorized to make "findings of fact as to the material issues in the case"[33] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[34] 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. So long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer.

Failure to Apply University Regulations

The agency also contends that the hearing officer erred by not applying the police department's regulations "as stated." These regulations provide that "failure to perform assigned work" is a Group II offense.[35] Although the Written Notice did not charge the grievant with a failure to perform his assigned work, the agency argues that the grievant's failure to physically secure the buildings constituted a failure to perform assigned work, and that the hearing officer should therefore have reduced the Group III Written Notice to a Group II, rather than a Group I. [36]

Aug. 18, 2005) (in explaining the meaning of "similarly situated," the court noted that it compares "discipline for comparable offenses, instead of strictly identical offenses, 'reflecting an understanding both of the need to compare only discipline imposed for like offenses in sorting out claims of disparate discipline under Title VII and of the reality that the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances.'" (citing Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993)); Spratley v. Hampton City Fire Dept., 933 F. Supp. 535, 540 (E.D. Va. 1996).

[32] Reconsideration Decision at 1.

[33] Va. Code § 2.2-3005.1(C)(ii).

[34] *Grievance Procedure Manual* § 5.9.

[35] The agency suggests that police department regulations differ in this respect from the Standards of Conduct set forth by the Department of Human Resource Management (DHRM). However, under both DHRM Policy 1.60 and the police department regulations, "Failure to follow [a] supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is designated as a Group II offense, while "Inadequate or unsatisfactory work performance" is classified as a Group I offense.

[36] The grievant argues that because he was not charged with a Group II offense, "fundamental principles of due process forbid [him] from being disciplined" for that offense. As we decide this issue on other grounds, it is unnecessary to address this argument.

In his hearing decision, the hearing officer rejected the agency's claim that the grievant's conduct warranted at least a Group II written notice.[37] The hearing officer found that the grievant did not disregard an instruction from a supervisor, and that the policy requiring physical checks of buildings was not an established written policy.[38] Under these circumstances, the hearing officer concluded, the grievant did not refuse to perform assigned work, but merely failed to perform that work satisfactorily.[39] The agency argues that the hearing officer erred by interpreting the department's policy to require a refusal, rather than simply a failure, to perform assigned work.

Although cast as a policy issue, the agency's objection appears to challenge the hearing officer's factual findings regarding the instructions given to the grievant. To find that an employee failed to perform assigned work, the hearing officer must, in effect, make two factual determinations: that specific work was assigned to the employee, and that the employee did not perform that work as instructed. It is only if the hearing officer finds that specific work was assigned and not performed as instructed that the issue of intent (*i.e.*, refusal versus failure) raised by the agency becomes relevant.

Here, the hearing decision, fairly read, concludes that the grievant was not given a sufficiently specific instruction to physically secure windows and doors to justify a Group II Written Notice. The hearing officer not only finds that the grievant did not "refuse" to perform his work, but also apparently concludes that the agency had failed to show that the grievant had been specifically assigned to perform physical inspections of building windows and doors (as opposed to checking the windows and doors in another manner, such as through visual inspection). In this regard, the hearing officer noted that there was no evidence that the grievant disregarded an instruction from a supervisor, and the department's policy regarding building checks was not an established written policy.[40] Thus, the hearing officer's conclusion that a Group II Written Notice was unwarranted was not the result, as the agency contends, of a misinterpretation of policy, but rather appears to have been based on a factual finding that, while physical inspections may have been the "best and preferred practice,"[41] the agency had not shown that the grievant had been given a sufficiently specific instruction that he must physically check building doors and windows. This factual finding was within the hearing officer's discretion and supported by the record evidence. Accordingly, this Department will not substitute its judgment for that of the hearing officer with respect to this finding.

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[37] Hearing Decision at 5.
[38] *Id.* at 5-6.
[39] *Id.*
[40] While the hearing officer acknowledged that the grievant's EWP obligated him to check doors and windows to ensure they were secured, and recognized that satisfactory performance of this duty should require physical inspection, he also apparently concluded that the grievant had not received a specific instruction (either from his supervisor or through a written policy) that he must perform the assigned checks by physically inspecting doors (rather than by performing a visual inspection). This is consistent with the hearing officer's conclusions that the grievant (1) did not falsify records, because when he called in his inspection he believed that he was allowed to make only a visual inspection; (2) did not shirk his official duty, because he "attempted to perform his duty of verifying the security of buildings. . . ."; and (3) did not engage in "extreme misfeasance, malfeasance, or nonfeasance of duty." *See* Hearing Decision at 5.
[41] *See* Reconsideration Decision at 3.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reconsider his decision with respect to the grievant's claims of discrimination. All pending agency challenges to the hearing officer's award of attorney's fees to the grievant will be stayed until the completion of the reconsideration.

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.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44] This Department's rulings on matters of procedural compliance are final and nonappealable.[45]

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Claudia T. Farr
Director

[42] *Grievance Procedure Manual*, § 7.2(d).
[43] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[44] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[45] Va. Code § 2.2-1001 (5).