

Issue: Compliance/agency challenges hearing officer's decision to re-open hearing;
Ruling Date: December 20, 2005; Ruling #2006-1202; Agency: Old Dominion
University; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Old Dominion University
Ruling Nos. 2006-1202
December 20, 2005

Old Dominion University (ODU or the agency) has requested a compliance ruling in regard to the hearing officer's reconsideration of the hearing 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 He was removed from employment effective March 22, 2005 after receiving a Group III Written Notice for allegedly making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department, and shirking official duty.²

On April 15, 2005, the grievant filed a grievance challenging the disciplinary action.³ After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.⁴ The hearing was held on July 14, 2005.⁵ On 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.⁶ The hearing decision also found that the grievant had not proven that the Written Notice was issued as a result of discrimination.⁷

By letter dated August 2, 2005, the agency, through its counsel, requested an administrative review by this Department of the hearing officer's decision.⁸ By letter

¹ Hearing Decision dated July 20, 2005 (Hearing Decision) at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1, 6.

⁷ *Id.* at 4.

⁸ 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.

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 hearing decision by the Department of Human Resource Management (DHRM).

The hearing officer issued his reconsideration decision on August 26, 2005.⁹ In his decision, the hearing officer affirmed his earlier ruling and also awarded attorneys' fees to the grievant.¹⁰ 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.¹¹

On November 22, 2005, the Director of this Department issued a ruling addressing the claims raised by the grievant in his first and second requests for administrative review and by the agency in its first request for administrative review.¹² In that ruling, the Director concluded that the hearing officer had erred with respect to the scope of the issue qualified for hearing and directed that the hearing officer reconsider his decision accordingly.¹³

By letter dated November 28, 2005, the hearing officer asked the parties to review the Director's ruling and advise him if they wished to present additional testimony. The grievant, through counsel, subsequently advised the hearing officer that he would like to present additional testimony in support of his claim of race discrimination. By letter dated December 5, 2005, the agency's counsel objected to the hearing officer's decision to re-open the hearing and requested a compliance ruling from the Director. The agency also states that it "reserves the right" to present additional evidence in the event its challenge to the re-opening is unsuccessful.

DISCUSSION

The agency challenges the hearing officer's decision to re-open the hearing to allow the parties to present additional testimony. The agency argues that the Director's November 22nd ruling merely ordered the hearing officer to reconsider his decision, but did not order or allow for re-opening the concluded hearing.

Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and

⁹ Reconsideration Decision dated August 26, 2005 (Reconsideration Decision) at 1.

¹⁰ *Id.* at 1-5.

¹¹ 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.

¹² EDR Ruling Nos. 2006-1099, 2006-1104.

¹³ *Id.* at 3-5.

take any other actions as necessary or specified in the grievance procedure.¹⁴ An action taken by a hearing officer in the exercise of his authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.¹⁵

In this case, the hearing officer believes that reopening the hearing to take additional evidence is necessary to correct his error regarding the scope of the issue qualified, as addressed in the Director's November 22nd ruling. During the course of this Department's investigation, the hearing officer stated that he limited the Grievant to presenting only evidence related to discrimination arising as part of the disciplinary action. As the hearing officer correctly recognizes, such a limitation is inconsistent with the Director's conclusion that the issues qualified for hearing included not simply the grievant's termination, but also the grievant's more general claim of discrimination.

Accordingly, we find that, under the circumstances of this case, the hearing officer's decision to reopen the hearing to take previously excluded evidence regarding the grievant's claim of discrimination is not an abuse of discretion. However, we caution that a hearing officer's authority to reopen a hearing is not without limitation. In particular, where a hearing officer has not previously excluded evidence in error, allowing parties to submit additional evidence on reconsideration would generally be inappropriate. Therefore, in this case, it would constitute an abuse of discretion for the hearing officer to accept additional evidence which he had not previously and erroneously excluded, either through instructions at the pre-hearing conference or at hearing.

This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁶

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Director

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¹⁴ *Grievance Procedure Manual* at § 5.7; see also Va. Code § 2.2-3005.

¹⁵ See, e.g., EDR Ruling No. 2003-123, EDR Ruling No. 2004-742, EDR Ruling No. 2004-934, and EDR Ruling No. 2005-1037.

¹⁶ Va. Code § 2.2-1001 (5).