Issue: Administrative Review of Hearing Officer's Decision in Case No. 8969, 8970; Ruling Date: August 20, 2009; Ruling #2009-2328; Agency: Virginia Community College System; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Community College System
Ruling Number 2009-2328
August 20, 2009

The grievant has requested that this Department ("EDR") administratively review the hearing officer's Second Reconsideration Decision in Case Number 8969 / 8970. The agency has also requested review. For the reasons set forth below, there is no reason to further disturb the decision in this matter.

FACTS

Prior to his resignation, the grievant was employed by the Virginia Community College System ("agency") as an Administrative and Program Specialist. On February 11, 2008, the grievant was issued two Group II Written Notices for allegedly failing to follow the Dean's October 2007 instructions to raise any concerns he may have regarding faculty actions directly with her.[1] The first written notice ("Written Notice 1") was issued as a result of an e-mail the grievant sent to Ms. D, an adjunct faculty member.[2] Other salient facts as set forth in Case No. 8969 / 8970 with regard to the second written notice ("Written Notice 2") are as follows:

[1] On October 11, 2007, in response to an e-mail the grievant sent to the Dean and Ms. K. regarding alleged fraud by Ms. K, the Dean told the grievant he was not responsible for monitoring the actions of adjunct faculty and was to bring his concerns about adjunct faculty directly to her instead of others at the agency. *See* Decision of Hearing Officer, Case No. 8969 / 8970, Dec. 30, 2008 ("Hearing Decision") at 2-3.

[2] *See* Hearing Decision at 3-5. In this e-mail exchange, Ms. D asked the grievant a question regarding where/how to process incomplete grade forms; specifically, whether or not the grievant needed both copies of the form. *Id*. at 3. The grievant answered Ms. D's question by stating that both copies of the form were needed. *Id.* However, the grievant went on to state that: "[s]ince there [have] been so many issues with your students and their grades it is more important that you follow the appropriate procedures and we maintain the proper records." *Id.* (alteration in original). Ms. D was offended by the grievant's comments and responded as such copying the Dean on her e-mail back to the grievant. *Id*. at 3-4. The Dean considered the grievant's e-mail to Ms. D to be contrary to her previous instruction to bring his concerns regarding faculty directly to her. *Id.* at 4. As such, the grievant was issued Written Notice 1. *Id*. at 5. In his December 30th decision, the hearing officer upheld the issuance of Written Notice 1 and determined that Written Notice 1 was not retaliatory. *Id.* at 5-6.

On January 17, 2008, the Human Resource Director sent Agency staff including Grievant an email regarding "Leave Roll over Announcement." The email stated, in part:

> Please feel free to contact HR via the leave Inquires [sic] email address if you have any questions or concerns regarding your leave records. After 1/22/08, human resources will be able to rollover the leave balances to give the provisions for the new leave year, 1/10/2008 – 1/09/2009. These leave balances will be available for view by the end of the month.

Grievant responded:

> Since we have had a few faculty members call in today and cancel their classes and office hours are they required to take leave? Is there a college policy when faculty and staff decided not to work when the college is open and taking leave?

The HR Director replied:

> I suggest you speak with their supervisors, since we do not know what type of arrangement has been made, if any. College policies do state that employees not reporting to work should use leave, however, supervisors have the right to flex employees work hours.

Grievant responded:

> Thanks. I will contact the fraud, waste and abuse hotline and relay your comments and the incidents reported to you for investigation.

The HR Director replied:

> I don't think you have any information to contact anybody relative to fraud. You asked me a question, and I gave you a general answer, based on policies. I also told you that supervisors had the authority to flex employees' work schedule.
>
> You, therefore, have no knowledge of arrangements that could have been made between employees and their supervisor, so you have no specific information to determine if there is any wrong, much less anything to report. Please do not take it upon yourself to monitor faculty work hours. This is the job of the Deans. If you believe there is something out of place, you need to speak with the Dean.

> The Dean considered Grievant's email to the HR Director to be contrary to her instruction because Grievant was raising his concerns about faculty leave with an employee other than the Dean.[3]

On March 6, 2008, the grievant initiated two grievances challenging Written Notice 1 and Written Notice 2. After the parties failed to resolve the grievances during the management resolution steps, the agency head qualified both grievances for hearing. The grievances were subsequently consolidated for hearing and a hearing was held on December 19, 2008. In a December 30, 2008 decision, the hearing officer upheld the agency's issuance of Written Notice 1 and Written Notice 2.[4]

Following the grievant's request that the hearing officer reconsider his decision, in a January 9, 2009 Reconsideration Decision ("R1"), the hearing officer upheld his earlier decision and denied the grievant's request for reconsideration.[5]

The grievant requested administrative review from this Department alleging that: (1) the findings of fact were erroneous regarding the hearing officer's finding of no retaliation; (2) the hearing officer was biased; and (3) the hearing officer improperly excluded evidence relating to an alleged hostile workplace that led to the grievant's resignation. In EDR Ruling No. 2009-2207, this Department found no bias on the part of the hearing officer.[6] However, the decision was remanded on the issue of the findings regarding retaliation.[7] The decision also ordered the hearing officer to remove all references to the hostile workplace claim, which had not been qualified for hearing.[8]

In the Second Reconsideration Decision ("R2"), the hearing officer removed the references to the hostile workplace. In addition, the hearing officer reversed himself by overturning Written Notice 2.[9]

The agency has appealed the hearing officer's overturning of Written Notice 2. The grievant has asked this Department to reconsider the holding in Ruling 2009-2207 affirming the hearing officer's upholding of Written Notice 1. The grievant also challenges this Department's determination that the hearing officer had no authority to address the hostile workplace/constructive discharge claim. Finally, the grievant requests that this Department order the hearing officer to modify his decision to remove references regarding the grievant's credibility.

Each of these concerns is addressed below.

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[3] Hearing Decision at 4-5.
[4] Hearing Decision at 7.
[5] Reconsideration of Hearing Officer, Case No. 8969/8970-R, Jan. 9, 2009, at 2.
[6] EDR Ruling No. 2009-2207 at 8.
[7] *Id.* at 5-8.
[8] *Id.* at 9.
[9] Second Reconsideration of Hearing Officer, Case No. 8969/8970-R2, May 18, 2009 ("R2"), at 1-2.

DISCUSSION

I. Agency Objections

A. Written Notice 2

The agency contests the hearing officer's reversal of his original decision to uphold Written Notice 2. In Ruling No. 2009-2207, this Department remanded the original decision to the hearing officer for clarification and/or reconsideration as to his findings and conclusions regarding Written Notice 2. In his request for administrative review, the grievant had asserted that his e-mail communication with the HR Director, the subject of Written Notice 2, was not misconduct, but rather was "going through the proper channels" in reporting to a member of agency management possible fraud, waste or gross mismanagement and was in and of itself a protected activity for which he should not have suffered retribution. Additionally, the grievant argued that he felt the Dean to be a possible contributor in the fraudulent behavior and as such, he should not have been required to bring his concerns regarding such activities to the Dean.

In his Reconsideration Decision, the hearing officer had held:

> Grievant argues he sent his email to the HR Director in order to report fraud and abuse to her. The HR Director had no responsibility for investigating fraud. There is nothing in the HR Director's email to Grievant and other staff suggesting she was soliciting information about fraud at the University. Grievant did not report any specific instances of fraud to the HR Director. The most appropriate interpretation of Grievant's email is that he was informing the HR Director of his intent to report fraud to the State Fraud, Waste and Abuse Hotline. It was unnecessary for Grievant to inform the HR Director that he was reporting fraud to the State Fraud, Waste and Abuse Hotline. In short, Grievant was letting someone outside of his chain of command know that he had unspecified concerns about fraud at the Agency.[10]

EDR Ruling No. 2009-2207 held that while the hearing officer found that the HR Director (1) had no responsibility to investigate a claim of fraud herself, and (2) her email to the grievant was not soliciting information about fraud at the agency, it was unclear how these two findings dispelled the grievant's contention that his correspondence with the HR Director was nevertheless protected activity.[11] Accordingly, the ruling ordered the hearing officer to clarify and/or explain the relevance of his findings -- that the HR Director had no responsibility to investigate claims of fraud and that she was not soliciting such information -- to the issue of whether the grievant's email communication with the HR Director was protected activity, an issue not addressed in the hearing decision.[12] EDR Ruling No. 2009-2207 also observed that it appeared that the hearing officer had found that the grievant must always bring his workplace concerns to the Dean, his immediate supervisor, and that the grievant's failure to do so, being

[10] Reconsideration Decision at 2 (footnote omitted).
[11] EDR Ruling No. 2009-2207 at 6.
[12] *Id.*

contrary to the Dean's instructions, warranted discipline.[13] EDR Ruling No. 2009-2207 noted that employees of the Commonwealth are encouraged to report "situations where fraud, waste or abuse may be occurring" to *management*.[14] The ruling further noted that the grievant had alleged that he believed the Dean was involved in the alleged fraudulent behavior that he was attempting to report to the HR Director.[15] EDR Ruling No. 2009-2207 concluded that it was unclear whether in upholding Written Notice 2 the hearing officer had considered these arguments, particularly, the propriety of disciplining an employee for violating an instruction which, if interpreted and applied too broadly, may run counter to an employee's rights to bring concerns to management under the grievance statutes and Executive Order 12.[16]

In Responding to EDR Ruling 2009-2207, the hearing officer held that:

> The HR Director is a manager. Grievant informed the HR Director that he intended to report fraud to the State Hotline. Grievant was discussing his concern with a manager and, thus, cannot be retaliated against for that discussion. Within the context of this case, issuing a Written Notice for that discussion would constitute retaliation.[17]

Accordingly, the hearing officer reversed the Written Notice.[18] The agency objects to the reversal on several bases as set forth and addressed below.

(1) New Evidence/New Argument

The agency states that the first time that the grievant asserted that he believed that the Dean may have committed gross misconduct was in his request for administrative review. Therefore, the agency claims that the grievant was improperly allowed to introduce new evidence (or perhaps more properly viewed, a new argument) after the hearing. The agency is incorrect in its assertion that "[p]rior to appeal grievant had never made any reference to misconduct by the dean as a basis of his complaint or concern regarding FWA and the college has not had the opportunity to address this issue during the hearing." At one hour and seven minutes into the hearing, the grievant posed the following question to the Dean: "Now if the issue is gross mismanagement on the part of you, would it be appropriate for me to bring that issue to you, if I didn't feel comfortable doing it?" The Dean responded: "Well I,--this is new to me. I don't know that you had ever suggested there was gross mismanagement and I haven't heard anything about that, so I don't know." Based on this testimony, this Department cannot conclude that the grievant raised this evidence (or argument) for the first time in his request for administrative review or that the agency did not have an adequate opportunity to address this issue during the grievance hearing.

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[13] *Id.* at 7.
[14] *Id.* citing to Executive Order 12 (2006)(emphasis in original).
[15] *Id.* at 7.
[16] *Id.*
[17] Second Reconsideration Decision at 2.
[18] *Id.*

(2) Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[20] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[21] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[22] 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. As 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 with respect to those findings.

The agency asserts that the hearing officer's original findings contradict his findings in R2. EDR Ruling 2009-2207, instructed the hearing officer:

> to clarify and/or explain the relevance of his findings -- that the HR Director had no responsibility to investigate claims of fraud and that she was not soliciting such information -- to the issue of whether the grievant's email communication with the HR Director was protected activity, an issue about which the hearing decision is silent.[23]

The Ruling further instructed that: "If the hearing officer finds that the grievant's email communication to the HR Director was protected activity, he is directed on remand to consider the effect of such a determination on the grievant's overall claim that Written Notice 2 was retaliatory."[24] The hearing officer responded in R2 by holding that:

> The HR Director is a manager. Grievant informed the HR Director that he intended to report fraud to the State Hotline. Grievant was discussing his concern with a manager and, thus, cannot be retaliated against for that discussion. Within the context of this case, issuing a Written Notice for that discussion would constitute retaliation. Accordingly, the second Group II Written Notice is **reversed.**[25]

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[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.
[23] EDR Ruling #2009-2267 at 6.
[24] *Id. at 6-7.*
[25] Second Reconsideration Decision at 2.

The agency states that the hearing officer's finding that the HR Director neither received any specific information about fraud, waste or abuse (FWA), nor solicited such information, nor had a duty or responsibility to investigate FWA where she was not provided with specific information about FWA, is contradictory to the findings in R2. We disagree. Our ruling had instructed the hearing officer to address the relevancy of his finding in R1 that the HR Director had no responsibility to investigate claims of fraud and that she did not solicit such information. Implicit in his decision in R2 is the recognition that these findings in R1, even if true, were irrelevant, at least as to the issue of whether the grievant's e-mail to the HR Director was a protected activity. By finding in R2 that: (1) the HR Director was a manager, (2) the grievant informed the HR Director that he intended to report fraud to the State Hotline, and (3) issuing the grievant a Written Notice for that particular discussion would constitute retaliation, the hearing officer tacitly concluded that the findings in R1 and original hearing decision regarding the HR Director's lack of duty to investigate and lack of solicitation were irrelevant. That conclusion was correct—the earlier findings cited by the agency have nothing to do with whether the grievant's email discussion was protected. This Department finds no contradiction or error with the hearing officer's findings as to this issue.

In addition, the agency argues that the lack of specifics regarding the grievant's statements to the HR Director, and the absence of any particular incidence of alleged FWA, rendered that communication unprotected. The agency also draws a distinction within the context of acts that are protected by law, between a statement of intent to act and the act itself, that is, carrying out the stated intention. The agency cites to no authority for either proposition. In the absence of any authority to support its contentions, and in light of analogous authority supporting an opposing conclusion,[26] this Department has no reason to disturb the decision on this basis.

II. Grievant Objections

A. Exclusion of Evidence/Scope of Relief

The grievant claims that the hearing officer erred and/or abused his discretion by not allowing the grievant to present evidence of the alleged hostile and/or abusive work environment that he endured, which, he claims, ultimately culminated in his resignation from employment with VCCS. In other words, it is the grievant's contention that the hearing officer had the authority to address the issue of the grievant's purported constructive discharge.

This issue was addressed in EDR Ruling No. 2009-2207 and thus has been adjudicated. We therefore have no further authority to review this matter.[27] We nevertheless note as we did in

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[26] *See e.g.,* Mayo v. Kiwest Corporation, No. 95-2638, 1996 U.S. App. LEXIS 20445, at *13 (4th Cir. Aug. 15, 1996) (unpublished) (overruled on other ground) ("An employee need not have instituted formal proceedings under Title VII in order subsequently to invoke the protection of Title VII's retaliation provision; informal complaints to the employer will suffice."). Armstrong v. Index Journal Co., 647 F.2d 441, 448 (4th Cir 1981)(same); Gifford v. Atchison Topeka and Santa Fe. Railroad Co., 685 F.2d. 1149, 1156 n.2 (9th Cir. 1982)(noting that there is no "legal distinction" between filing a charge with the EEOC and threatening to file such a charge).

[27] *See* EDR Ruling No. 2004-859 (Administrative reviewer allowed a single opportunity address an objection).

EDR Ruling No. 2009-2207, that a review of the hearing tapes in this case reveals that the hearing officer restricted the introduction of such evidence because the issue of a hostile and/or abusive work environment, which allegedly resulted in the grievant's resignation, was not an issue qualified for hearing.[28] This Department found that the hearing officer was correct in holding that the issue of a hostile work environment/resignation had not been qualified for hearing.[29] Specifically, EDR Ruling No. 2009-2207 held that the grievant's resignation from employment from VCCS was not an issue in either Grievance 1 or Grievance 2, and neither Grievance 1 nor Grievance 2 mention the alleged hostile work environment endured by the grievant which he claims led to his resignation. While we have no authority to disturb our prior decision, there would be no reason to even if we had such authority. The hearing officer observed at hearing that the grievances were filed prior to resignation.[30] If the grievant had wished to challenge his purported constructive discharge, he should have initiated a grievance to do so. His previous grievances did not and could not pick up this new claim.[31]

B. Written Notice I

The grievant asserts, as he did in his original request for administrative review, that the hearing officer erred and/or abused his discretion by finding no retaliation on the part of the Dean in issuing Written Notice 1. Again, this objection has been adjudicated and is thus final. We are nevertheless compelled to note that 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 with respect to those findings. The grievant asserts that Written Notice I was issued because he had reported to his supervisor alleged fraud by a faculty member and because he was merely doing his job. The hearing officer found:

> On January 10, 2008, Grievant sent an email to an adjunct faculty member, Ms. D, expressing his opinion that she had many issues regarding her students and their grades. His email offended Ms. D and was contrary to the Dean's instruction to him to bring his concerns with faculty directly to her rather than to the faculty members.[32]

The hearing officer concluded that the "Agency has presented sufficient evidence to support the issuance of a Group II Written Notice regarding Grievant's January 10, 2008 email."[33]

The *Grievance Procedure Manual* does not expressly address the burdens of the parties in a case such as this where the agency disciplines an employee for reporting a concern and the

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[28] EDR Ruling No. 2009-2207 at 8, citing to Hearing Recording at 1:33:35 through 1:40:07.
[29] EDR Ruling No. 2009-2207 at 8-9.
[30] Hearing Recording at 1:36.
[31] *See Frequently Asked Question Number 28 at* http://www.edr.virginia.gov/faqs.htm. Question: Once I have begun a grievance, may I amend my "Form A" to reflect other issues that arise? Answer: Once you have initiated your grievance, you may not add new issues to the grievance. However, if you have other concerns that do not arise out of the same facts as your original grievance, you may initiate a separate grievance. Any subsequent grievances are subject to all Grievance Procedure rules.
[32] Hearing Decision at 5.
[33] *Id.*

employee challenges the discipline on the basis that the discipline was issued in retaliation for reporting those concerns. With "disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances."[34] On the other hand, the *Grievance Procedure Manual* states that "[i]n all other actions, the employee must present his evidence first and must prove [his] claim by a preponderance of the evidence."[35] We reconcile these two provisions by viewing the disciplined employee's assertion of retaliation to be an affirmative defense and it is the employee's burden to prove the affirmative defense.[36] Accordingly, the grievant must establish by a preponderance of the evidence that the agency's actions were retaliatory.

Here, the hearing officer found that the agency's actions were based on the grievant's failure to bring his concerns with faculty directly to the Dean rather than to the faculty members, not for reporting purported fraud by a faculty member to the Dean. There is record evidence (testimony by the Dean)[37] to support this contention and thus there would be no reason for this Department to disturb the hearing officer's findings regarding Written Notice 1 even if we had the authority to revisit this objection.

C. Credibility of the Grievant

The grievant requests that comments in the hearing decision regarding his credibility be removed from the decision. (He does not identify the comments but they are presumed to be those found in note 1 in R2.[38]) As noted above, 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. As 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 with respect to those findings. The hearing officer explained in Note 1 the reasoning behind his determination that the grievant was not

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[34] *Grievance Procedure Manual* § 5.8.
[35] *Id. C.f.* EDR Ruling No. 2009-2300.
[36] Edwards v. Dep't of Veterans Affairs, 100 M.S.P.R. 437, 2005 MSPB LEXIS 6557 (2005).
[37] Hearing Recording beginning at 36:00.
[38] Note 1 states:

> As part of his appeal to the EDR Director, Grievant claimed he was attempting to report fraud to the HR Director. He told the EDR Director he was "going through the proper channels". Grievant made a similar assertion during the hearing. He was not credible when he made this claim. There is no credible evidence to support Grievant's assertion. Grievant was attempting to let the HR Director know he intended to report fraud to the State Hotline. Grievant was not attempting to report fraud to the HR Director. In light of Grievant's statement that he intended to report the HR Director's comments to the State Hotline raises the likelihood that Grievant intended to report the HR Director to the State Hotline as opposed to reporting fraud to the HR Director. The fact that the HR Director had no responsibility to investigate fraud and had not asked to receive information about alleged fraud is consistent with this conclusion. The most telling evidence that Grievant did not intend to report fraud to the HR Director is the absence of any details about what he considered fraud. Grievant did not describe the fraud to the HR Director. He did not indicate who was involved. If Grievant intended to report fraud to the HR Director, he had every opportunity to express the circumstances of that fraud.

credible. Because determinations of credibility are reserved for the hearing officer and because the hearing officer has explained his reasoning for his findings on credibility, this Department has no basis for disturbing those findings.

APPEAL RIGHTS AND OTHER INFORMATION

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 and any reconsidered hearing decisions following such review have been decided.[39] 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.[40] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[41] This Department's rulings on matters of procedural compliance are final and nonappealable.[42]

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Claudia T. Farr
Director

[39] *Grievance Procedure Manual*, § 7.2(d).
[40] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[41] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[42] *See* Va. Code § 2.2-1001 (5), 2.2-3003(G).