Issue: Administrative Review of Hearing Officer's Decision in Case No. 9131; Ruling Date: November 5, 2009; Ruling #2010-2400; Agency: Richard Bland College; Outcome: Hearing Decision In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Richard Bland College
Ruling Number 2010-2400
November 5, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9131. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision.

FACTS

The fact of this case as set forth in the Hearing Decision in Case Number 9131 are as follows:

> On April 27, 2009, the Grievant was working as a Housekeeping and Apparel Worker I for the Agency. In that position he was to provide custodial support by cleaning bathrooms, office areas and classrooms in the Barn Theater and in the Humanities Building. In addition, he could be asked to perform similar tasks in other buildings of the Agency. On that date, the Grievant was approached by his immediate supervisor and was requested to move to another building at the Agency. This supervisor testified that the Grievant became angry and wanted to know why he was being moved. The Grievant stated to his immediate supervisor that, "You people have no right to move us people." The Grievant walked away from his immediate supervisor and stated that he simply had to talk to someone about this move.
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> The Grievant did not respond when the supervisor called him on his radio and, subsequent to this, the supervisor called his immediate superior and requested that she help in this matter. This second supervisor was picked up and brought to the location where the initial confrontation took place. The Grievant continued to not respond to calls on his radio when his supervisor called him and only responded when the supervisor stated that he had the second line supervisor with him. The second line supervisor inquired of the Grievant as to what the problem was. The Grievant stated to her that, "You people do not have the right to move us people around." The second line supervisor testified that the

> Grievant's voice was raised and that he was angry and that he was not responding to her direction to move to a new building.
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> Campus police were notified and, during the confrontation with the second line supervisor, they arrived on the scene. The second line supervisor advised the Grievant that he was being terminated for failure to follow instructions and he was reminded to turn in his keys, radio and uniforms. The second line supervisor and the first line supervisor testified that the Grievant took his shirt off and threw it at the second line supervisor and it was caught by one of the campus police officers. Both supervisors testified that the Grievant raised the radio as if to throw it and was advised not to by the police officer. The Grievant testified that he dropped the radio and had no intent on throwing it at anyone. Both of these supervisors testified that the Grievant became so angry so quickly that there was no effective opportunity to explain to him the purpose and rationale for moving him to a new building. It was, in fact, to allow a newer employee the opportunity to learn the building in which the Grievant was currently working. Both supervisors testified that the move was not permanent and was merely temporary.
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> The new employee who was to take over the Grievant's building was present during some of this confrontation. She testified that the Grievant was extraordinarily angry and that the supervisors were acting in a calm manner. She further testified that she was concerned enough that she left the immediate vicinity and went into a bathroom. She testified that she was a little scared and that she went into the bathroom because she did not want to be around the Grievant.[1]

The hearing officer upheld the Group II Written Notice and termination based on the following findings:

> The Agency called a fellow custodian of the Grievant to testify. He identified himself as a friend of the Grievant who had known him for thirteen (13) years. This custodian testified that the Grievant was a good worker but that he had trouble following supervisors' instructions. He testified that the Grievant had told him that people were out to get him but he knew of no one in management who was out to get the Grievant. He testified that the first line supervisor treated everyone "pretty much" the same and that he was a "pretty good" supervisor. He further testified that everyone liked this supervisor and that the supervisors had put up with a lot from the Grievant.
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> The Grievant called several fellow custodians as witnesses. One of them testified that fellow employees had a hard time working with the Grievant. Another testified that the Grievant has a quick temper and that he had experienced this temper of the Grievant.

[1] August 6, 2009 Decision of the Hearing Officer in Case No. 9131 ("Hearing Decision"), at 3 (footnote omitted).

> Accordingly, after listening to the witnesses and observing their demeanor, the Hearing Officer finds that the Agency has bourne its burden of proof to establish that the Grievant, on April 27, 2009, did fail to follow instructions, was insubordinate and was exhibiting disruptive behavior.[2]

DISCUSSION

The grievant's request to this Department for administrative review challenges the hearing officer's decision on several grounds. The grievant claims that: (1) the agency failed to show by a preponderance of the evidence that the grievant failed to follow instructions or was insubordinate; (2) the hearing officer's decision was based on testimony by the supervisor who terminated his employment; (3) the hearing decision was based on the testimony of fellow custodians who testified as to general impressions of the grievant's work rather than the specific events of April 27th; (4) the hearing decision does not reference documents provided by the grievant relating to his positive employment record; (5) testimony from current employees, appearing at the request of their employer, would naturally be biased in favor of the agency; and (6) while the decision states that campus police were called to the scene on April 27th, no police officer testified and no report was entered into evidence. These arguments are addressed below.

Findings of Fact/Consideration of Evidence/Burden of Proof

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."[3] 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.[4]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and grounds in the record for those findings."[6] 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.[7] 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.[8] Where the evidence conflicts or is subject to varying

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[2] Hearing Decision at 3-4.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *Grievance Procedure Manual* § 6.4.
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.
[7] *Rules for Conducting Grievance Hearings* § VI(B).
[8] *Grievance Procedure Manual* § 5.8.

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.

Here, each of the challenges above to the hearing officer's decision, in effect, simply contests the weight and credibility that the hearing officer accorded to the testimony of those witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority. Moreover, as explained below, this Department concludes that there was sufficient evidence in the record to support the hearing officer's determination that the grievant engaged in the alleged misconduct.

While the grievant asserts that the agency did not prove by a preponderance of evidence that he failed to follow an instruction and was insubordinate, record evidence (testimony) supports that finding. That testimony, however, is challenged by the grievant. He notes that the testimony upon which the hearing officer based his decision came from the supervisor who fired him (#2 above). Furthermore, he asserts that the testimony from witnesses called by the agency will naturally be biased in favor of the agency (#5 above).

As an initial point, there is no prohibition against the supervisor who issues discipline testifying about that discipline. To the contrary, the practice is common and certainly appropriate where the supervisor has knowledge of the facts surrounding the misconduct. As to any natural bias in favor of the agency from witnesses who are called by the agency, we are unable to accept such a proposition as a given. Witnesses swear or affirm to testify truthfully at hearing. Parties have an opportunity at hearing to cross-examine witnesses and to ferret out and expose any false information presented to the fact-finder. Finally, the Code of Virginia strictly prohibits retaliation for participation in the grievance process. Thus, we decline to adopt a blanket assumption that testimony from witnesses called by the agency is inherently biased.

As to the point that testimony from fellow custodians focused on general impressions of the grievant's work rather than the specific events of April 27th, we note while the facts surrounding the events of April 27th and eyewitness accounts of those circumstance would certainly appear more relevant than general impressions of the grievant's work, general impressions would not appear to be wholly irrelevant. Thus, the hearing officer did not err by considering this testimony or by mentioning it in his hearing decision.

Regarding the contention that the agency did not provide either testimony from a police officer or even a police report in support of the agency's version of the facts surrounding April 27th, we agree with the grievant that a police report or officer testimony may have been useful in providing clarification of what transpired that day. However, the absence of such evidence does not render the hearing decision invalid. Sufficient record evidence supports the agency's version of the facts.

Finally, as to the grievant's contention that the hearing officer did not consider documentation provided by the grievant regarding his "consistently good work throughout the thirteen years that [he] was employed," the hearing decision expressly states that the hearing officer did consider the "the length of time that the Grievant has been employed by the Agency," and "whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency."[9] Moreover, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[10] Based upon the hearing record, there is no reason to believe that the hearing officer abused his discretion by failing to find that the grievant's past performance was sufficient to warrant mitigation.

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 have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[11] 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.[12] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[13]

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Claudia T. Farr
Director

[9] *Hearing Decision* at 7.
[10] EDR Ruling Nos. 2010-2368; 2007-1518.
[11] *Grievance Procedure Manual* § 7.2(d).
[12] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[13] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).