Issue: Administrative Review of Hearing Officer's Decision in Case No. 9255; Ruling Date: May 3, 2010; Ruling #2010-2568; Agency: Virginia Commonwealth University; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia Commonwealth University
Ruling No. 2010-2568
May 3, 2010

The grievant has requested that this Department administratively review the hearing decision in Case Number 9255. The grievant had challenged two Group II Written Notices, a demotion, and a disciplinary pay reduction, issued on November 12, 2009, for alleged workplace harassment.[1] The hearing officer upheld the Group II Written Notices and disciplinary action.[2] He affirmed his decision in a March 4, 2010 reconsideration decision.

For the reasons set forth below, we will not disturb the decision.

FACTS OF THE CASE

The facts of this case, as set forth in the hearing decision in Case Number 9255, are as follows.

> Virginia Commonwealth University employed Grievant as an Enforcement and Safety Supervisor prior to his demotion to an Enforcement Safety Officer. The purpose of his position as a supervisor was:
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> > To handle inquiries and complaints related to enforcement of parking regulations and security concerns.
> > To coordinate enforcement/security of special events.
> > To exchange information, ideas, and to adapt procedures as required.
>
> Grievant supervised Ms. P over a period of several years. On occasion, grievant would brush up against Ms. P without the necessity or permission to do so. Grievant made comments about the attractiveness of her lips and rear end. On several occasions while at work, he attempted to kiss her. Each time she said "no" but he continued to attempt to kiss her. He would tell her how beautiful he thought she was. On one occasion, Grievant kissed Ms. P without her consent.

[1] Hearing Decision at 6.
[2] Decision of the Hearing Officer in Case Number 9255 issued February 16, 2010 ("Hearing Decision") at 1. Footnotes from the original decision have been omitted.

She said "don't do this to me". Grievant told Ms. P that she could come and sleep at his place. She told Grievant she did not want to go to his place. Ms. P was offended by Grievant's behavior.

Grievant supervised Ms. W. When she was pregnant, Grievant said that she no longer had to used [sic] condoms because she was pregnant. Grievant told her that after she had her baby he would help "work her stomach off" which she interpreted to mean reducing her weight by having sex with him. On one evening, Grievant told Ms. W that he was tired and he wanted to go home to "get a nut". Ms. W understood Grievant to be referring to having an orgasm. Ms. W was offended by Grievant's behavior.

Grievant supervised Ms. Wo from sometime in 2007 until early in 2008. Grievant was overly flirtatious towards her. He would make comments about her body and how she looked. He asked her out for dates on more than one occasion. She told him she would never go out with them. Grievant asked her to his house and she said it would never happen. Grievant would "look her up and down". Ms. Wo was offended by Grievant's behavior.[3]

Based on these "findings of fact," the hearing officer reached the following "conclusions of policy," ultimately denying the grievant relief.[4]

Grievant engaged in workplace harassment of Ms. P contrary to State and Agency policy. Ms. P did not welcome Grievant's behavior and routinely informed him of her objections. Grievant made several comments of a sexual nature about Ms. P's body. Grievant inappropriately brushed against Ms. P and kissed her. Based on both an objective and subjective standard, Grievant's behavior was workplace harassment. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to comply with DHRM Policy 2.30 as well as the Agency's policy with respect to Ms. P.

Grievant denies making inappropriate comments to Ms. P. Ms. P's testimony was credible. In addition, she only reported the matter to the Manager after his insistence that she do so. Her conversation with the Manager was emotional and credible to the Manager. Ms. P also reported her concerns to another female coworker as Grievant continued his inappropriate behavior.

Grievant argues that Ms. P's testimony was unreliable because she had received sexual harassment training and was aware that his supervisor had an "open door policy". Grievant argued that Ms. P's failure to timely report her claim of sexual-harassment shows that the claim is untrue.

[3] *Id.* at 2-3.
[4] *Id*. at 4-5

Although it is clear that Ms. P should have more timely reported Grievant's inappropriate behavior, she failed to do so because she is from another country whose culture encourages women "deal with" abusive behavior from men. In addition, she feared that Grievant would initiate action to have her fired from her job. She reached this conclusion because of Grievant's threats to have her fired on those occasions when she arrived at work late.

Grievant engaged in workplace harassment of Ms. W contrary to State and Agency policy. Ms. W did not welcome Grievant's comments. Grievant made inappropriate comments about Ms. W's pregnancy. He suggested they have sex so that she could lose weight. He made inappropriate comments to Ms. W about his sexual behavior. Based on both a subjective and objective standard, Grievant's behavior was workplace harassment.

Grievant denied harassing Ms. W. He argued she filed her complaint against him in retaliation for his issuing her a written counseling. He argued she had taken courses in sexual-harassment and knew to report any inappropriate behavior by a supervisor. Her failure to do so, according to Grievant, showed her allegations were untrue.

Ms. W's testimony was credible. She did not report Grievant's behavior because she was fearful he would take disciplinary action against her and she felt it would be easier to ignore his behavior. These factors do not undermine Ms. W's credibility.

Grievant presented evidence of several female subordinates who did not observe him behave inappropriately towards them or other coworkers. Although these female employees may not have been subjected to inappropriate behavior from Grievant, this does not preclude the conclusion that Ms. P and Ms. W were subject to inappropriate behavior from Grievant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to comply with DHRM Policy 2.30 as well as the Agency's policy with respect to Ms. W.

Upon the accumulation of two active Group II Written Notices, the Agency may remove an employee. In lieu of removal, the Agency may demote, transfer, and impose a disciplinary pay reduction. Accordingly, Grievant's demotion, transfer, and disciplinary pay reduction must be upheld.

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."[5] 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.[6]

Failure of Agency to Have Witnesses Testify in Person Rather than by Phone

The grievant objects to several witnesses testifying by phone rather than in person. The hearing officer responded to this objection in his March 4, 2010 Reconsideration Decision in Case 9255 ("Reconsideration Decision"). First, as the grievant acknowledges, one of the witnesses, Ms. W., was apparently at work and called in order to testify. This employee works for the agency on weekends and has a job with another employer during the workweek.[7] Allowing telephonic testimony in a situation such as this can hardly be viewed as improper.[8] Moreover, the *Rules for Conducting Grievance Hearings* expressly allow for testimony to be provided telephonically under certain circumstances.[9] Significantly, the grievant never raised any objection at hearing as to testimony being provided telephonically. Accordingly, we will not disturb the decision on this basis.

Inability to Question a Witness and Present Opening Statement/Bias

The grievant asserts that he was not allowed to fully present his case. In particular, the grievant claims that the hearing officer cut him short several times during his questioning of witnesses and during his opening statement. The grievant asserts that this serves as evidence of bias.

As to the grievant's contention that the hearing officer cut short his opening statement, the grievant is correct that he was instructed to "wrap it up" after less than six minutes into his presentation. However, from our review of the hearing record, including the entire recording of the hearing, we cannot conclude that the grievant was prejudiced by having his opening curtailed or that the shortened opening resulted in any reversible error. The grievant had clearly laid out what appeared to be the main theory of his case: that he was the victim of retaliation for having reprimanded the alleged victims. We recognize, however, that a party could potentially view the denial of a full opening statement, particularly when less than six minutes have lapsed, as troubling. To the extent that hearing officer intends to limit time to present openings, it might be a preferred practice to let the parties know in advance how much time they will be allotted. Such a practice could reduce the potential risk that a party might view any curtailing of an opening statement as possible evidence of bias. In any event, under the facts here, we find no reversible error regarding the opening statement.

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[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Hearing recording beginning at 1:38:25.
[8] The hearing officer essentially instructed the agency that it should contact Ms. W and make her available to testify. Ms. W. subsequently called in and provided testimony.
[9] *See, Rules for Conducting Grievance Hearings*, § IV(E). *See also* EDR Ruling No. 2009-2245 (witness may testify telephonically when unable to testify in person); EDR Ruling No. 2003-123 (same).

The grievant contends that because of the hearing officer's interruptions, he was not allowed to fully interview witnesses. We disagree. On several occasions, the hearing officer halted a line of questioning. While the grievant was correct that the hearing officer appeared at least somewhat annoyed when first attempting to redirect the grievant to a more relevant line of questioning,[10] the propriety of the hearing officer's halting the questioning was undoubtedly correct given that the grievant's questions appeared to have nothing to do with any of the central (or even tangential) issues in the case and thus were clearly irrelevant.

In addition, the grievant asserts that the "uncontrollable and uncooperative outburst" of a key witness essentially denied him the opportunity to cross-examine that witness. This witness testified passionately and was at times animated, requiring intervention by the hearing officer on one occasion. However, once the hearing officer instructed the witness to allow the grievant to finish his questions before beginning her answers and to answer as precisely as possible, the grievant was not unduly hampered in continuing his questioning of this witness.

Failure to Make Witness Available

The grievant asserts that the agency did not make a particular witness available for hearing. The hearing officer addressed this objection in his Reconsideration Decision. He held that "[t]o the extent any of Grievant's witnesses did not appear at the hearing, Grievant failed to proffer the extent of their testimony and seek an adverse inference against the Agency."[11]

For the following reasons, we find no reason to disturb the ruling on this basis. First, the grievant proffered enough information for this Department to gain a general understanding as to the apparent purpose for which the grievant attempted to call this witness. The grievant asserted that this individual was a "direct witness" to an interaction between the grievant and one of his accusers (Ms. W) on the day that he presented Ms. W with a written counseling. Ms. W allegedly made a derogatory comment about the grievant to this absentee witness. Another witness, Mr. S. also allegedly heard Ms. W's comment, as did the grievant. The comment was also memorialized in an e-mail memorandum that the hearing officer apparently considered.[12] Given that (1) the hearing officer apparently considered the report; and (2) the grievant was able to proffer that Mr. S., who had previously testified and been released, would have provided testimony corroborating that Ms. W made a derogatory comment about the grievant, the testimony from the absentee witness would merely have been redundant and cumulative, reiterating the information set forth on page 4 of grievant's Exhibit 1. Accordingly, we find no prejudice here.[13]

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[10] Hearing recording beginning at 2:31:45. ("Mr. [Grievant], get to something relevant.")
[11] Reconsideration Decision at 1-2.
[12] The hearing officer is heard reading from this e-mail memorandum (Grievant's Exhibit 1, page 4) in the hearing at 3:01:25.
[13] The grievant asserts that rumors have surfaced that witnesses were told not to be present at hearing or were not notified of the hearing and he has requested a full investigation "[d]ue to the fact that the accusers and witnesses did not attend the hearing." As discussed above, based on this Department's review of the recording of the hearing, the only witness that the grievant appeared to want to testify who did not was the one described above, who allegedly would have testified (as Mr. S. purportedly would have testified) that Ms. W. made a derogatory remark about the

New Evidence

In support of his case, the grievant asserts that "new evidence was discovered upon reviewing the audio transcript of the hearing testimony."

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[14] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[15] The fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[16]

Here, the evidence that the grievant seeks to have considered is by definition not "newly discovered." Anything that is revealed through a review of the hearing recording clearly could have and should have been addressed at the hearing, not after it concluded. For example, the grievant points to the testimony of one of the agency's witness as new evidence. He claims that this testimony should be viewed as "question[able]," apparently implying that this witness did not testify accurately. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.[17] In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.[18] Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process

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grievant. The grievant was asked directly if he wanted to present additional witness and stated that he did not. In addition, he made no comment about wanting to present other witnesses who had not been made available. Moreover, contrary to the grievant's assertion that the accusers did not testify, they did. Hearing recording at beginning at 22:00 and at 1:49:00. Accordingly, under the particular facts of this case, we find no reason to disturb this decision based on lack of witness availability.

[14] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[15] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

[16] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

[17] *See e.g.*, EDR Ruling #2006-1383.

[18] *See, e.g.*, Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

indefinitely, and thus hinder a needed finality to litigation. The same principles described above generally apply to other forms of allegedly false evidence. Accordingly, we decline to disturb the decision on the basis of allegedly "new" evidence.[19]

Hearing Officer's Findings of Fact and Conclusions

The grievant appears to challenge the hearing officer's findings and conclusions and claims that the alleged victims violated rules by retaliating against him and by filing false reports against him. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[20] and to determine the grievance based "on the material issues and grounds in the record for those findings."[21] 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.

Based upon a review of the hearing record, sufficient evidence supports key hearing officer findings such as:

> (1) Grievant engaged in workplace harassment of Ms. P contrary to State and Agency policy.[22]
>
> (2) Grievant engaged in workplace harassment of Ms. W contrary to State and Agency policy.[23]

Accordingly, this Department cannot conclude that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no reason to disturb the hearing decision on this basis.[24]

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[19] Each of the remaining points under the caption "New Evidence" could have been and should have been addressed at hearing through cross-examination. The sole exception would be the grievant's assertion that part of the decision was based on the notion "that [Ms. P] is creditable [sic] because she is a female from another country," which is discussed in the *Hearing Officer's Findings of Fact and Conclusions* Section.

[20] Va. Code § 2.2-3005.1(C).

[21] *Grievance Procedure Manual* § 5.9.

[22] Testimony of Ms. P beginning at 22:00.

[23] Testimony of Ms. W beginning at 1:49:00.

[24] Under the caption of "New Evidence," the grievant objected to the hearing officer's finding that the accuser's failure to report harassment by the grievant was based, in part, on the cultural norms related to national origin. The grievant asserts that such a finding is inconsistent with the Virginia Human Rights Act. We find no issue with this finding. The accuser, in explaining why she did not report the harassment, referenced her African heritage and later her "cultural background." *See* Testimony of Ms. P at beginning at 28:00 and 38:00. *See also* the testimony of the Manager of Parking and Transportation Services at 56:00. The hearing officer merely included a summary of this testimony in his decision.

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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Claudia T. Farr
Director

[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).