Issue: Administrative Review of Hearing Officer's Decision in Case No. 9571; Ruling Date: July 29, 2011; Ruling No. 2011-2997; Agency: Old Dominion University; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Old Dominion University
Ruling Number 2011-2997
July 29, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9571. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

On February 22, 2011, the grievant was issued a Group III Written Notice with termination for threatening behavior.[1] On March 2, 2011, the grievant timely challenged the disciplinary action and on April 18, 2011, this Department assigned the grievance to a hearing officer.[2] A hearing was subsequently held on May 9, 2011.[3]

The salient facts as set forth in Case Number 9571 are as follows:

> After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:
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> Old Dominion University employed Grievant as an Administrative Assistant. She had been employed by the Agency for approximately 13 years. Except with respect to the facts giving rise to this grievance, Grievant's work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant reported to the Supervisor. On February 3, 2011, Professor B sent the Supervisor an email stating "Something has been brought to my attention that I think I need to bring to your attention, may I speak privately with you

[1] Decision of Hearing Officer, Case No. 9571, issued May 10, 2011 ("Hearing Decision") at 1. Footnotes from the hearing decision have been omitted here.
[2] *Id.*
[3] *Id.*

tomorrow before or after the faculty meeting?" Professor B sent the Supervisor copies of some emails between Grievant and several Graduate Assistants studying at the Agency.

On February 4, 2011, the Supervisor met with Professor B. Professor B told the Supervisor that the Graduate Assistants were greatly troubled by Grievant's interference with their work. On the prior day, one of the Graduate Assistants left work in tears because she could not handle the pressure caused by Grievant anymore. The Supervisor communicated with several Graduate Assistants who confirmed their concerns as reported by Professor B. The Supervisor sent an email to Grievant asking her to arrange a meeting to discuss the concerns of the Graduate Assistants. Grievant went to the Supervisor's office and said that she did not like the idea of a meeting with the Graduate Assistants and said that she would not attend such a meeting. The meeting was scheduled for Tuesday, February 8, 2011.

On February 7, 2011, Grievant went to the Supervisor's office. Grievant said that she was in a bad mood. She asked the Supervisor how he was going to run the meeting, and suggested the way the meeting should be run. When the Supervisor told her that he did not need her advice on how to run a meeting, Grievant became upset. She said that she felt that she was going to be "beaten up" in that meeting. She said that she does not understand why people should not bring guns on campus when they feel that they need to protect themselves; she talked about her collection of guns and how good she was at guns. Grievant said that her handgun is always loaded, just in case she needs to protect herself. She told the Supervisor "I just want to help you. I do not want you and I to have an adversarial relationship. But it looks like that you do not need my help. I do not think you need my help; you are an intelligent man; you do not need my help." Grievant "stormed out" the Supervisor's office.

On February 8, 2011, the Supervisor met with the Graduate Assistants. Grievant attended the meeting. Several Graduate Assistants expressed concern about how Grievant had been interfering with their work. Grievant and several faculty members also spoke during the meeting. The Supervisor concluded that the meeting went well. The Supervisor assured the students that the Agency was committed to providing them with the best educational experience possible and that he would follow up on their expressed concerns.

On February 8, 2011 and approximately 3:30 p.m., the Supervisor called Grievant into his office to discuss the meeting. He told Grievant that he expected her not to interfere with the Graduate Assistants work anymore. Grievant said that sometimes in the Supervisor's interactions with her, she feels the need to protect herself. Grievant also said that she is a big girl and that she can protect herself. The Supervisor told her that what she had just said was very troubling and that he will have to report it to be Dean and Human Resources. The

> Supervisor later reported Grievant's comments to the Dean and to Human Resource staff.
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> After meeting with Grievant, the Supervisor pondered Grievant's comments and concluded that by referring to guns and the need to protect herself she was threatening him. He worked from his home for four days instead of working in the office because he feared Grievant. He asked the Agency Police to have a police officer stationed outside of his home for several days.[4]

Based on the foregoing findings of fact, the hearing officer concluded the following:

> Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."
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> "[T]hreatening others" is a Group III offense. The context of Grievant's comments shows that she threatened the Supervisor. The Supervisor was speaking to Grievant regarding her interaction with the Graduate Assistants. The Supervisor did not address the issue of Grievant possessing guns or the Agency's policy regarding possession of guns on campus. The Supervisor did not make any statements that would have triggered a discussion of guns. Grievant stated that based on her interactions with the Supervisor, sometimes she felt the need to protect herself. Grievant talked about possessing guns and said that she was able to handle guns. Grievant said that she did not understand why people should not bring guns on campus when they feel the need to protect themselves. Although not expressly articulated, the message that Grievant conveyed to the Supervisor was that she was capable of using guns and that she considered it appropriate to bring a gun on campus when she felt the need to protect herself from the Supervisor. The Supervisor reasonably construed Grievant's comments as a threat. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for threatening another employee. Upon the issuance of a Group III Written Notice, an Agency may remove an employee. Accordingly, Grievant's removal must be upheld.
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> Grievant argued that she did not discuss guns during her conversation with the Supervisor. She argued that the only discussion of guns occurred several weeks earlier during a faculty meeting to discuss the Agency's policy prohibiting individuals from bringing guns on campus. Although Grievant called other witnesses, she did not testify. The Supervisor testified regarding Grievant's comments during their meeting. His testimony was credible. There exists

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

sufficient evidence to support the Agency's assertion that Grievant threatened the Supervisor.

Grievant argued that the Agency failed to protect her from the Supervisor. When Agency staff asked her why she felt she needed protection from the Supervisor, she stated she had witnessed the Supervisor become angry with her while she was near him and she did not know what he might do. No credible evidence was presented to support the accuracy of Grievant's opinion that she needed protection from the Supervisor. To the extent her opinion was accurate, threatening the Supervisor was not an appropriate response.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant presented evidence that on February 15, 2011, Professor S told Professor Z that she did not feel safe and would take measures to protect herself. Grievant argued that because Professor S was not removed from employment, Grievant should not have been removed from employment. The key difference between the behavior of Grievant and the behavior of Professor S is that Professor S did not mention guns or indicate that she intended to take any unlawful or unreasonable measures to protect herself. Guns are weapons. Professor S did not mention the need to use a gun to protect herself from another employee.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the

> evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.
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> The Hearing Officer will assume for the sake of argument that Grievant engaged in protective activity. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protective activity and the disciplinary action. Grievant did not receive disciplinary action for engaging in protective activity; she received disciplinary action for threatening the Supervisor.

DECISION

> For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.[5]

The grievant subsequently sought an administrative review from the hearing officer, and in a May 31, 2011 decision, the hearing officer denied the grievant's request for reconsideration.[6] The grievant now seeks administrative review from the Director of this Department.

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."[7] 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.[8]

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[5] *Id.* at 3-6.
[6] Reconsideration Decision of Hearing Officer, Case No. 9571-R, issued May 31, 2011 ("Reconsideration Decision") at 1.
[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

Findings of Fact

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and grounds in the record for those findings."[10] 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.[11] 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.[12] 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.

Here, the grievant simply contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[13] This Department cannot find 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. In particular, there is evidence in the record--specifically, witness testimony--to support the hearing officer's findings that the grievant discussed guns in a meeting with the Supervisor, stated that she felt the need to protect herself and that such statements by the grievant were perceived as threatening by the Supervisor.[14] Accordingly, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to remand the decision on this basis.

Failure to Produce Documents

The grievant also claims that the agency failed to produce documents even though ordered to do so by the hearing officer. The *Rules for Conducting Grievance Hearings* state that:

> Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant

[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *See* Hearing Recording at 38:20 through 59:20 (testimony of the Supervisor).

> witnesses as the hearing officer or the EDR Director had ordered. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor.[15]

The document at issue is a Threat Assessment that on May 4, 2011 the hearing officer ordered the agency to produce.[16] According to the grievant, she wanted the document to determine whether prior instances of alleged "random gun conversations" had been reported to the Threat Assessment team. The grievant asserts that if no such reports were made, such information would lend credence to her argument that no such conversations took place and may have proven the Supervisor not credible.

At the beginning of the hearing, the grievant raised the issue of the agency's noncompliance with the hearing officer. When asked by the hearing officer why the document had not been produced, the agency asserted that based upon its interpretation of the hearing officer's order, it had complied and also claimed that the document requested was basically irrelevant and as such, need not be produced. After listening to the parties' competing interests regarding the production of the Threat Assessment document, the hearing officer determined that there was no reason to believe that the agency had not complied with his May 4th order to produce the document.[17] Further, he appears to have found that based on the statements of the parties, the document could, in fact, be irrelevant if it concerned prior events not at issue in the discipline against the grievant. Nevertheless, the hearing officer invited the grievant to proffer any evidence regarding this issue during the hearing and to object to irrelevancy issues as she deemed necessary.[18]

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[15] *Rules for Conducting Grievance Hearings* at § V(B).

[16] According to the hearing officer's May 4, 2011 Revised Order for the Production of Documents, the agency was to produce:

> *Any documentation regarding Grievant related to numbers 2, 3, 4, 5, 6, 7, 8, 8a and 8b under ODU Number 1014 – Threat Assessment – subsection F".*
>
> Notwithstanding the foregoing, the Agency need not produce any documents contrary in Va. Code 23-9.2:10(E) which states "No member of a threat assessment team shall redisclose any criminal history record information or health information obtained pursuant to this section or otherwise use any record of an individual beyond the purpose for which such disclosure was made to the threat assessment team."

[17] Likewise, in the Hearing Decision, the hearing officer states:

> Grievant sought certain documents from the Agency's threat assessment team. The Hearing Officer issued a revised order of production and the Agency complied with that order. There is no reason to believe that the Agency has withheld any documents that would have formed a basis to reverse or reduce the disciplinary action.

Hearing Decision at 4, footnote 3.

[18] Hearing Recording at 1:08 through 6:01.

Because the hearing officer determined that the agency complied with his order (a determination this Department cannot disturb given that there is record evidence to support the finding, i.e., the statement of agency counsel), he did not err by failing to make an adverse inference against the agency for not to producing the document. Moreover, as noted above, the grievant wanted the Threat Assessment to attack the Supervisor's credibility. Even in the absence of the Threat Assessment document, the grievant had the opportunity to attempt to discredit the Supervisor during her cross examination of him at hearing by asking him questions related to the Threat Assessment document.[19] Accordingly, this Department finds no reason to remand the decision on this basis.

Failure to Grant a Continuance

The grievance procedure requires that grievance hearings "should be held and a written decision issued within 35 calendar days of the hearing officer's appointment."[20] The 35 day timeframe can be extended only upon a showing of "just cause."[21] The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause."[22] Circumstances "beyond a party's control such as an accident, illness, or death in the family" generally constitute "just cause" for a continuance.[23] The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure including the granting or denying of continuances, but a hearing officer's decision regarding a hearing continuance will only be disturbed if (1) it appears that the hearing officer has abused his discretion; and (2) the objecting party can show undue prejudice by the refusal to grant the continuance.[24]

The grievant asserts that the hearing officer erred by not granting an extension of the 35 calendar day timeframe in order for her to review the voluminous documents received pursuant to her document requests and allow her time to potentially request more documents. The

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[19] During the hearing, the grievant did attempt to ask questions regarding the Supervisor's allegations of prior gun conversations between them. That is, when asked by the grievant if he had any proof that she discussed guns with him prior to the events of February 7th, the Supervisor indicated that he did not have recorded proof, but did state that such conversations took place. Hearing Recording at 1:01:36 through 1:02:16.

[20] *Grievance Procedure Manual*, § 5.5.

[21] *Grievance Procedure Manual*, § 5.1 "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual*, § 9.

[22] *See Grievance Procedure Manual*, § 5.2 and *Rules for Conducting Grievance Hearings*, § III(B).

[23] *Rules for Conducting Grievance Hearings*, § III(B).

[24] *See* EDR Ruling No. 2002-213. *Cf.* Venable v. Venable, 2 Va. App. 178 (1986). "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." *Venable* at 181, citing Autry v. Bryan, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). *See also* U.S. v. Bakker, 925 F.2d 728 (4th Cir. 1991) "[t]o prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." *Bakker* at 735 citing to U.S. v. LaRouche, 896 F.2d 815, at 823-25 (4th Cir. 1990). "Abuse of discretion" in the context of a denial of a motion for continuance has been defined as an "unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay." *Bakker* at 735, quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983). The test for whether a hearing officer has abused his discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented to the hearing officer at the time that request is denied. *See LaRouche*, at 823.

grievant has not stated how she has been prejudiced by the hearing officer's refusal to grant an extension and merely speculates that had she had more time, she "may have found" evidence to support her case. As such, this Department cannot conclude that the hearing officer abused his discretion in failing to grant the grievant's request for an extension.

Hearing Officer Pressured the Grievant

The grievant asserts that the hearing officer "conduct[ed] the pace and direction of the hearing and at times seemed in a hurry for the grievant to ask questions when she wasn't ready which created pressure on the grievant." However, in her request for administrative review, the grievant has not stated, nor has this Department found during its review of the hearing recording, how this alleged "pressure" by the hearing officer impacted the outcome of the decision.[25] Accordingly, this Department has no reason to remand or disturb the hearing decision on this basis.

APPEAL RIGHTS

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.[26] Because all timely requests for administrative review have been decided,[27] the hearing decision is now a final decision. 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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Claudia T. Farr
Director

[25] Based upon this Department's review of the hearing recording, there were several instances where the grievant would pause for lengthy periods of time during her questioning of witnesses in order to assess her next question and the hearing officer said nothing to the grievant to "hurry" her along in her questioning. *See e.g.*, Hearing Recording at 1:20:01 through 1:21:29 and Hearing Recording at 1:23:21 through 1:24:27. On a number of occasions, however, the hearing officer did ask the grievant to move forward with her next question. However, these instances appear to have arisen when an objection was made by opposing counsel. That is, if the hearing officer sustained the objection or found the question irrelevant, he would ask the grievant to move on with her next question. *See e.g.*, Hearing Recording at 34:45 through 35:24.
[26] *Grievance Procedure Manual* § 7.2(d).
[27] DHRM responded to the grievant's request for administrative review on May 31, 2011.
[28] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).