Issue: Administrative Review of Hearing Officer's Decision in Case No. 9550; Ruling Date: September 15, 2011; Ruling No. 2011-3007; Agency: George Mason University; Outcome: Hearing Decision In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of George Mason University
Ruling Number 2011-3007
September 15, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9550. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9550 are as follows:[1]

> George Mason University (hereafter GMU) employs the Grievant, a female, in a position as an Administrative Associate and Program Coordinator. The Grievant provides administrative support to GMU administrators, faculty and students. The Grievant has been employed by GMU for close to ten years and has received "high achiever" performance evaluations. The Grievant started employment with GMU in 2002 as an Executive Secretary, earning $28,500.00 per year; in 2004, she was promoted to her current position at a salary of $38,000.00 per year. The Grievant has received salary increases to her current salary of $44,941.00 per year. The Grievant's position is "exempt" under the Fair Labor Standards Act (hereafter FLSA). The Grievant's duties included working in support for an economics group which included a Nobel Prize winning economist. This group was recognized with elite status and was able to receive funding approval directly from the Provost's office. Special projects and supplemental payments to employees were, at times, approved through this channel. The Grievant's supervisor had indicated he thought she should be paid at a higher rate, closer to $60,000.00, but he was limited by the GMU pay policy to her salary of approximately $40,000.00. The Grievant received supplemental pay through compensation for individual projects. The Grievant's supervisor allowed the Grievant to frequently work from home and take time out of the office. She was provided with a blackberry cell phone at GMU's expense to facilitate her work while out of the office.

[1] See Decision of Hearing Officer, Case No. 9550, ("Hearing Decision"), issued May 18, 2011 at 1-3.

In 2008, the Grievant's position changed significantly when the group left GMU and went to another university. The Grievant's immediate supervisor left with the group and her current supervisor, a male, took over the role of leading her department. Initially the department consisted of the Grievant and her supervisor. Her supervisor had previously worked as a professor and not as an administrator. In 2009, two additional faculty members joined the department. Additional staff hires have also occurred such that the Grievant's supervisor directly supervises six employees now. The Grievant does not have a Telework Agreement with GMU. The Grievant does not have a Flexible Work Agreement with GMU. In June 2010, the Grievant was informed that GMU would no longer pay for her blackberry cell phone.

In 2008, the department received a project grant from Battelle as part of a Department of Defense contract. The grant included a line item in the budget for $15,000.00 in salary associated with the work to be performed on the project by the Grievant. The Grievant contends that this amount should be paid to her in addition to her regular salary from GMU as just compensation for her work. The Grievant's supervisor had included the salary line item with the intent that the Grievant would be paid additional money. The Grievant's supervisor had no authority to designate the funds as an additional payment to the Grievant. The Grievant requested the payment and was told by the financial department that she could not receive a payment from the grant in addition to her salary. The Grievant's job duties included the work she was doing on the Battelle project and she would need to receive a salary increase based upon promotion or role change to qualify for additional pay. The grant funds are used as an offset to the GMU standard payroll funds and simply provide an additional source of funding for GMU.

The Grievant contends that she performs work far in excess of the duties contained in her Employee Work Profile (hereafter EWP). The Grievant has requested her position be evaluated for a salary increase and title change on many occasions since 2008. Her supervisor has signed, in agreement to, every request she has made. The Grievant began using the title "Managing Director" and was subsequently told by her supervisor she could not use that title. GMU human resources has reviewed the Grievant's position and determined that she is financially compensated at an appropriate level for the type of work she performs. GMU has never changed her position title or reclassified her job since her promotion in 2004. Numerous proposed EWPs for the Grievant's position have been exchanged between the Grievant and GMU human resources. In August 2010, a meeting was held and the Grievant's EWP was discussed. GMU personnel thought an agreement had been reached and submitted a proposed EWP to the Grievant for review. The Grievant returned the EWP with significant changes including language which indicated she would not perform certain job duties unless she received additional compensation. The Grievant's statement in

the EWP alarmed the GWU administration and the Group II Written Notice, which is the subject of this proceeding, was issued.

In August 2010, the Grievant requested one year of unconditional leave pursuant to Department of Human Resource Management (hereafter DHRM) policy number 4.45 in order to spend time with a child she was expecting to give birth to in October 2010. Her supervisor supported her request. The Grievant had first informed her supervisor she was pregnant in April 2010. The leave request was denied by GMU administration. GMU administrators justified the denial stating that GMU did not want to create precedent for such leave; unconditional leave for one year had never been granted before by GMU. GMU further justified the denial contending, that length of leave would create a hardship for GMU because, for that length of time, GMU would have to hire a replacement which it would have to train then fire after the grievant's return. GMU's leave practices grant short periods of leave for medical reasons pursuant to the Family Medical Leave Act (hereafter FMLA) and long periods under its disability program. Extended leave is also granted for military personnel when called to duty and faculty who are governed by different leave policies because they are called upon to be absent from GMU for professional development. Pursuant to FMLA, the grievant was granted two twelve week periods of maternity leave from September 29, 2010 to March 29, 2011.

In 2009, the Grievant's supervisor received numerous complaints about the work performance and attendance of the Grievant. The Grievant was counseled by her supervisor about these issues. The Grievant's supervisor reported the absenteeism of the Grievant to GMU human resources and also noted it on her annual evaluation. No further disciplinary action was taken at that time. These complaints continued into 2010 until a second administrative assistant was hired. The new assistant began supporting two faculty members in the department and the Grievant supported her supervisor. Her supervisor had no personal complaints about the Grievant and the other faculty had no complaints after the hire of a second assistant, as they had stopped relying on the Grievant for support. In November 2009, the Grievant was absent from the work place without leave and took a trip to Africa. At the Grievant's request, the Grievant's supervisor had granted permission for the Grievant to work from home on one of the days she was absent, when she indicated her children would be in school and she could come in as needed. The Grievant was not available to come in as she had stated because she was in Africa. In August 2010, the Grievant was absent from the work place, taking a trip to Europe. The Grievant did not claim leave for one of the days she was on the trip. The Grievant claimed 60 hours of annual leave but had used 68 hours of annual leave. The discrepancy was noticed by the administration and subsequently, leave was deducted.

On June 16, 2010, the Grievant filed a charge of discrimination. The complaint alleged disability, gender, pregnancy discrimination and retaliation.

> The Grievant named her supervisor as retaliating against her by taking away her job title and blackberry cell phone for requesting additional compensation. The Grievant named her supervisor as discriminating against her because he suggested she take a job reduction after she had notified him she was pregnant. Additionally, he indicated she must be in the office to fulfill her duties. She believes it is not necessary and she can work from home. The Grievant named her supervisor and one faculty member, a female, as discriminating against her because of disability for being absent frequently from work for medical appointments for one of her children who has a serious medical condition. The Grievant indicated they are intolerant with her. This complaint was investigated by GMU and found to be unsubstantiated. GMU took no further action on this complaint.

On September 15, 2010, GMU (also known as the "university" or "agency") issued the grievant a Group II Written Notice for her refusal to complete assigned tasks, the ongoing nature of her attendance, and for customer service attitude problems. On October 15, 2010, the grievant timely filed a grievance to challenge the university's action. On March 28, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this appeal to a hearing officer. On May 9, 2011, a hearing was held.[2] In a May 18, 2011 hearing decision, the hearing officer upheld the university's issuance of a Group II Written Notice.[3]

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."[4] 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.[5]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review primarily challenges the hearing officer's consideration of the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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

[2] *Id*. at 1.
[3] *Id*. at 9.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.

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 alleges that: (1) the hearing officer failed to consider the grievant's evidence of discrimination; (2) the hearing officer failed to consider the grievant's evidence of retaliation; (3) the hearing officer inappropriately considered the university's unsubstantiated evidence of poor attendance; and (4) the weight given by the hearing officer to the university's emails regarding the grievant's customer service attitude was wrong.

1. Evidence of Discrimination

The grievant argues that because she was no longer allowed to use the "Managing Director" title and because her blackberry cell phone was taken away from her after she had informed her supervisor that she was pregnant, the university engaged in pregnancy discrimination. However, as the hearing officer found, the record supports the contrary.[8] Specifically, the record reflects that the Equal Employment Officer testified that he investigated the grievant's claim of pregnancy discrimination and concluded there was insufficient evidence of such claim.[9] During his investigation, he found that the grievant never officially held the title of "Managing Director."[10] Likewise, the grievant's supervisor testified that the faculty complained about the grievant's use of the "Managing Director" title, and he was unsuccessful in attempts to revise the grievant's title in her Employee Work Profile (EWP).[11] Moreover, the Equal Employment Officer found that the only reason the grievant's blackberry cell phone was taken away from the grievant was because no other employee was given a blackberry cell phone.[12] Similarly, the grievant's supervisor testified that the university perceived the grievant's blackberry cell phone as an inappropriate privilege because the university did not provide other faculty or staff members with a similar device.[13]

The grievant also asserts that the university's denial of her request for unconditional leave for a year following the birth of her child was discrimination. However, the hearing officer found that granting such a request was purely within the agency's discretion.[14] Furthermore, he held the university did not violate the Department of Human Resource Management (DHRM) or the university's unconditional leave policies by denying such a request.[15] Moreover, the grievant's supervisor testified that although he was not against the idea, the university's human resource department would not approve the request.[16] Likewise, the Equal Employment Officer

[8] Due to a technical error, parts of the hearing were not recorded and, therefore, this Department could not review all of the testimony evidence. However, because of the nature of the appeal, this Department was able to review most of the testimony evidence, the hearing decision, and the record exhibits to resolve the issues in this review.
[9] *See* Hearing Record (testimony of Equal Employment Officer).
[10] *Id*.
[11] *See* Hearing Record (testimony of grievant's supervisor).
[12] *See* Hearing Record (testimony of Equal Employment Officer).
[13] *See* Hearing Record (testimony of grievant's supervisor).
[14] Hearing Decision at 5.
[15] *Id*.
[16] *See* Hearing Record (testimony of grievant's supervisor).

testified that during his investigation, no evidence was brought forth that the university had discriminated against the grievant in making its final decision.[17] Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, his findings are supported by the record evidence and the material issue in the case.

2. Evidence of Retaliation

The grievant contends that the university acted in retaliation when it issued the Group II Written Notice two months after she filed an EEOC complaint. However, the hearing officer held, and the hearing record supports, that the grievant did not present any evidence that the university's stated reason was pretextual.[18] For example, the university's human resource director testified that the only reason the grievant received a Group II Written Notice was because she indicated in her EWP that she would not perform her job duties without additional compensation.[19] Hence, the university considered the grievant's comments insubordinate and issued the discipline.[20] Thus, 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.

3. Evidence of Poor Attendance

The grievant alleges the university's evidence of the grievant's poor attendance was unsubstantiated. Based upon a review of the hearing record, however, sufficient evidence supports the hearing officer's decision that "the [g]rievant took many liberties with her attendance at work."[21] In particular, the evidence reflects that one faculty member testified that when the grievant's supervisor was not in the office, the grievant often would not come in to the office either.[22] She specifically described a time when the grievant's supervisor was out of the country and the grievant was left in charge of the arrangements for some guests visiting the university, but when some issues arose with the guest arrangements, the grievant was not around to help.[23] Professor P also testified about two other incidents when the grievant's presence was relied upon to have maintenance issues resolved and student reviews performed, but the grievant was not present to take care of the matters.[24] 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 disturb the hearing officer's findings.

[17] *See* Hearing Record (testimony of Equal Employment Officer).
[18] Hearing Decision at 4.
[19] *See* Hearing Record (testimony of human resource director).
[20] *Id*.
[21] *Id*. at 7.
[22] *See* Hearing Record (testimony of Professor P).
[23] *Id*.
[24] *Id*.

4. Weight Given to University Emails

The grievant disputes the weight given by the hearing officer to the university's emails about the grievant's attitude, and specifically argues the hearing officer took those emails out of context. The hearing officer held that "[t]he email traffic documents in evidence demonstrate support for the allegation in the Group II Written Notice by showing the Grievant setting her own priorities rather than responding to the priorities of the people she is assigned to support. The many complaints about the Grievant also support the allegation of an attitude problem because the complaints come from many sources and thus cannot simply be attributed to an individual vendetta or personal disagreement."[25]

The hearing record clearly supports the hearing officer's findings of the grievant's attitude problem. For example, the agency introduced several email exchanges between the grievant, her supervisor, and other faculty members which reflected the grievant's overall attitude towards her job.[26] In addition, Professor P testified about the grievant's attitude and explained that it typically took the grievant several weeks to complete administrative tasks such as sorting the mail, ordering office supplies, and completing travel reimbursement forms for faculty members.[27] She gave one specific example of when she made several requests for the grievant to order labels, but the grievant responded on each occasion that she was too busy to order them.[28] Professor P testified that she had no confidence in the grievant to complete a job.[29] As such, she sent the grievant's supervisor several emails about her concerns.[30] In light of the email evidence provided by the university and the faculty testimony, we cannot conclude that the hearing officer erred as argued by the grievant. Accordingly, this Department has no reason to disturb the decision.

Hearing Officer's Ability to Conduct a Fair Hearing

A. Bias

The grievant asserts that the hearing officer showed prejudice to the grievant "by allowing the [university] to extend the hearing if needed" because the grievant did not deliver her exhibits on time. It appears the grievant contends that because the hearing officer's procedural rulings tended to support the university's position in this case, he was biased against the grievant.

The *Rules for Conducting Grievance Hearings (Rules)* provide that a hearing officer is responsible for:

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by

[25] Hearing Decision at 8.
[26] *See* Agency Exhibits 7, 17, and 18.
[27] *See* Hearing Record (testimony of Professor P).
[28] *Id*.
[29] *Id*.
[30] *Id*.

> the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[31]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[32]

The grievant has not identified any applicable rules or requirements to support her position, nor are we aware of any. As to the EDR requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," the applicable standard is generally consistent with the manner in which the Virginia Court of Appeals reviews recusal cases.[33] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[34] EDR has found the Court of Appeals standard instructive and has held that in compliance reviews by the EDR Director on the issue of a hearing officer's failure to recuse (disqualify) himself, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[35] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[36]

In this particular case, there is no evidence of bias. The mere fact that a hearing officer's rulings on procedure (e.g. an extension of time) align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[37] This is not the extraordinary case where bias can be inferred from a hearing officer's rulings on procedure. Here, the grievant attempted to introduce at hearing documents that had not previously been exchanged. The hearing officer was, appropriately, merely offering the agency time to review the documents. The hearing officer's offer to allow the agency time to review these documents was entirely appropriate and provides to reason to disturb the decision.

B. Inability of Grievant's Advocate to Attend the Hearing

The grievant contends that the hearing officer did not allow the grievant's advocate to attend the hearing. The general conduct of the hearing is within the sound discretion of the

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[31] *Rules* at II.
[32] EDR Policy 2.01, p. 3.
[33] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[34] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[35] *See, e.g.,* EDR Ruling No. 2011-2807.
[36] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[37] *C.f.,* Al-Ghani v. Commonwealth No. 0264-98-4, 1999 Va. App. LEXIS 275 at * 12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings **adverse** to a defendant, standing alone, is insufficient to establish **bias** requiring recusal.")

hearing officer.[38] Thus, noncompliance with the grievance procedure and *Rules for Conducting Grievance Hearings* on such grounds will only be found if the hearing officer has abused that discretion. In her request for administrative review, the grievant did not explain why her advocate was unable to attend the hearing or how the hearing officer denied her the ability to have her advocate attend the hearing. Based on this Department's review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. Both parties were able to present their cases adequately and neither appeared to be materially prejudiced.

C. Inadequate Time at Hearing

The grievant asserts that she did not have sufficient time to present her case. Specifically, the grievant argues that her witnesses could not testify because it was after five o'clock when she was given an opportunity to call her witnesses, and by that time, they had all left. The *Rules* do not expressly require that the hearing officer grant a party a particular amount of time to present their case. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.[39] However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.[40]

After reviewing the grievance hearing tapes, this Department cannot conclude that the hearing officer denied the grievant a fair opportunity to present her case. Our review of the hearing record indicates that the grievant was unable to call one of her witnesses because the hearing had gone beyond five o'clock.[41] While she may have wished for additional time to call this additional witness, we cannot conclude that the amount of time she was granted was insufficient or unfairly prejudiced her, or that additional time would have changed the outcome. Thus, we will not disturb the decision on this basis.

Layoff Records Evidence

The grievant asserts that she was unable to obtain layoff records from the agency which purportedly showed evidence of discrimination. Assuming without deciding that the grievant actually requested the layoff records from the agency, the grievant has provided no evidence that she used the noncompliance provisions of the *Grievance Procedure Manual* or that she requested an order from the hearing officer requiring the agency to provide the layoff records. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[42] Newly discovered

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[38] *E.g.*, EDR Ruling No. 2009-2091.

[39] *Rules* at III(B). The *Rules* state that "[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours."

[40] The *Rules* further state the "hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides." *Id.*

[41] *See* Hearing Recording (statement of grievant).

[42] *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).

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.[43] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party 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.[44]

Here, the grievant has provided no information to support a contention that the layoff records should be considered newly discovered evidence under this standard. Specifically, the grievant was apparently aware of the layoff records prior to the hearing and did not submit this evidence at hearing or present any evidence at hearing that she had taken measures to ensure that she would have the layoff records available at hearing. Consequently, there is no basis to reopen the hearing for consideration of these additional layoff records.

CONCLUSION

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.[45] 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.[46] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[47]

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Claudia T. Farr
Director

[43] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[44] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[45] *Grievance Procedure Manual* § 7.2(d).
[46] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[47] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).