Issue: Administrative Review of Hearing Decision in Case No. 9838, 9839; Ruling Date: July 25, 2012; Ruling No. 2013-3383; Agency: Old Dominion University; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2013-3383
July 25, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9838 / 9839. 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 9838 / 9839 are as follows:[1]

> Old Dominion University employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 16 years until her removal effective April 5, 2012. Grievant had prior active disciplinary action. On February 3, 2010, Grievant received a Group II Written Notice for Fed [sic] to follow established procedure.
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> Grievant worked in Building 1. She was told she was being moved to Building 2. She did not wish to move to Building 2 because she would be under the supervision the B Supervisor. Grievant knew that the B Supervisor was abrasive, confrontational, and extremely difficult to work with. Grievant was instructed to report to Building 2 on February 6, 2012. Instead Grievant reported to be Human Resource Office on February 6, 2012 and asked HR staff to be moved to a different location. Grievant's request was denied. On February 7, 2012, Grievant began working in Building 2 under the supervision of the B Supervisor. The B Supervisor presented Grievant with a schedule outlining Grievant's duties throughout the day in Building 2. The B Supervisor reported to the C Supervisor who reported to the Director.

[1] Decision of Hearing Officer, Case No. 9838 / 9839 ("Hearing Decision"), June 26, 2012, at 2-3. (Some references to footnotes from the Hearing Decision have been omitted here.)

Grievant argued that the B Supervisor was a difficult person to work with. Grievant presented evidence showing that the B Supervisor was abrasive when speaking with other employees. The B Supervisor was excessively confrontational with employees and often spoke to them in a demeaning manner. The evidence showed that employees had complained to the Agency but the Agency had taken few actions to correct the B Supervisor's behavior. Grievant was justified in being concerned about having to work with the B Supervisor. The Hearing Officer will disregard evidence relating to instructions given by the B Supervisor. The Hearing Officer will only consider evidence with respect to instructions given by the C Supervisor and/or the Director.

On February 14, 2012, a tenant complained to the Agency that a women's restroom had a "closed for cleaning" sign posted in front of the restroom at 3:01 p.m. Grievant's shift ended at 1:30 p.m. Grievant failed to remove the closed for cleaning sign before she ended her shift that day. Grievant was reminded subsequently that she was obligated to remove the signs before the end of her shift.

On February 16, 2012, Grievant was assigned responsibility to clean two rooms. The Director observed the condition of the two rooms and concluded that Grievant had not properly cleaned the rooms.

On February 20, 2012, a tenant filed a complaint at 2:48 a.m. that a men's restroom was blocked with a "closed for cleaning" sign. Grievant's shift ended at 1:30 p.m. She failed to remove the sign before she ended her shift that day.

On February 24, 2012, Grievant was assigned responsibility to clean two rooms. The Director observed the condition of the two rooms and concluded that Grievant had not properly cleaned the rooms. He observed that the floors contained trash, white boards had not been cleaned, and the table tops were dirty.

Grievant was assigned responsibility for cleaning ten rooms during the Agency's Spring Break, from March 5, 2012 through March 9, 2012. Some of her duties included wiping walls clean, vacuuming floors, cleaning white boards, and picking up trash. On March 7, 2012, the C Supervisor observed the rooms and informed Grievant of the items needing correction. The C Supervisor instructed Grievant to clean the rooms based on the items identified for correction. On Friday, March 9, 2012, Grievant had not fully cleaned the rooms. There remained marks on the walls, paper under desks, and floors not vacuumed. The C Supervisor spoke with Grievant and pointed out the items that needed to be completed and instructed Grievant to finish cleaning the rooms. She instructed Grievant to vacuum the floors, clean the marks off the walls, and wipe the tables. On Saturday, March 10, 2012, the C Supervisor inspected the rooms and observed that Grievant had not addressed any of the remaining items. The Director also observed marks on the wall and trash under desks.

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On March 7, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. On April 5, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction in unsatisfactory job performance. Grievant was removed from employment based on the accumulation of disciplinary action.[2]

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On May 18, 2012, the EDR Director issued Ruling Numbers 2012-3348 and 2012–3349 consolidating the two grievances for one hearing. On May 29, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2012, a hearing was held at the Agency's office.[3]

In a June 26, 2012 hearing decision, the hearing officer upheld the Group I Written Notice of disciplinary action and upheld the Group II Written Notice with removal.[4] The grievant now seeks administrative review from EDR.

DISCUSSION

By statute, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management 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, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Appearance of Bias

The grievant alleges that the hearing officer's decision was not fair. It appears the grievant contends that because the hearing officer's factual findings tend to support the agency'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:

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[2] *Id*. at 1.
[3] *Id*.
[4] *Id*. at 5.
[5] Va. Code § 2.2-1202.1(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

> [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 the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[7]

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."[8]

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.[9] 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.'"[10] EDR has found the Court of Appeals standard instructive and has held that in compliance reviews by EDR 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.[11] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[12]

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[13] This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Therefore, EDR finds no reason to disturb the hearing officer's decision for this reason.

Findings of Fact and Witness Testimony

In her request for administrative review, the grievant alleges that she was "wrongfully accused" about her job performance and she challenges whether the hearing officer considered the witness testimony regarding how the grievant's supervisor had a tendency to cause trouble for the grievant.

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[7] *Rules* at II.
[8] EDR Policy 2.01, p. 3.
[9] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals and found its holdings persuasive.
[10] 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)).
[11] *See, e.g.,* EDR Ruling No. 2011-2807.
[12] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[13] *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 officers are authorized to make "findings of fact as to the material issues in the case"[14] and to determine the grievance based "on the material issues and grounds in the record for those findings."[15] As with disciplinary actions, the hearing officer must review the evidence *de novo* and all remedies for non-disciplinary actions must conform to law, policy, and the grievance procedure.[16] 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.[17] 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.[18] 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

We cannot find that the hearing officer failed to consider how the grievant's supervisor had caused trouble for the grievant. For example, the hearing decision reflects that the hearing officer agreed "that the B Supervisor lacked proper communication skills" and therefore he "disregarded the facts originating from the B Supervisor with respect to the disciplinary actions."[19] However, the hearing officer found that even if the facts relating to the B Supervisor were disregarded, the "[g]rievant was not mistreated by the C Supervisor or the Director," and the agency still provided sufficient evidence to support both disciplinary actions.[20] Therefore, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Consequently, we have no basis to disturb the hearing officer's decision for this reason.

CONCLUSION AND 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.[21] 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

[14] Va. Code § 2.2-3005.1(C).
[15] *Grievance Procedure Manual* § 5.9.
[16] *Rules for Conducting Grievance Hearings* § VI(C).
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.
[19] Hearing Decision at 4.
[20] Hearing Decision at 4-5.
[21] *Grievance Procedure Manual* § 7.2(d).

arose.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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