

Issue: Administrative Review/hearing decision appeal; Ruling Date: March 14, 2006; Ruling #2006-1271; Agency: Virginia Community College System; Outcome: hearing officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Northern Virginia Community College  
Ruling Number 2006-1271  
March 14, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8225. For the reasons set forth below, we will not disturb the hearing officer's decision in this case.<sup>1</sup>

FACTS

The underlying facts of this case as set forth in the hearing decision are as follows:

The Northern Virginia Community College (NVCC or agency) has employed grievant as an administrative assistant for 12 years.

In 2000, grievant was counseled because she had become involved in a shouting match with a faculty member; she was warned that a repetition of such an incident could result in discipline up to and including removal from state employment. In 2004, grievant was counseled about her use of profanity in the workplace.

The dean of the division in which grievant is employed has an office suite in which he, his senior administrative assistant (SAA), and another administrative assistant work. Down the hall is another office in which are housed an assistant dean and other technical support personnel, including grievant. Since all office supplies are purchased by the division, it has been a routine practice to share supplies when either office runs out. On August 15, 2005, the SAA had run out of copy paper. She and the acting dean went to the technical support office to obtain a case of copy paper. When they entered the office, the SAA told grievant that they needed a case of paper. Grievant became angry and loudly said "you are not taking my paper." The SAA assumed grievant was joking and again said that she and the dean needed copy paper. Grievant became louder and again said "you're not taking my paper." The SAA said, "I'll order

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<sup>1</sup> While this ruling does not expressly address every point raised in the request for administrative review, each has been carefully considered. In addition, objections based on conduct that purportedly occurred during the resolution steps are deemed waived.

my own paper” and left the office. Grievant closed the door and asked the dean about a meeting scheduled later that day. The SAA then decided to return to the office. As she tried to reenter the office, grievant told her “This is none of your business” and slammed the door closed.

The acting dean returned to his office suite with a case of copy paper. A few minutes later, he and the SAA were talking in his inner office when grievant entered. She closed the door and loudly said that she had not slammed the door in the SAA’s face. As she did so, grievant walked toward the SAA while speaking loudly, assertively, and in what appeared to be a threatening manner. He immediately stepped between grievant and the SAA. The SAA began crying and left the office. After asking the acting dean another question about the upcoming meeting, grievant walked into the outer office where the SAA and other administrative assistant work. She again began talking loudly towards the SAA. Hearing the loud commotion, the acting dean came into the outer office and again positioned himself between grievant and the SAA. At this point, he asked grievant to leave the office and opened the outer door to indicate that she should leave. Grievant said she was not going to leave. The acting dean said “Call the campus police” and he reached for a telephone. Grievant then left the office.

The SAA was so upset that she left the campus for about 20 minutes to compose herself and then returned to work. When she returned, grievant approached her in a hallway and said she had only been kidding. The SAA said words to the effect of, “We have kidded each other in the past but this time you were definitely not kidding.” During this time, the acting dean had reported the incident to his supervisor - the provost - and then to the human resources director.

The hearing officer upheld the Group II discipline imposed by the agency. The hearing officer concluded that:

The agency has demonstrated by a preponderance of evidence that grievant’s behavior on August 15, 2005 was loud, confrontational, intimidating, aggressive, insubordinate, and unprofessional. Three witnesses testified credibly and consistently that grievant exhibited such behavior. None of the witnesses found credible grievant’s assertion that she had just been “kidding.”

The hearing officer further found that the “grievant’s testimony regarding the August 15, 2005 incident was also inconsistent.” In addition, he found that grievant’s preemptive attempt to deny the slamming of the door “strongly suggests that she felt some guilt about having slammed the door and was trying to disavow that her action had been intentional.”

## 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.”<sup>2</sup> 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.<sup>3</sup>

### *Cross Examination:*

The grievant asserts that the hearing officer disallowed testimony and that no proper cross examination of the SAA or any witnesses were conducted. The grievant’s request for administrative review asserts that a review of the hearing tapes will “reveal the disallowance of our efforts to present pertinent and relevant information to rebut false accusations.”

A review of the hearing tape reveals no support for the assertion that the grievant was not given an opportunity to cross-examine the SAA and other witnesses. To the contrary, the opposite is true. The grievant’s representative was given ample opportunity to cross examine the SAA.<sup>4</sup> Cross examination of the SAA ended only when the hearing officer accurately cautioned the grievant’s representative that his question had previously been asked and answered, at which point the representative stated that he had no further questions for the SAA.<sup>5</sup> The hearing officer also granted the grievant’s representative ample opportunity to cross-examine the other witnesses<sup>6</sup> and granted him wide latitude to explore issues well beyond the scope of those discussed in their direct testimony.

### *Bias:*

The grievant asserts that the hearing officer was biased against her. As evidence of his purported non-objectivity, the grievant challenges the hearing officer’s conclusion that the grievant’s “behavior was also sufficiently aggressive and insubordinate that the acting dean had to twice position himself between grievant and the SAA, and threaten to call the campus police when grievant refused to comply with his instruction to leave the office.” The grievant also claims that the hearing officer’s finding that the “grievant’s behavior was so loud and aggressive that it caused the SAA to begin crying and have to leave campus for 20 minutes to compose herself” belies any claim of objectivity.

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<sup>2</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>3</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>4</sup> Hearing Tape 1, side A, counter 353-501, 513-537, and 558-585.

<sup>5</sup> Hearing Tape 1, side A, counter 583-585.

<sup>6</sup> Hearing Tape 1, side B, counter 233-318, 325-352, and 357-380 (cross examination of Administrative Assistant). Extensive cross examination of the Acting Dean begins on Tape 2, side A, counter 402.

The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an “orderly, fair and equitable fashion”<sup>7</sup> and to “maintain order, decorum and civility.”<sup>8</sup> Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process<sup>9</sup> and avoid the appearance of bias.<sup>10</sup> The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has “a direct, personal, substantial [or] pecuniary interest” in the outcome of a case.<sup>11</sup> While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.<sup>12</sup>

In this case, the grievant’s assertion that the hearing officer’s conclusion that the grievant’s behavior required intervention by the Acting Dean was fully supported by record evidence. First, there are statements in the record from both the Acting Dean and the SAA that indicate because of the grievant’s behavior the acting Dean felt that he needed to step between the grievant and the SAA.<sup>13</sup> In addition, the Acting Dean testified that he felt that he needed to intercede.<sup>14</sup> Furthermore, the SAA’s written statement and testimony both support the hearing officer’s conclusion that grievant’s behavior was so loud and aggressive that it caused the SAA to begin crying and have to leave campus.<sup>15</sup> In sum, the grievant has not claimed that the hearing officer had a “direct, personal, substantial or pecuniary interest” in the outcome of this grievance nor identified or submitted any evidence to support her claim of unfairness or bias. Accordingly, we find no actionable bias on the part of the hearing officer.

#### *Admission into Evidence of Documents Relating to her Application for Employment*

The grievant asserts that the hearing officer erred by allowing into evidence certain documents relating to her employment application. These documents were apparently introduced by the agency to call into question the grievant’s credibility.

There is no prohibition in the *Rules for Conducting Grievance Hearings* that prohibits a party from introducing personnel documents at a grievance hearing. Certainly, if the documents are not considered relevant, the hearing officer should not admit them into evidence. However, where such documents are introduced for a legitimate reason, including impeachment, as appears in the case here, the hearing officer is obligated to admit relevant evidence.

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<sup>7</sup> See *Rules for Conducting Grievance Hearings*, § IV(C).

<sup>8</sup> See *Rules for Conducting Grievance Hearings*, § IV(A).

<sup>9</sup> See *Rules for Conducting Grievance Hearings*, § III(D).

<sup>10</sup> See *Rules for Conducting Grievance Hearings*, § II.

<sup>11</sup> *Welsh v. Commonwealth of Va.*, 14 Va. App. 300, 315 (1992), (brackets in original).

<sup>12</sup> See, e.g., Ruling Nos. 2006-1186, 2004-758, and 2003-113.

<sup>13</sup> Agency Exhibit A.

<sup>14</sup> Hearing Tape 2, side A, counter at 560-588, (testimony of Acting Dean).

<sup>15</sup> Agency Exhibit A; Hearing Tape 1, Side A, counter 338-345.

*Due Process*

The grievant appears to challenge the decision on the basis that the Written Notice does not expressly mention the Department of Human Resources Management (DHRM) Policy 1.80, Workplace Violence, yet the hearing officer found that the grievant's behavior (yelling and moving aggressively towards the SAA on two occasions) was a violation of DHRM Policy 1.80. Fairly read, this objection is essentially a due process argument, a legal concept appropriately raised with the circuit court. Nevertheless, because due process is inextricably intertwined with the grievance procedure, this Department will address this issue of due process.

Prior to receiving discipline, the United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.<sup>16</sup> A more comprehensive post-disciplinary hearing follows once the discipline has been issued. Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."<sup>17</sup>

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.<sup>18</sup> The grievance statutes and procedure provide these

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<sup>16</sup> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985). State policy requires:  
Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Department of Human Resource Management (DHRM) Policy 1.60 VII (E)(2). In addition, the Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

<sup>17</sup> *Loudermill*, 470 U.S. at 546.

<sup>18</sup> *Reeves v. Thigpen*, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995). *See also* *Garraghty v. Commonwealth of Virginia*, 52 F.3d 1274 (4<sup>th</sup> Cir. 1995) (holding that "[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" *Garraghty*, 52 F.3d at 1284. *See also* *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-561 (4<sup>th</sup> Cir. 1983)(Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

basic post-disciplinary procedural safeguards through an administrative hearing process.<sup>19</sup> Based on these principles of notice and due process, where an employee is challenging a disciplinary action, “only the misconduct cited on the Written Notice and attachments are subject to adjudication.”<sup>20</sup>

In this case, the grievant essentially asserts that the hearing decision is upholding her discipline and termination for conduct that was not cited in the Written Notice—violation of the Workplace Violence Policy. While it is true that the Written Notice does not expressly reference Policy 1.80, it cites the grievant for “Inappropriate, aggressive, and unprofessional behavior. [Grievant] became loud, boisterous, confrontational and intimidating to coworkers over use of copy paper.”<sup>21</sup> This language generally tracks DHRM Policy 1.80 which defines “workplace violence” as “[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties” and includes but is not limited to “intimidating presence, and harassment of any nature such as stalking, shouting or swearing.”<sup>22</sup> Thus, while the Written Notice and attachments did not expressly cite Policy 1.80, it nevertheless clearly provided the grievant with a description of the alleged offense and an explanation of the supporting evidence. In other words, the grievant was provided with sufficient notice of the misconduct for which she was charged and the facts supporting the charge, so that she had a full and fair opportunity to address and rebut those charges. Accordingly, from the perspective of the grievance procedure, this Department finds no due process error.

#### 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.<sup>23</sup> 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

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<sup>19</sup> See Va. Code § 2.2-3004(F) which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. See Va. Code §§ 2.2-3005 and 3006. See also *Grievance Procedure Manual* §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

<sup>20</sup> See Hearing Case No. 551, page 6, issued March 12, 2004. In this hearing decision, the hearing officer cites to *O’Keefe v. United States Postal Service*, 318 F.3d 1310 (U.S. Ct. App., 2002), which states that “[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.” *O’Keefe*, 318 F.3d at 1315. Moreover, under the rules of the grievance procedure, “[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.” *Rules for Conducting Grievance Hearings*, I. In this case, the Written Notice that was qualified for hearing was expressly issued for alleged conduct occurring on August 15, 2005.

<sup>21</sup> In addition, the Written Notice had several witness statements attached.

<sup>22</sup> DHRM Policy 1.80.

<sup>23</sup> *Grievance Procedure Manual*, § 7.2(d).

arose.<sup>24</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>25</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>26</sup>

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Claudia T. Farr  
Director

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<sup>24</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>25</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>26</sup> Va. Code § 2.2-1001 (5).