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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia
Ruling Number 2024-5642
January 12, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Numbers 11948/11971. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Numbers 11948/11971, as found by the hearing officer, are as follows:¹

During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a network engineer.

The Grievant began working for UVA on March 6, 2020, reporting to W.

On November 9, 2021, W issued a Letter of Counselling/Expectations requiring, amongst other things, Grievant to be logged into the VPN during work hours in order to adequately perform his job duties, and to be in regular communication with Grievant's supervisor (W at this time) to keep his supervisor apprised of the progress of any of Grievant's projects.

UVA kept Grievant well informed concerning its reasonable work expectations and UVA followed a course of progressive and situationally appropriate discipline that objectively and consistently addressed Grievant's behavior.

¹ Decision of Hearing Officer, Case Nos. 11948/11971 ("Hearing Decision"), November 10, 2023, at 8-13 (internal citations and paragraph enumeration omitted). The heading of the decision document erroneously refers to EDR Case Number 11605, which does not relate to the present matter. Notwithstanding the apparent typographical error, we review the hearing decision submitted under cover page indicating Case Numbers 11948 and 11971 as the decision addressing these consolidated cases.

On March 31, 2022, W completed a CY21 Academic Year-End Narrative Review noting, among other things, that Grievant "Does not participate in daily operational activities, Does not consistently log into work . . . Has been given counseling on 'showing up to work' and being available online . . . is not working at a Sr. Level Engineer skillset . . ."

W left UVA employment on May 2, 2022.

L, Assistant Vice President for Enterprise Infrastructure, then served as the Grievant's Manager on an interim basis.

On May 18, 2022, L provided a Performance Improvement Plan ("PIP") to Grievant. One component of the PIP was for Grievant to "[b]uy a webcam so that you can participate F2F ('face to face') in Zooms (EI will pay for this)."

On June 17, 2022, L issued Grievant a Group I Written Notice to Grievant for "Failure to Follow Instructions" and "Disrespectful Behavior."

An email is attached to this Written Notice in which Grievant tells L "[I]f I get this project done... You have to resign and leave UVA immediately (within a week of my project completion)."

B began managing Grievant on November 7, 2022.

On November 17, 2022, B was managing about 12 people, including Grievant.

Grievant worked for UVA on a full-time remote basis from his home.

From November 9-14, 2022, encountering much resistance, B sent numerous emails to Grievant to set up meetings with Grievant in order to introduce himself and to ascertain Grievant's workload and progress on assigned projects.

B repeatedly instructed Grievant to meet via Zoom with the camera on.

Grievant consistently failed to cooperate with B's reasonable instructions, responding avoidantly or with disrespect. Grievant state[d] that "C [B's boss] just took his foot out of my ass" and Grievant's instruction to B to pick a meeting time after 6 pm.

In response, B patiently counseled Grievant about the necessity of meeting one on one with the camera on, during work hours when B is available.

B had absolutely no difficulty scheduling meetings with the 11 other network engineers/IT professionals B supervised.

On November 16, 2022, B instructed Grievant to have Grievant's computer repaired or replaced "ASAP" so that the two of them could meet via video. Grievant was also instructed to order a new computer to cure his inability to connect to UVA's VPN.

On or slightly before November 16, 2023, Grievant properly requested to be off on November 18, 21, and 22 through Workday, UVA's official timekeeping system.

B sent 3 emails instructing Grievant to put it on the group calendar.

B also sent Grievant a Slack message (UVA's instant messaging service) on November 16 at 3:40 pm instructing Grievant to put his time off on the team calendar.

Grievant did not put his time on the calendar, as instructed. Grievant's failure to share his calendar disrupted UVA IT operations and materially compromised IT support within the Agency because IT could not provide consistent coverage without knowing who was available to work.

There is no evidence that Grievant worked on November 18, 21, and 22.

Grievant never produced any work product for those three days, nor did he ever inform B that he was working those three days.

Grievant did not follow B's instructions to put his time on the group calendar.

The record is also replete with multiple instances of Management instructing Grievant to appear face to face via Zoom.

Grievant did not follow Management's instructions to appear on camera.

Accordingly, for Grievant's disciplinary infractions essentially all revolving around Grievant's unmitigated failure to follow instructions, . . . B issued to Grievant a Group II Written Notice on January 6, 2023.

As described above, the January 6 Written Notice is no longer operative because Management rewrote and reissued it on March 13 to correct some immaterial, minor errors and to make it clearer.

Exercising progressive discipline, when Grievant's behavior not only did not improve but began to deteriorate, UVA was compelled to issue 2 additional Group II Written Notices, with termination due to accumulation, on February 17, 2023.

. . . Grievant[] continued egregious disrespectful behavior causing disruption to normal UVA workplace operations.

For example, Grievant repeatedly questioned the competency of B, his manager: "[B] you do not know what you are talking about"; "My advice is to double check your work and follow up with [C] before he has to follow up with you"; "try asking [C] for management training"; and "[B] does not know what he is talking about."

[T]he other Group II Written Notice dated February 17, 2023, was issued for Written Notice Offense Code 13, "Continued failure to follow instructions or policy."

Grievant refused to get his university-issued laptop serviced and functional for work use, as instructed innumerable times.

UVA presented multiple emails in which B instructed Grievant to have a functioning computer by contacting the helpdesk and getting a ticket for repairs. January 12, 2023 "Please get a ticket going with the helpdesk ... "; January 13, 2023 "On the desktop issue. I will ask yet again ... what is the ticket number... "; January 13, 2023, "5th time for same request. What is the ticket number for your laptop troubleshooting."

On January 17, 2023, Grievant finally opened two tickets.

While IT Support responded promptly, Grievant never presented any substantive information to the IT Support team, which resulted in IT Support closing both tickets.

B testified that Grievant never produced any work product the entire three months they worked together and that managing Grievant was extremely time-consuming.

Each of the three Group II Written Notices describe egregious acts of misconduct having a significant adverse impact on UVA business operations.

The grievant timely grieved these disciplinary actions,² and a hearing was held in two parts on September 7 and October 17, 2023.³ In a decision dated November 10, 2023, the hearing officer upheld the agency's discipline, concluding that the agency had proven the cited offenses and that no mitigating circumstances existed to reduce the disciplinary action.⁴

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR 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 hearing officer correct the noncompliance.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant challenges the hearing decision on several grounds. For example, he argues that the hearing officer improperly excluded his evidence, cut off his examination of witnesses, and generally demonstrated bias during the hearing proceedings that was then reflected in the hearing decision. The grievant also maintains in various arguments that the agency failed to carry its burden of proof, both on procedural legitimacy and substance, for the disciplinary actions at issue.⁸

² The grievant filed his first grievance on or about January 25, 2023 to challenge the Group II Written Notice issued on January 6. While the January 25 grievance was pending, the agency issued the two Group II Written Notices indicating termination, which the grievant challenged separately via the dismissal grievance process. During the management steps of the January 25 grievance, management elected to rescind and re-issue the January 6 Written Notice, with a new effective date of March 13, 2023. For purposes of qualification for hearing, EDR allowed the grievant to amend his January 25 grievance to encompass the disciplinary action re-issued as of March 13. The two grievances and all challenges raised therein were then consolidated for a single hearing. *See* EDR Ruling Nos. 2023-5535, -5536; EDR Ruling No. 2023-5552.

³ Hearing Decision at 1.

⁴ *Id.* at 19-22.

⁵ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁶ *See Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ The grievant's 16-page Request for Administrative Review presents numerous challenges to the hearing officer's decision, some of which have already been addressed with finality in five prior administrative rulings issued by EDR in relation to these cases. *See generally* EDR Ruling Nos. 2023-5535, -5536; EDR Ruling No. 2023-5552; EDR Ruling No. 2023-5564; EDR Ruling No. 2023-5583; EDR Ruling No. 2024-5618. EDR's rulings on matters of compliance are final and not subject to appeal. *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G). To the extent that the present ruling does not explicitly address certain arguments in the grievant's Request, EDR has thoroughly reviewed the entirety of the record in this matter and finds no circumstances that could justify disturbing the hearing officer's decision.

Consideration of Evidence

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 the 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 As long as the hearing officer’s findings are based on 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.

As an initial matter, EDR acknowledges the grievant’s various arguments that the hearing officer’s decision included certain facts unfavorable to the grievant and excluded favorable facts. The grievance procedure does not require that a hearing officer specifically discuss every argument or fact presented by a party; thus, a hearing decision’s mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand.¹³ Instead, a hearing officer is required to include sufficient findings of fact that support their ultimate conclusions, supported by evidence in the record.¹⁴ Based on the evidentiary record in this case, EDR finds no material error with respect to the hearing officer’s findings of fact, and we likewise cannot find that there was evidence the hearing officer erroneously failed to consider any disputed issue of material fact. With that said, we address the hearing officer’s findings as to each Written Notice in turn.

January 6/March 13 Written Notice

On January 6, 2023, the university issued to the grievant a Group II Written Notice, which he grieved.¹⁵ During the management step resolution process, the university elected to rescind and re-issue an amended version of this Written Notice, effective March 13, 2023.¹⁶ As re-issued, the March Written Notice cited the following misconduct:

On 3 separate emails on 11/16/22, Management instructed [the grievant] to enter his [leave] requests for dates 11/18/22, 11/21/22, and 11/22/22 into the shared team calendar. [The grievant] never entered his time as requested. . . .

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 See, e.g., EDR Ruling No. 2020-5075; EDR Ruling No. 2020-5073.

¹⁴ *Rules for Conducting Grievance Hearings* § V(C).

¹⁵ See Hearing Decision at 1-2; EDR Ruling Nos. 2023-5535, -5536.

¹⁶ Hearing Decision at 2; EDR Ruling No. 2023-5552.

On occasion, Management requires [the grievant] to meet on camera via zoom and connect to the required [virtual private network]. [The grievant] has been unable to accomplish this on multiple occasions. . . . To the extent that [the grievant] was having problems with his computers, Management assigned [the grievant] the task to create appropriate ticket(s) with the help desk and to have the technology issues resolved. Rather than performing this work as assigned, [the grievant] responded that he was using his own hardware and if his manager doesn't like it then his manager should "get a new Mac and ship it" to [the grievant]. Through January 6, 2023, [the grievant] was still not joining zoom calls on camera or connecting to the VPN when needed.¹⁷

The hearing officer upheld the re-issued March Written Notice, and evidence in the record supports his conclusion. The grievant's supervisor instructed him to enter leave time on the team's shared calendar for leave requests made for November 18, 21, and 22.¹⁸ The supervisor also required the grievant to meet with him one-on-one, and to work with the university's help desk to address any equipment issues that prevented the grievant's compliance.¹⁹ Email evidence shows that the grievant repeatedly failed to comply with these instructions.²⁰ In addition, the grievant's supervisor testified that, despite repeated instructions, the grievant never appeared on camera for a meeting with his supervisor or attended a meeting prepared to answer the supervisor's questions about the grievant's work activities.²¹

In sum, the hearing officer found that the grievant "consistently failed to cooperate with [his supervisor]'s reasonable instructions, responding avoidantly or with disrespect."²² Because evidence in the record supports the hearing officer's conclusions, EDR finds no basis to disturb the hearing decision to the extent it upholds the Written Notice that the agency re-issued on March 13, 2023.

¹⁷ Agency Ex. 5. The grievant argues that the hearing officer should have "assume[d] no prior group notice existed before February 17." Request for Administrative Review at 5. EDR addressed the issue of the amended/re-issued Written Notice in Ruling Numbers 2023-5535, -5536, finding that "[b]oth versions appear to address the same courses of conduct by the grievant, though worded differently." In the ruling, we indicated that re-issuing the Written Notice did not appear to be inconsistent with law or policy, and we are aware of no basis to alter that conclusion on appeal. Because the Written Notice as issued January 6 had been rescinded and re-issued, EDR clarified that the disciplinary action qualified for hearing was the Group II Written Notice as re-issued effective March 13. However, as the hearing officer clearly understood, this direction was not an order for him to exclude evidence related to this disciplinary action, up to and including the Written Notice as issued on January 6. As the prior version was relevant to the re-issued version, we find no error in the hearing officer's admission of certain evidence as to the disciplinary history. However, during the lengthy hearing proceedings the hearing officer also had authority to limit testimony on this issue to the extent that such testimony did not appear probative of the material issues. Our review of the recorded proceedings does not suggest an abuse of the hearing officer's discretion in this regard.

¹⁸ Agency Ex. 7.

¹⁹ Agency Exs. 14, 16.

²⁰ See, e.g., Agency Exs. 14, 16, 17, 18, 20; see also Hearing Recording Pt. I at 50:00-53:30, 56:50-57:20.

²¹ Hearing Recording Pt. I at 43:40-44:10.

²² Hearing Decision at 10; see DHRM Policy 1.60, Att. A: "Examples of Offenses Grouped by Level" (identifying failure to follow a supervisor's instructions as an example of an offense meriting discipline at the Group II level).

February 17 Written Notice 1

On February 17, 2023, the agency issued to the grievant a Group II Written Notice citing the following misconduct:

[The grievant] responded unprofessionally and disrespectfully to Management's emails about his daily work tasks in several emails between January 13, 2023, and January 23, 2023. On January 13th [the grievant] wrote to his supervisor, "You do not know what you're talking about." On January 19th he responded to his supervisor, "If you are not sure what is consuming the team, try asking [Supervisor's manager] for management training." On January 23rd [the grievant] wrote to his supervisor, "You guys wasted time because you asked [Supervisor's manager] to take care of something he does not know how to fix. Why are you involving [Supervisor's manager], [Supervisor's manager] does not know what he is talking about."²³

The hearing officer upheld this First February 17 Written Notice, and evidence in the record supports his conclusion. The specific comments referenced in the Written Notice are reflected in emails presented in the agency's exhibits.²⁴ The hearing officer described these and other comments made during the cited timeframe as "continued egregious disrespectful behavior."²⁵ The hearing officer further found that this sustained misconduct warranted disciplinary action at the Group II level for "acts of misconduct of a more serious and/or repeat nature."²⁶ The grievant apparently does not agree that these communications were disrespectful, arguing that the cited comments were taken out of context. However, there is nothing to indicate that the written correspondence in evidence is materially incomplete as to the dialogues between the grievant and his management, and as such the full context appears to be reflected in the record and is consistent with the hearing officer's characterization. Accordingly, EDR finds no grounds to disturb the hearing officer's conclusions as to the First February 17 Written Notice.

February 17 Written Notice 2

Also on February 17, 2023, the agency issued to the grievant a Second Group II Written Notice citing the following misconduct:

On January 17, 2023, [the grievant] opened two IT helpdesk tickets, then failed to respond to the helpdesk's questions to those tickets, sent between January 17 and January 25, 2023. Nevertheless, on January 24, 2023, [the grievant] told

²³ Agency Ex. 28.

²⁴ Agency Ex. 29 at 232-234; Agency Ex. 30 at 250; Agency Ex. 31 at 256-257. Although these emails suggest that the grievant's written comments were primarily about his supervisor, rather than "Supervisor's manager" as stated on the Written Notice, EDR does not find that any discrepancy in this regard affects the sustained charge that the grievant "responded unprofessionally and disrespectfully to Management's emails" See Agency Ex. 28.

²⁵ Hearing Decision at 12.

²⁶ *Id.* at 19 (citing DHRM Policy 1.60, *Standards of Conduct*, at 8); see generally DHRM Policy 2.35, *Civility in the Workplace*, at 5 (providing that prohibited conduct under the policy is subject to corrective or disciplinary action "up to and including termination").

Management he was still unable to work because his “laptop does not function and is not usable.” On January 25, 2023, IT helpdesk closed one ticket due to [the grievant]’s failure to respond to them. The second ticket [the grievant] responded to one of six inquiries and helpdesk considered it resolved due to no response on February 15, 2023.

Consequently, on January 25, 2023, Management intervened and ordered the new equipment from the IT helpdesk on [the grievant]’s behalf. [The grievant] wasted over two weeks of work time and was deceptive about the laptop’s functionality. [The grievant]’s persistent failure to follow his supervisor’s instructions and lack of follow-through caused delays in work productivity.²⁷

The hearing officer upheld this Second February 17 Written Notice, and evidence in the record supports his conclusion. Emails and other correspondence in evidence indicate that the grievant was informing his supervisor by January 13 at the latest that he expected work interruptions due to the need to repair or replace his laptop,²⁸ but he did not open a service ticket with university helpdesk staff until after 10:00 p.m. on January 17.²⁹ On the morning of January 18, helpdesk staff replied that they would order a new machine for the grievant after he provided his department procurement code.³⁰ The grievant did not respond or update his supervisor as to what was needed. On January 23, helpdesk staff repeated their response and asked for the appropriate procurement code. The grievant asked for clarification on the information needed, which the helpdesk staff provided. The grievant did not communicate further with helpdesk staff, despite their repeated follow-ups on February 6, 8, and 14, 2023.³¹ From January 17 through 25, 2023, the grievant continually deflected his supervisor’s questions about how the grievant was using his work time, what problems the grievant was having with his laptop (if any), and what he was doing to pursue repair or replacement through the helpdesk.³²

The grievant argues that, with respect to the Second February 17 Written Notice, the “core issue” is whether the university provided him “a camera or a laptop.”³³ Based on the disciplinary documents, EDR cannot agree. Instead, the core issue presented by the Written Notice was whether the grievant substantially complied with the reasonable instructions of his supervisor as to procuring functional work equipment, or whether he failed to do so. The grievant also appears to argue that his actions were consistent with prior directions from his supervisor’s manager, and therefore he was not required to follow the instructions from his new supervisor. Upon a thorough review of the record, including the grievant’s proffered exhibits, we find nothing that would have compelled the hearing officer to conclude that the clear and repeated written instructions of the grievant’s supervisor were illegitimate. There is also nothing to suggest that the grievant engaged in any good-faith efforts to resolve any perceived discrepancies in management directives, or that

²⁷ Agency Ex. 33.

²⁸ Agency Ex. 29 at 232-238.

²⁹ Agency Ex. 36 at 270-271.

³⁰ *Id.* at 277.

³¹ *Id.*

³² Agency Exs. 29, 30.

³³ Request for Administrative Review at 5.

the hearing officer failed to consider evidence related to that argument. In light of the evidence discussed above, EDR finds no grounds to disturb the hearing officer's findings upholding the Second February 17 Written Notice charging the grievant with failure to follow his supervisor's instructions.

In sum, the hearing officer's decision to uphold each of the three Group II Written Notices is appropriately analyzed with respect to the material facts and reasonably based on evidence in the record. Therefore, EDR has no grounds to disturb his conclusion that the agency met its burden of proof.

Admission of Evidence

In his request for administrative review, the grievant objects to the exclusion of certain documents from the record, and he suggests that the hearing officer improperly curtailed his examination of witnesses. The grievant argues that there was "no valid reason for the hearing officer to withhold admission of [his] exhibits into evidence."³⁴ He further requests a "ruling regarding the hearing officer's authority to exclude all of my evidence,"³⁵ claiming that the hearing officer excluded even documents to which the agency had waived any objections.

In a previous compliance ruling in this matter, EDR briefly addressed certain procedural issues surrounding the grievant's proffered exhibits. Based on our review of the audio recording of the first day of hearing proceedings, we described the events as follows:

[T]he hearing proceeding became extraordinarily contentious when the grievant began to present his case – largely due to confusion regarding the grievant's proffered documentary exhibits which apparently were not numbered, tabbed, or otherwise organized for reference. The hearing officer then determined that he had not received the same documents from the grievant as the university had, and his copy of the grievant's evidence did not include all of the documents the grievant sought to introduce.³⁶

In his decision, the hearing officer summarized his ultimate ruling as to the grievant's evidence, which he had announced for the record on the first day of the hearing:

only [agency]-generated documents which the Grievant sought to introduce into evidence at the hearing on October 17, 2023 (to which [the agency] had withdrawn its initial objection) were admitted and the other documents referred by the Grievant were excluded because the participants could not identify and reference them during the hearing and because it would not be feasible during the hearing to

³⁴ Request for Administrative Review at 2.

³⁵ *Id.* at 14.

³⁶ EDR Ruling No. 2024-5618 (footnotes omitted).

determine whether such documents were previously part of Grievant's August 31 electronic submission.³⁷

Upon a thorough review of the record, including the full audio recording of both days of hearing proceedings and all documents proffered for admission into the record, EDR cannot find that the hearing officer abused his discretion by declining to admit all of the grievant's proffered exhibits during the hearing. As we described in our previous ruling, at the outset of the first day of hearing proceedings, the hearing officer noted indications that the grievant had not necessarily provided the same documents to the agency and to the hearing officer. The hearing officer's initial solution was to admit individual documents provisionally, subject to later exclusion if it was determined that the grievant had not timely provided the document to the agency.³⁸ However, as the grievant began presenting documents, the hearing officer found that at least some of these documents did not appear to be in his record copy of the grievant's exhibits.³⁹ Moreover, the agency objected to the presentation of documents where it could not be determined whether they had been duly exchanged. Unable to determine contemporaneously whether each specific document had been timely provided to both the agency and to the hearing officer, the hearing officer concluded that the grievant's documents could not be admitted into the record. The first day of proceedings ended before the grievant had concluded examining witnesses, and the hearing officer agreed to schedule further proceedings on a second day. However, he made clear that these additional proceedings would be limited to taking testimony from particular witnesses.⁴⁰

On October 3, 2023, the grievant informed both the hearing officer and the agency that he would deliver a tabbed binder of documents to each of them, to be admitted as evidence.⁴¹ The hearing officer responded in writing that, for the reasons discussed during the first day of proceedings, new documents would not be admitted. Disregarding the hearing officer's ruling, the grievant sought at the continued hearing to introduce the new documents. The hearing officer again declined to admit them.⁴² The grievant requested a continuance to seek a compliance ruling from EDR on the issue, and the hearing officer declined.⁴³ When the grievant refused to elicit further testimony for his case, the hearing officer concluded the proceedings.⁴⁴

The grievance record provided by the hearing officer includes the box of voluminous documents that was initially delivered to the hearing officer on the grievant's behalf as his proffered exhibits. The documents primarily consist of emails and online chats between the

³⁷ Hearing Decision at 6. Although the grievant asserts that the hearing officer excluded "all" of his exhibits, even those to which the university raised no objection, his characterization of the hearing officer's order is not consistent with the hearing decision or the record as a whole. As discussed above, given that the grievant offered no viable way for his documents to be contemporaneously referenced by the participants during the hearing, we cannot find that the hearing officer abused his discretion in declining to admit documents unless it could be reasonably presumed that the university possessed them.

³⁸ Hearing Recording Pt. IV at 5:00-6:00.

³⁹ *See id.* at 58:00-59:00.

⁴⁰ Hearing Recording Pt. VI at 52:20-55:50.

⁴¹ Hearing Decision at 14.

⁴² Hearing Recording Pt. VII at 39:40-44:10.

⁴³ *Id.* at 44:10-49:05.

⁴⁴ *Id.* at 50:30-1:07:40.

grievant and his coworkers and supervisors, as well as other personnel records. The packet does not include any tabulation, pagination, or other method that might facilitate reference or navigation by any reviewer. To the extent the grievant argues that his failure to proffer consistent and organized documentary exhibits was due to “financial constraints,”⁴⁵ nothing in the hearing officer’s scheduling order or subsequent communications suggests that he imposed an undue financial or administrative hardship on the grievant’s ability to present his case cogently. Moreover, the record presents no basis to doubt the hearing officer’s finding, based on discussion on the record at the hearing, that the agency did not receive the same documents. Under the circumstances, we cannot find that the hearing officer abused his discretion in ultimately declining to admit these documents into the record.⁴⁶

Testimony

Apart from the documents issue, the grievant further appears to argue that he was denied sufficient opportunities to present his case by questioning university witnesses. First, the grievant objects to the hearing officer’s accommodation of university staff schedules in determining when they would testify.⁴⁷ Second, he objects to the hearing officer’s actions (occasionally *sua sponte*) cutting off certain lines of witness questioning by the grievant.⁴⁸

Upon a thorough review of the hearing proceedings, there is no indication that the grievant was prevented from eliciting any relevant witness testimony. On the first day of proceedings, the grievant was granted ample time to question both his former supervisor and manager under oath. The hearing officer intervened at times during this questioning, which became argumentative. EDR addressed this issue as a compliance matter in Ruling Number 2024-5618, finding that, as to the first day of proceedings, “we identify no instance in which the hearing officer exceeded his authority to conduct the hearing in an orderly, fair, and equitable fashion [and] to admit relevant exhibits and exclude proffered evidence for good cause”⁴⁹

We now extend that conclusion to include the second day of proceedings, which the hearing officer granted specifically to allow the grievant to question additional relevant witnesses as he desired. However, after some witness questioning, the grievant declined to call additional witnesses.⁵⁰ In addition, neither the grievant’s request for administrative review nor the record as

⁴⁵ Request for Administrative Review at 1, 5.

⁴⁶ Although not necessary to reach the conclusions expressed in this ruling, EDR has reviewed all documents proffered to the hearing officer for admission into the record. Our review has identified no information that could reasonably compel the hearing officer to reach a different decision as to the merits of each Group II Written Notice based on admitted evidence, as described above.

⁴⁷ Request for Administrative Review at 15.

⁴⁸ *Id.* at 12.

⁴⁹ See EDR Ruling No. 2024-5618, at 3-4.

⁵⁰ The grievant declined to call additional witnesses following the hearing officer’s confirmation that the grievant’s newly-submitted binder of exhibits would not be admitted into evidence, and also that the hearing officer would not continue the proceedings to a third day to allow the grievant to appeal mid-hearing. Although the hearing officer invited the grievant to call his next witness after that point, the grievant effectively refused to do so. Accordingly, the hearing officer ended the proceedings. Hearing Recording Part VII at 50:30-1:07:40. As discussed in further detail below, we find no error in the hearing officer’s administration of the hearing under these difficult circumstances.

a whole suggests what relevant testimony the grievant would have been prevented from eliciting for the record, beyond the several hours reflected in the audio record. In short, the grievant did have substantial time to question relevant witnesses, has not identified additional relevant information he was unable to elicit through testimony, and has not demonstrated that the hearing officer prevented him from doing so. Therefore, EDR will not disturb the hearing decision on these grounds.

Hearing Officer Bias

Finally, the grievant has levied various charges that the hearing officer's conduct and administration of the hearing was biased in favor of the university. As noted above, we addressed this charge in an interlocutory capacity in EDR Ruling Number 2024-5618, finding no indication of bias reflected in the first day of hearing proceedings.⁵¹ Upon subsequent review of the entirety of the proceedings, proffered and admitted exhibits, and the hearing decision itself, EDR has no grounds to conclude that the hearing officer exhibited improper bias during the hearing or otherwise abused his discretion in light of the grievant's uncooperative behavior throughout the proceedings.

Consistent with due process principles, the grievance procedure generally entitles employees to a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.⁵² As to the impartial decision-maker, a hearing officer is responsible for avoiding the appearance of bias and:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (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.⁵³

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.⁵⁴ 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

⁵¹ EDR Ruling No. 2024-5618, at 4.

⁵² *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995) ("The 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.'" (quoting *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985))).

⁵³ *Rules for Conducting Grievance Hearings* § II; *see also* EDR Policy 2.01, *Hearings Program Administration*, at 2, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself"

⁵⁴ While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

defendant a fair trial.”⁵⁵ EDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, 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.⁵⁶ The party moving for recusal has the burden of proving the hearing officer’s bias or prejudice.⁵⁷

In Ruling Number 2024-5618, we summarized what had transpired during the first day of proceedings:

[A]s the hearing officer attempted to mitigate confusion caused by the grievant’s failure to follow prehearing evidentiary procedures, the grievant directed profanity at the university’s advocate at multiple points. In his various subsequent arguments, the grievant misrepresented prehearing disputes, the hearing officer’s prior orders, the university’s positions, and witness testimony. When the hearing officer made rulings against him, he continued to argue the issues at length and accused the hearing officer of bias. . . .⁵⁸

We further instructed:

In the continued proceedings during this matter, the hearing officer has authority to intervene *sua sponte* to prevent unprofessional conduct toward any hearing participant. If he judges that the grievant is unwilling to comply with his orders and present the remainder of his evidence in a civil and respectful manner, the hearing officer ultimately has authority to end the hearing and close the evidentiary record.⁵⁹

In his decision, the hearing officer detailed several examples of the grievant continuing to demonstrate disrespect toward hearing participants on the second day of proceedings.⁶⁰ After substantial witness examination, the grievant attempted to introduce new documents as evidence, and the hearing officer declined to admit them into the record.⁶¹ The grievant continued to insist that his documents should be admitted, attributing the hearing officer’s ruling to the hearing officer’s race and generally refusing the hearing officer’s invitation to engage in additional witness questioning.⁶² As a result, the hearing officer decided to conclude the hearing.⁶³

⁵⁵ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

⁵⁶ *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

⁵⁷ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

⁵⁸ EDR Ruling No. 2024-5618, at 4-5.

⁵⁹ *Id.* at 5.

⁶⁰ The hearing officer’s descriptions, which include profanity and other uncivil comments, are consistent with our review of the audio recording. *See* Hearing Decision at 15-16; *see generally* Hearing Recording Pt. VII.

⁶¹ Hearing Recording Pt. VII at 57:00-1:05:30.

⁶² *Id.* at 1:05:30-1:06:30.

⁶³ *Id.* at 1:06:30-1:07:40.

For largely the same reasons articulated in Ruling Number 2024-5618, we decline to attribute the hearing officer's management of the hearing or his ultimate decision to any bias or prejudice against the grievant. In our prior ruling, we determined that, "[a]lthough the hearing officer's tone of interaction with the grievant [during the first day of proceedings] was increasingly critical and stern, . . . this tone was wholly in response to the grievant's refusal to comply with the hearing officer's rulings, his abusive approach toward multiple hearing participants, and his general disregard for the hearing officer's authority to maintain order in the proceedings."⁶⁴ In other words, a grievant's misconduct during a hearing, and the hearing officer's reasonable response to it, does not inherently prevent the hearing officer from producing a fair and carefully reasoned written decision. As it relates to the full hearing and hearing decision in this case, we conclude that the hearing officer's attempts to manage the grievant's conduct did not demonstrate bias and did not compromise his ability to produce a thorough written decision on the material issues based on evidence in the record.

We acknowledge that concluding a hearing over the grievant's objection would be an extraordinary sanction in most cases and should therefore be closely scrutinized for abuse of discretion. In this case, however, the grievant had numerous opportunities over two days to present relevant evidence in a civil and professional manner consistent with the hearing officer's orders. Yet he proved unwilling or unable to refrain from profanity, incivility, and personal attacks on hearing participants during the proceedings. The grievance process does not create a venue whereby state employees must be subject to such behavior, and we perceive nothing about these proceedings that put the grievance procedure's civility requirements at odds with the grievant's due process rights.⁶⁵

Perhaps more significantly in this case, after the conclusion of the hearing, the grievant submitted a 29-page closing brief, followed by a 16-page request for administrative review. These documents, as well as the entire grievance record (including both admitted and proffered exhibits), have been reviewed by EDR. We identify nothing in any of the grievant's submissions to suggest that the hearing officer's analysis of the three written notices constituted an abuse of discretion. Although we repeat that concluding a hearing before the grievant voluntarily rests their case should be an exceedingly rare occurrence, such a step is justified where, as here, the grievant's actions demonstrate a persistent unwillingness to follow the hearing officer's reasonable instructions and it does not appear that additional material evidence (*i.e.* relevant and non-cumulative) is forthcoming.

In sum, EDR cannot conclude that the hearing officer's decision to uphold each of the three Group II Written Notices at issue in this case was tainted by the unfair exclusion of relevant evidence or by other bias.

⁶⁴ EDR Ruling No. 2024-5618, at 4.

⁶⁵ See *Grievance Procedure Manual* § 1.9.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.⁶⁶ 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.⁶⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁶⁸

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⁶⁶ *Grievance Procedure Manual* § 7.2(d).

⁶⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁶⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).