

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10262; Ruling
Date: May 29, 2014; Ruling No. 2014-3866; Agency: George Mason University;
Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2014-3866
May 29, 2014

George Mason University (the agency or the University) 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 Number 10262. For the reasons set forth below, EDR remands this case to the hearing officer for further consideration consistent with this ruling.

FACTS

The relevant facts as set forth in Case Number 10262 are as follows:¹

George Mason University employs Grievant as a Sergeant in its Police Department. Grievant worked in the University's Main Campus for four years as the Sergeant in charge of investigations. He was a Detective Sergeant, a position with high prestige among the sergeant positions. In October 2013, Grievant was transferred to a satellite campus. Grievant has 15 years of police experience. Twelve of those years were with the University's Police Department. Grievant has worked as a Sergeant for eight years with the University.

Grievant observed actions by co-workers that he considered criminal or inappropriate. He attempted to report his concerns through his chain of command, but found that Police Department command staff was willing to "turn a blind eye" towards the inappropriate behavior. Grievant decided to call the State Employee Fraud, Waste, and Abuse Hotline ("Hotline").

On January 18, 27, and 30, 2012, the University's Division of State Internal Audit received allegations via the State Employee Fraud, Waste, and Abuse Hotline against employees of the University's Police Department. Allegations were made against one of the two Captains, all four Lieutenants, four of eight Sergeants, and two non-Law Enforcement employees. No allegations were made against Grievant. Grievant was one of the individuals who called the Hotline to make allegations against the University's Police Department. Grievant called the Hotline in good faith with the belief that the information he was reporting was accurate.

¹ Decision of Hearing Officer, Case No. 10262 ("Hearing Decision"), March 26, 2014 at 2-10 (citations omitted).

The University's Director of Internal Audit ("Auditor") began an investigation of the Hotline call allegations. The Auditor contacted the Former Assistant Chief of the Police Department and asked for the assistance of Grievant and the Detective. The Former Assistant Chief told the Auditor he could use the two employees as he deemed necessary. The Former Assistant Chief instructed Grievant and the Detective to assist the Auditor as the Auditor needed. The Former Chief told Grievant that he would be assisting the Auditor and that the Former Assistant Chief would be his point of contact.

In March 2012, Grievant began providing assistance to the Auditor. Prior to performing any duties for the investigation, Grievant met privately with the Auditor and told the Auditor that he was one of the callers to the Hotline. Grievant wanted to know if the Auditor had any concerns about Grievant assisting the Auditor. The Auditor stated that he did not have any concerns about using Grievant in the investigation. The Auditor used Grievant and the Detective to perform tasks relating to the retrieval of information. For example, if the Auditor wanted to conduct a forensic examination of an employee's computer hard drive, the Auditor would ask Grievant and/or the Detective to obtain the employee's University issued computer and bring it to the Auditor. Grievant and the Detective would assist in the examination of the computer.

The Auditor issued a lengthy confidential report outlining his findings from the investigation. The report showed wide-spread violations of State policy and law among the senior leadership command of the Police Department. For example, the Former Captain failed to record his leave taken, viewed, shared, and stored sexually explicit materials on his State issued computer while on State time, and made racist/sexually explicit comments to other employees. Former Lieutenant M's State issued computer showed over 3,000 sexually explicit photographs and 80 messages requesting sexual favors. He sent sexually explicit emails to junior officers in the Police Department. Former Lieutenant B engaged in theft of items placed in "lost and found." Sergeant L admitted to picking-up his child from day care three or four times about four years ago, while on duty in his assigned patrol vehicle without taking leave but with the approval of his supervisor. Sergeant L received emails with sexually explicit materials and stored them in a folder he created on his hard drive. Sergeant M admitted to taking medicine home (after stopping at the store) to her children on the night shift of February 11-12, 2012 using the State patrol car and on State time but with approval of her supervisor. Numerous other violations of policy and law were identified by the Auditor.

As a result of the investigation, approximately seven or eight member of the Police Department left the University. Although no allegations were made against the Former Chief, once he reviewed the Auditor's findings, he elected to resign from his position.

Many of those employee had developed friendships and relationships with other employees in the Police Department and departments working with the Police Department. A number of remaining employees at the University were

upset or displeased to see the employees leave. Many remaining employees were aware that Grievant and the Detective had participated in the investigation. Several employees did not like Grievant because of his participation in an investigation that resulted in the removal of long-term Police Department employees including the Former Chief who was later replaced with the Chief. Grievant was blamed for ending the careers of several Police Department employees.

The Chief began working for the University on June 16, 2013. During his first five months of employment, the Chief met with every member of the Police Department. In those meetings, staff mentioned the poor working environment. Several staff mentioned how Grievant behaved when he was assisting the Auditor in the investigation. For example, the Chief learned that Grievant had “high-fived” in celebration of other employees’ demise. The Chief told Grievant what other staff were saying about him because he thought Grievant needed to know the truth. Grievant told the Chief he denied “high-fiving” but was happy when some members of the Police Department left the University.

During a meeting Grievant attended, the Chief said that if he did not like someone, he would find a way not to hire that person.

Initially three lieutenant positions were vacant. When one of the existing lieutenants was promoted to captain, a fourth lieutenant position became open. The primary purpose of the lieutenant’s position was:

The University Police Lieutenant performs supervisory law enforcement, security, safety, and service functions within the George Mason University Police Department.

The knowledge, skills and abilities for the lieutenant’s position was:

Considerable knowledge of the principles and techniques of law enforcement, security, investigations, training, and crime detection and prevention. Demonstrated ability to plan, organize, and direct the efforts relating to law enforcement operations. Ability to work independently and solve problems involving many variables. Working knowledge of administrative functions in areas of policy and supervision.

It was common knowledge among many staff working for the University that Grievant was assisting with the Auditor’s investigation. Mr. P worked in a division that worked closely with the Police Department.

The University formed a hiring Committee to assist with the selection of applicants to fill the vacant lieutenant positions. The Committee consisted of Mr. P, Ms. C, and Ms. K. Ms. K and Mr. P were aware of the problem the rest of the police force had with Grievant. They believed this problem with the police force would result in difficulty if Grievant was promoted within the Police Department. Mr. P expressed concern that if Grievant was hired for a lieutenant position, there

would be a lot of ill will between Grievant and the Police Department staff. Ms. K had heard that people in the Police Department disliked Grievant. She pointed out that Grievant had been observed giving a “high-five” when he learned a senior manager with the Police Department was leaving the University.

Sixteen people applied for the lieutenant positions and were considered by the Committee. The Committee was instructed to select approximately eight to ten applicants for first interviews. The Committee did not select Grievant for an interview. The Committee’s decision was based on the opinions of Mr. P and Ms. K that Grievant’s peers did not like him. When the Chief learned of this decision, he instructed that all internal candidates including Grievant be interviewed.

The Committee recommended four applicants for interviews with the Chief. Ms. K sent the Chief a memorandum discussing the interviews for lieutenant. She wrote, in part:

[Sergeant J]

Has been with the university since 1989.
Administrative / training sergeant for the department.
Assigned one of the vacant lieutenant’s duties since August 2012.
Very well respected by his peers.

[Sergeant G]

Employed at GMU since 1996.
Past 8 years rank of sergeant supervising officers at Fairfax and PW Campus
Associates Degree in Applied Science.
Very well respected by his peers.

[Sergeant L]

10 years with the university.
Participated with task force for Homeland Security investigation / GMUPD
received \$350,000 for his participation.
Associates degree in computer science.
Well respected by his peers.

[Sergeant M]

Employed by GMU since 2004.
Excellent written and verbal communication skills.
2 years college experience.
Initiated RAD program.
Instructed at ... Training Academy.

[Grievant] – committee felt his answers were disingenuous given the fact that the committee members was familiar with this candidate. Also, there seemed to be no effort in his cover letter or resume.

The Chief reviewed the Committee's recommendation but decided all internal candidates would have an interview with the Chief.

On September 9, 2013, the Chief met with Grievant and told Grievant that the Committee had not recommended him for advancement.

The Chief interviewed Grievant on September 13, 2013. During the interview with the Chief, the Chief asked similar questions to those asked by the Committee. The Chief concluded that Grievant interviewed "okay" but not as well as the other the other four candidates. The Chief concluded Grievant's interview was not a poor interview.

At the time the Chief decided not to promote Grievant, the Chief knew that Grievant had called the Hotline to initiate complaints against Police Department employees. The Chief knew that Grievant had participated in the Hotline investigation by assisting the Auditor.

On October 4, 2013, the Chief read a draft of the B-Report regarding a complaint against Grievant. This report addressed a complaint filed by a subordinate Officer who worked with Grievant. The Officer had filed several Hotline complaints and was familiar with the Hotline process. In July 2013, the Officer made an official complaint to the Chief regarding Grievant's treatment of her while he supervised her. One of her complaints was that Grievant pressured her to make a Hotline complaint regarding behavior she and Grievant had observed among Police Department employees. She was upset when she later found out that Grievant had also called the Hotline and that Grievant was participating in the investigation.

The Chief assigned a Retired Chief to investigate the allegations. The Retired Chief interviewed the Officer, Grievant, and several current and former employees regarding the Officer's allegations. The Officer provided the Retired Chief with the names of several individuals to contact. The Retired Chief concluded, "I found that the credibility of both [Officer] and [Grievant] are somewhat diminished" Without discussing any evidence to support his conclusion, the Retired Chief wrote, "Clearly, [Grievant] had ulterior motives in reducing the roadblock ahead of him (promotion) and cleaning the place up was a nice bonus." The Retired Chief added, "Clearly, [Grievant] has a long way to go as many [of] his peers and subordinates have little faith or trust in his ability to effectively supervise or lead others. 'Doing the right thing' is merely a convenience, or as a means to an end, which is often self-serving and not in the best interests of the department or its members."

The Chief decided who to select as lieutenants over the weekend of October 4, 2013. The Chief relied on the B-Report while making his decision to deny a promotion to Grievant.

On October 8, 2013, Grievant met with the Chief. The Chief said he was not going to promote Grievant because Grievant did not get along with people.

He said he would transfer Grievant to another campus to give Grievant a chance to improve his reputation in the department and make him a viable candidate. The Chief told Grievant that it was a conflict of interest for Grievant to have participated in the investigation. The Chief said Grievant should have told command staff about his conflict.

The University announced the selection of four lieutenants on October 9, 2013. Sergeant L, Sergeant M, Sergeant G, and Sergeant J were selected for promotion.

After the Chief announced selection of the new lieutenants, he transferred Grievant to a satellite campus. The Chief asserted that the reason for the transfer was because the University did not wish to send inexperienced Sergeants to supervise staff working at a satellite campus. The Chief claimed the transfer would be temporary. Nothing in the record, however, shows the duration of Grievant's transfer was for a specific period of time with a return to the Main Campus at the expiration of that time period. The Hearing Officer does not believe that Grievant's transfer was intended to be "temporary." Employees transferred to satellite campuses were often less likely to be promoted in the future.

One of the reasons Grievant was denied promotion was because of his interaction with a former employee. A former employee used the University's credit card to purchase fuel for his personal vehicle. He was allowed to resign his position and was not prosecuted for his theft. On August 28, 2013, the former employee sent the Chief an email complaint regarding "the rudeness of one of your supervisors." The former employee said that on August 6, 2013, he attended a Conference on behalf of his employer, another university's police department. Grievant also attended the Conference on behalf of the University. According to the former employee, as the former employee's group was registering at the hotel, the Detective greeted the former employee. The Detective pointed to Grievant and said to Grievant, "Hey, look who's here." The former employee extended his hand to shake Grievant's hand but Grievant said, "You're lucky I didn't investigate your case because I would have locked your ass up." The interaction with Grievant made the former employee feel embarrassed and uncomfortable.

The University investigated the allegation. The Detective said he did not see or hear any conversation between Grievant and the former employee. Grievant said he attended the Conference on August 8, 2013 and was approached by the former employee in a hallway. Grievant told the former employee he "had nothing to say to him." The former employee said, "What?" and Grievant responded with words to the effect that if it had been up to Grievant, he would have arrested the former employee. The investigator concluded, "While I believe it was not [Grievant's] intent to embarrass [former employee] or to upset him, the complaint could have been avoided by him either walking away or simply stating he did not wish to speak with [former employee] and leave it at that."

Several of Grievant's subordinates and work group were moved to a new set of offices. Some of the offices did not have furniture and Lieutenant L told the employees go to surplus to obtain desks. When Grievant returned the next day, both of his detectives were upset. One detective said he felt he was being treated as a second class citizen. Later on, the Chief asked Grievant how the move was going. Grievant responded that one of his detectives said he felt like a second class citizen.

A vehicle was seized from a drug dealer and turned over to the University. The vehicle was assigned to Grievant, a sworn law enforcement officer. Under the Department of Criminal Justice Services' Forfeited Asset Sharing Program Manual, it was impermissible for the vehicle to be used by non-law enforcement personnel for non-law enforcement business. The Chief informed Grievant that he was removing the vehicle from Grievant and assigning it for use by the University's security guards. University security guards were non-sworn personnel with no police authority. Grievant told the Chief that transferring the vehicle was contrary to policy. The Chief interpreted Grievant's comments to be a challenge to the Chief's authority.

On October 15, 2013, Grievant's Supervisor, Lieutenant M, completed Grievant's annual performance evaluation. The Chief signed the evaluation on October 17, 2013 as the Reviewer. Grievant received an overall rating of High Achiever. The Supervisor's comments included:

[Grievant provided positive supervision to the officers assigned to his squad. He provides and applies the community policing concept by having officer's conduct vehicle, bicycle, and foot patrols of the community.

[Grievant] provides training and guidance to the officers assigned to his section. He is responsible to ensure that critical thinking skills are appropriately applied to every situation that his officers encounter.

[Grievant] promotes a strong interaction with other university offices such as housing and judicial affairs. He places a heavy emphasis on interaction with the community, faculty, staff and students to help ensure the safety of all concerned.

[Grievant] is often relied upon to make critical decisions in the absence of command leadership such as on weekends and while the night shift. He approaches his assignments in a fair, firm, and friendly manner and accomplishes all tasks presented before him.

[Grievant] provides his section members continual feedback as to their work performance. He ensures that they have the necessary skills to accomplish the department's mission. He makes on the spot corrections and promotes officer safety.

[Grievant] has performed a very critical role heading up the department's Criminal Investigative Section. He has provided the necessary guidance and leadership to his team members so they can continue to support the department's goals and objectives. He has performed very well in this role and has the potential to serve the department and the George Mason community in roles of greater responsibility.

On November 4, 2013, Grievant filed a grievance challenging the University's failure to promote him and the University's decision to transfer him to a satellite campus. In the Second Step response, the Chief described the reasons why he did not promote Grievant. He wrote, in part:

Ultimately, on October 4, 2013, after taking into account the committee's recommendation, your performance on the final interview in comparison to the other candidates interviewed, as well as several negative direct factors of which I have addressed with you during my initial five months of serving as Chief of Police, I determined that you were not a viable candidate for promotion to Lieutenant at this time. Those direct factors included the following:

As a result of a citizen's complaint against you it was determined that you engaged in rude or unprofessional behavior directed at a former department employee while representing the police department at the annual department hosted [Conference]. This complaint was sustained against you on September 9, 2013.

On several occasions including the early morning of August 30, as well as during meetings with me on September 9 and 11 of 2013, you consistently and inappropriately used disparaging comments when describing your fellow colleagues including several of which were in direct competition with you in the Lieutenant's process. These comments included labeling some of those colleagues as "criminals" and "thieves" as well as questioning their competency.

On several occasions you have directly challenged several of my decisions to include reassigning a department vehicle assigned to your unit in which you inferred that I was violating policy by reassigning the vehicle which in fact I was not, you directly accused me of treating your assigned detectives as "second class citizens" when I directed them to move from individual offices to a shared office with cubicles in the interest of space management and you were visibly in disagreement when I made the decision to include student government representation on the police officer

hiring panel in an effort to increase collaboration with campus partners.

Additionally, as a result of a second internal affairs investigation that was initiated in July 2013 in which several allegations were made against you by a current department member, several indirect issues were raised during that investigation that highlighted concerns regarding your character and integrity that included your decision to intentionally withhold information from department command staff so that you could assist the State Auditor in the audit investigation of your own complaints against department members.

This along with all of the above direct factor call into question your ability to lead in a position and ethical manner, interact professionally with internal and external constituents, and your ability to support decisions made by command staff in a manner that would foster an environment of effective followership.

None of the reasons described by the Chief resulted from the questions he asked Grievant during Grievant's interview with the Chief.

In the March 26, 2014 hearing decision, the hearing officer determined that the grievant had established that the University denied him a promotion because he engaged in protected activity.² As a remedy, he ordered that the University create an environment free from retaliation against the grievant, promote the grievant from his current position of Sergeant to Lieutenant, and move his work location back to the University's main campus.³ The University now seeks administrative review from 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 ..."⁴ 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.⁵

Inconsistency with Agency Policy

The University's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make

² *Id.* At 10-16.

³ *Id.* at 18-19.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ *See Grievance Procedure Manual* § 6.4(3).

a final determination on whether the hearing decision comports with policy.⁶ The University has requested such a review. Therefore, the University's policy-based arguments will not be addressed in this ruling.

Hearing Officer's Consideration of the Evidence

The University's request for administrative review challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. It asserts that the grievant did not meet his burden of proof to show, by a preponderance of the evidence, that the University retaliated against him. It also argues that the hearing officer inappropriately shifted the burden of proof to the University.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁸ 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.

Retaliation Claim - Promotion

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in protected activity, subsequently suffered an adverse employment action, and a causal link exists between the adverse employment action and the protected activity as discussed below.⁹ The hearing officer found that the grievant engaged in protected activity when, in January 2012, he called the State Employee Fraud, Waste, and Abuse Hotline to report violations of law and state policy, and also through his participation in the Hotline investigation.¹⁰ It does not appear that these findings are disputed. The hearing officer also found that the Chief of Police, who had the ultimate responsibility for making decisions regarding the promotional process, knew that the grievant had engaged in this protected activity, prior to making the ultimate decision denying the grievant a promotion.¹¹ This finding does not appear to be disputed either.

The hearing officer found that the grievant suffered an adverse employment action with respect to being denied a promotion and that a causal link exists between that action and the grievant's protected activity.¹² Based upon EDR's review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this respect. Specifically, the hearing officer found that

⁶ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ Hearing Decision at 10-16.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 6.

¹² Hearing Decision at 7, 12.

[t]he Chief denied Grievant a promotion because of “concerns regarding your character and integrity that included your decision to intentionally withhold information from department command staff so that you could assist the State Auditor in the audit investigation of your own complaints against department members.” This statement confirms that the Chief retaliated against Grievant by refusing to promote Grievant because Grievant was a caller to the Hotline and Grievant participated in the Hotline investigation.¹³

The hearing officer’s findings as detailed above are based upon the Chief’s written response to the grievance filed in this case.¹⁴ The University argues that, essentially, the grievant’s participation in investigating the Hotline complaint was not protected activity as no authority exists “that encourages or even permits a whistleblower to investigate *his own complaint*.” Thus, the University argues, the Chief’s written comments do not demonstrate reliance upon the grievant’s engagement in protected activity in denying him the promotion.

Although there were potentially other reasons underlying the University’s decision not to promote the grievant, some of which were presented at hearing, the main argument highlighted on appeal by the University again is this point about the grievant being involved in an investigation in which he was one of those who reported the allegations to the Hotline. To make this explicit argument, the University must parse the grievant’s conduct on a fine line. It may be reasonable to view the grievant’s conduct as some kind of conflict in certain respects. However, this approach is not at all clear when the University’s action is influenced by this conduct. The University cites to a report from the Office of the State Inspector General (OSIG) in which it was determined that the grievant, as a caller to the Hotline, should not have been involved in the investigation.¹⁵ While that report might be used to support the University’s claim as to the existence of a possible conflict, that report was about the conduct of the auditor, not the grievant’s choices. Based on a review of the documents in evidence, the OSIG report does not go so far to state that by engaging in the investigation after calling the Hotline the grievant was not still engaging in conduct protected by law.¹⁶

As such, in making this delicate argument, the University runs the risk of being found to have based its decision on the protected activity of the employee. Such a finding is reasonable because the University is directly relying on conduct by the grievant ordinarily protected by law from retaliation, i.e., contacting the Hotline and participating in a Hotline investigation.¹⁷ Further, the argument fails to recognize the difficult situation the grievant would have found himself in after being directed to assist the auditor in the investigation, or the grievant’s decision to raise the potential concern directly with the auditor. Indeed, the University has explicitly suggested in this case that the grievant was under a duty to have informed those in management who either were being investigated or reported to those under investigation that he was the Hotline caller. It is not clear how the grievant should have been required to disclose his activity as a caller to those who may have been the direct subjects, or closely associated therewith, of the investigation.

¹³ Hearing Decision at 13.

¹⁴ Grievant’s Exhibit 5.

¹⁵ Grievant’s Ex. 3 & 4.

¹⁶ *Id.*

¹⁷ *E.g.*, Va. Code § 2.2-3011.

While there may indeed have been a conflict of some kind here that the University could reasonably call into question the grievant's choices, the hearing officer found otherwise, noting that while "[i]t is not clear what, if any, conflict existed, ... if a conflict had existed, Grievant's responsibility for that conflict was resolved when the Auditor elected to continue receiving Grievant's assistance after the Auditor learned Grievant was one of the callers."¹⁸ Where, as here, the evidence is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. The interpretation of the evidence in the record is squarely within the purview of the hearing officer.

Further, additional evidence in the hearing record supports the hearing officer's finding that the University had engaged in retaliation against the grievant. For instance, the record contains a great deal of testimony on this issue from the University's auditor who was assigned to investigate the Hotline complaints. The auditor testified that he believed "absolutely" that the reason for the grievant's being denied a promotion to Lieutenant and transfer to the satellite campus was because of his participation in protected activity.¹⁹ When questioned by the hearing officer regarding the foundation for this belief, the auditor testified that his conclusion was based upon his knowledge of the situation and several conversations he had with both the former and current Chief during the same time frame in which the University was recruiting for the positions at issue.²⁰ While reasonable minds may differ as to whether sufficient evidence exists to support the finding of retaliation against the grievant, this determination rests solely with the hearing officer. 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 that issue. Accordingly, we decline to disturb the decision on this basis.

Retaliation Claim – Transfer

However, one issue not explicitly addressed by the hearing officer in portions of the retaliation analysis is the grievant's transfer to another location. Although the hearing officer addressed that matter in the ordered remedy, there is no discussion as to whether there was a causal link between the grievant's protected activity and the transfer in the original decision. It is not sufficient to simply find that the grievant would not have been transferred if he had been promoted. The hearing officer must assess the transfer decision and reasons therefor independently to determine if retaliation is founded. The hearing officer also has not explicitly considered the University's non-retaliatory explanations for the transfer. Therefore, on remand, the hearing officer is directed to address the grieved transfer as to the remaining elements of the grievant's retaliation claim to determine whether the hearing record supports a finding that the protected activity was the but-for cause of the transfer.²¹

¹⁸ Hearing Decision at 13-14.

¹⁹ Hearing Record at 1:25:28 - 1:25:55 (testimony of auditor).

²⁰ *Id.* at 1:25:55 – 1:27:02. In fact, the auditor indicated that during one such conversation, the Chief indicated that he had initiated a separate investigation on the grievant. *See id.* (testimony of auditor).

²¹ Depending on the outcome of the hearing officer's analysis, there may also need to be revision to any order of appropriate remedies, as further discussed below. In short, if the hearing officer does not find sufficient evidence to determine that the grievant's transfer was retaliatory, there would be no basis to order relief as to the transfer.

Burden of Proof

The University also argues in its request for administrative review that because the hearing officer concluded that it was not clear if any conflict existed with respect to the grievant's acting as an investigator for a complaint which he made, the burden of proof was improperly shifted to the University. Under the *Grievance Procedure Manual*, the grievant had the burden of proof in this case,²² and that fact is clearly stated at the outset of the hearing decision.²³ The hearing officer's determination of whether a conflict may have existed with respect to the grievant's investigating his own complaint is immaterial to the question of which party has the burden of proof in this matter. A review of the record does not indicate that the hearing officer improperly placed this burden upon the University based upon this, or any other, finding rendered. Thus, we will not disturb the hearing decision on this basis.

Authority of Hearing Officer in Granting Relief

The University asserts that the hearing officer granted relief that he was not entitled to grant by ordering the University to promote the grievant and transfer him back to the University's main campus. It argues that, essentially, the hearing officer's order unduly interferes with management's right to manage the University and oversteps the authority granted to him under the Code of Virginia and the grievance procedure. In support of these claims, it points out that the *Rules for Conducting Grievance Hearings* ("Rules") prohibit the hearing officer from ordering such remedies that would "unduly interfere with management's prerogatives to manage the agency."²⁴

The Code of Virginia confers upon the hearing officer the authority to "order appropriate remedies" for those issues qualified for hearing.²⁵ The *Rules* expound upon this authority, indicating that the hearing officer may "order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy"²⁶ and that in cases involving retaliation, the hearing officer may order the agency to "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."²⁷ Further, the *Rules* advise that hearing officers "should avoid providing specific remedies" that would "unduly interfere with management's prerogatives to manage the agency," and describes as an example an order from a hearing officer directing the agency to discipline a manager who engaged in discriminatory practices.²⁸

The question of whether a specific remedy is one that "unduly interferes with management's prerogatives to manage the agency" must be determined on a case-by-case basis, taking into account factors such as the challenged management action, the egregiousness of the harm to the grievant, and other potential avenues for relief. Undeniably, an agency has the prerogative to manage its employees; however, some situations will warrant a hearing officer's

²² *Grievance Procedure Manual* § 5.8(3).

²³ Hearing Decision at 2.

²⁴ *Rules* § VI(C)(3).

²⁵ See Va. Code § 2.2-3005.1(A).

²⁶ *Rules* § VI(A).

²⁷ *Id.* § VI(C)(3).

²⁸ *Id.*

intervention in such management when a grievant prevails at hearing.²⁹ In this instance, the grievant challenged his denial of a promotion to a Lieutenant position during the University's selection process, and his subsequent transfer to a satellite campus. The hearing officer found that the grievant had met his burden to show that the University engaged in retaliation against the grievant, and that the only appropriate remedy would be an order that the University promote the grievant and transfer him back to its main campus.³⁰

Upon review, we do not find that sufficient facts can be found in the record that would demonstrate such an award of relief would be the only available option to cure the retaliation and place the grievant in the same (or nearly the same) position he would have been in had the retaliation not occurred. We recognize that the University may have at its disposal other methods, less intrusive upon its management of personnel, by which the violation can be cured appropriately.³¹ While we do not find that a hearing officer could *never* order relief such as was awarded to the grievant here, we do not believe that a sufficient factual basis exists in this instance upon which to do so.

A hearing officer's order of relief "should avoid providing specific remedies" that would "unduly interfere with management's prerogatives to manage the agency."³² The order of relief in this case has intruded into management's prerogatives without a sufficient basis to support such an extreme remedy. The hearing officer determined that the specific remedy of ordering the grievant's promotion was necessary because 1) "it is not likely Grievant could be evaluated by Police Department managers objectively and without consideration of his participation in the investigation;" 2) "it is unlikely University managers outside of the Police Department could objectively evaluate Grievant for promotion;" and 3) "[i]t is not possible to return truly to the status quo because Grievant would be compared to others with an advantage that would not exist under the status quo."³³ Even assuming there is evidence in the record to support these findings, the hearing officer has not articulated a sufficient rationale warranting the extreme remedy of ordering the specific form of relief chosen. In short, the hearing officer has determined that it would be "unlikely" or potentially difficult to assess fairly the grievant's candidacy for promotion at this time. These findings are far removed from a determination that there is no way such an assessment could be accomplished fairly, something the record would not appear to support here. In addition, these reasons presuppose that the only other alternative relief available was to order the University to reassess the grievant's promotional candidacy again, which is not so.

When retaliation is founded, intrusion into management's prerogatives can be avoided by directing the University to fashion the appropriate remedy that would carry out the hearing officer's order to cure the violation and place the grievant in a position as near as possible to that which he would have been in had the retaliation not occurred. An agency would have many potential options that could be seen as appropriate, including a) promoting the grievant and returning him to main campus (the original order of the hearing officer), b) promoting the

²⁹ For example, a hearing officer clearly has the authority to overturn an employee's dismissal and reinstate that person back to work at the agency, which necessarily interferes with management's prerogatives.

³⁰ Hearing Decision at 17-19.

³¹ Indeed, we would encourage the parties to work together toward fashioning an agreement that may be able to meet the needs of both the grievant and the University in this situation.

³² *Rules* § VI(C)(3).

³³ Hearing Decision at 17-18.

grievant and keeping him at his transferred location, c) providing the grievant with a salary increase consistent with a promotion and allowing him to compete for the next promotional opportunity, or d) placing the grievant in an alternate equivalent position (possibly an existing or newly created position), and many other potential options. The agency will be in a better position to determine potential possibilities appropriate to the situation, preferably with the grievant's input, to fulfill the hearing officer's directives in the least disruptive way. To the extent this is seen as placing too much discretion in the hands of the University, all parties should be mindful that whether the University satisfactorily implements the hearing officer's decision may be assessed by the Circuit Court. If the grievant objects to the remedy selected by the University, the Circuit Court would have authority to determine its inappropriateness on a petition by the grievant for implementation of the hearing decision.³⁴

Thus, based on the foregoing, we remand the case to the hearing officer to restate the ordered remedy in this case. The hearing officer is directed to revise the decision to reflect a general order that the University shall, in creating an environment free from retaliation against the grievant, take appropriate corrective measures to cure the violation, prevent its reoccurrence, and place the grievant in a position as near as possible to that which he would have been in had the retaliation not occurred (to the extent warranted and practicable). The hearing officer may not direct a specific form of relief in this case.

Witness Statements

In its request for administrative review, the University states that “[m]any statements were made without corroboration during the hearing” and attaches additional witness statements, apparently as further evidence. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”³⁵ Newly discovered 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 hearing ended.³⁶ However, the fact that a party discovered the evidence after the hearing 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.³⁷

In this instance, the University has provided no information to support a contention that the witness statements should be considered newly discovered evidence under this standard. The University had the ability to obtain or otherwise submit this evidence prior to the hearing. If the University could not have anticipated the need for this testimony, it could have requested a

³⁴ Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

³⁵ *Cf. Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the 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).

³⁶ *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989).

³⁷ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

continuance or that the hearing officer keep the hearing record open after the hearing for submission of rebuttal evidence. No such requests were made by the University at the hearing or immediately afterward. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

We would also note that the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.³⁸ Accordingly, the technical rules of evidence do not apply.³⁹ By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁴⁰ Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. The hearing officer in this instance analyzed the evidence and testimony provided and found the grievant's evidence to be credible, taken independently. There is no requirement for further authentication or corroboration under the grievance procedure. In short, it is not error for the hearing officer to make factual findings based on evidence unrebutted by the University.

Length of Hearing

The University asserts that it did not have sufficient time to present its case, as, after indicating each party would have 180 minutes to present evidence, the hearing officer allowed the grievant over five hours, but limited the University to less than two hours. The University argues that several witnesses did not have the opportunity to testify at all, and the University representative felt pressured to conclude his presentation of evidence, thus omitting questions he may otherwise have asked of the University's witnesses.

The *Rules* do not expressly require the hearing officer to grant a party a particular amount of time to present its case. Generally, hearings can be concluded in a day or less but there is no requirement that a hearing last an entire day.⁴¹ However, a hearing should last as long as necessary for the parties to have an opportunity to fully and fairly present their evidence.⁴² Based upon EDR's review of the record in this case, we cannot conclude that the hearing officer did not allow the University's representative a fair opportunity to present his case.

The University is correct in its assertion that the grievant was permitted time in excess of 180 minutes in which to present his case.⁴³ However, there is no evidence in the recording to support the University's position that it was limited to less than two hours for its presentation of evidence. The University's advocate concluded his presentation of evidence of his own volition after approximately two hours.⁴⁴ At that time, the hearing officer directed him to call the next

³⁸ *Rules for Conducting Grievance Hearings*, § IV(D).

³⁹ *Id.*

⁴⁰ Va. Code § 2.2-3005(C)(5).

⁴¹ *Rules* § III(B).

⁴² *See id.*

⁴³ *See* Hearing Record at 19:02 through 04:58:33 (grievant's case in chief). While the grievant requested to recall an additional witness immediately thereafter, the hearing officer advised the grievant that he was out of time and requested a proffer of testimony in lieu of recalling the witness. *See* Hearing Record at 04:58:34 through 04:59:23.

⁴⁴ *See* Hearing Record at 05:04:46 - 07:02:06.

witness and the advocate responded, "I think we're done."⁴⁵ At no time did the advocate raise an objection or make a motion regarding the amount of time he was allotted to present evidence, nor was any witness called but not allowed by the hearing officer to testify. Further, we find nothing in the record to suggest that undue pressure was placed upon the University's advocate by the hearing officer such that he was unfairly prejudiced in presenting his case. Thus, we will not disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

The hearing decision is remanded for further consideration and revision as more specifically discussed above. 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.⁴⁶ 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.⁴⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁸



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⁴⁵ See Hearing Record at 07:02:00 - 07:02:06.

⁴⁶ *Grievance Procedure Manual* § 7.2(d).

⁴⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).