Issue: Administrative Review of Hearing Officer's Decision in Case No. 10941; Ruling Date: June 30, 2017; Ruling No. 2017-4556; Agency: Virginia Tech; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of Virginia Polytechnic Institute & State University
Ruling Number 2017-4556
June 30, 2017

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 Number 10941. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10941 are as follows:[2]

> Virginia Tech employs Grievant as an Application Developer. She has been employed by the Agency for over ten years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant used MicroStrategy software to perform her work duties. MicroStrategy is a business intelligence tool. MicroStrategy functions by querying external databases based on an internal data model. The resulting data are presented in the form of a report, document, or dashboard where the data can be further analyzed, displayed, and reported to the user. This can be accomplished two ways – specifying a precisely defined model of the data ("data model") or by creating a freeform cube.
>
> Data models can be set up to request database credentials from each user, which are then used when querying with the external database. This ensures that no user ever gets access to data he or she is not entitled to see. Cubes, however, acquire the access credentials of the developer. This means that when an Application Developer creates a cube, that cube has access to all of the University data to which the Application Developer has access. The Agency considered

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] Decision of Hearing Officer, Case No. 10941 ("Hearing Decision"), May 5, 2017 at 2-3 (citations omitted).

cubes to present a security data risk because they enabled users to access information for which the users would not otherwise be permitted to access.

Structured Query Language (SQL) is a programming language used to retrieve data in a relational database.

On October 15, 2015, Supervisor J sent Grievant an email stating:

> I don't want to default to using a cube for these applications. Decisions to use cubes need to be made carefully taking into consideration response time, memory usage and other turning issues. It is easy to switch to a dataset if we decided not to run off of a cube? I am also not sure how security operates on a cube vs a dataset.

On March 14, 2016, Supervisor J sent Grievant an email stating:

> My concern is that we have addressed taking [name's] time up multiple times now and we have talked about standards multiple times now. Standards such as we will not be doing Send Now, Cubes, direct connects until the policies are in place but the communication still happens.

During a meeting on July 13, 2016, Supervisor J told Grievant that, "team members will not be using cubes ([regardless] of what other teams use)".

On occasion, Supervisor C would create cubes in MicroStrategy if he felt it was necessary to do so. His action to create a cube was not an authorization for Grievant to create a cube.

The Manager reviewed Grievant's changes to MicroStrategy from June 19, 2016 through August 30, 2016. On August 17, 2016, Grievant created an "Intelligence Cube" entitled OSP EOY Expenditures Cube_SAS_Based. On August 29, 2016, Grievant deleted the cube. Grievant did not obtain permission from Supervisor C to create this cube.

The Agency used work "tickets" to assign tasks to employees, including Grievant. Grievant was assigned responsibility on June 17, 2016 to create dashboards utilizing EOY information for Grants. She was told to complete the project by August 19, 2016. Grievant met with Supervisor C on a weekly basis. During those meetings, Supervisor C asked Grievant what problems she was having. Grievant responded that she was working on the assignment. Grievant did not complete the assignment by August 19, 2016. Supervisor C "closed the ticket" on August 24, 2016 because Grievant did not complete the assignment.

The grievant timely grieved the disciplinary action and a hearing was held on March 6, 2017.[3] On May 5, 2017, the hearing officer issued a decision upholding the disciplinary action.[4] The grievant has now requested administrative review of the hearing officer's decision.

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 action be correctly taken.[6]

Inconsistency with Agency Policy

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] Accordingly, the grievant's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review further challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[10] 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.[11] 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

[3] Hearing Decision at 1.
[4] *Id*. at 4-5.
[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] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In support of this assertion, she disputes that she failed to follow her supervisor's instructions, claiming that she "worked in exact accordance with what was intended by the assignment and within the timeline in which it had to be completed . . . ." She disputes the hearing officer's finding that she was not authorized to create a freeform cube, stating that she did present evidence that her supervisor authorized her to do so. Further, the grievant challenges the hearing officer's findings with respect to missing a deadline, arguing that meeting the deadline would have been impossible due to circumstances beyond her control and asserting that she had discussed the ongoing issues with her supervisor.

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 the behavior described in the September 15, 2016 Written Notice and that the behavior constituted misconduct.[12] The grievant's supervisor testified to the fact that the use of freeform cubes presents a security risk,[13] and pointed out an email instructing the grievant not to create such a cube. Nevertheless, he found the grievant created such a cube on August 17, 2016.[14] The grievant did not deny creating the freeform cube, but testified that there is an understanding that an employee given such an assignment should create a cube.[15] Likewise, the grievant did not deny missing an August 19, 2016 deadline, but testified that the deadline was a "soft deadline" and in the past, her supervisor had extended similar deadlines upon realizing that she was struggling to meet them.[16]

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where, as here, 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. In his hearing decision, the hearing officer found the testimony of the grievant's supervisor credible and held that the grievant

> "was repeatedly instructed to refrain from creating cubes without permission. On August 17, 2016, Grievant created a cube without permission from a supervisor. Grievant was instructed to complete a task by August 19, 2016. She did not complete the task by that deadline and the task was removed from her. It is not clear how much of the task she completed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions.[17]

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[12] Hearing Decision at 4.
[13] Hearing Recording at 1:20:34-1:23:10.
[14] *Id.* at 1:39:15-1:40:36; *see* Agency Exhibit 6.
[15] Hearing Recording at 3:01:47-3:02:16.
[16] *Id.* at 3:11:01-3:13:36.
[17] Hearing Decision at 4.

Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the Group II Written Notice.[18] In support of her position, she argues that the agency has not consistently applied disciplinary action among similarly situated employees. She asserts that that the University's managers, including her supervisor, would regularly extend deadlines for other employees, and other members of her team had not received disciplinary action for missing deadlines.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[19] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer.' Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[20] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[21]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or

[18] *Id.* at 4-5.
[19] Va. Code § 2.2-3005(C)(6).
[20] *Rules for Conducting Grievance Hearings* § VI(A).
[21] *Id.*§ VI(B)(1).

totally unwarranted.[22] EDR will review a hearing officer's mitigation determination for abuse of discretion,[23] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Here, the facts upon which the hearing officer relied support the finding that a Group II Written Notice with suspension was appropriate and did not exceed the limits of reasonableness in this particular circumstance. EDR has thoroughly reviewed the hearing record and sees no indication that the grievant presented evidence as to a similarly situated employee who received no disciplinary action for a similar infraction, as she argued in her request for administrative review.[24] As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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[22] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[23] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[24] The grievant testified that she herself had missed deadlines in the past without receiving a disciplinary action; however, assuming the accuracy of this statement, it does not indicate that the hearing officer erred with respect to his mitigation determination. *See* Hearing Recording at 3:12:47-3:13:36.

[25] *Grievance Procedure Manual* § 7.2(d).

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

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