JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of University of Virginia Medical Center
Ruling Number 2023-5432
August 2, 2022

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11799. For reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11799, as found by the hearing officer, are as follows:[1]

> The University of Virginia Health System employed Grievant as a Radiologic Technologist. She had been employed by the University for approximately 18 years.
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> On November 26, 2018, Grievant received a Step 1 Counseling for being tardy. On March 21, 2019, Grievant received a Step 2 Counseling for unauthorized absence from her assigned work area.
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> Grievant's work schedule was from 7 a.m. until 5:30 p.m. If she reported to work at 7:01 a.m., she was considered tardy. Her primary work location was in B-Building. Grievant could walk from W-Building lobby to B-Building in approximately five to ten minutes.
>
> The Agency used a time and attendance system known as Kronos to track when employees began and ended their shifts. Employees were expected to "clock in" at the Kronos terminal the moment they entered the building where they worked. Employees were not permitted to clock in from a remote location.
>
> Grievant knew she was supposed to clock in on the second floor of B-Building near her work area.

[1] Decision of Hearing Officer, Case No. 11799 ("Hearing Decision"), June 28, 2022, at 2-3.

Grievant would sometimes park her vehicle near K-Building and walk into the W-Building lobby to clock in at the Kronos terminal in the lobby. Grievant did so in order to avoid being tardy.

Grievant clocked in at the Kronos terminal in K-Building on: July 6, 2021, July 20, 2021, July 22, 2021, August 26, 2021, August 27, 2021, August 30, 2021, September 13, 2021, September 16, 2021, September 20, 2021, September 23, 2021, September 30, 2021, October 4, 2021, October 7, 2021, October 11, 2021, October 21, 2021, and October 25, 2021. She clocked in before her scheduled shift and reported to B-Building to work after her shift began.

The University estimated that it took Grievant approximately ten to twenty minutes to park her vehicle, clock in at W-Building lobby and then reach B-building where she worked.

Grievant submitted letters of recommendation showing that she performed her work duties very well. Grievant was not disciplined for the quality of her work.

On December 17, 2021, the University of Virginia Medical Center ("university" or "agency") issued to the grievant a Step 4 Performance Improvement Counseling Form ("Step 4") with removal.[2] The grievant timely grieved the disciplinary action and a hearing was held on June 8, 2022.[3] In a decision dated June 28, 2022, the hearing officer found that the university had "presented sufficient evidence" to support the issuance of the Step 4 with removal.[4] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[5] The grievant now appeals the 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 . . . ."[6] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant asserts that she did not know that her conduct was violating university policy. EDR will review her assertions as disputing the hearing officer's assessment of the evidence and conclusion that she engaged in conduct warranting a Step 4 with removal. The grievant's appeal also identifies a variety of health and personal challenges

[2] Agency Ex. 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.*
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

that the grievant was enduring, as well as 13 letters demonstrating her work, character, and general support from various individuals admitted into the hearing record as evidence.

Hearing Officer's Consideration of Evidence

The grievant asserts that she "was oblivious to the fact that what [she] was doing was a violation of [university] policy." 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] 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 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.

The conduct for which the grievant was disciplined is not in dispute as she admits that she engaged in the behavior. The grievant asserts instead that she did not know her conduct violated university policy. However, the hearing officer found that the grievant "knew she was supposed to clock in … near her work area."[13] EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination. For example, the Attendance Policy Addendum provided: "All clocking transactions are to be done from within your work areas."[14] At the hearing, the grievant's supervisor also testified that the grievant acknowledged she knew where to clock in during a meeting when the grievant was notified of the misconduct.[15] Based on the evidence presented, the hearing officer determined that

> Grievant knew she was not working when she clocked in and knew that it would appear to the University that she was working from the time she clocked in. Grievant represented she was working when she was not actually working. The University has presented sufficient evidence to show that Grievant falsified her time records and pay records.[16]

Taken together, the evidence in the record supports the hearing officer's finding that the grievant's behavior was "deception" and considered "serious misconduct" violating university policy, justifying the issuance of a Step 4 with removal.[17] Weighing the evidence and rendering

[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[12] *Grievance Procedure Manual* § 5.8(2).
[13] Hearing Decision at 2.
[14] Agency Ex. 3C-3.
[15] Hearing Recording at 17:54-18:20; *see also* Agency Ex. 1-1.
[16] Hearing Decision at 4.
[17] *Id.*

factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[18] Accordingly, EDR declines to disturb the hearing decision on these grounds.[19]

Mitigation

The additional points presented by the grievant can best be characterized as asserting that mitigating circumstances warrant a reduction or removal of the disciplinary action. By 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]."[20] 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."[21] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[22]

Because reasonable persons may disagree over whether and 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 high.[23] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[24] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[25] and will reverse the determination only for clear error.

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[18] *See*, *e.g.*, EDR Ruling No. 2020-4976.

[19] The grievant also appears to assert on appeal that others engaged in the same behavior she did and, presumably, did not receive disciplinary action. EDR has reviewed the hearing record and does not find evidence in the record demonstrating that similarly situated employees engaged in the same behavior. Notably, the grievant did not testify as a witness at the hearing.

[20] Va. Code § 2.2-3005(C)(6).

[21] *Rules for Conducting Grievance Hearings* § VI(A).

[22] *Id.* at § VI(B)(1).

[23] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

[24] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[25] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Step 4 Performance Improvement Counseling, termination is an inherently reasonable outcome.[26] Moreover, a hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[27] In the decision, the hearing officer considered the evidence regarding mitigation, finding that no mitigating circumstances existed to reduce the disciplinary action.[28] The hearing officer additionally found that "Grievant's personal challenges may have explained her actions but they did not excuse them."[29] Having reviewed the evidence in the record regarding the grievant's claims, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the Step 4 with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

[26] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

[27] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

[28] Hearing Decision at 4.

[29] *Id.*

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

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

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