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ADMINISTRATIVE REVIEW

In the matter of Norfolk State University
Ruling Number 2023-5572
July 12, 2023

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 11944, which addresses a grievance with Norfolk State University (the "university" or "agency"). For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11944, as found by the hearing officer, are as follows:[1]

> Norfolk State University employed Grievant as a Police Sergeant. He had been employed by the University as a classified employee for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing[.]
>
> Grievant reported to the Supervisor. Several months prior to December 2022, the Supervisor believed he had observed Grievant asleep when Grievant should have been working. When the Supervisor discussed his observation with Grievant, Grievant claimed he was not asleep, but rather was praying. The Supervisor informed Grievant that employees are not allowed to sleep while on duty.
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> Grievant's shift began on December 25, 2022 at 8 p.m. and was scheduled to end at 8 a.m. on December 26, 2022.
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> In the morning of December 26, 2022, Grievant parked his police vehicle in the parking lot of a resident hall. He remained seated in the driver's seat. He left the vehicle's engine running because it was cold outside and he needed to run the vehicle's heater. At approximately 6:30 a.m. on December 26, 2022, Grievant

[1] Decision of Hearing Officer, Case No. 11944 ("Hearing Decision"), June 2, 2023, at 2-3.

> logged into his church's prayer line. Grievant was not on an approved break at that time.
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> At approximately 6:37 a.m., the Supervisor drove his police vehicle into the parking lot of the resident hall and observed Grievant. The Supervisor drove his vehicle next to Grievant's vehicle so that the driver's side of the Supervisor's vehicle was closest to the driver's side of Grievant's vehicle. The two vehicle[s] were a few feet apart. The Supervisor expected Grievant to notice his arrival and then they would begin a conversation. Grievant did not notice the Supervisor's arrival because he was asleep. The Supervisor waited approximately two minutes and watched Grievant with his eyes closed continue to sleep. Because Grievant had previously claimed he was praying when the Supervisor raised the issue of whether Grievant was sleeping at work, the Supervisor decided to video record Grievant. The Supervisor recorded Grievant sleeping for approximately 30 seconds.

On January 31, 2023, the agency issued to the grievant a Group III Written Notice with removal for sleeping during work hours and for unsatisfactory performance of duties.[2] The grievant timely grieved the disciplinary action and a grievance hearing occurred on May 31, 2023.[3] In a decision dated June 2, 2023, the hearing officer determined that the Group III Written Notice with termination should be upheld and that no mitigating circumstances existed to reduce the agency's discipline.[4]

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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.

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[2] Agency Ex. F at 3; *see* Hearing Decision at 1. The hearing decision contains a typographical error in that it lists the issuance date as January 13 instead of January 31. In addition, the hearing officer makes note in his Decision that the agency's Written Notice is "poorly drafted and incorrectly alleges that Grievant was removed because of excessive absences." This is likely referring to the "unsatisfactory performance" offense code, but the primary issue at hand is the "sleeping during work hours" offense, which was correctly cited. Hearing Decision at 1, n.1.
[3] Hearing Decision at 1.
[4] *Id.* at 4.
[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).

In his request for administrative review, the grievant appeals the hearing officer's decision on the basis that the agency's discipline exceeded the limits of reasonableness. The appeal follows with four primary arguments: (1) the supervisor that observed the grievant allegedly sleeping did not have the firsthand knowledge required to prove the alleged conduct; (2) the lack of clarity regarding the Written Notice made it too difficult for the grievant to defend the allegations against him; (3) the grievant had preexisting medical conditions that, coupled with over-the-counter medication, could have caused him to fall asleep; and (4) the grievant was able to immediately respond to his supervisor's radio call. The appeal adds that the reason of medical conditions and medications is a sufficient mitigating factor that the hearing officer should have considered.

Agency's Burden of Proof

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 the grounds in the record for those findings."[9] 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.[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 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.

Regarding the first argument, the hearing officer found that based on the supervisor's testimony and video evidence of the incident, the grievant was sleeping.[12] The grievant is arguing that the supervisor did not have enough of a basis to say that it was "more probable than not" that the grievant was sleeping, because the supervisor never actually approached or interacted with the grievant, nor does he have the knowledge that he claims of being able to tell whether someone is asleep. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Here, the hearing officer considered the testimony of the supervisor, as well as the letter detailing his account of the incident and the grievant's letters in response to the pending discipline.[13] Weighing such evidence is solely within the authority of the hearing officer, absent any abuse of discretion. EDR cannot find any abuse of discretion regarding this issue as evidence in the record supports the hearing officer's

[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.
[12] *See* Hearing Decision at 3.
[13] *See, e.g.,* Agency Exs. A, B, D.

factual determinations. First, the supervisor was directly adjacent to the grievant's car when he recorded the video, in a manner where the supervisor's driver seat was directly next to the grievant's driver seat.[14] This proximity would allow the supervisor to view the grievant's behavior, regardless of whether he got out of his car to approach him directly. Second, the supervisor was relying on personal experience in his determination that the grievant was sleeping. The grievance procedure does not require expert testimony on the matter. The supervisor testified that from his experience, he could tell that the grievant was asleep and not praying – and the hearing officer had the ability to weigh this experience accordingly. For the foregoing reasons, EDR declines to disturb the hearing decision on these grounds.

Agency's Reason for Disciplinary Action

The grievant also argued in his appeal, as well as in the hearing itself, that the agency did not explicitly notate what he was being terminated for in the Written Notice.[15] The grievant seems to be referring to the fact that while the Written Notice only included the offense codes for "sleeping on the job" and "unsatisfactory performance," the agency is also alleging untruthfulness and falsification of records based on inconsistent statements, safety issues, and neglect of duty.[16] The inconsistent statements refer to the inconsistent responses the grievant gave after the incident in question. It appears that when initially confronted by his supervisor, the grievant stated that he might have been sleeping but was not sure, and then confirmed that he was sleeping in his response letter given to his supervisor that same day.[17] However, in his response to his Due Process letter, he neither confirmed nor denied whether he was sleeping or praying, which the agency interpreted as him "contradict[ing] his own admission."[18] Regardless of these inconsistencies, the hearing officer found that the grievant was in fact sleeping on the job.[19] While the grievant's frustration with how the agency notated the discipline is understandable, the record makes clear that the primary reason for the discipline and subsequent termination was for sleeping on the job,[20] and the hearing officer's decision was based on this charge.[21]

The appeal also mentions that the grievant's call log showing his activity on the prayer line was not properly considered by the agency when they were determining the proper discipline. Even if this is accurate, the call log was ultimately admitted into evidence, allowing the hearing officer to weigh it accordingly in his final decision and decide whether the call log was sufficient to refute the agency's discipline. The hearing officer ultimately found this evidence unpersuasive.[22] For the foregoing reasons, EDR finds nothing in the record that sufficiently shows an abuse of discretion by the hearing officer regarding his finding that the primary basis for the discipline was for sleeping on the job, and therefore declines to disturb the hearing decision on those grounds.

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[14] Hearing Decision at 3; *see also* Hearing Recording at 33:00-34:00 (Agency Witness testimony).
[15] Hearing Recording at 2:18:20-2:20:00 (Grievant closing statement).
[16] *Id*. at 1:40-3:40 (Agency opening statement), 1:06:30-1:07:30 (Grievant Witness testimony).
[17] Hearing Recording at 20:10-22:30 (Agency Witness testimony); *see* Agency Ex. B.
[18] *See* Agency Exs. D, E.
[19] Hearing Decision at 2-3.
[20] Agency Ex. F.
[21] Hearing Decision at 3.
[22] *Id.*

It should also be noted that the reasons of safety issues and neglect of duty mentioned by the agency, while not explicitly cited in the Written Notice, bear relevance to the incident in question. This is because, as the agency's testimony reflects, the grievant was the highest-ranking officer on campus working the night shift.[23] For that reason, it was paramount that the grievant remained awake and alert while on duty, as the hearing officer found in his decision,[24] justifying the agency's determination that the misconduct was properly characterized as a Group III. Here, agency testimony shows that the grievant was a high-ranking police officer at the vicinity, and that the area has had a history of safety issues in the past. For those reasons, an officer such as the grievant falling asleep during a night shift could have significant safety consequences, hence the agency's issuance of the Group III Written Notice. Therefore, EDR declines to disturb the hearing decision on these grounds, as well.

Grievant's Medical Conditions, Mitigation

The grievant also argues that the hearing officer failed to consider the fact that the agency knew of the grievant's medical conditions, and that using certain over-the-counter medications could have been the reason for the grievant's inattentiveness, or for his eyes being closed. In particular, the grievant argues that the potential medication side effects should have been considered as a mitigating factor. 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]."[25] 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."[26] 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.[27]

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

[23] Hearing Recording at 26:00-26:30 (Agency Witness testimony).
[24] *See* Hearing Decision at 2-3.
[25] Va. Code § 2.2-3005(C)(6).
[26] *Rules for Conducting Grievance Hearings* § VI(A).
[27] *Id.* § VI(B).

high.[28] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[29] and will reverse the determination only for clear error.

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 Group III Written Notice, termination is an inherently reasonable outcome.[30] 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.'"[31] The hearing officer did not find any existing mitigating circumstances to reduce the agency's disciplinary action in his decision.[32] For there to be mitigation, the hearing officer must have found that issuing a Group III Written Notice with termination for sleeping on the job exceeded the limits of reasonableness. The grievant argues that his medical condition that the agency failed to consider is a mitigating factor. The hearing officer noted in his decision that there is insufficient evidence to suggest that medication caused the grievant to fall asleep.[33] The hearing officer also found that the grievant had not made his supervisor aware that he was taking medication on the shift during which the misconduct arose.[34] Having reviewed the evidence in the record, 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 Group III with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

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[28] 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 F. App'x 868 (Fed. Cir. 2006).

[29] "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 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.").

[30] 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).

[31] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21; *e.g.* EDR Ruling No. 2014-3777.

[32] Hearing Decision at 4.

[33] *Id.*

[34] *Id.*

Grievant's Behavior

Finally, the grievant argues that based on his immediate, attentive response to his supervisor calling his radio, it is "more plausible than not" that he was not asleep. This assertion again relates to the hearing officer's determination of the credibility of the witnesses who testified. The hearing officer has the sole authority to weigh such testimony based on the witnesses' perceived credibility, and issue a decision based on that weight. While the hearing officer does not explicitly discuss the grievant's response to his supervisor's radio call, including such a discussion would not seem to change the hearing officer's decision. The hearing officer relied primarily on the sequence of events between the grievant logging into his prayer line and the supervisor recording his actions that made him appear to be asleep.[35] Whether the grievant immediately responded when the supervisor called him on his radio is a factor in the assessment of the evidence by the hearing officer. However, EDR cannot find that consideration of this evidence so clearly supports the grievant's version of events such that the hearing officer's ultimate findings are not supported by the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Accordingly, EDR has no basis to disturb the hearing officer's factual findings.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is insufficient record evidence to support the grievant's assertions and, accordingly, that EDR has no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.[36] 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.[37] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[38]

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[35] *Id.* at 2-3.
[36] *Grievance Procedure Manual* § 7.2(d).
[37] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[38] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).