

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10923; Ruling
Date: March 21, 2017; Ruling No. 2017-4516; Agency: George Mason University;
Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2017-4516
March 21, 2017

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 10923. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10923, as found by the hearing officer, are as follows:¹

1. On September 29, 2016 Grievant fell asleep during work hours without an excuse or just cause.
2. The Agency called three witnesses who were part of Grievant's painting crew, all of whom were present on the night in question. All three testified and corroborated each other that Grievant fell asleep on the job, that he was not praying, and that he was not complaining of any medical problem.
3. Grievant himself testified that his health was not a factor on the night in question.
4. The Agency's witnesses were credible and the Grievant himself acknowledged that the testimony of at least one of the Agency's witnesses was true and correct.
5. The Agency's actions in finding a Group III offence were justified and supported by the evidence.
6. There was no evidence of mitigating circumstances, medical or otherwise, to excuse Grievant's behavior.

On or about November 7, 2016, the grievant was issued a Group III Written Notice for sleeping during work hours and terminated from employment with the University.² The grievant filed a grievance to challenge the disciplinary action and a hearing was held on January 25, 2017.³ In a decision dated February 14, 2017, the hearing officer concluded that the University had presented sufficient evidence to show that the grievant was asleep at work and upheld the

¹ Decision of Hearing Officer, Case No. 10923 (“Hearing Decision”), February 14, 2017, at 2.

² *Id.* at 1.

³ *See id.*

issuance of the Written Notice and the grievant's termination.⁴ The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁶

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. 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 the grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ 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.

In the hearing decision, the hearing officer assessed the evidence and concluded that the “Grievant was asleep during work hours,” an action which justified the issuance of a Group III Written Notice and termination.¹¹ In support of his position, the grievant argues that he “did not fall asleep” at work, that the hearing officer incorrectly stated that three witnesses testified he was asleep when only two witnesses observed him during the incident, and that the testimony of the University's witnesses was “inconsistent” and indicative of a “malicious conspiracy to have [him] fired.” The grievant further claims he has a disability that “will always be a health and risk factor,” although he does not dispute the hearing officer's statement that “his health was not a factor” in the incident.¹²

⁴ *Id.* at 2-3.

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

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

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Decision at 3.

¹² *Id.* at 2.

Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusion that the grievant was asleep during work hours. For example, one witness testified that he observed the grievant sleeping for at least five minutes, told two other employees, and that one of those employees awakened the grievant after watching him sleep for another seven to eight minutes.¹³ A second witness stated that, after hearing that the grievant was asleep, he observed the grievant sleeping and woke him up.¹⁴ The grievant appears to be correct that a third witness testified he was working during the incident and did not personally see the grievant asleep.¹⁵ However, any error in the hearing decision on this issue had no material impact on the outcome of the case such that remanding the hearing decision is warranted here. Two witnesses testified that they observed the grievant and confirmed that he was sleeping.¹⁶ There is nothing to indicate that the hearing officer's decision was based on anything other than the actual evidence in the record. While the grievant may disagree with the hearing officer's assessment of the evidence, 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. EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the record was sufficient to demonstrate that the grievant engaged in behavior that justified the issuance of the Written Notice in this case.

Likewise, EDR is not persuaded that the hearing officer's assessment of the grievant's disability is inconsistent with the evidence in the record. At the hearing, the hearing officer asked the grievant whether his health was a factor in the incident.¹⁷ The grievant responded that it was not and he was praying.¹⁸ No other evidence was presented that would indicate otherwise. Indeed, two witnesses testified that the grievant did not tell them he was ill or needed to rest on the night of the incident.¹⁹

In summary, 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. While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case 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 hearing decision on the bases raised by the grievant in his request for administrative review.

¹³ Hearing Recording at 47:55-49:29, 56:47-56:56 (testimony of Witness B).

¹⁴ *Id.* at 1:09:42-1:10:05, 1:14:34-1:14:45 (testimony of Witness C).

¹⁵ *Id.* at 33:38-34:12 (testimony of Witness D).

¹⁶ *See supra* notes 13-14 and accompanying text.

¹⁷ Hearing Recording at 1:26:46-1:27:05 (testimony of grievant).

¹⁸ *Id.*

¹⁹ *Id.* at 25:51-26:37 (testimony of Witness D), 53:24-53:44 (testimony of Witness B).

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the University's disciplinary action. Specifically, he argues that the hearing officer did not consider the information about mitigating circumstances contained in his dismissal grievance. The grievant further appears to claim that the hearing officer should have mitigated the discipline because the University improperly delayed its investigation of the incident and the issuance of the Written Notice.

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* provide that “a hearing officer is not a ‘super-personnel officer’” and that “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, 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.²²

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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 the 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 totally unwarranted.²³ EDR will review a hearing officer's mitigation determination for abuse of discretion,²⁴ and will reverse only where the hearing officer clearly erred in applying the *Rules*' “exceeds the limits of reasonableness” standard.

²⁰ Va. Code § 2.2-3005(C)(6).

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

²² *Id.* § VI(B).

²³ 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).

²⁴ “‘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.*

Furthermore, and 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, dismissal is inherently a reasonable outcome.²⁵ It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.²⁶

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the University.²⁷ While a more detailed discussion of mitigating factors presented by the grievant could have been included in the hearing decision, the 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.’”²⁸ Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer’s determination regarding mitigation was in any way unreasonable or not based on the evidence in the record.²⁹ As such, EDR will not disturb the hearing officer’s decision on this basis.

Newly-Discovered Evidence

In his request for administrative review, the grievant appears to assert that additional information about other University employees who were allegedly not disciplined for sleeping at work should be considered newly discovered evidence. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”³⁰ 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.³¹ 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

²⁵ 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).

²⁶ The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has “knowingly and intentionally treat[ed] similarly-situated employees differently.” Parker v. Dep’t of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); see Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

²⁷ Hearing Decision at 2-3.

²⁸ EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

²⁹ See, e.g., EDR Ruling Number 2017-4407; EDR Ruling No. 2015-4096.

³⁰ 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 EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

³¹ See Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

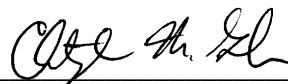
outcome if the case were retried, or is such that would require the judgment to be amended.³²

In this case, the grievant has provided no information to support a contention that this additional information about other University employees should be considered newly discovered evidence under this standard. The grievant has presented nothing to indicate that he was unable to obtain this evidence prior to the hearing. Indeed, much of the grievant's description of the alleged newly discovered evidence appears to be based on his own observations and/or actions in the workplace. The grievant had the ability to offer all relevant evidence and call all necessary witnesses at the hearing. It was the grievant's decision as to what evidence he should present. While the grievant may now realize he could have testified about allegedly inconsistent discipline or called other witnesses, this is not a basis on which EDR may remand the decision. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

The grievant has provided no information to support a contention that any documents or other evidence should be considered newly discovered evidence under this standard. Even assuming the grievant was able to demonstrate that the cited information about the Supervisor could be considered newly discovered under the standard discussed above, there is no basis for EDR to conclude that additional evidence about the Supervisor's conduct in the workplace is material or would result in a new outcome if the case was remanded to the hearing officer. Indeed, it appears from the grievant's description that much, if not all, of the alleged newly discovered evidence is either unrelated to the conduct that prompted the Written Notices, or it occurred after the Written Notices were issued. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

³² *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

³³ *Id.* § 7.2(d).

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

³⁵ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).