Issue: Administrative Review of Hearing Officer's Decision in Case No. 11166; Ruling Date: June 28, 2018; Ruling No. 2018-4734; Agency: Virginia State University; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia State University
Ruling Number 2018-4734
June 28, 2018

Virginia State University (the "agency" or "University") has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11166. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTUAL BACKGROUND

The facts in Case Number 11166, as found by the hearing officer, are incorporated by reference.[1] On December 13, 2017, the grievant was issued a Group III Written Notice with termination.[2] In short, the grievant was disciplined for having obtained another employee's counseling memo (the "personnel document"), which came to light when he presented it to a grievance step-respondent in a prior grievance (the "prior grievance"). The grievant timely grieved the disciplinary action and a hearing was held on April 18, 2018.[3] In a decision dated May 11, 2018, the hearing officer concluded that the agency had not presented sufficient evidence to support the Written Notice and termination.[4] The University now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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, EEDR does not award a decision in favor of either 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 EEDR conduct this administrative review for appropriate application of policy.

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[1] Decision of Hearing Officer, Case No. 11166 ("Hearing Decision"), May 11, 2018, at 2-5.
[2] *Id.* at 1.
[3] *Id.*
[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).

Request for Documents under the Grievance Procedure

The hearing officer's decision indicates that the grievant's attempts to obtain the personnel document was a request under Section 8.2 of the *Grievance Procedure Manual*. However, EEDR is unable to locate the record evidence to support this contention, or at least it is not clearly elucidated in the hearing decision. While Section 8.2 of the *Grievance Procedure Manual* does permit a party to request records from the opposing party, such a request can only be made once a grievance is initiated.[8] While there is evidence in the record to establish when the prior grievance was filed,[9] the hearing decision does not contain factual findings as to when the personnel document was allegedly requested. As such, the case must be remanded to the hearing officer for further findings and determinations on this issue. If the record evidence does not establish that the grievance had already been initiated when the grievant allegedly requested the personnel document, the grievant's actions to obtain the personnel document cannot be considered a request under the grievance procedure, making the language of Section 8.2 inapplicable. To the extent this issue is a defense the grievant is raising to support his actions as protected under a grievance procedure document request, this would appear to be a factual contention on which the grievant carries the burden of proof.

The University also argues that the grievant did not adhere to the grievance statutes or procedure in making the request of an administrative staff member instead of a member of upper management aware of the grievance. Neither the grievance statutes nor the grievance procedure specifically describe to whom a document request must be submitted. Section 8.2 merely discusses receipt of a request by "a party" to the grievance. The *Grievance Procedure Manual* defines the "parties" to a grievance as the "employee who initiates a grievance and his/her employing agency."[10] It is difficult to construe an administrative staff member as someone who would be considered the "employing agency." Typical practice would be for a grievance procedure document request to be presented to a member of management, a step-respondent, or a human resources office, not an administrative staff member. However, the fact that the administrative staff member in question was the actual custodian of the record being sought complicates the analysis in this case.[11]

As the grievant did not testify at hearing, there is very little record evidence that would shed light upon whether his actions were actually intended as a request for the personnel document under the grievance procedure. However, it is important to note that even if the grievant's request for the personnel document was not done in compliance with the grievance procedure, that does not render the grievant's behavior automatically misconduct. With limited exception, neither the grievance procedure nor the *Standards of Conduct* policy describe a failure to follow the requirements of the grievance procedure as something that subjects an employee to disciplinary action.

One exception that the University appears to rely upon is the language in Section 8.2 that provides, "[i]mproper use of documents by a party could result in disciplinary action under the

[8] *Grievance Procedure Manual* § 8.2.
[9] *See* Agency Exhibit 9.
[10] *Grievance Procedure Manual* § 9.
[11] Hearing Decision at 4.

Standards of Conduct."[12] However, this language is preceded by the sentence, "Documents obtained under the grievance procedure are to be used for grievance purposes only."[13] The proper construction of this language means that if a party obtains documents under the grievance procedure, they are to be used for the grievance and no other purpose. None of this language would appear to be applicable in this case. This language does not mean that an employee's failure to adhere to the grievance procedure document request requirements is misconduct. Rather, the language means that if the party uses the documents obtained under the grievance procedure for a non-grievance purpose, then the party could potentially be subject to disciplinary action under the *Standards of Conduct*. Consequently, even if it is presumed that the grievant obtained the personnel document under the grievance procedure, there is no evidence that it was used for any purpose other than a grievance. While there may be other appropriate grounds, as identified in the disciplinary action in this case, as to why the University found the grievant's conduct wrongful, EEDR can find no violation of the provisions of the grievance procedure that would have subjected him to disciplinary action.

In conclusion, EEDR cannot find record evidence that properly supports the hearing officer's findings as to the application of the document request provisions of the grievance procedure. For all of the reasons stated above, these provisions do not appear relevant or applicable to the grievant's behavior in this case. The hearing officer must reconsider his findings in this regard accordingly.[14]

Consideration of Grounds for Discipline

The University contends that the hearing decision did not address the grounds on which the Written Notice was issued. In some respects, the hearing officer did address those grounds in stating that he found no violation of DHRM Policy 1.60.[15] However, that conclusion requires further discussion on remand, especially in light of the other questions that require further review as addressed elsewhere in this ruling. The University states that the Written Notice was issued for 1) misuse or unauthorized use of a state record and 2) abuse of authority for personal gain.[16] On remand, the hearing officer must address these contentions specifically as to whether the record evidence supports finding that the grievant engaged in either of these allegations of misconduct.

[12] *Grievance Procedure Manual* § 8.2.
[13] *Id.*
[14] Nothing in this section is meant to assert an ultimate finding that the grievant's conduct was either permissible or impermissible if the grievance procedure document request provisions are inapplicable. Rather, this finding merely means that the disciplinary action must be assessed by the hearing officer without reference to the grievance procedure document request provisions. For instance, the hearing officer could still assess whether the grievant's behavior was a permissible request under the Virginia Freedom of Information Act (if record evidence supports such a contention), and, even if so, whether the grievant still engaged in misconduct as alleged by the University.
[15] Hearing Decision at 4.
[16] EEDR is presuming this to be the case based upon the two-page due process letter issued to the grievant. *See* Agency Exhibit 4. The Written Notice in this case contains no actual text describing the misconduct, the identification of the level of discipline, or offense code. The Written Notice simply states "see attached," and references an unidentified document. Agency Exhibit 4. EEDR again presumes the referenced letter is the due process notice as it appears to be the most likely document contained in Agency Exhibit 4.

Termination for Unsatisfactory Performance

In its request for review, the University indicates that another basis for the grievant's termination was unsatisfactory performance. Being that the first offense of unsatisfactory performance is typically a Group I violation,[17] and the only active Written Notice in the record is a single Group I,[18] the University's argument is unpersuasive. There is nothing in the *Standards of Conduct* policy that allows an agency to issue a Group III or terminate an employee for unsatisfactory performance based on the evidentiary record that exists in this case.[19] The University appears to cite to the *Standards of Conduct* provision that provides that an employee who has received a disciplinary action that would normally support termination but was mitigated may be terminated if any further misconduct occurs in the future. The problem with this argument is that the grievant never received a Group III Written Notice (prior to the one at issue in this case), or at least no record evidence supports such a contention.

While EEDR has thoroughly reviewed the University's submission and understands its argument, for the reasons described above, the argument that the record supports the grievant's termination based on unsatisfactory performance is not supported. It is possible that the University could have sought to terminate the grievant's employment for unsatisfactory performance if he failed to meet expectations during the required re-evaluation period following his receipt of a "Below Contributor" annual evaluation pursuant to DHRM Policy 1.40, but that course was not taken by the University here. Nevertheless, because the case is being remanded, the hearing officer must also consider and address whether the grievant's conduct regarding the personnel document was unsatisfactory performance under the *Standards of Conduct* policy that might justify disciplinary action at a level other than a Group III.

Mitigation

The University also challenges the hearing officer's "alternative" analysis of mitigating factors. In the decision, the hearing officer states that if the case is remanded, he would find that the Written Notice should be upheld as a Group I due to issues of disparate treatment.[20] Neither the *Grievance Procedure Manual* nor EEDR's *Rules for Conducting Grievance Hearings* ("*Rules*") contemplate the utilization of an alternate decision. Further, there is nothing in the grievance procedure that would make an alternative analysis effective if some other portion of the decision is found to be inconsistent with policy, the grievance procedure, and/or law.[21] Accordingly, unless the issue of mitigation is reached by the hearing officer on remand, the "alternative" analysis of mitigating factors must be removed from the decision. In the interest of

[17] DHRM Policy 1.60, *Standards of Conduct*, Attach. A.
[18] Agency Exhibit 4. The only Group III Written Notice the grievant received is the one that is the subject of the grievance in this case. *Id.*
[19] There could be a basis to issue a Written Notice with termination based on progressive discipline following the accumulation of a sufficient amount of active disciplinary actions or in certain extreme circumstances. *See* DHRM Policy 1.60, *Standards of Conduct*. None of those circumstances exist in this case, however.
[20] Hearing Decision at 5.
[21] EEDR Ruling No. 2018-4588. A notable distinction about the "alternative" analysis is not that the hearing officer used an alternate theory to reach the same conclusion as the primary decision, but rather used an alternate theory to reach a completely different outcome. Nothing in this ruling is meant to discourage a hearing officer from reaching the same conclusion based on multiple theories of analysis.

having a complete review of all questions, EEDR will nevertheless address the issue of mitigation in this ruling.

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 [EEDR]."[22] 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."[23] 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.[24]

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 ("MSPB") 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.[25] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Inconsistent discipline is one of those factors noted by the *Rules* that could support mitigation of a disciplinary action.[27] Analogous MSPB precedent on this type of issue provides that a grievant must show "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated

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[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id.* § VI(B)(1).
[25] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[26] "'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.*
[27] *Rules for Conducting Grievance Hearings* § VI(B)(2).

employees differently . . . ."[28] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[29] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[30] Therefore, in making a determination as to whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

The University argues that the grievant has not presented any evidence to support his burden of raising and establishing mitigating circumstances. While it is true that the grievant presented testimony from no witnesses during his "case in chief," there is evidence in the record related to a disciplinary action at the Group I level issued to the administrative staff member from whom the grievant apparently obtained the personnel document.[31] Although the exact nature of this disciplinary action is unclear, it does appear to have arisen from facts related to this situation.[32] Consequently, the hearing record contains evidence that could be considered by the hearing officer as to the issue of mitigation.

The University's other arguments regarding the hearing officer's mitigation analysis relate to whether the administrative staff member is properly considered a similarly situated comparator employee. The factors cited by the University are those that should normally be considered by a hearing officer in a mitigation analysis, such as, for example, the suggestion by the University that the administrative staff member was a non-supervisory, non-law enforcement employee, unlike the grievant. Thus, should the issue of mitigation be reached by the hearing officer on remand, the hearing officer must reconsider the record evidence of potential inconsistent treatment, or lack thereof, and whether there is a sufficient evidentiary basis to establish inconsistent treatment of similarly situated employees that would support the high burden of mitigation.

The University also presents for argument on appeal the rationale as to why the administrative staff member received a Group I and the reason for the apparent different treatment from the grievant's termination. As identified by the University, however, little, if any, of the evidentiary basis for these arguments exists in the hearing record. The University appears to argue that this evidence was not admitted because it was "beyond the scope of the original grievance and only became pertinent based on conclusions made by the Hearing Officer in his decision." However, it is a very rare case when the issue of inconsistent treatment would not be potentially relevant and properly within the scope of a grievance hearing regarding a disciplinary action. Furthermore, it was the University's counsel herself that elicited testimony at the hearing about the discipline issued to the administrative staff member in her questioning of

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[28] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 (2010). Notably, the MSPB utilizes a "more flexible approach" in determining whether employees are comparators following the 2009 decision by the Court of Appeals for the Federal Circuit in *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009). *Lewis*, 113 M.S.P.R. at 663.
[29] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[30] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[31] Hearing Recording at 2:34:55 – 2:36:10.
[32] *Id.*

the witness.[33] The University's counsel also acknowledged in her discussion with the hearing officer that consistent treatment for similar offenses and the consideration of mitigating circumstances was at issue.[34] The hearing officer attempted to seek testimony from the Deputy Chief related to the basis for the resulting discipline issued to the administrative staff member and difference from the discipline issued to the grievant.[35] However, the Deputy Chief stated he could not answer the questions because he was not the administrative staff member's supervisor.[36] EEDR has reviewed no indication on the record that the University sought to present further testimony from another witness who could provide answers to such questions or to hold the record open following the hearing for such a purpose. Accordingly, relevant evidence on this issue is missing from the record.

In conclusion, the issue of mitigation may not need to be reached depending on the outcome of the hearing officer's remand decision. If it remains an "alternative" analysis, it must be eliminated from the decision as discussed above. If, however, mitigation is reached by the hearing officer on remand, such consideration must be consistent with the above discussion and the parameters of mitigation listed in the *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings*. The hearing officer is reminded that the *Rules* provide that:

> *In making such a determination the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness. A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.*[37]

As a result, to hold that the record supports mitigating the disciplinary action, the hearing officer must make findings specific to this standard.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for reconsideration consistent with this ruling. As directed above, the following matters must be reconsidered:

1) Reconsider and address findings and analysis related to the document request provisions of the grievance procedure;
2) Consider and address the stated grounds for the Written Notice specifically and whether the record evidence supports finding that the grievant engaged in the allegations of misconduct;

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[33] *Id.*
[34] *Id.* at 2:59:35 – 3:00:07.
[35] *Id.* at 3:00:16 – 3:01:00.
[36] *Id.*
[37] *Rules for Conducting Grievance Hearings* § VI(B)(2) (citation omitted).

3) Consider and address whether the grievant's conduct regarding the personnel document was unsatisfactory performance under the *Standards of Conduct* policy that might justify disciplinary action at a level other than a Group III;
4) Either eliminate or, if reached, reconsider and address mitigation analysis as discussed above.

Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).[38] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[39]

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.[40] 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.[41] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[42]

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[38] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[39] *See Grievance Procedure Manual* § 7.2.
[40] *Id.* § 7.2(d).
[41] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[42] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).