Issue: Administrative Review of Hearing Officer's Decision in Case No. 11218, 11236; Ruling Date: September 27, 2018; Ruling No. 2019-4773; Agency: University of Virginia Medical Center; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2019-4773
September 27, 2018

The grievant 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 Numbers 11218/11236. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

On March 15, 2018, the grievant was issued a Step 3 Formal Performance Improvement Counseling Form, with suspension.[1] On May 1, 2018, the grievant was issued a Step 4 Formal Performance Improvement Counseling Form and removed from employment.[2] The grievant timely grieved both actions, and a hearing to address both matters was held on August 1, 2018.[3] On August 21, 2018, the hearing officer issued a decision upholding both disciplinary actions and, accordingly, the grievant's termination from employment.[4] The hearing officer's factual findings are hereby incorporated by reference.[5] The grievant has now requested administrative review of the hearing officer's decision.

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 . . . ."[6] 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 a party; the sole remedy is that the action be correctly taken.[7]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review can be construed as challenging 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

[1] Decision of Hearing Officer, Case Nos. 11218/11236 ("Hearing Decision"), August 21, 2018, at 1.
[2] *Id.*
[3] *Id.*
[4] *Id*. at 1, 7.
[5] *Id.* at 2-5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

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

In this instance, the grievant disputes the hearing officer's findings in several areas, essentially arguing that the agency did not prove by a preponderance of the evidence that the disciplinary actions were warranted and appropriate given the circumstances of his case. He challenges the hearing officer's findings regarding his suctioning techniques as used upon both patients at issue in each of the two disciplinary actions. He asserts that he was never told not to utilize the deep suctioning technique, and claimed that agency witnesses "overstated the possibility of trauma occurring" to the patient following use of deep suctioning.

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 agency's witnesses to be credible and held that, under policy, the grievant "mistreated" both patients, using "treatment [that] was more aggressive than necessary . . . [causing pain] sufficient for neither patient to want to work again with Grievant;" thus, the agency presented sufficient evidence to support its disciplinary actions.[12]

EEDR has reviewed the record, and cannot find that the hearing officer's determination that the agency met its burden of proof to show that both disciplinary actions were proper was without basis in the record. For instance, the agency presented several witnesses, including the grievant's supervisor, who testified to the fact that in both instances, the grievant's techniques violated the agency's code of conduct policy, which requires that patients are treated with respect and courtesy.[13] The grievant's supervisor further testified that there is no clinical indication supporting the use of deep suctioning due to the potential for extreme pain,[14] as did a second agency witness, a respiratory therapist who also testified that deep suctioning can create very painful trauma.[15] While the grievant may disagree, EEDR has repeatedly held that it will not

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 6-7.
[13] Hearing Recording at 02:01:47 – 02:02:41 (testimony of grievant's supervisor).
[14] *Id*. at 1:48:10 1:48:33.
[15] *Id*.at 48:45 – 49:06.

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.[16] Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR 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.

Newly Discovered Evidence

The grievant has also submitted additional information to EEDR, which he requests be considered as part of EEDR's administrative review. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[17] 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.[18] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…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 outcome if the case were retried, or is such that would require the judgment to be amended.[19]

Here, the grievant has provided no information to support a contention that the additional documentation should be considered newly discovered evidence under this standard. It appears the grievant had the ability to obtain this evidence prior to the hearing. As the grievant already had the opportunity at the hearing to submit this evidence in support of his position, there is no basis for EEDR to reopen or remand the hearing for consideration of this additional evidence.

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the disciplinary actions, arguing in his request for administrative review that he presented evidence regarding two other employees who received patient complaints but did not receive disciplinary action. He argues that the agency's decision to discipline him based upon patient complaints was "unequal and unfair."

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 [EEDR]."[20] The *Rules for Conducting Grievance Hearings* ("*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

---

[16] *See, e.g.*, EDR Ruling No. 2012-3186.
[17] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 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).
[18] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989).
[19] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[20] Va. Code § 2.2-3005(C)(6).

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] EEDR 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.

Inconsistent discipline is one of those factors noted by the *Rules* that could support mitigation of a disciplinary action.[25] 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 employees differently . . . ."[26] 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.[27] 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."[28] 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

---

[21] *Rules for Conducting Grievance Hearings* § VI(A).
[22] *Id.* § VI(B)(1).
[23] 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).
[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.*
[25] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[26] *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.
[27] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[28] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

(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.

In this case, the hearing officer found no mitigating circumstances existed to reduce either disciplinary action.[29] While the hearing officer did not specifically address an allegation of inconsistent discipline, based on EEDR's review of the hearing record there was insufficient evidence presented to support mitigation of the disciplinary action under the standard that exists under the grievance procedure. 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.'"[30] Accordingly, EEDR 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. As such, EEDR 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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[29] Hearing Decision at 7.
[30] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).