Issue: Administrative Review of Hearing Officer’s Decision in Case No. 10972; Ruling Date: November 17, 2017; Ruling No. 2018-4639; Agency: University of Virginia; 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
Ruling Number 2018-4639
November 17, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10972. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10972, as found by the hearing officer, are as follows:[1]

> The University of Virginia employed Grievant as an Information Technology Specialist III. Grievant had been employed by the University for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant began reporting to the Supervisor in the fall of 2015.
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> Grievant worked in the Unit's desktop support image now team. Grievant was responsible for purchasing mobile devices. He had autonomy regarding mobile device procurement and distribution. When an employee needed a cell phone or an upgrade to a cell phone, Grievant would initiate the request to obtain a new cell phone by contacting Ms. J who worked with VITA.
>
> Grievant was the primary contact for upgrading and maintaining electronic hardware including computers, mobile devices, peripherals, and servers. He was responsible for keeping an accurate and timely inventory of Unit Strategic Systems and Support equipment.
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> Grievant was in possession of cell phones and MIFI devices owned by the University and previously assigned to Unit employees. He used Unit cell phones and phone lines and MIFI devices. Grievant testified he kept a stock of phones not assigned to any particular person so that if an employee came to him asking for another cell phone, he would be able to take the SIM card from that employee's

[1] Decision of Hearing Officer, Case No. 10972 ("Hearing Decision"), October 12, 2017, at 2-5 (citations omitted).

old phone and put it into the new cell phone. Grievant had physical possession and control over several cell phones and MIFIs.

On March 14, 2016, Grievant walked past Mr. Ro and overheard Mr. Ro say he had a problem with his cell phone. Mr. Ro was referring to his personal cell phone. Grievant asked Mr. Ro if he wanted a cell phone he had. Grievant said he intended to throw away the cell phone. Grievant said the cell phone was Ms. Ca's cell phone. Mr. Ro said he wanted the cell phone and asked if it was ok with Mr. G. Grievant left briefly and then returned and said it was ok. Grievant gave him the cell phone. Grievant transferred Mr. Ro's SIM card into the Unit's phone and gave it back to Mr. Ro. Mr. Ro used the Unit's cell phone as his personal cell phone because he believed Grievant was authorized to give him the cell phone.

On June 10, 2016, the Supervisor sent Grievant an email stating:

> I hope this message finds you well. I have some questions regarding the inventory. In our meeting with [name] the other week, I mentioned that we need an update on the Inventory list for mobile devices. And I also noticed that we don't have the loaner laptops with the appropriate designee. Please be sure to have both of those updated by Monday close of business. Just to give you some feedback: this is the second time I am requesting for the mobile device inventory to be updated. As I wrote you in previous emails, you are responsible for keeping an updated inventory list with accurate information.

On June 24, 2016, the Supervisor sent Grievant an email stating, in part:

> 4) Inventory. On your inventory listing, there is no indication to whom the mobile devices and loaner laptops have been assigned. Your performance keeping an updated and accurate inventory listing has been inconsistent over the past several months. I want to remind you that this was your responsibility.

On July 29, 2016, Grievant drafted a spreadsheet entitled "Departmental Inventory." He listed four iPad2 devices with their serial numbers and locations at the University. He did not list any cell phones or MIFIs.

Grievant left the Unit on July 29, 2016 to take another position with the Second Unit at the University of Virginia. Grievant completed a Knowledge Transfer Template to benefit the Unit he was departing. Grievant was asked, "What equipment was assigned to you for use? Where is the equipment?" Grievant responded, "Laptop, Monitor and Phone, [Location]". The Supervisor went to Grievant's office and verified Grievant had left his laptop, monitor, and office phone. If Grievant had mentioned he possessed several cell phones, the Supervisor would have obtained them from Grievant.

Grievant took two cell phones and two MIFI devices to his new position in the Second Unit. Grievant moved the billing and possession of MIFI 3756 and MIFI 3351 to the Second Unit in August 2016. He took the MIFIs to the Second Unit because if his coworkers went to a trade show, up to 15 employees could use a MIFI to access the internet. PTAO was an internal billing number. Grievant changed the PTAO for these items to the Second Unit. He did not tell any employee working in the Unit that he had cell phones and MIFIs and that he was taking with him to the Second Unit or that he was changing the PTAO.

Phone line 7509 had been assigned to Ms. Ca. When Ms. Ca left the University in January 2016, her cell phone and SIM card were returned to Grievant. Grievant used the phone to call his wife on August 27, 2016, August 29, 2016. Grievant's wife called him on August 29, 2016 and August 30, 2016 using that phone line.

Phone line 9289 had been assigned to Mr. H, until 2009. On October 25, 2016, an employee called that line to confirm whether it was still in use. Grievant answered the call. Grievant stated that he was using the phone line.

Mr. G was a Human Resources Vice President. Mr. G contacted the Supervisor in October 2016 and asked to upgrade his cell phone. This surprised the Supervisor because the Supervisor was not aware that the Unit had any cell phones. The Supervisor asked Mr. D to handle the request. Mr. D contacted Ms. J and they discovered that Mr. G's phone had been upgraded in May 2016. It seemed strange to them that Mr. G would seek another upgrade only a few months later.

The University began an investigation. In October 2016, Unit managers realized that four iphones and two mobile MIFI devices were missing. During the investigation, Unit managers discovered that two additional iphones from 2015 were missing.

IMEI numbers are unique serial numbers given to each iphone. The last three digits of that number are used in this decision. Grievant was involved in the Unit's purchasing of the following iphones:

IMEI Number	Date Upgrade Ordered	Upgraded Item
257	3/7/2016	Iphone 6s 64GB
875	5/13/2016	Iphone 6s plus 128GB
285	5/13/2016	Iphone 6s plus 128GB
418	5/16/2016	Iphone 6s plus 128GB
449	4/27/2016	Iphone 6
249	4/27/2016	Iphone 6

On October 12, 2016, Unit managers learned that the Unit had active cell phone lines assigned to employees as follows:

Last four digits of telephone number	Assigned person
3495	Mr. Ko
0999	Ms. TG
2278	Mr. Ga
7509	Ms. Ca

> The Agency held a predetermination meeting on December 12, 2016. Grievant met with the Supervisor and two other employees. Grievant presented one MIFI device and one cell phone (IMEI 418). Grievant was unable to find the second MIFI. Grievant said he transferred his iphone (IMEI 418) and Unit telephone number 9289 to the Second Unit in August 2016.

On January 17, 2017, the grievant was issued a Group III Written Notice with termination for failure to follow instructions, unauthorized use of state property or records, unauthorized removal of state property, falsifying records, and deceitfulness.[2] The grievant timely grieved the disciplinary action and a hearing was held on June 7, 2017.[3] In a decision dated October 12, 2017, the hearing officer determined that the University had presented sufficient evidence to show that the grievant had engaged in deceptive behavior and upheld the issuance of the Group III Written Notice with termination.[4] The grievant 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]

Inconsistency with State and/or University Policy

In his original request for administrative review, received by EEDR on October 27, 2017, the grievant did not allege that the hearing decision is inconsistent with policy. The University submitted a rebuttal to the grievant's request for administrative review on October 31, 2017. The grievant provided EEDR with a response to the University's rebuttal on November 3, 2017, in which he asserts that the hearing decision is inconsistent with state and/or University policy. The grievant's response to the University's rebuttal was not received by EEDR within fifteen calendar days of the date of the original hearing decision (i.e., within fifteen calendar days of October 12, 2017). The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** the reviewer within 15 calendar days of

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[2] *Id.* at 1.
[3] *Id.*
[4] *See id.* at 1, 5-7. The hearing officer found that, while "[d]eceitfulness is not listed as an offense in the Standards of Conduct," it is "similar to falsification and neglect of duty," and thus was appropriately considered as a Group III offense by the University. *Id.* at 6. The grievant has not challenged the hearing officer's conclusions of policy regarding the level of offense.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in the hands of a delivery service."[7] As the grievant did not provide EEDR with a timely submission raising a claim that the hearing decision was inconsistent with policy, EEDR will not consider the grievant's claims with regard to that issue in this ruling.

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant appears to argue that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence 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"[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 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 the hearing decision, the hearing officer assessed the evidence and determined that the grievant "was in possession of several cell phones and two MIFI devices[,] . . . knew he was obligated to maintain an inventory on mobile devices such as cell phones and MIFIs," but created a departmental inventory that did not list cell phones or MIFIs.[12] The hearing officer further noted that the grievant "completed a Knowledge Transfer Template" without "disclos[ing] any cell phones or MIFI devices" in the document and "transferred at least one cell phone and two MIFIs to the Second Unit," even though he "knew or should have known" that University management "would have wanted to know of his action."[13] In the hearing officer's judgment, this conduct constituted deception that was sufficient to constitute a Group III offense warranting the issuance of the discipline and the grievant's termination.[14] In his request for administrative review, the grievant generally disputes the hearing officer's conclusions and assessment of the evidence. In support of his claims, the grievant has provided a detailed refutation of certain aspects of both the University's evidence and the hearing officer's conclusions.

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[7] *Grievance Procedure Manual* § 7.2(a).
[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] Hearing Decision at 6.
[13] *Id.*
[14] *Id.*

EEDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence were either not material or are simply factual findings on which the grievant disagrees with the hearing officer's conclusions or impact of the findings. For example, the grievant alleges that certain employees' recollection of when their phones were purchased and/or upgraded is inaccurate. However, the hearing officer did not base his decision on issues relating to the purchasing or upgrading of phones; he instead determined that the grievant's actions with regard to the departmental inventory, the Knowledge Transfer Template, and the transfer of devices to the Second Unit were deceptive.[15] As a result, EEDR cannot find that remanding the case to the hearing officer for reconsideration on the specific factual issues alleged by the grievant would have an effect on the ultimate outcome of this case. The hearing officer clearly assessed the evidence presented by the parties and found that the University had met its burden of showing that the grievant engaged in the conduct described in the Written Notice, that his behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. EEDR's review of the hearing record indicates that there is evidence to support those findings.[16]

Though the grievant may disagree with the hearing officer's assessment of this evidence, conclusions as to the credibility of witnesses 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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR 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.[17] Because the hearing officer's findings of facts with regard to these issues are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

Mitigation

In addition, the grievant appears to challenge the hearing officer's decision not to mitigate the University's disciplinary action. Specifically, he seems to assert that the hearing officer did not consider evidence about mitigating circumstances relating to issues of retaliation and workplace harassment about which he testified at the hearing.[18] 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]."[19] The *Rules for Conducting Grievance Hearings* (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

[15] *See id*.
[16] *E.g.*, Agency Exhibit 13; Agency Exhibit 14 at 1-2; Agency Exhibit 17.
[17] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[18] *See* Hearing Recording at 7:03:31-7:06:29 (testimony of grievant).
[19] Va. Code § 2.2-3005(C)(6).

with law and policy."[20] 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.[21]

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.[22] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[23] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. 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.[24] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EEDR also acknowledges that certain circumstances may require this result.[25]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the University.[26] 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

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[20] *Rules for Conducting Grievance Hearings* § VI(A).
[21] *Id.* § VI(B)(1).
[22] 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).
[23] "'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.*
[24] 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).
[25] 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).
[26] Hearing Decision at 6-7.

limits of reasonableness.'"[27] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, 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.

Newly-Discovered Evidence

Finally, the grievant appears to offer additional evidence for EEDR's consideration that is not a part of the hearing record. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[28] 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.[29] 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 outcome if the case were retried, or is such that would require the judgment to be amended.[30]

In this case, the grievant has provided no information to support a contention that the additional information he has offered should be considered newly discovered evidence under this standard. Moreover, even assuming that the grievant could satisfy all of the other elements necessary to support a contention that the evidence in question should be considered newly discovered evidence under this standard, the grievant has provided nothing to demonstrate that the information he has offered would have any impact on the outcome of this case. While it is apparent that the grievant disagrees with the hearing officer's decision, there is evidence in the record to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy, as discussed more fully above. EEDR has reviewed nothing to suggest that the additional evidence offered by grievant would have any have any impact on the hearing officer's findings. Accordingly, there is no basis for EEDR to re-open or remand the hearing for consideration of this additional evidence.[31]

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

[28] *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).

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

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

[31] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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