Issue: Administrative Review of Hearing Officer's Decision in Case No. 11203; Ruling Date: December 20, 2018; Ruling No. 2019-4786; Agency: Virginia Department of Transportation; 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 Virginia Department of Transportation
Ruling Number 2019-4786
December 20, 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 Number 11203. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The facts in Case Number 11203, as found by the hearing officer, are incorporated by reference.[1] On March 9, 2018, the grievant was issued a Group II Written Notice, with termination, for alleged misuse of state equipment,[2] as well as a Group III Written Notice, with termination, for alleged abuse of state time and falsification of a state record.[3] The grievant timely grieved the disciplinary actions and a hearing to address both matters was held on July 2, 2018.[4] In a decision dated September 7, 2018, the hearing officer concluded that the agency presented sufficient evidence to support both disciplinary actions and the accompanying termination from employment.[5] The grievant now appeals the hearing decision to EEDR.[6]

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 . . . ."[7] 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.[8]

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[1] Decision of Hearing Officer, Case No. 11203 ("Hearing Decision"), September 7, 2018, at 2-3.
[2] Agency Exhibit 2.
[3] Agency Exhibit 3.
[4] Hearing Decision at 1. On page two of the hearing decision, the hearing officer misstates the date of the hearing. This appears to have been an inadvertent error. A correction of the date will be made in the final posted version of the decision.
[5] *Id.* at 3.
[6] The ruling in this case was delayed because the hearing officer had not provided EEDR a full copy of the hearing recording for many weeks. EEDR received all portions of the hearing recording on December 12, 2018, whereupon this review was finalized.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

Timeliness

The grievant asserts that the Commonwealth of Virginia failed to afford her a timely hearing and that the hearing officer failed to issue a timely decision in this matter. According to the *Rules for Conducting Grievance Hearings*, "[g]enerally, the hearing should occur within 35 calendar days after the hearing officer is appointed."[9] In this case, the hearing officer was appointed on April 23, 2018, and a prehearing conference was held on May 6, 2018.[10] Initially, the hearing was set for June 21, 2018; however, based upon the unavailability of a material witness, the matter was continued until July 2, 2018, upon which date the hearing occurred.[11]

Although it is preferable that hearings take place within the 35-day timeframe set forth in the *Rules*, such a result is not always possible, especially in instances when several parties' calendars must be coordinated, like this case, when both parties are represented by counsel, and multiple witnesses were requested to appear. Furthermore, while a continuance was granted by the hearing officer, the hearing was delayed only eleven days from the initial date that had been established. Based upon these facts, EEDR does not find noncompliance under the grievance procedure regarding the scheduling of this hearing.

The decision in this matter was issued on September 7, 2018, sixty-eight days after the hearing.[12] Again, while EEDR encourages hearing officers to issue decisions in a more timely fashion, we also recognize that particular cases may be more complicated, requiring more time to complete, or circumstances may arise that impede the issuance of a timely decision.[13] EEDR has reviewed the facts of this case, and we do not find that noncompliance under the grievance procedure has occurred so as to require a rehearing in this instance.

Alleged Bias of Hearing Officer

The grievant further alleges that the hearing officer demonstrated bias in showing "a lack of attentiveness, focus, and interest in this case. . . [and failing to] take his responsibilities as a hearing officer seriously." The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EEDR Policy No. 2.01, Hearing Officer Program Administration.[14]

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[9] *Rules for Conducting Grievance Hearings*. § III(A).
[10] Hearing Decision at 1.
[11] *Id.*
[12] *Id.*
[13] *See, e.g.*, EDR Ruling No. 2008-1747.
[14] *Id.* § II. See also EEDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

The applicable standard regarding EEDR's requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[15] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[16] EEDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[17] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[18] In this particular case, there is no such evidence. EEDR has thoroughly reviewed the hearing record, and finds no indication that any improper bias affected the outcome of the hearing decision. EEDR therefore declines to disturb the decision on this basis.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review challenges the hearing officer's findings of fact in several areas based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing.[19] She argues that the hearing decision was brief and omitted relevant details from testimony, and that that the hearing officer disregarded testimony presented about common practices within the office and "informal conversations" employees have with supervisors. Further, she disputes his conclusions regarding the agency's evidence about her computer use and how she documented time worked. In short, she asserts that the agency did not bear its burden of proof to show that the disciplinary action at issue was warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[20] and to determine the grievance based "on the material issues and grounds in the record for those findings."[21] 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.[22] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a

[15] While not always dispositive for purposes of the grievance procedure, EEDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[16] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[17] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[18] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[19] The grievant also challenges the hearing officer's decision due to a misstatement of the hearing date in one section and the number of witnesses he stated testified by telephone in another section. While the grievant is correct that there was a typographical error, these errors do not appear to have any substantive effect on the hearing officer's findings and therefore will not be addressed further in this ruling.
[20] Va. Code § 2.2-3005.1(C).
[21] *Grievance Procedure Manual* § 5.9.
[22] *Rules for Conducting Grievance Hearings* § VI(B).

preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[23] 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.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. EEDR has thoroughly reviewed the testimony at hearing and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the two March 9, 2018 Written Notices and that her behavior constituted misconduct.[24] For example, the agency's Assistant Director of the Assurance and Compliance Office testified regarding the investigation substantiating that the grievant engaged in state time abuse and state vehicle abuse, and produced data detailing the instances of the grievant's misuse of the state vehicle and falsifying hours worked.[25] The agency produced exhibits detailing several trips taken in the state vehicle to retail stores and private residences, along with the grievant's computer logon/logoff information, which the investigator reviewed alongside timesheets and leave reports submitted by the grievant.[26] In accordance with the data produced, the Assistant Director of the Assurance and Compliance Office explained that there were several days when the grievant left the office for extended periods of time, as well as several days when no computer use occurred at all; however, the grievant reported a full day of regular hours worked.[27] To this, the grievant's manager testified that if the grievant falsely reported hours worked on a federal project, the agency was at risk of losing federal funding.[28] After considering the totality of the evidence, the hearing officer found that the agency's issuance of a Group II Written Notice and a Group III Written Notice was warranted and appropriate.[29]

In her request for administrative review, the grievant challenges the hearing officer's conclusions, arguing that she presented evidence that would show she worked extra hours and her supervisor was aware of changes in her schedule, and that she used the state vehicle in accordance with office practices. However, the grievant's manager testified that it would be impossible for her to work a full eight hours on so many different occasions without ever signing onto her computer.[30] Furthermore, he testified that the grievant should have asked questions of upper level management regarding any policies that she did not understand.[31] 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.

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[23] *Grievance Procedure Manual* § 5.8.
[24] Hearing Decision at 3.
[25] *See* Hearing Recording (testimony of Assistant Director of Assurance and Compliance Office), *see also* Agency Exhibit 15.
[26] Agency Exhibit 15.
[27] *See* Hearing Recording (testimony of Assistant Director of Assurance and Compliance Office),
[28] *See* Hearing Recording (testimony of Area Construction Engineer).
[29] Hearing Decision at 3.
[30] *See* Hearing Recording (testimony of Area Construction Engineer).
[31] *See* Hearing Recording (rebuttal testimony of Area Construction Engineer).

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.

Furthermore, to the extent the hearing officer did not discuss the testimony cited in the grievant's request for administrative review, there is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing. It is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. Mere silence as any specific piece of evidence does not necessarily constitute a basis for remand.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate the disciplinary actions in several areas, asserting that the discipline issued exceeds the limits of reasonableness given all the circumstances of her particular situation. In support of her position, she argues that 1) she was not aware of agency policies regarding reporting of time and use of vehicles prior to receiving disciplinary action, and argues that such policies were not enforced prior to her termination, 2) the agency did not apply discipline to her consistent with that of similarly situated employees, and 3) she had a long tenure of satisfactory performance at VDOT and had never received prior disciplinary action. Each argument will be addressed below.

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]."[32] 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 management that are found to be consistent with law and policy."[33] 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.[34]

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.

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[32] Va. Code § 2.2-3005(C)(6).
[33] *Rules for Conducting Grievance Hearings* § VI(A).
[34] *Id*. § VI(B)(1).

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 that 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.[35] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[36] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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.[37] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, we also acknowledge that certain circumstances may require this result.[38]

Lack of Notice

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings* includes "lack of notice" as an example of mitigating circumstances. Significantly, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically "exceeds the limits of reasonableness." Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all facts and circumstances, including the lack of notice as a mitigating circumstance, to determine whether the imposed discipline "exceeds the limits of reasonableness."

Accordingly, the *Rules'* notice provision is not intended to require or permit a hearing officer to mitigate discipline simply on the basis that an agency had failed to provide the employee with prior notice that a particular offense could result in the specific discipline imposed, or indeed, with prior notice of the *Standards of Conduct* (although the latter would be a good management practice).[39] The *Rules* provision on notice does not require that exact consequences be spelled out in advance; rather, this provision must be read to include an

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[35] *See, e.g.*, EDR Ruling No. 2011-2992.

[36] "'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.*

[37] 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).

[38] The Board views mitigation as potentially appropriate when an agency has knowingly and intentionally treated similarly situated employees differently. *See* Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991); Berkey v. United States Postal Service, 38 M.S.P.R. 55, 59 (1988).

[39] *Cf.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009)(in due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").

objective "reasonableness" standard. This provision is intended to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.

Thus, consistent with the *Rules* provision quoted above, notice of the possible consequences may not even be required if a reasonable, objective employee should have anticipated the severity of the discipline in light of the founded misconduct.[40] In this matter, as outlined above, the record evidence supports the hearing officer's findings that the grievant misused state equipment, abused state time, and falsified time records.[41] EEDR has carefully reviewed the record in this matter, and, even considering the grievant's situation as outlined in her testimony and request for administrative review as one that could reasonably support mitigating the discipline issued, we are unable to find that the hearing officer's decision not to do so was unreasonable in any way. This does not appear to be a case in which the severity of the disciplinary action is so inconsistent with the significance of the misconduct that the lack of notice argument must be substantiated by the record evidence. Further, 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.'"[42] As such, EEDR will not disturb the hearing officer's decision on that basis.

Inconsistent Discipline

The grievant also argues that the agency did not apply disciplinary action to her consistent with other similarly situated employees. Inconsistent discipline is one of those factors noted by the *Rules* that could support mitigation of a disciplinary action.[43] 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 . . . ."[44] 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.[45] 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."[46] 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

[40] *See* EDR Ruling No. 2011-2866.
[41] *See* Hearing Decision at 1, 3.
[42] *See Rules* at VI(B)(1) note 22 citing to Davis v. Dep't of Treasury, 8 M.S.P.R. 317 (1981). *See also* Mings v. Dep't of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(This Court has held that it "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors.")
[43] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[44] *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.
[45] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[46] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

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.

In this instance, the agency presented testimony from an employee within the human resources division that all employees in the grievant's department found to be engaging in falsification of time records received a Group III Written Notice with termination, and all employees in the grievant's department found to be violating policies regarding vehicle use received a Group II Written Notice, just as the grievant did.[47] Essentially, the hearing officer found that the grievant did not submit sufficient evidence to show that she was similarly situated to any other agency employee who may not have received similar disciplinary action. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's failure to mitigate based upon alleged inconsistent discipline was unreasonable or not based on the actual evidence in the record and thus, we will not disturb the decision on this basis.

Length of Service

Finally, to the grievant's argument that her length of service and otherwise satisfactory performance should have been mitigating factors, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[48] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor her otherwise satisfactory work performance are so extraordinary as to justify mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity. 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.[49] 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.[50] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[51]

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[47] *See* Hearing Record, testimony of HR Generalist Senior.
[48] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[49] *Grievance Procedure Manual* § 7.2(d).
[50] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[51] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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