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ADMINISTRATIVE REVIEW

In the matter of James Madison University
Ruling Number 2022-5306
October 8, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11696. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11696, as found by the hearing officer, are as follows:[1]

> James Madison University [the "university"] employed Grievant as an Administrative Specialist/Fiscal Tech. Grievant received an overall rating of Contributor on her 2020 annual performance evaluation. Grievant had prior active disciplinary action. On July 30, 2019, Grievant received a Group I Written Notice for unsatisfactory performance. On July 21, 2020, Grievant received a Group II Written Notice for unsatisfactory performance.
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> University staff issued parking citations to faculty, students, and visitors whose vehicles were improperly parked on campus. Someone who received a citation may appeal the infraction to a University Committee. The Committee consists of faculty, staff, and student volunteers. It met every two or three weeks. A person appealing a citation did not have to pay the citation until the Committee ruled on the appeal and the person was notified of the decision. The University has a database identifying each ticket.
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> Grievant was responsible for identifying those tickets for the Committee to consider. After the Committee ruled on each ticket under appeal, Grievant was supposed to update the University's database to reflect the Committee's decision. She was to "close" the ticket in the database and remove the ticket from the Committee's docket for review. Grievant was to ensure that people receiving

[1] Decision of Hearing Officer, Case No. 11696 ("Hearing Decision"), September 13, 2021, at 2-3.

citations were aware of the Committee's conclusion so that they could pay their tickets.

The Committee met on February 17, 2021. The Committee reviewed 117 citations. Following the meeting, Grievant was notified of the results but failed to update the University's database.

The Committee met again on March 8, 2021. Because Grievant had not updated the database to reflect decisions made during the February 17, 2021 meeting, those citations appeared on the Committee's docket on March 8, 2021. The Committee had to review those decisions for a second time.

Upon learning of the error, Grievant did not notify the Office Operations Manager and the Director of Parking Services that she failed to apply the appeals results.

The University issued citations to approximately eight employees from July 1, 2020 to October 21, 2020 that Grievant verified but did not send to the payroll department to be deducted from the employees' paychecks. After being overdue for 90 days, the citation amounts were supposed to be deducted from the employee's paychecks. As a result of Grievant's omission, the University was unable to collect approximately $840.

The University has a semi-monthly permit deduction reconciliation process. The process begins with a list of employees with current parking permits ("hang tags") with no deductions. The list is to be reviewed to see if there is an error in processing the permit, deduction not keyed, or for what reason the employee has no deduction or no permit. Each payroll period, a payroll employee sends a list of deducted vehicle registration fees to Grievant. Grievant was supposed to save the list to the "N" computer drive of the Parking Services unit.

Grievant was expected to run the vehicle registration process in accordance with Parking Services policy. Payroll Services provided Grievant with a deduction list. Grievant failed to save that list onto the Parking Services shared drive for numerous pay periods.

On April 5, 2021, the university issued to the grievant a Group II Written Notice for unsatisfactory performance.[2] The grievant's employment was terminated based on her accumulation of discipline.[3] The grievant timely grieved the disciplinary action and a hearing was held on August 24, 2021.[4] In a decision dated September 13, 2021, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the charged misconduct and that her behavior was appropriately considered a Group II offense because of the grievant's prior active discipline for unsatisfactory performance.[5] As a result, the hearing

[2] Agency Ex. at 4-10; *see* Hearing Decision at 1.
[3] *Id*; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[4] *See* Hearing Decision at 1.
[5] Hearing Decision at 3-4.

officer upheld the Group II Written Notice and the grievant's termination.[6] The hearing officer further determined that there were no circumstances warranting mitigation of the discipline.[7]

The grievant now appeals the decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[8] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant appears to argue that hearing officer failed to properly consider mitigating factors. In particular, she argues that termination was a "harsh [penalty] for an unintentional mistake" and that she displayed "teamwork, responsibility, knowledge, dependability and willingness to learn and help others" during her 13 years of employment with the university. The grievant also notes that she has "a lot of experience" working with the university and assisting others in performing their job duties. As a result, the grievant contends that her termination was unwarranted.

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[11] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "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."[12] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[13]

Because reasonable persons may disagree over whether and 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

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[6] *Id.* at 3-5.
[7] *Id.* at 4-5.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Va. Code § 2.2-3005(C)(6).
[12] *Rules for Conducting Grievance Hearings* § VI(A).
[13] *Id.* § VI(B).

high.[14] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[15] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[16] and will reverse the determination only for clear error.

Having thoroughly reviewed the hearing record and the grievant's request for administrative review, EDR cannot find that the hearing officer clearly erred in his consideration of potential mitigating circumstances. In this case, the grievant's claim that her length of employment and history of satisfactory work performance should have been considered as mitigating factors is unpersuasive. Though it cannot be said that length of service and prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which they could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[17] 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 that length of employment becomes.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. DHRM Policy 1.60, *Standards of Conduct*, provides that an employee's accumulation of "[a] second active Group II Notice normally should result in termination."[18] Though it is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline, EDR also acknowledges that certain circumstances may require this result.[19] Here, however, the mitigating factors cited by the grievant on administrative review are not so extraordinary that they would clearly justify mitigation of the university's decision to issue a Group II Written Notice for conduct that was determined by the hearing officer to be terminable

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[14] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

[15] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[16] "'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.*

[17] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

[18] DHRM Policy 1.60, *Standards of Conduct*, at 9. 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).

[19] For example, 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).

due to its severity. Moreover, the grievant's assertion that the hearing officer should have mitigated the disciplinary action based on her previous satisfactory performance is belied by the evidence that she received a Group I Written Notice in 2019 and a Group II Written Notice in 2020, both for unsatisfactory work performance.[20]

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.'"[21] Although the grievant disagrees with the hearing officer's analysis of mitigating factors, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the agency's Group II Written Notice with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[22] 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

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[20] Agency Ex. at 23-24.
[21] EDR Ruling No. 2014-3777; *see Rules for Conducting Grievance Hearings* § VI(B)(1) n.21.
[22] *Grievance Procedure Manual* § 7.2(d).
[23] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).