

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9974; Ruling
Date: March 6, 2013; Ruling No. 2013-3541; Agency: University of Virginia;
Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia
Ruling Number 2013-3541
March 6, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9974. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

In Case Number 9974, the grievant challenged a disciplinary action she received in which she was disciplined for:

On 7/26/12, [Grievant] accessed her (minor) daughter's EMR for purposes of court (child support hearing). Her daughter had been seen at [the University] in 2011 (one time visit). She accessed the records while on leave from [the University]. This access was discovered by the Compliance Office in September 2012. This access occurred off-site at [a separate facility] She used their computer to look up the EMR and also printed out the record. This access is a Level 2 violation of Policy No 1.431. During the predetermination meeting on 9/12/12, [Grievant] admitted to this violation but stated she thought she could access a minor child's record. [Grievant] takes annual retraining, last on 7/15/10 and 6/29/11.¹

Prior to hearing, the parties entered into the following stipulation:

The Grievant stipulated that on or about July 26, 2012, she went to an off-site location of the Agency at [the separate facility]. At that location, she accessed the Agency's computer system to obtain medical records for her [minor] daughter. The Grievant stipulated that she now knew that such access was a violation of Agency policy but stated that she did not understand that it was a violation on or about July 26, 2012, when the access occurred.²

¹ Decision of Hearing Officer, Case No. 9974 ("Hearing Decision"), Feb. 1, 2013 at 1.

² *Id.* at 3.

In his decision, the hearing officer assessed the evidence as to whether the grievant knew that obtaining her daughter's medical records in this fashion violated policy. The hearing officer found in the affirmative.³ The hearing officer also assessed the evidence as to whether the grievant was treated differently from other employees for similar offenses. The hearing officer found that there was no such disparate treatment.⁴ Accordingly, the disciplinary action was upheld.⁵ The grievant now appeals the hearing decision to EDR.⁶

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.”⁷ 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 a party; the sole remedy is that the action be correctly taken.⁸

Timeliness of Administrative Review Request

The University asserts that the grievant's request for administrative review was untimely. Appeals to EDR considered under section 7.2 of the *Grievance Procedure Manual* as administrative reviews “must be in writing, and **received by** the reviewer within 15 calendar days of the date of the original hearing decision.”⁹ In this case, the fifteenth calendar day after the issuance of the February 1, 2013 decision was Saturday, February 16, 2013. When the 15th day falls on a weekend or holiday, as was the case here, the parties have until the following business day to timely seek an administrative review.¹⁰ Because the following Monday, February 18th, was a state holiday on which EDR's offices were closed, the grievant had until Tuesday, February 19th to timely submit her request for administrative review. The grievant's request was received on February 19th and is, therefore, timely.

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The grievant has

³ *Id.* at 3 – 4.

⁴ *Id.* at 5.

⁵ *Id.* at 6.

⁶ The grievant has also claimed that the hearing officer and hearings process was unfair and biased. However, the grievant has indicated no way in which any lack of fairness or bias occurred. Consequently, there is no basis on which to consider this claim further.

⁷ Va. Code § 2.2-1202.1(2), (3), and (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ *Grievance Procedure Manual* § 7.2 (emphasis in original).

¹⁰ E.g., EDR Ruling No. 2009-2274; EDR Ruling No. 2003-486; EDR Ruling No. 2002-140.

¹¹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing and the facts he chose to include in the decision. She has pointed to certain facts that she feels support her claims and infers there are others, without identifying them, not referenced by the hearing officer that did as well. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹² and to determine the grievance based "on the material issues and grounds in the record for those findings."¹³ 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.¹⁴ 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.¹⁵ 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Based on a review of the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant knew or should have known accessing her daughter's medical records through her work-related access was prohibited by the University's policy. The hearing decision includes a discussion of evidence regarding training completed by the grievant in which she was asked whether this type of scenario, accessing a family member's medical records, was allowed. The grievant responded correctly in the trainings that such access was prohibited.¹⁶ Consequently, the hearing officer's finding that the grievant knew or should have known her choice to access her daughter's medical records was prohibited by policy is supported by record evidence. Accordingly, with the grievant's admission to accessing the records,¹⁷ the hearing officer's decision to uphold the disciplinary action is well-supported by the record.

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

¹² Va. Code § 2.2-3005.1(C).

¹³ *Grievance Procedure Manual* § 5.9.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *Grievance Procedure Manual* § 5.8.

¹⁶ Hearing Decision at 3 – 4.

¹⁷ Hearing Decision at 3.

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the disciplinary action. 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 [EDR]."¹⁸ 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."¹⁹ 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.²⁰

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 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.²¹ EDR will review a hearing officer's mitigation determination for abuse of discretion,²² and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant argues in her request for administrative review that the hearing officer should have mitigated the disciplinary action because: (1) her actions resulted in no breach of

¹⁸ Va. Code § 2.2-3005(C)(6).

¹⁹ *Rules* § VI(A).

²⁰ *Rules* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).

²¹ *E.g., Id.*

²² "'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.*

privacy; (2) she has been employed for 20 years by the University; and (3) inconsistent discipline, in that a co-worker received a Group I with one year of probation for accessing her husband's records. First, whether there has been a breach of privacy does not appear to be a factor in determining whether an employee has violated the University policy here.²³ As such, we cannot find that the hearing officer has abused his discretion by not mitigating on that basis. Similarly, while it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.²⁴ Although the grievant's longevity of service is commendable, we cannot find that the hearing officer abused his discretion by not mitigating on this basis. Lastly, the hearing officer has already addressed the grievant's argument about the co-worker who received the Group I.²⁵ While reasonable minds might disagree as to whether the situations of the grievant and the co-worker were distinguishable and/or treated consistently, we cannot find that the hearing officer has abused his discretion in finding that this evidence was not sufficient to mitigate the grievant's disciplinary action.

Therefore, based upon a totality of the circumstances, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or an improper application of the "exceeds the limits of reasonableness" standard. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

HIPAA Violation

One of the grievant's arguments is that she was permitted under the Health Insurance Portability and Accountability Act (HIPAA) to access her daughter's records as her daughter's personal representative. In essence, the grievant argues that as her daughter's personal representative, access to her daughter's records is the equivalent of access to her own records. While we do not disagree that HIPAA would grant the grievant access to her daughter's medical records, we cannot find anything that would mandate that the University allow her access to the records through her work-related access. However, we acknowledge that this issue also could be viewed as challenging whether the hearing decision is consistent with law. As such, the grievant may raise an appeal on this issue, and any other issue of law presumably, to the appropriate Circuit Court.²⁶

²³ University Ex. 1, Tab 1 (University Policy 1.431).

²⁴ See EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518. 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.

²⁵ Hearing Decision at 5.

²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹



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²⁷ *Grievance Procedure Manual* § 7.2(d).

²⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).