Issue: Administrative Review of Hearing Officer's Decision in Case No. 10230; Ruling Date: March 10, 2014; Ruling No. 2014-3820; Agency: Virginia Commonwealth University; Outcome: Hearing Decision in Compliance.

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

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2014-3820
March 10, 2014

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 10230. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10230, as found by the hearing officer, are as follows:[1]

> Virginia Commonwealth University employs Grievant as a Business Services Administrator. The purpose of his position is:
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> > Provide fiscal and administrative support for Physical Plant to include but not limited to Support Shops, Zones, Grounds, Utilities, Sustainability, Steam Plant, and Administrative staff. Provide administrative and fiscal support to the Administrative Supervisor. Provide fiscal, administrative, and computer training to all PPD Departments. Create and maintain codified financial and administrative work processes to ensure efficiency of operations. Review all PPD billing to ensure proper charges and payments are made.
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> Students were scheduled to move into their dorms during the weekend of August 16, 2013. Grievant and several other employees were expected to complete their normal work duties at their offices and then perform additional duties at dorms on campus. Grievant was to serve as a point of contact as students moved into their rooms. If a student discovered a problem with his or her room such as it not having been cleaned or having broken light bulbs, etc., the student was to notify Grievant and Grievant would coordinate resolution of the problem.
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> The Supervisor instructed Grievant to work overtime at Hall J. Grievant was instructed to work on Friday August 16, 2013 from 6 p.m. until 8 p.m. He

[1] Decision of Hearing Officer, Case No. 10230 ("Hearing Decision"), February 3, 2014, at 2-3 (citations omitted).

was instructed to work on Saturday August 17, 2013 from 8 a.m. to 6:30 p.m. or 7:30 p.m. He was instructed to work on Sunday August 18, 2013 from 6 a.m. until approximately 6 p.m.

On Sunday August 11, 2013, Grievant sent the Supervisor an email stating:

> I will not be able to work Friday evening, Sunday and potentially Saturday this week. If I am able to work Saturday, it will be from 8-4:30. If you need further clarification about this, please let me know.

The Supervisor read the email on Monday August 12, 2013. She met with Grievant on Tuesday August 13, 2013 and told him that the overtime was mandatory for her subordinates including Grievant.

On August 14, 2013, Grievant sent the Supervisor an email stating, in part:

> Secondly, you informed me that this weekend's overtime is mandatory. I will not be staying late nor coming in this weekend because of a family situation that precludes the move-ins.

Grievant reported to work on Friday August 16, 2013 and worked his regular shift until 4:30 p.m. Grievant did not report to Hall J at 6 p.m. that day to perform his additional work duties.

On Saturday August 17, 2013, Grievant did not report to work at Hall J as scheduled. On Sunday August 18, 2013, Grievant did not report to work at Hall J as scheduled.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow a supervisor's instructions, finding in the affirmative, and upheld the agency's issuance of a Group II Written Notice.[2] The grievant now appeals the hearing 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."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[2] *Id*. at 3-5. The offense codes on the Written Notice indicate that the charged conduct was "[f]ailure to report to work without notice" and "[f]ailure to follow instructions and/or policy." *See* Grievant's Exhibit 1 at 3-4. While the hearing decision does not explicitly address whether the grievant failed to report to work without notice, failure to follow a supervisor's instructions is sufficient, by itself, to warrant the issuance of a Group II Written Notice. *See* DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

[3] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[4]

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and/or agency policy, and specifically that his conduct was not "either serious or repeated" and that, as a result, the issuance of a Group II Written Notice instead of some lesser disciplinary action was unwarranted. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy, including whether the University's issuance of the Written Notice was consistent with DHRM Policy 1.60, *Standards of Conduct*.[5] The grievant has 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 argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Specifically, he claims that: (1) there is no evidence to show that he refused to work overtime; (2) the hearing officer did not consider that the grievant "provided a work weeks' notice of being unable to work overtime," that the work to be performed was not a part of his ordinary job duties, or that the University did not allow him to find someone to work in his place; and (3) the hearing decision does not mention that the grievant worked overtime in the past.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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.[8] 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.[9] 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.

In this case, the hearing officer concluded that "[t]he evidence showed that [the grievant] refused to work overtime."[10] While the grievant may disagree with this statement, the hearing

[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] Hearing Decision at 4.

officer's characterization of the grievant's response to his supervisor's request is supported by the evidence in the record. On August 14, 2013, two days before the scheduled overtime hours were to be worked, the grievant emailed the following to his supervisor: "I will not be staying late nor coming in this weekend because of a family situation that precludes the move-ins."[11] It was not unreasonable for the hearing officer to determine this statement constituted a refusal to work overtime.

More importantly, however, it is not clear that the characterization of this email as a "refusal" had any effect on the hearing officer's decision in this case. The conduct at issue was not the grievant's refusal to work overtime, but rather his failure to follow his supervisor's instructions by not reporting to work as directed on August 16 through August 18.[12] The hearing officer's conclusion that the grievant failed to follow his supervisor's instruction is supported by the evidence in the record,[13] and the grievant does not appear to argue otherwise. Determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. 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. 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.

The grievant's claims that the hearing officer did not consider or mention that he "provided a work weeks' notice of being unable to work overtime," that the work to be performed was outside of his normal job duties, that the University did not allow him to find someone to work in his place, and that the grievant previously volunteered to work overtime are similarly unpersuasive.[14] While the grievant correctly notes that these issues are not discussed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness or refer to each exhibit. In addition, there is nothing in the record to suggest that the hearing officer failed to consider the grievant's arguments on these points; rather, it seems likely that he merely concluded the grievant's evidence on these points was not relevant and/or persuasive because it was within the University's discretion to order the grievant to work overtime.[15] We do not find that the hearing officer abused hisdiscretion by not including a discussion of these points in his decision and, therefore, decline to disturb the decision on this basis.

[11] Grievant's Exhibit 1 at 36.
[12] *See* Agency Exhibit 1 at 1.
[13] Hearing Recording at 10:34-10:50, 13:00-13:05.
[14] There is evidence to show that the grievant provided advance notice of his inability to work overtime, that the work to be performed was not a part of his ordinary job duties, and that he had previously volunteered to work overtime. *See* Hearing Recording at 9:36-9:47, 22:04-22:14, 22:40-23:11. However, EDR has been unable to identify any evidence in the record to suggest that the grievant offered or attempted to substitute another employee in his place for the overtime hours he was scheduled to work on August 16 through August 18.
[15] *See* Agency Exhibit 5 at 4 ("Employees are expected to work overtime hours as required by their supervisor or manager.").

Mitigation

The grievant also argues that the Group II Written Notice should have been mitigated because his previous work performance was satisfactory. 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]."[16] 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 with law and policy."[17] 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.[18]

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.[19] EDR will review a hearing officer's mitigation determination for abuse of discretion,[20] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's claim that his otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot be said that prior satisfactory work performance 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.[21] The weight of an

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[16] Va. Code § 2.2-3005(C)(6).
[17] *Rules for Conducting Grievance Hearings* § VI(A).
[18] *Id.* § VI(B)(1).
[19] 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).
[20] "'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.*
[21] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

employee's past satisfactory 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 otherwise satisfactory performance becomes. In this case, the grievant's prior satisfactory performance is not so extraordinary that it would clearly justify mitigation of the agency's decision to issue a Group II Written Notice for conduct that was determined by the hearing officer to support the issuance of such a disciplinary action. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

Alleged Improper Conduct of Hearing

The grievant also appears to claim that the hearing was not conducted in a fair and impartial manner. The grievant states that (1) he "was not given an adequate opportunity to present [his] case in response to the agency's evidence" and "was not afforded the opportunity to introduce [his] exhibits"; (2) the agency advocate and representative "were convened in the conference room" with the hearing officer before the hearing while the grievant "was made to wait outside"; and (3) the "hearing officer's recording equipment was not functioning properly" and he decided to use the agency's recording equipment instead.

There is nothing in the record to suggest that the grievant was denied an opportunity to present evidence on his behalf. A review of the hearing recording indicates that the hearing officer explained the procedural process of the hearing to the grievant, specifically noting that the grievant could call witnesses to testify on his behalf and introduce exhibits to be considered.[22] The grievant chose not to call any witnesses.[23] His exhibits were introduced into evidence and are a part of the hearing record.[24] In fact, the hearing decision cites to the exhibits presented by the grievant in the hearing decision.[25] It is clear, therefore, that the hearing officer accepted, reviewed, and considered the grievant's exhibits in rendering his decision. Similarly, it was the grievant's decision not to call witnesses to testify on his behalf. While he may now realize that choice was unwise, it is not a basis on which EDR may remand the decision.[26] Accordingly, we will not disturb the hearing decision on this basis.

With respect to the grievant's claim that the University's advocate and/or representative may have engaged in improper communication with the hearing officer, the *Rules* states that "[h]earing officers should bear in mind . . . that . . . an *ex parte* conversation . . . can be perceived as partiality, no matter how necessary and proper such communication may have been."[27] If the hearing officer had dismissed the grievant to have an ex parte conversation with the University's advocate and/or representative, that would be highly inappropriate. Simply because the hearing officer engaged in conversation with one or both of them in advance of the hearing, however, does not indicate that anything improper occurred. The grievant has not identified any statements

[22] Hearing Recording at 28:08-29:37.
[23] *Id*. at 29:38-29:42.
[24] *See id.* at 29:43-31:15.
[25] *See* Hearing Decision at 2-3 nn. 1-3.
[26] EDR may only remand a decision where the grievant has shown that the hearing officer has failed to comply with the grievance procedure. *See Grievance Procedure Manual* § 6.4(3).
[27] *Rules for Conducting Grievance Hearings* § III(D).

in the record or presented any new information that would indicate the hearing officer has acted improperly. Further, there is no indication from the record evidence and resulting hearing decision that any improper influence or conversations affected the outcome. EDR declines to disturb the decision on this basis.

The *Rules* and the grievance statutes further require that the hearing "must be recorded verbatim to create a record should there be an administrative or judicial review of the hearing decision."[28] It is the responsibility of the hearing officer to record the hearing, and he or she must "test the recording equipment to ensure that a clearly audible recording is produced" before commencing the hearing.[29] In this case, it seems that the hearing officer's personal recording equipment was not functioning properly on the day of the hearing. The hearing officer explained, on the record, that the University offered the use of its recording equipment when the problem was discovered.[30] The grievant has not identified any evidence in the record or other new information to show that the hearing officer's conduct with regard to recording the hearing was somehow improper. For example, there is nothing to suggest that the recording may have been compromised in some way such that it is inaccurate or otherwise defective. Rather, it appears that the hearing officer chose to use the University's recording equipment because his own was malfunctioning. EDR will not disturb the decision on this basis.

Timeliness of Hearing Decision

Finally, the grievant asserts that the hearing decision was not issued promptly after the hearing. Specifically, he states that "most hearing decisions" involving the University "have been delivered within a week," while the decision in his case was not issued until almost one month after the hearing date. The *Rules* state that the hearing officer's "written decision shall be issued as promptly as reasonably possible after the close of the evidentiary record."[31] There is no indication that the amount of time between the hearing and the issuance of the hearing decision in this case was so great that the decision itself does not comply with the grievance procedure. Likewise, there is nothing to suggest that any delay was the result of bias on the hearing officer's part or was caused by any improper influence from the University. While a period of almost thirty days may seem overly long to the grievant, the facts of each case are unique and the time necessary to evaluate the evidence and reach a decision will, of necessity, vary somewhat from case to case. It does not appear that any delay in the issuance of the hearing decision here was the cause of material prejudice to a party or was the result of bias on the part of the hearing officer.[32] Accordingly, EDR declines to disturb the decision on this basis.

[28] *Id.* § IV(B); *see* Va. Code § 2.2-3005(C)(5).
[29] *Rules for Conducting Grievance Hearings* § IV(B).
[30] Hearing Recording at 1:12-1:26.
[31] *Rules for Conducting Grievance Hearings* § V(C).
[32] As a practical matter, there would seem to be little or no effectual relief offered by remanding a case for further consideration based solely on a delay in the issuance of the hearing decision itself. On administrative review, EDR evaluates the question of whether the content of the hearing decision complies with the grievance procedure. It is unclear how remanding a case to the hearing officer would result in the correction of an issue with the timeliness of decision itself.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[33] Within thirty 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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