Issue: Administrative Review of Hearing Officer's Decision in Case No. 10303; Ruling Date: May 14, 2014; Ruling No. 2014-3877; Agency: Virginia Polytechnic Institute and State University; Outcome: Remanded for clarification.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2014-3877
May 14, 2014

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10303. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The grievant is employed by Virginia Polytechnic Institute and State University (the "University") as a Laboratory Specialist, Senior.[1] On October 17, 2013, the grievant was issued a Group II Written Notice of disciplinary action for failing to follow instructions and/or policy in regard to a training session held on September 20, 2013, his preparation and use of amino acid solutions, and his alleged tardiness.[2] The grievant timely grieved the disciplinary action.[3] A hearing was subsequently held on April 9, 2014.[4] On April 15, 2014, the hearing officer issued a decision upholding the disciplinary action on the sole basis that the grievant had failed to attend the September 2013 training.[5] The grievant has now requested administrative review of the hearing officer's decision.

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."[6] 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.[7]

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[1] Decision of Hearing Officer, Case No. 10303 ("Hearing Decision"), April 15, 2014, at 2.
[2] Agency Exhibit 1.
[3] Hearing Decision at 1.
[4] *Id.*
[5] *Id*. at 1, 3-4. The hearing officer rejected the University's argument that the other conduct cited on the Written Notice and/or record evidence thereof was sufficient to support disciplinary action. *Id.* at 3-4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Findings of Fact

The grievant asserts that the hearing officer erred in finding a sufficient factual basis to support the Group II Written Notice. In particular, the grievant argues that the hearing officer lacked a basis to find that he had been given an instruction by his supervisor to attend "mandatory training scheduled for September 20, 2013" and that he "failed to attend the training without justification."[8]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and grounds in the record for those findings."[10] 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.[11] 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.[12] 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 found that the University had scheduled "mandatory training for Grievant and of [sic] several other employees on September 20, 2013," and that the grievant "was sent four or five emails reminding him of the training and his obligation to attend."[13] From a review of the hearing record, however, it is not clear how the hearing officer reached these conclusions. The first notice provided to the grievant of the meeting appears to have been a September 12, 2013 email sent from the Graduate and Communications Coordinator at 11:58 am.[14] That notice, which was directed to all wage and salaried regular staff, stated:

> Please mark your calendar for Friday, September 20th from 12:00 pm until 2:00 pm for the Fall Staff Luncheon hosted by [Department Head] followed by the new university required Civil Rights Training workshop. The luncheon and meeting will both be held in [location]. Please complete the RSVP survey below regarding your participation by no later than Monday September 16th.[15]

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[8] Hearing Decision at 3.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 2.
[14] Agency Exhibit 3 at 4.
[15] *Id.*

A link to an online RSVP survey followed this text. Approximately 30 minutes later, the Department Head sent an email clarifying the purpose and agenda for the meeting. This email provided, in relevant part:

> All faculty and staff will be required to demonstrate participation in civil rights training this year. It can be accomplished on-line but there are numerous lengthy modules and non-trivial quizzes associated with going the on-line route.
>
> To facilitate quicker compliance and avoid quizzes, I have arranged to have the compliance training offered for our…staff on Friday, September 20th at [location]. (Faculty will do the same in one of our upcoming faculty meetings.)
>
> . . .
>
> Thanks in advance for your participation.[16]

Other than these initial two emails advising staff of the meeting and the means by which they should respond regarding their attendance, the University has only produced one subsequent email.[17] That email was sent by the Graduate and Communications Coordinator on September 16, 2013, and forwarded the Coordinator's first message with the words "Reminder this is the last day to sign up."[18]

While this evidence supports a conclusion that the University mandated some type of civil rights training during the year, it is less clear that the language of the three emails conveyed a mandatory instruction to the grievant. The email sent by the Department Head states that the training may also be accomplished on-line, but that she has scheduled a training to "facilitate quicker compliance and avoid quizzes."[19] Although the language of the email indicates that she considers the meeting to be a preferable means of training, at no point does the text of the email advise staff that the September 20, 2013 meeting is mandatory.[20] Further, the two emails from the Graduate and Communications Coordinator arguably suggest, through the use of an RSVP process, that employees could decline the invitation to the training and meeting.[21] Given this record evidence, additional clarification is needed of the hearing officer's conclusion that the grievant failed to attend mandatory training.

The hearing officer's conclusion that the grievant received "four or five emails reminding him of the training and his obligation to attend"[22] similarly warrants additional clarification. Although the University has offered various characterizations of the number of reminders sent to

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[16] *Id.* at 2.
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.* at 2.
[20] *Id.*
[21] *Id.* at 3-4.
[22] Hearing Decision at 2.

the grievant,[23] the Written Notice and the documentation entered into evidence by the agency support only three communications regarding the September 20, 2013 training: the two September 12, 2013 emails initially advising the grievant of the training and the means by which he could RSVP, and one follow-up email from the Graduate and Communications Coordinator on September 16, 2013.[24]

Finally, the grievant asserts, in effect, that he was given conflicting instructions regarding September 20, 2013, and that the hearing officer erred in not considering this argument. In his decision, the hearing officer found that the grievant had forgotten the training and instead performed his regular work in the lab.[25] While the grievant's communication to the Department Head about the training suggested that he had forgotten to attend,[26] evidence at hearing also suggested that the individual directing his work on that day had not been advised by the Department of the September 20, 2013 training or that the grievant's attendance was required; that the grievant was scheduled to perform one or more experiments on the day of the training; that he may have been unfamiliar with the experiment(s) in question; and that some experiments could last for a full day.[27] As these circumstances could arguably provide a justification for the grievant's failure to attend the training, clarification by the hearing officer of his findings is warranted on this basis as well.

The hearing decision is therefore remanded to the hearing officer for further consideration consistent with this ruling. In his decision on remand, the hearing officer should provide clarification and explanation of his conclusion that the grievant failed to attend a mandatory training event on September 20, 2013; that his failure to attend the training was without justification; and that his actions warranted a Group II Written Notice for failure to follow policy and/or instructions. However, the determination of whether the hearing officer has correctly applied policy will ultimately be a matter within the sole authority of DHRM.

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review also appears to challenge the hearing officer's application of state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy, and the grievant has requested such a review.[28] However, because this decision is being

[23] For example, the October 17, 2013 Written Notice issued to the grievant identifies a total of three emails: two emails sent on September 12, 2013 and one sent on September 16, 2013 (although the text of the Written Notice includes a statement that the grievant should not have required "a 5th reminder to attend"). Agency Exhibit 1. In contrast, the October 16, 2013 due process notice states that the grievant had received four email reminders, but only the three emails identified in the Written Notice appear to have been appended to the due process notice. Agency Exhibit 3. The Department Head testified at hearing that she "believes" that there had been five reminders, but stated in her email to the grievant of September 20, 2013 that she "guess[ed] there were at least 3 or 4 reminders." *See* Agency Exhibit 9; Hearing Recording at 15:50-16:00.
[24] Agency Exhibits 1, 3.
[25] Hearing Decision at 3.
[26] *See* Agency Exhibit 9 at 1; *see also* Hearing Decision at 3.
[27] *See*, *e.g.*, Hearing Recording at 20:43-20:53; 1:00:30 – 1:01:51; Agency Exhibit 6 at 3-4; Agency Exhibit 7 at 3.
[28] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

remanded to the hearing officer for further consideration of the factual basis for the Group II Written Notice, it makes sense to await a remand decision from the hearing officer before any additional administrative review decisions are issued. Thus, to the extent either party wishes to raise concerns regarding the hearing officer's application of policy in the remand decision, the parties will have **15 calendar days** from the date of the remand decision to raise these issues to DHRM. Any such future review by DHRM will also have at issue any policy matters already raised by the grievant as to the original hearing decision if still applicable following the remand decision.

Failure to Mitigate

The grievant also challenges the hearing officer's failure 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]."[29] 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."[30] 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.[31]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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 difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[32] EDR will review a hearing officer's mitigation determination for abuse of

[29] Va. Code § 2.2-3005(C)(6).
[30] *Rules* § VI(A).
[31] *Id.* at § VI(B)(1) (citations omitted).
[32] 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).

discretion,[33] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Here, the grievant asserts that other employees who failed to attend the September 20, 2013 training were not disciplined. While inconsistent treatment may, in some cases, be a basis for mitigation, the grievant bears that burden of establishing that such treatment occurred. In this case, the grievant has not presented sufficient evidence to prove this assertion. Accordingly, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION

For the foregoing reasons, EDR remands the decision to the hearing officer for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision). Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[34]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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