Issue: Administrative Review of Hearing Officer's Decision in Case No. 10466; Ruling Date: January 26, 2015; Ruling No. 2015-4079; Agency: University of Virginia Medical Center; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2015-4079
January 26, 2015

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 10466. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as an imaging technician chief by the University of Virginia Medical Center (the "University").[1] On August 26, 2014, the grievant received two Formal Performance Improvement Counseling Forms with termination for engaging in "repeated instances of research misconduct over a period of years, resulting in a potentially severe impact on business operations."[2] The grievant timely grieved the disciplinary action[3] and on December 9, 2014, a hearing was conducted.[4] In his hearing decision, issued December 23, 2014, the hearing officer upheld the disciplinary action.[5] The grievant has now requested an administrative review.

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 a party; the sole remedy is that the action be correctly taken.[7]

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[1] *See* University Exhibit 2 at 1.
[2] *Id.* at 1-2; University Exhibit 23.
[3] University Exhibit 1.
[4] *See* Decision of Hearing Officer, Case No. 10466 ("Hearing Decision"), December 23, 2014, at 1.
[5] *Id.* at 1, 12.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review arguably asserts that the hearing officer's decision is inconsistent with state and University policy. In particular, the grievant appears to argue that his conduct did not warrant termination under policy, especially in the absence of previous progressive discipline. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] If he has not already done so, the grievant may raise these issues in a request for administrative review to the Director of DHRM, by fax, e-mail, or mail at 101 North 14th Street, 12th Floor, Richmond, VA 23219. Such a request must be **received within 15 calendar days of the date of this ruling.**

Alleged Bias of Hearing Officer

The grievant alleges, in effect, that the hearing officer demonstrated bias against the grievant by spending a brief period in a restroom with the University's representative. The *Rules for Conducting Grievance Hearings* (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 EDR Policy No. 2.01, Hearing Officer Program Administration.[9]

The grievant has not identified any applicable rules or requirements to support his position that the hearing officer demonstrated bias against him, nor are we aware of any. As to the EDR requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," the applicable standard is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[10] 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.'"[11] EDR 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.[12] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[13]

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[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] *Rules for Conducting Grievance Hearings* § II. See also EDR 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."
[10] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[11] 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.").
[12] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[13] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

In this particular case, there is no such evidence of bias or prejudice. The mere fact that a hearing officer had a brief opportunity to engage in an *ex parte* communication regarding the case does not mean that such a communication in fact occurred. Further, even had such a communication occurred, that would not in and of itself demonstrate bias or prejudice.[14] There is no indication from the record evidence and resulting hearing decision that any improper influence or conversations affected the outcome of the hearing decision. EDR therefore declines to disturb the decision on this basis.

Due Process

The grievant also argues that the University failed to provide him with due process under the grievance procedure. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[15] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[16] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the *Rules*. Further, as discussed above, we note that the grievant may request an administrative review by the DHRM Director. That review may determine whether the University's actions violated DHRM Policy 1.60, *Standards of Conduct*, which contains a section expressly entitled "Due Process."[17]

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[18] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct her behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[19] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence;

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[14] EDR Ruling No. 2014-3820.

[15] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that notice prior to a hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency and held as an actual revocation hearing).

[16] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[17] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

[18] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E. Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[19] *Loudermill*, 470 U.S. at 545-46.

and an opportunity for the presence of counsel.[20] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[21]

In this case, the grievant appears to assert that the University failed to advise him of the charges against him prior to the termination meeting. A review of the evidence presented at hearing, however, indicates that the University held a pre-determination meeting with the grievant on July 25, 2014 prior to his termination on August 26, 2014, and that the grievant had the opportunity to address the University's concerns about his performance at this meeting.[22] Further, the grievant does not argue that he lacked notice of the charges against him at the time of hearing, and the grievant received adequate post-disciplinary due process through the grievance process and hearing. Under these circumstances, there is no basis to disturb the hearing decision.[23]

Findings of Fact

The grievant's request for administrative review also challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[24] and to determine the grievance based "on the material issues and grounds in the record for those findings."[25] 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.[26] 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.[27] 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, there is sufficient evidence to support the hearing officer's conclusions that, in violation of applicable procedures and expectations, the grievant

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[20] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).
[21] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).
[22] University Exhibit 2 at 1-2; University Exhibit 21; University Exhbit 23 at 2.
[23] *See* Va. Dep'tof Alcoholic Beverage Control v. Tyson, 63 Va. App. 417, 427 n.5; 758 S.E.2d 89, 94 n.5 (Va. App. 2014).
[24] Va. Code § 2.2-3005.1(C).
[25] *Grievance Procedure Manual* § 5.9.
[26] *Rules for Conducting Grievance Hearings* § VI(B).
[27] *Grievance Procedure Manual* § 5.8.

used an "unapproved consent form," failed to re-consent participants, and failed "to maintain complete and accurate records . . . ."[28] Determinations of credibility as to disputed facts 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.

Mitigation

The grievant also appears to challenge 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]."[29] The *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 if the hearing officer 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 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

[28] Hearing Decision at 10; *see* University Exhibits 2-9, 20 at 1-5, 21, 23-24, and 26.
[29] Va. Code § 2.2-3005(C)(6).
[30] *Rules for Conducting Grievance Hearings* § VI(A).
[31] *Id.* § VI(B)(1).

totally unwarranted.[32] EDR will review a hearing officer's mitigation determination for abuse of discretion,[33] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant appears to assert that the hearing officer should have mitigated the disciplinary action on the basis of his long-term employment and prior satisfactory work performance. While it cannot be said that length of service and previous performance are *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.[34] 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, the grievant's length of service and past performance are not so extraordinary that they justify mitigation of the University's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity.[35]

The grievant also appears to argue that the punishment was too severe for the nature of his offence, particularly in the absence of notice and an opportunity to correct his conduct. While the University could have chosen to address the grievant's conduct through a less severe form of disciplinary action, its decision to terminate the grievant was not outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.[36] Accordingly, EDR will not disturb the hearing officer's decision.

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.[37] Within 30 calendar days of a final hearing decision, either party may appeal the

[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).

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

[35] The grievant further objects that the hearing officer erred in finding he had "almost 19 years" of service with the University , Hearing Decision at 11, rather than 28 years of service. Even if the 28-year figure were assumed to be correct, mitigation would nevertheless not be warranted under the facts of this case .

[36] *See* Hearing Decision at 10-12.

[37] *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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