

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10554; Ruling  
Date: May 21, 2015; Ruling No. 2015-4136; 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 2015-4136  
May 21, 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 10554. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10554, as found by the hearing officer, are as follows:<sup>1</sup>

The University of Virginia Medical Center employs Grievant as a Registered Respiratory Therapist. She has been employed by the Agency for approximately 24 years.

Grievant worked in the Clinic approximately two days per week. When she worked in the Clinic, she met with approximately 10 patients per day. She was responsible for updating a spreadsheet containing Smoking Cessation Intervention Data and a spreadsheet containing Non-Smoking Cessation Log with information about her observations of patients. Updating the spreadsheet for each patient required approximately one or two minutes. She was expected to update those spreadsheets within the day.

On May 28, 2014, Grievant received a Step 2 Formal Performance Improvement Counseling Form for failure to timely update information in spreadsheets. She was advised, “[t]his spreadsheet must remain current at all times, which means documentation should be completed/updated at the end of each working day at [the Clinic.]”

On August 13 and August 14, 2014, Grievant was given additional time to update her spreadsheets to become timely.

On September 23, 2014, the Supervisor audited Grievant’s work product. She determined that Grievant had last updated the first spreadsheet on September

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<sup>1</sup> Decision of Hearing Officer, Case No. 10554 (“Hearing Decision”), April 1, 2015, at 2-3 (citations omitted).

9, 2014 and the second spreadsheet on September 3, 2014. Grievant had worked in the Clinic between those dates but failed to timely update the spreadsheets.

On October 1, 2014, the grievant was issued a Step 3 Formal Performance Improvement Counseling Form with a 90 day performance warning for failure to meet performance expectations.<sup>2</sup> The grievant timely grieved the disciplinary action<sup>3</sup> and a hearing was held on March 27, 2015.<sup>4</sup> In a decision dated April 1, 2015, the hearing officer determined that the University of Virginia Medical Center (“University”) had presented sufficient evidence to support the Step 3 Formal Performance Counseling Form with a performance warning and upheld the disciplinary action.<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup>

#### *Inconsistency with Agency Policy*

The grievant asserts in her request for administrative review that the hearing officer’s decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> The grievant has requested such a review. Accordingly, the grievant’s policy claims will not be discussed in this ruling.

#### *Consideration of the Evidence*

The grievant argues that the hearing officer’s findings of fact are not supported by the evidence. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>9</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>10</sup> 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.<sup>11</sup> Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a

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<sup>2</sup> University Exhibit 1.

<sup>3</sup> University Exhibit 2.

<sup>4</sup> See Hearing Decision at 1.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>12</sup> 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.

Fairly read, the grievant's request for administrative review alleges that the hearing officer should have reversed the disciplinary action on the basis that the University improperly failed to accommodate her disability. In particular, the grievant appears to assert that she should have received more time to complete the spreadsheets. The hearing officer concluded that there was "insufficient evidence" to support the grievant's claims regarding accommodation.<sup>13</sup> EDR's review of the hearing record indicates that while a more thorough discussion of this issue in the hearing decision would have been beneficial, the hearing officer's finding is supported by evidence in the record. Evidence presented by the University shows that after the grievant had advised the University of her disability and her need for more time to complete her work, she was given additional time to address her backlog of uncompleted spreadsheets.<sup>14</sup> The grievant apparently agreed with the University that after she had completed the backlog, she would no longer need additional time as an accommodation to complete the spreadsheets; and prior to the September 23, 2014 audit, she had not notified her supervisor that she was failing to complete her work in a timely manner and again needed additional time as an accommodation.<sup>15</sup> Under these circumstances, EDR cannot find that the hearing officer erred in finding that insufficient evidence supported the grievant's claims regarding accommodation. Consequently, the hearing decision will not be remanded on this basis.

The grievant also appears to dispute the hearing officer's finding that she failed to timely complete the spreadsheets. Although the grievant may disagree with the findings of the University's audit of her work, there is record evidence to support the hearing officer's conclusion that "[a]s of September 23, 2014, Grievant did not timely update the spreadsheets."<sup>16</sup> 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. Here, the hearing officer's findings are based upon evidence in the record and the material issues of the case, and 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 as well.

### *Mitigation*

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action on the basis of her disability. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by

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<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> Hearing Decision at 3.

<sup>14</sup> University Exhibits 4B, 4D.

<sup>15</sup> University Exhibits 4D, 4E, 4F; Hearing Recording at 25:58-26:48; 34:20-35:28 (testimony of supervisor).

<sup>16</sup> *Id.* at 3; *see, e.g.*, University Exhibit 1 at 3; Hearing Recording at 6:23-6:50; 7:18-8:00 (testimony of supervisor).

an agency in accordance with rules established by [EDR].”<sup>17</sup> 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.”<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> EDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>21</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

Based on EDR’s review of the hearing record, there is nothing to indicate that the hearing officer’s decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

### *Conduct of Hearing*

The grievant argues that the hearing officer erred by failing to allow her to question a representative from Human Resources at the hearing. EDR’s review of the hearing recording indicates that while questioning her supervisor, the grievant said that she would also like to ask a

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<sup>17</sup> Va. Code § 2.2-3005(C)(6).

<sup>18</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>19</sup> *Id.* § VI(B)(1).


<sup>20</sup> 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).

<sup>21</sup> “‘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.*

question of the University's representative, who works in the University Human Resources.<sup>22</sup> The hearing officer explained that the representative was not a witness at that time, but that the grievant would be able to call the representative as a witness during her case.<sup>23</sup> The grievant then apparently elected not to call the representative during her case.<sup>24</sup> Under these circumstances, it appears the hearing officer acted appropriately with respect to this possible witness. The grievant also asserts that the hearing officer conducted the hearing in too formal a manner, improperly failed to read the hearing exhibits prior to the hearing, and did not tell her that a hearing recording could be requested. EDR's review of the hearing recording indicates that the hearing was conducted in a manner consistent with the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*. Accordingly, the hearing decision will not be remanded on this basis.

### 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.<sup>25</sup> 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.<sup>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup>



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<sup>22</sup> Hearing Recording at 0:20-0:22; 35:31-35:39.

<sup>23</sup> *Id.* at 35:33-35:39.

<sup>24</sup> *Id.* at 42:52-42:53.

<sup>25</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>26</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>27</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).