

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10767; Ruling  
Date: May 10, 2016; Ruling No. 2016-4344; Agency: James Madison University;  
Outcome: AHO's decision affirmed.



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

**ADMINISTRATIVE REVIEW**

In the matter of James Madison University  
Ruling Number 2016-4344  
May 10, 2016

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 10767. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant was employed as an HVAC Senior Technician by James Madison University (“University”).<sup>1</sup> On October 9, 2015, the grievant was issued a Group I Written Notice for unsatisfactory performance.<sup>2</sup> In addition, the grievant received a “below contributor” rating for the performance period from September 2014-September 2015.<sup>3</sup> The grievant timely grieved these management actions and a hearing was held on March 10, 2016.<sup>4</sup> On March 30, 2016, the hearing officer issued a decision upholding the University’s actions.<sup>5</sup> 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 . . . .”<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 a party; the sole remedy is that the action be correctly taken.<sup>7</sup>

*Characterization of Grievant’s Evidence*

In his request for administrative review, the grievant challenges the hearing officer’s statement that he did not testify during the hearing. The grievant asserts that he testified during

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<sup>1</sup> See Decision of Hearing Officer, Case No. 10767 (“Hearing Decision”), March 30, 2016, at 2; Agency Exhibit 2 at 1.

<sup>2</sup> Agency Exhibit 1 at 2-3.

<sup>3</sup> Agency Exhibit 1 at 13-17

<sup>4</sup> See Hearing Decision at 1; Agency Exhibit 2.

<sup>5</sup> *Id.* at 1, 7.

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

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

the hearing and rebutted the University's arguments verbally, as well as through documentary evidence.

EDR's review of the hearing recording indicates that the hearing officer is correct that the grievant did not testify. While the grievant spoke at length, particularly during his cross-examination of the agency's witness, these statements by the grievant were not made under oath and may therefore not be considered evidence.<sup>8</sup> When the grievant was offered the opportunity to identify himself as a witness and testify under oath, he did not avail himself of that opportunity.<sup>9</sup> Because the only verbal statements made by the grievant during the hearing were not sworn testimony, they could not be considered as evidence by the hearing officer. As such, the hearing officer was limited to considering only the testimony by the University's and grievant's witnesses and documents introduced into evidence by both parties.<sup>10</sup> While we do not disagree with the grievant that he presented verbal arguments and explanations in his favor during the hearing, these arguments and explanations are not record evidence and could not be considered as such by the hearing officer. Accordingly, EDR will not disturb the hearing on this basis.

#### *Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review also appears to challenge the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>11</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>12</sup> Further, in cases involving discipline, the hearing officer reviews the evidence *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>13</sup> 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.<sup>14</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.

In this instance, the grievant argues that the University did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In addition, he asserts that the hearing officer erred in finding that the grievant had not met his burden to show that the University "failed to follow policy or inaccurately evaluate his work performance." EDR's review of the hearing record indicates that the University presented record evidence

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<sup>8</sup> See, e.g., Hearing Recording at 1:20:03-1:23:04, 1:24:11-1:26:35.

<sup>9</sup> *Id.* at 2:23:20-2:25:13.

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

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

showing that the grievant made a number of errors during the period following his Notice of Improvement and that the grievant's performance failed to meet the University's expectations during the annual performance period.<sup>15</sup> 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.

### *Failure to Mitigate*

The grievant appears to challenge the hearing officer's decision not to mitigate the Written Notice. In particular, the grievant appears to argue that there has been a "deficiency of supervision" with respect to his diagnosis and repair capabilities.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or in aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>16</sup> 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."<sup>17</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>18</sup>

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 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

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<sup>15</sup> See Hearing Decision at 5-7; see also, e.g., Agency Exhibit 1; Agency Exhibit 4, at 1-20; Hearing Recording at 15:06-22:19, 38:40-39:29; 1:14:54-1:17:05.

<sup>16</sup> Va. Code § 2.2-3005(C)(6).

<sup>17</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>18</sup> *Id.* § VI(B)(1).

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

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that no mitigating circumstances exist that would warrant reduction of the disciplinary action.<sup>21</sup> While the agency could have chosen to address the grievant's conduct through a less severe form of disciplinary action, its decision was not outside the limits of reasonableness and, therefore, not subject to reduction by the hearing officer. Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

### CONCLUSION AND APPEAL RIGHTS

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>22</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>23</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>24</sup>



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<sup>19</sup> The Merit Systems Protection Board's approach to mitigation, while not binding on this Office, 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>20</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.*

<sup>21</sup> Hearing Decision at 6.

<sup>22</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>23</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>24</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).