Issue: Administrative Review of Hearing Officer's Decision in Case No. 10774; Ruling Date: June 14, 2016; Ruling No. 2016-4366; 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 2016-4366
June 14, 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 10774. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by the University of Virginia Medical Center ("University") as a charge nurse.[1] On December 4, 2015, the grievant was placed on administrative leave pending investigation of an alleged medication error.[2] The University charged that subsequently, the grievant engaged in "threatening and intimidating" conduct toward other employees and failed "to perform responsibilities as reasonably requested, assigned, or directed," and the grievant's employment with the University was terminated.[3] The grievant timely initiated a grievance to challenge this disciplinary action and denied that she had engaged in the threatening behavior or refused to participate in a pre-determination meeting.[4] A hearing was held on April 21, 2016, and in a hearing decision dated May 18, 2016, the hearing officer upheld the disciplinary action.[5] The grievant has now requested administrative review of the hearing 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

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[1] *See* Decision of Hearing Officer, Case No. 10774 ("Hearing Decision"), May 18, 2016, at 2; Agency Exhibit 1 at 1.
[2] Agency Exhibit 2 at 1; Agency Exhibit 3 at 2.
[3] Agency Exhibit 2.
[4] Agency Exhibit 1; *see* Hearing Decision at 1. The grievant also denied making a medication error. Agency Exhibit 1 at 2.
[5] Hearing Decision at 1, 7.
[6] 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.[7]

Inconsistency with University Policy

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with University policy. In particular, she argues that she did not make "threats of physical harm, in violation of Policy 701." The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] Accordingly, the grievant's policy claims will not be discussed in this ruling.

Timing of Hearing Decision

The grievant claims that the hearing officer issued the hearing decision "17 days after the deadline." In this case, the hearing was held on April 21, 2016, and the hearing decision was issued on May 18, 2016.[9]

Contrary to the grievant's assertion, neither the *Grievance Procedure Manual* nor the *Rules for Conducting Grievance Hearings* ("*Rules*") mandates that a hearing decision must be issued within a certain number of days following the hearing.[10] Instead, Section V(C) of the *Rules for Conducting Grievance Hearings* provides only that "[a] written decision shall be issued as promptly as reasonably possible after the close of the evidentiary record." In this case, the grievant has not presented any evidence to show that the hearing decision was not issued as soon as reasonably possible, nor has she shown that she has been prejudiced by any delay. As such, EDR will not disturb the hearing officer's decision on this basis.

Alleged Bias of Hearing Officer

The grievant further alleges that the hearing officer exhibited bias in the hearing decision, by, in effect, ignoring the grievant's evidence and adopting the University's assertions. The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [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.[11]

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Hearing Decision at 1.
[10] To the extent University policy or documents make other representations, the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* are controlling.
[11] *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."

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[12] 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.'"[13] 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.[14] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[15]

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, constitute sufficient evidence of bias. Further, although the grievant notes that the University witnesses were "white," while the grievant and her witness were "black," this implied claim of discrimination, standing alone, is not enough to demonstrate bias on the part of the hearing officer. Other than these allegations, the grievant has not presented any evidence that would demonstrate bias or prejudice such as to deny a fair and impartial decision. As the grievant has failed to meet her burden, EDR will not disturb the decision of the hearing officer on this basis.[16]

University's Failure to Produce Documents

The grievant also argues that the hearing officer erred in failing to draw an adverse inference against the University. Specifically, the grievant asserts that the University failed "to produce records related to other disciplinary actions against employees for medication errors," and as such, the hearing officer "should have drawn an adverse inference that those documents would have been favorable to the [g]rievant."

Under Section V(B) of the *Rules for Conducting Grievance Hearings*, a heaving officer may draw an adverse factual inference "against a party, if that party, without just cause, has failed to produce relevant documents . . . ." In this case, the requested documents regarding the treatment of other employees involved in medication errors would not seem to be relevant, as the grievant was disciplined for her conduct towards other employees and her failure to participate in the investigation, not for the underlying possible medication error.[17] Further even if EDR were to assume that an adverse inference should be drawn, such an inference would result only in a finding that the University treated other employees involved in medication errors more favorably than it treated the grievant. As the grievant was not disciplined for the potential medication

[12] 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.
[13] 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.").
[14] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[15] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[16] The grievant has also asked that the hearing officer be recused from any further proceedings in this matter. As EDR finds no basis to remand the matter to the hearing officer, this request will not be addressed in this ruling.
[17] *See* Agency Exhibit 2.

error, however, such a finding would be irrelevant to the outcome in this case. Accordingly, the hearing decision will not be disturbed on this basis.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges 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"[18] and to determine the grievance based "on the material issues and grounds in the record for those findings."[19] 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.[20] 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.[21] 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.

Here, the grievant challenges the hearing officer's conclusion that the testimony and other evidence offered by the University was more credible than her own testimony and evidence. As the grievant's request for review explains, "[b]ecause the witnesses of the two parties were polar opposites, one can assume that the Hearing Officer did not believe the [g]rievant and her witnesses." However, 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.

In this case, the hearing officer concluded that the grievant threatened two other employees with physical harm.[22] In explaining why he found the University witnesses' testimony credible, the hearing officer stated:

> The question arises regarding why the Hearing Officer should believe the Agency's employees instead of believing Grievant's account of the events. The Agency's employees were credible. Grievant made threatening comments to the Supervisor during the first telephone call. She repeated similar threats during the second telephone call. Both agency employees wrote accounts of their

[18] Va. Code § 2.2-3005.1(C).
[19] *Grievance Procedure Manual* § 5.9.
[20] *Rules for Conducting Grievance Hearings* § VI(B).
[21] *Grievance Procedure Manual* § 5.8.
[22] Hearing Decision at 5.

> conversations immediately after the telephone calls. Their testimony was consistent with their written accounts.[23]

EDR's review of the record evidence indicates that there was sufficient evidence to support the hearing officer's findings regarding the grievant's conduct.[24] Although the grievant is correct that the testimony of her witnesses, as well as other evidence presented by the grievant, contradicts the evidence apparently relied upon by the hearing officer, this does not in itself constitute a basis for overturning the hearing officer's decision. The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

To the extent that the grievant argues that the hearing officer did not specifically address the evidence she presented, we find no basis to disturb the decision. It is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or each piece of evidence introduced. Here, it is clear that the hearing officer found the University witnesses' testimony persuasive and accordingly held that the grievant engaged in the charged misconduct. Mere silence as to other evidence does not constitute a basis for remand in this case. For these reasons, EDR declines to disturb the decision on this basis.

Mitigation

Read broadly, the grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the agency's disciplinary action. 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]."[25] 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."[26] 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

[23] *Id.*
[24] *See, e.g.*, Agency Exhibit 3 at 3-8; Hearing Recording at 33:45-35:29 (testimony of Supervisor); 1:57:15- 1:59:40, 2:25:28-2:27:16 (testimony of ERC).
[25] Va. Code § 2.2-3005(C)(6).
[26] *Rules for Conducting Grievance Hearings* § VI(A).

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[27]

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.[28] EDR will review a hearing officer's mitigation determination for abuse of discretion,[29] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[30]

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[31] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[32]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the University.[33] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable

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[27] *Id.* § VI(B)(1).

[28] 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).

[29] "'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.*

[30] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[31] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

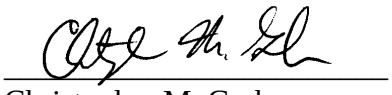
[32] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

[33] Hearing Decision at 6.

limits of reasonableness.'"[34] Even considering those arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.[35] 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.[36] 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.[37] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[38]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[34] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[35] To the extent this ruling does not address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that any such issue is not material, in that it has no impact on the result in this case.
[36] *Grievance Procedure Manual* § 7.2(d).
[37] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[38] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).