Issue: Administrative Review of Hearing Officer's Decision in Case No. 10806; Ruling Date: June 16, 2016; Ruling No. 2016-4367; Agency: Virginia Polytechnic Institute and State 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 Virginia Polytechnic Institute and State University
Ruling Number 2016-4367
June 16, 2016

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10806. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 10806, as found by the hearing officer, are as follows:[1]

> The grievant worked in the Maintenance Department for the school in March, 2016. He had worked for the school for approximately eleven years. During his career he had consistently received satisfactory evaluations. He received in 2015 a Service Recognition Program. Also in 2015, the grievant had been nominated for a Departmental Service Award. He was proficient in his job-related skills.
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> The agency involved in this grievance is a state institution of higher learning.
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> The relevant events in this grievance involve a co-worker of the grievant (referred to herein as "Employee A"). The co-worker worked in the same department as the grievant, although on a different shift. Employee A is somewhat hearing-impaired. He heavily relies on reading lips.
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> In the late afternoon on March 1, 2016 Employee A was sitting in a motorized, enclosed cart used in his job. He was smoking a cigarette. The grievant approached the cart and shook it to get the attention of Employee A. The grievant told Employee A that he was there to collect money owed by Employee A to a third co-worker ("Employee B"). The grievant confronted Employee A because he was tired of hearing Employee B complain about the outstanding debt.
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> The grievant said to Employee A that he wanted either his money or his blood. Employee A responded that "you wouldn't want my blood if I had AIDS."

[1] Decision of Hearing Officer, Case No. 10806 ("Hearing Decision"), June 1, 2016, at 2-4.

Employee A told the grievant that the debt owed to Employee B was none of his business. The grievant then left the area, shaking the cart one more time as he walked away. The following day (March 2), at approximately 4:00 p.m. a number of departmental employees were present in a staff breakroom. This was near the end of one shift and the beginning of Employee A's shift.

Employee A entered the breakroom. The grievant was seated there at a desk. Upon observing Employee A entering the room, the grievant asked Employee A "do you have AIDS"? The grievant advised Employee A that he had been telling other employees that was the situation. A vigorous argument ensued between the grievant and Employee A. Employee A called the grievant an obscene name. The grievant stood up from his chair and began confronting the grievant face-to-face. They were in relatively close proximity to each other. Employee A again told the grievant that the debt to Employee B was none of his business. The grievant repeatedly told Employee A to "shut up." Both individuals were using raised voices.

When this verbal argument was heating up, all but one of the other employees in the breakroom quickly departed. One co-worker remained behind with the intent to intervene if the argument escalated into physical violence. No violence ensued before the grievant left the room. One additional employee entered the room at the tail end of the argument. After the grievant left, Employee A asked the co-worker his impression of what was going on with the grievant. This co-worker advised Employee A that he thought that the grievant was about to become physically violent toward him.

The Department investigated these events after Employee A made an oral complaint on the evening of March 2. As a result of the investigation, the Departmental Supervisor made the decision to issue a Group III Written Notice and terminate the grievant from employment. The school had issued the grievant a separate Group III Written Notice in 2014. That discipline was grieved unsuccessfully and remained active at the time of the events in 2016. In addition to the 2014 events, the school had counseled the grievant on multiple occasions for actions considered to be disruptive, actions not similar to those in 2016. No formal written discipline was issued for those events.

On or about March 22, 2016, the grievant was issued a Group III Written Notice with termination for failure to follow instructions and/or policy and disruptive behavior.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on May 20, 2016.[4] In a decision dated June 1, 2016, the hearing officer determined that the University had presented sufficient evidence to show that the grievant had engaged in disruptive behavior and upheld the issuance of the Group III Written Notice with termination.[5] The grievant now appeals the hearing decision to EDR.

[2] Agency Exhibit 1.
[3] Agency Exhibit 2.
[4] *See* Hearing Decision at 1.
[5] *See id.* at 1, 4-8.

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 hearing officer correct the noncompliance.[7]

Due Process

In his request for administrative review, the grievant alleges that he was not afforded due process because the University did not reference or discuss his disciplinary history in the Written Notice. Specifically, he claims that the hearing officer "improperly considered allegations of [the grievant's] past conduct" by admitting into evidence documents that contained information about a prior Group III Written Notice issued to the grievant. The grievant appears to assert that the hearing officer exceeded the scope of his authority in accepting evidence about the past disciplinary action that was not specifically referenced in the Written Notice. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[8] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[9] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

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.[10] 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 his 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."[11]

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[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] *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).
[9] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[10] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior 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(1). 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."
[11] *Loudermill*, 470 U.S. at 546.

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; and the presence of counsel.[12] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[13]

In this case, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice and in the University's notice of intent to issue disciplinary action.[14] There is nothing in the hearing record to indicate that the hearing officer considered the previous Group III Written Notice as evidence to support the University's issuance of the Written Notice at issue in this case. To the contrary, the hearing officer accepted evidence regarding the existence of prior disciplinary action because he found that it was "relevant on the question of possible mitigation . . . ."[15] Nevertheless, an employee's disciplinary history is relevant and properly considered in almost every grievance hearing concerning discipline and/or termination. For instance, a hearing officer must always assess the disciplinary history of an employee to determine whether the grieved disciplinary action is classified at the appropriate level based on the employee's accumulation of Written Notices, consistent with DHRM Policy 1.60, *Standards of Conduct*.[16] EDR is aware of no provision of policy or the grievance procedure that requires an agency to list an employee's prior discipline on the Written Notice or an attachment, or that an agency's failure to do so prevents the employee's disciplinary history from being considered at a hearing. Based on a review of the hearing record in this case, EDR cannot conclude that the hearing officer erred in admitting evidence regarding the grievant's history of disciplinary action with the University into the record.[17]

In addition, the grievant does not appear to dispute that he received a copy of the past disciplinary action at the time it was issued.[18] Indeed, the evidence in the record indicates that the grievant filed a grievance to challenge it.[19] Furthermore, documents relating to the prior Written Notice were included in the University's exhibit binder and provided to the grievant before the hearing.[20] The grievant objected to the admission of those documents.[21] It cannot be

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[12] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[13] See Va. Code § 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).

[14] *See* Agency Exhibits 1, 5.

[15] Hearing Decision at 1.

[16] *See* DHRM Policy 1.60, *Standards of Conduct*, §§ B(2)(a), B(2)(b), B(2)(c), (B)(3). This policy also expressly states that even *inactive* Written Notices should be considered in the case of repeated misconduct. *Id.* § G(1)(b).

[17] *See* Va. Code § 2.2-3005(C)(5) (stating that hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive); *see also Rules for Conducting Grievance Hearings* § IV(D).

[18] *See* Agency Exhibit 10.

[19] *Id.*

[20] *See* Hearing Decision at 1.

said, therefore, that the grievant had no knowledge of the existence of the prior disciplinary action, or of the University's intention to present evidence about that discipline, in advance of the hearing. Having reviewed the evidence in the record, we cannot conclude that the University's failure to discuss the grievant's disciplinary history in the Written Notice deprived him of pre-disciplinary due process as a matter of the grievance procedure.

In addition, we further note that the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the University's witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[22] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[23] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure.

Hearing Officer's Consideration of the Evidence

Fairly read, the grievant's request for administrative review 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"[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 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.[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.

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[21] *Id.* The hearing officer found that some of the University's proposed exhibits containing background about the circumstances that led to the issuance of the prior Written Notice were irrelevant and would not be admitted into evidence. *Id.*

[22] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[23] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

[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.

In the hearing decision, the hearing officer determined that the grievant engaged in misconduct that justified the issuance of a Group III Written Notice.[28] In explaining the reasoning for his decision, the hearing officer stated:

> The uncontradicted evidence from the two days supports a finding that Employee A reasonably felt threatened. The grievant shook the cart as he left Employee A on March 1, without any apparent innocent reason. The confrontation in the breakroom degenerated quickly into a shouting match and a face-to-face confrontation. The one co-worker who remained behind felt concerned enough that a fight could occur.
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> The actions of the grievant gave the clear impression that he was willing to injure Employee A, if not physically, in his reputation. By telling the co-workers that Employee A had said he suffered from AIDS, the grievant exhibited at least reckless indifference to the rights of Employee A.[29]

The grievant disagrees with these conclusions and appears to argue that his actions did not constitute threatening or disruptive behavior sufficient to support the issuance of the disciplinary action.

EDR's review of the record evidence indicates that there was sufficient evidence to support the hearing officer's findings that the grievant engaged in threatening and/or disruptive behavior in the breakroom that justified the issuance of a Group III Written Notice.[30] Though the grievant may disagree with the hearing officer's assessment of the evidence, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[31] Because the hearing officer's findings of facts with regard to these issues are based upon evidence in the record and address 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 challenges the hearing officer's decision not to mitigate the University's disciplinary action. He argues that, because the hearing officer found the March 1 incident "was not significantly disruptive"[32] and the March 2 incident "involved no violence or

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[28] Hearing Decision at 5-8.
[29] *Id.* at 7.
[30] *See, e.g.*, Agency Exhibit 7; Hearing Recording at 18:55-20:18, 21:17-21:46, 23:20-24:31 (testimony of Employee W), 1:00:23-1:03:30, 1:04:17-1:05:18 (testimony of Employee A). While "disruptive behavior" is often characterized as a Group I offense, *see* DHRM Policy 1.60, *Standards of Conduct*, Attachment A, when that behavior involves threats, it can quite understandably rise to the level of a Group III offense. *Id.*
[31] *See, e.g.*, EDR Ruling No. 2012-3186.
[32] Hearing Decision at 6.

threat of violence," the level of discipline imposed by the University was unreasonable. In support of this assertion, the grievant notes that Employee A was "somewhat hearing-impaired"[33] and, thus, his speaking loudly to Employee A did not justify disciplinary action or termination. The grievant also claims that the hearing officer failed to consider the extent of his prior satisfactory work performance with the University.

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]."[34] 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."[35] 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.[36]

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.[37] EDR will review a hearing officer's mitigation determination for abuse of discretion,[38] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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

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[33] *Id.* at 2.
[34] Va. Code § 2.2-3005(C)(6).
[35] *Rules for Conducting Grievance Hearings* § VI(A).
[36] *Id.* § VI(B).
[37] 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).
[38] "'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.*

issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[39] 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.[40]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the University.[41] 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 limits of reasonableness.'"[42] Even considering those arguments advanced by the grievant in his 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.

APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

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[39] 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).
[40] 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).
[41] Hearing Decision at 7-8.
[42] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[43] *Grievance Procedure Manual* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).