Issue: Administrative Review of Hearing Officer's decision in Case No. 11259; Ruling Date: 01/08/19; Ruling No. 2019-4820; Agency: Virginia State University; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia State University
Ruling Number 2019-4820
January 8, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 11259. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11259, as found by the hearing officer, are as follows:[1]

> Virginia State University employed Grievant as an Administrative Program Specialist II. She began working for the University in 2007. Grievant worked in the Department. Grievant's position Objective was:
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> > Provide administrative and operational support, technical assistance, and office management for the department.
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> Grievant did not teach classes at the University and was not part of the textbook selection process.
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> One of Grievant's duties was to purchase books for the Department at the discretion of the Department Chair. The Department received desk copies and special copies of textbooks relating to the Department's teaching topics.
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> Grievant requested pretext photocopies and instructor copies relating to the courses offered by the Department. This occurred when the Department had a new instructor or there was a new course offering. These books were free to the Department and were not purchased using University funds.
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> Textbook publishers often sent University faculty textbooks to review with the hope that the professor would adopt the textbook for his or her class. The publishers would not expect payment for these sample textbooks. In most cases, if a faculty member decided not to use a sample textbook, he or she would retain the textbook without returning it to the publisher. Sending free textbooks to faculty

[1] Decision of Hearing Officer, Case No. 11259 ("Hearing Decision"), Nov. 20, 2018, at 2-4 (citations omitted).

was a form of marketing for the publishers. The textbooks were promotional materials. Faculty members would not index these free textbooks or record them as University inventory. In some cases publishers would send textbooks to faculty members and require the faculty member to purchase or return the textbooks within a certain time period. This practice varied by publisher and by textbook.

The Virginia Fraud Waste and the Abuse Hotline received a call alleging Grievant "over purchases books and sells them to outside entities." The University's Internal Auditor began an investigation.

The Investigator reviewed the University's "Textbook Adoption and Affordability Policy" and interviewed numerous University employees to gain an understanding of the University's culture surrounding the textbook review process. The Investigator spoke with Grievant. The context of their discussion was about textbooks.

The Investigator asked Grievant if she sold books. Grievant answered "yes". Grievant says that she sold two or three books for about $20 each. The Investigator asked Grievant if she taught at the University. Grievant said "no" but the policy allowed her to sell books. The Investigator asked Grievant to show her policy. Grievant "pulled up" a policy. The Investigator looked at policy and said she had seen it before and that it only applied to teachers.

Grievant told the Investigator that the books came from the publishers addressed to Grievant through the University's mailroom.

Grievant said the books were her books and they were addressed to her. Grievant said that publishers addressed books to her.

On June 18, 2018, the Investigator issued a report concluding that the allegation was investigated and substantiated.

Professor S testified credibly that there were textbook buyers who came onto the University's campus towards the end of each semester to solicit faculty for the purchase of textbooks. Textbook buyers would place business cards in the office doors of faculty members requesting contact to purchase textbooks. Some faculty members sold their textbooks to textbook buyers and received cash. They kept the cash because they believed the textbooks belonged to them and not to the University. Professor S did not believe any faculty member would be disciplined for selling textbooks.

The Department Chair credibly testified that University faculty received textbooks from publishers and then resold those textbooks for cash. She testified that publishers sent textbooks to faculty at their work and home addresses as marketing tools. If a faculty member did not adopt the textbook, the textbook was the property of the faculty member. She testified that textbook buyers would come to a faculty member's office door and ask if the faculty member had any textbooks for sale. The textbook buyer would then go to the next faculty

> member's door to ask again for textbooks. The Department Chair testified that if a publisher sent a teacher an instructor copy (a copy with test answers), the publisher would usually mark the book as "not for resale."

On July 9, 2018, the Grievant was issued a Group III Written Notice for theft and terminated from employment with the University.[2] The grievant timely grieved the disciplinary action and a hearing was held on November 1, 2018.[3] In a decision dated November 20, 2018, the hearing officer determined that the agency had presented sufficient evidence to show the grievant removed University property (i.e., textbooks) without authorization and upheld the issuance of the Written Notice.[4] The grievant now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant appears to argue that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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

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[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* at 1, 4-6.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and concluded that the "Grievant's duties included receiving textbooks from the University's mailroom" and that "[w]hen she received textbooks she received them in her capacity as a University employee" and "on behalf of the University," with the result that "the textbooks Grievant received were University property."[12] The hearing officer further determined that the grievant "did not have the authority to sell textbooks and receive cash for those textbooks" and that her actions therefore constituted "unauthorized removal of University property," thereby warranting the issuance of a Group III Written Notice.[13] In support of her position, the grievant appears to argue that the University's policy prohibiting the sale of textbooks is inconsistent with applicable language in Section 23.1-1308(A) of the Code of Virginia relating to the adoption and sale of textbooks at public institutions of higher education. The grievant also contends that the University had the burden of proving that there was "a written policy that allowed faculty to sell textbooks that were sent to the University by book publishers."

EEDR finds the grievant's assertions regarding the burden of proof unpersuasive. In hearings involving disciplinary actions, the agency is required to show by a preponderance of the evidence that the disciplinary action issued to the grievant was warranted and appropriate under the circumstances.[14] In this case, the Written Notice charged the grievant with "selling two or three books for $20 each of which were intended for faculty textbook review."[15] It was the University's burden to present witness testimony and/or other evidence to demonstrate by a preponderance of the evidence that the grievant engaged in the charged misconduct. While evidence about University policies addressing the purchase, acquisition, and/or sale of textbooks by employees would be relevant to the question of whether the grievant engaged in the charged misconduct, the agency was not necessarily obligated to present such policies for the disciplinary action to be upheld.

Moreover, the basis for the grievant's argument relating to University's policy prohibiting the sale of textbooks by employees and relevant provisions of the Code of Virginia is unclear. Section 23.1-1308(A) of the Code of Virginia states as follows:

> No employee of a public institution of higher education shall demand or receive any payment, loan, subscription, advance, deposit of money, services, or anything, present or promised, as an inducement for requiring students to purchase a specific textbook required for coursework or instruction. However, such employee may receive (i) sample copies, instructor's copies, or instructional material not to be sold and (ii) royalties or other compensation from sales of textbooks that include such instructor's own writing or work.

The University's Policy 1600, which governs the adoption and sale of textbooks, provides, in relevant part, that

[12] Hearing Decision at 5.
[13] *Id.*
[14] *Grievance Procedure Manual* § 5.8.
[15] Agency Exhibit 2 at 1.

> [n]o employee of Virginia State University or its contractors shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, as an inducement for requiring students to purchase a specific textbook required for coursework or instruction; with the exception that employees or contractor employees may receive (i) sample copies, instructor's copies, or instructional material, not to be sold . . . .[16]

In many respects, the language of the Code and Policy 1600 is nearly identical. Indeed, the hearing officer noted that "a portion of the University textbooks policy mirrors the language" of Section 23.1-1308(A).[17] EEDR cannot disagree with the hearing officer's conclusion on this issue. Furthermore, the hearing officer found that the grievant's misconduct in this case was properly considered an unauthorized removal of University property because the textbooks the grievant received in the University's mailroom and in her capacity as a University employee were the University's property, and that the grievant sold such textbooks without having the authority to do so.[18] EEDR has thoroughly reviewed the hearing record and finds that there is evidence in the record to support the hearing officer's factual findings about these matters.[19]

In conclusion, and although 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 EEDR 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.[20] 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.[21]

Mitigation

In addition, the grievant challenges the hearing officer's decision not to mitigate the Written Notice and/or her termination. 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 [EEDR]."[22] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'";

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[16] Agency Exhibit 5 at 1.
[17] Hearing Decision at 5.
[18] *Id.*
[19] *See, e.g.*, Grievant's Exhibit 1 at 1-2; Agency Exhibit 5 at 1; Agency Exhibit 8.
[20] *See, e.g.*, EDR Ruling No. 2014-3884.
[21] The grievant's argument regarding the language in Section 23.1-1308(A) of the Code may also be construed as an assertion that the hearing officer's decision is contradictory to law. Under the grievance procedure, the circuit court in the jurisdiction in which the grievance arose has the statutory authority to evaluate such a claim. Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a). The grievant may file an appeal to the circuit court within 30 calendar days of the date that the hearing officer's decision becomes final. *Id.*; *see Grievance Procedure Manual* § 7.2(d).
[22] Va. Code § 2.2-3005(C)(6).

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."[23] 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.[24]

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 totally unwarranted.[25] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Inconsistent Discipline

In support of her position that the hearing officer should have mitigated the disciplinary action, the grievant contends that other similarly situated employees at the University sold textbooks and were not disciplined for that behavior. More specifically, the grievant asserts that members of the University's faculty sold textbooks and that she was similarly situated to those employees because "both state law and University policy do not make a distinction between faculty and staff" in relation to the sale of textbooks. As a result, she argues that the Written Notice should have been considered an inconsistent application of disciplinary action in this case.

In his mitigation analysis, the hearing officer found that it was "clear that the University treated Grievant differently from how it treated faculty members."[27] The hearing officer went on

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[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id.* § VI(B)(1).
[25] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[26] "'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.*
[27] Hearing Decision at 6.

to state that the evidence showed University management "was aware that some University faculty were routinely and blatantly violating the University's textbook policy by selling textbooks they received from publishers for cash that they kept."[28] The hearing officer ultimately concluded, however, that the "Grievant was not similarly situated to University faculty" because "[s]he did not hold a teaching position[, p]ublishers did not send her textbooks in order to persuade her to adopt the textbooks for University classes[, and she] would not have any reason to believe she was receiving a 'marketing gift' from a publisher."[29]

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[30] At the hearing, the Department Chair testified that publishers send textbooks to faculty members at the University as a marketing tool, and that any such textbooks that are not adopted for a class are considered the faculty member's property.[31] The Department Chair further explained that faculty members sell such textbooks, and that she was unaware of any faculty members who had been disciplined or terminated for selling textbooks.[32]

Upon conducting a review of the hearing record, however, it does not appear that the evidence is sufficient to demonstrate that the agency's treatment of the grievant was different from other employees who may have been similarly situated to her. While the evidence shows that some faculty members sold textbooks and were not subject to disciplinary action, no witness testified that he or she had personally sold a textbook. Moreover, the evidence in the record supports the hearing officer's conclusion that faculty members who sold textbooks were not similarly situated to the grievant. For example, while there is evidence that the grievant was involved in the process of ordering textbooks for review by faculty members,[33] the grievant was not employed in a faculty position with the University where she was responsible for teaching classes or adopting textbooks.[34] As a result, EEDR has not identified evidence in the record to suggest that the grievant would have received textbooks as a marketing tool like members of the University's faculty.

In conclusion, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EEDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion here. 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.'"[35] In this case, there does not appear to have been sufficient evidence in the record regarding inconsistent discipline of similarly situated comparator employees that the hearing officer may have relied upon to support mitigation. Accordingly, EEDR cannot conclude

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[28] *Id.*
[29] *Id.*
[30] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[31] Hearing Recording at 3:56:04-3:58:01 (testimony of Department Chair).
[32] *Id.* at 3:56:10-3:58:39 (testimony of Department Chair).
[33] *E.g., id.* at 4:05:39-4:06:28 (testimony of Department Chair).
[34] *See* Agency Exhibit 3.
[35] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22.

that his mitigation analysis was flawed in this respect and declines to disturb the decision on this basis.[36]

Other Mitigating Factors

Finally, the grievant argues that her prior satisfactory performance and/or length of employment with the agency supported mitigation, and that termination was "excessive and unreasonable" under the circumstances. The grievant's claim that her length of employment and/or otherwise satisfactory performance should have been considered as mitigating factors is unpersuasive. While it cannot be said that length of service or prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[37] 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 that otherwise satisfactory performance becomes. In this case, the grievant's length of employment and prior satisfactory performance are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group III Written Notice for conduct that was determined by the hearing officer to be terminable due to its severity. Accordingly, EEDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's 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.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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Director
Office of Equal Employment and Dispute Resolution

[36] This ruling makes no determination as to whether faculty members and/or other University employees who may have sold textbooks and were not similarly situated to the grievant violated University Policy 1600 and/or relevant provisions of the Code of Virginia. This ruling only determines that the hearing officer's assessment of mitigating factors was consistent with the grievance procedure such that mitigation of the Written Notice issued to the grievant was not warranted in this case.
[37] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[38] *Grievance Procedure Manual* § 7.2(d).
[39] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[40] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).