Issue: Administrative Review of Hearing Officer's Decision in Case No. 10391; Ruling Date: October 16, 2014; Ruling No. 2015-3991; Agency: University of Virginia Medical Center; Outcome: Remand to AHO.

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 2015-3991
October 16, 2014

The University of Virginia Medical Center (the "agency") 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 10391. For the reasons set forth below, EDR remands the case to the hearing officer to the extent described below.

FACTS

The relevant facts in Case Number 10391, as found by the hearing officer, are as follows:[1]

> The Agency provided me with a notebook containing fifteen tabs and that notebook, with the exception of Tab 7, was accepted in its entirety as Agency Exhibit 1. There was an objection to Tab 7, and that Tab was excluded.
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> The Grievant provided me with a notebook containing twenty tabs and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.
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> Pursuant to discussions with me, counsel for both the Agency and the Grievant stipulated that the Grievant accessed the PHI for her ex-husband ("Patient") on December 9, 2013; December 24, 2013; January 28, 2014; and February 25, 2014. The access was performed at Patient's request and in his presence. Pursuant to the uncontradicted testimony of the Grievant and Patient, I find that each of them, at the time of access, was an employee of the Agency and that each of them had the authority to access their own personal PHI.
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> It was also stipulated by counsel that the Patient had appointed the Grievant as his agent in both his General Durable Power of Attorney dated April 9, 2012 and his Advance Medical Directive dated April 9, 2012.
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> Medical Center Human Resources Policy No. 707(D)(1), provides in part as follows:

[1] Decision of Hearing Officer, Case No. 10391 ("Hearing Decision"), August 18, 2014, at 3-9 (citations omitted).

> …A Single Access is Accessing a single patient's record within a single twenty-four hour period.
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> A Multiple Access is:
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> - Accessing the records of two or more patients, regardless of the time frame within which the Access occurs; or
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> - Accessing the same Patient's record on more than one occasion within two or more twenty-four hour periods (as measured from the time of the first access)

Medical Center Human Resources Policy No. 707(D)(2), provides as follows:

> Authorized Access or Disclosure - Access to or Disclosure of Confidential Information that is necessary to support treatment, payment or business operations, **or as is otherwise permitted by law and Medical Center policy**. (Emphasis added)

Medical Center Human Resources Policy No. 707(E)(1), provides as follows:

> Each employee must report all actual or suspected Violations promptly (and in any event within twenty-four hours) to his/her manager/designee of the relevant area.

Medical Center Human Resources Policy No. 707(E)(4), provides as follows:

> Any employee(s) responsible for a Violation shall be subject to corrective action based on the level of the Violation.

Medical Center Human Resources Policy No. 707(E)(6)(b), provides in part as follows:

> Intentional Access to Confidential Information without Authorization
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> This occurs when an employee intentionally Accesses Confidential Information without authorization…
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> …Corrective Measures:
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> A Level 2 Violation involving PHI shall be considered serious misconduct and shall, in most instances, result in performance warning (see Medical Center Human Resources

> Policy No. 701 "Employee Standards of Performance") with a three (3) day suspension without pay for the first Level 2 Violation involving PHI and **disciplinary action up to and including termination for multiple Level 2 Violations**, and for those Level 2 Violations where access was obtained under false pretenses…

Medical Center Human Resources Policy No. 707(E)(6)(c), provides as follows:

> Level 3: Intentional Disclosure of Confidential Information
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> This occurs when an employee intentionally discloses Confidential Information without authorization…
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> …Corrective Measures:
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> Disciplinary action for Level 3 Violations involving PHI in most cases shall result in immediate termination of employment. (Emphasis added)

Medical Center Human Resources Policy No. 701(C), provides in part as follows:

> ...Performance issues and misconduct are generally addressed through a process of progressive performance improvement counseling as outlined in this policy...

Medical Center Human Resources Policy No. 701(C)(2), provides in part as follows:

> Serious Misconduct refers to acts or omissions having a significant impact on patient care or business operations...
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> Examples of Serious Misconduct include, but are not limited to:
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> ...Intentionally accessing PHI without authorization...

On May 1, 2014, the Agency issued a Risk Assessment and Determination of Breach Notification, wherein it determined that there was a low probability that PHI was compromised and was, thus, not a breach.

There was agreement between the Agency and the Grievant that she had been trained numerous times on the policies that are appropriate to this matter before me. Indeed, in the most current training, **the Agency produced a handout which set forth: counseling; suspension without pay; performance warning; loss of job; and reporting to applicable licensing board, as possible consequences if an employee accessed PHI without a work-related need**. The

Agency clearly contemplates and instructs that there is a progression in the level of punishment.

I heard persuasive testimony from both Agency and Grievant witnesses that the Grievant's immediate supervisor was present during at least some of the four stipulated accesses by the Grievant to the Patient's PHI. Based on the demeanor and character of the witness testimony, I find that this supervisor approved such access and, in violation of Policy 707(E)(1), did not report such access to her supervisor.

I heard testimony from Agency witnesses that, because the Grievant's supervisor was supporting the Grievant's position that assisting the Patient in exercising his right to access his records was not a violation and, because the Agency felt that the Grievant's supervisor had violated confidentiality in talking to the Grievant about this matter as it was working its way through the administrative process, the Grievant's supervisor was removed from the process. However, I heard testimony that the Grievant's supervisor only received a Formal Letter of Counseling in this matter, even though the Agency was fully aware that the Grievant's supervisor was aware of the Grievant's actions and tacitly condoned them and did not report them.

On April 9, 2012, the Patient executed a Virginia Advance Medical Directive. That document served to appoint the Grievant as the Patient's agent. It further set forth, at Paragraph B, the following:

> To request, receive and review any information (whether verbal, written, printed or electronically recorded) regarding my current mental or physical health, including but not limited to medical, hospital and other records; and to consent to the disclosure of such information for medical or insurance purposes.

This document was in place prior to the accesses that are before me in this grievance. The Patient, as an employee of the Agency, had the authority to access his own record. He testified before me and indicated that, because of his ongoing cancer, his ability to enter his access code into the computer system to access his records; his ability to view those records once accessed; and his ability to understand the records, was seriously compromised. He asked the Grievant to assist him to exercise his own right. While it would seem that is a right he has without any written document, it is clearly a right that he could convey to the Grievant and did convey to the Grievant pursuant to the Advance Medical Directive. The Grievant's testimony and the Patient's testimony emphatically set forth that she was assisting him in exercising his right to access his records.

In addition to the Advance Medical Directive, on April 9, 2012, the Patient also appointed the Grievant as agent under his General Durable Power of Attorney. This gave the Grievant even greater authority to act on his behalf than the Advance Medical Directive.

The Agency clearly established that, regardless of its own policies, where there are multiple accesses for any reason whatsoever, termination is the only possible remedy. Witnesses for the Agency and counsel for the Agency used the word "consistency" literally tens of times in justifying the concept that, where there is a multiple act of access, there must be termination. Indeed, when I questioned an Agency witness and asked the hypothetical question, "If an employee did not have the use of their hands, could they request another employee to simply enter the appropriate code and then immediately leave the area so as to not see any PHI, would this be an unauthorized access?" The witness replied, "Yes, it would be an unauthorized access."

The Agency introduced an Exhibit whose sole purpose was to establish the consistency with which it terminated all employees where there were determined to be multiple accesses to PHI, regardless of the reason. The Agency saw no irony in that this Exhibit quite vividly demonstrated that the Agency never mitigated in these matters, regardless of the facts. It also clearly illustrated that the Agency read its policy and training manuals to provide for only a single punishment: Termination.

The Agency, through its witnesses, readily concedes that there was no disclosure of PHI, other than to the person to whom it belonged. The Agency, through its own witnesses, indicates that the misconduct here is "serious misconduct" and not "gross misconduct" as set forth in Policy 701(C)(2)(b). The Agency concedes that the Patient had legitimate access to his own records and had granted power to the Grievant to have access to those records. The Agency simply has established a knee-jerk reaction policy that, if there is a multiple-access, then there is termination. All of this for "consistency." I am reminded of the Ralph Waldo Emerson quote, "Foolish consistency is the hobgoblin of little minds." The Agency wishes to adopt a policy that simply means no one in management must think through the actual facts of the matter before them. The Agency's policies and training materials speak to progressive punishment. The Agency's training manuals speak to progressive punishment. The Agency chooses to read both its policy and its training manuals to say, if there are multiple accesses you shall be terminated. The Agency has the skill-set in place to re-write its policies and training manuals, it simply has not done so here.

Based on the testimony presented to me and the demeanor and character of the witnesses, the documents appointing the Grievant as agent for the Patient; the Patient's ability (as an employee of the Agency, to access his own records); and the Patient's testimony that he asked the Grievant to assist him in accessing his own records, I find that there has been no unauthorized access of the Patient's PHI in this matter.

. . . .

Should the Agency ask EDR or DHRM to review this Decision, and it is found that my finding regarding no improper access to the Patient's PHI is incorrect, I would then find that there has been disparate treatment in this matter.

> The Grievant's supervisor knew of and approved the Grievant's actions and the testimony before me was that this supervisor received a Performance Counseling Letter. Generally, management is held to a higher standard than those that they supervise. The Agency introduced no evidence whatsoever as to why the Grievant should be treated more harshly than her supervisor. Indeed, the Agency's testimony in this matter is that mitigation is simply never considered in multiple access events; termination is the only finding possible. Accordingly, I find that there was no mitigation (see discussion under mitigation); and there was also disparate treatment; and the Grievant should receive no punishment greater than her supervisor.
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> . . . .
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> The clear and unequivocable evidence before me, both from Agency witnesses and Grievant witnesses is that the Grievant was treated differently than her supervisor. One was terminated and the other received a letter. Clearly disparate treatment took place.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had violated agency policy by accessing the medical records of the Patient without authorization and concluded that she had not done so.[2] Based on this analysis, the hearing officer rescinded the Step 4 Formal Performance Improvement Counseling Form with termination and ordered the grievant reinstated with full back pay, less interim earnings.[3] In the alternative, the hearing officer found that the discipline issued to the grievant was inconsistent as compared to its treatment of the grievant's supervisor, and ordered the discipline reduced to a Step 2 Formal Counseling, which was the level of discipline issued to the grievant's supervisor.[4] The agency now seeks administrative review from 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."[5] 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.[6]

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[2] *Id*. at 7.

[3] *Id.* at 9. Medical Center Human Resource Policy No. 701, *Employee Standards of Performance and Conduct*, uses a classification system for disciplinary actions that differs from DHRM Policy 1.60, *Standards of Conduct*. *See* Agency Exhibit 1, Tab 13. Agency policy classifies performance improvement counseling as a four-step process consisting of (1) informal counseling, (2) formal (written) counseling, (3) performance warning and/or suspension, and (4) termination. *See* Medical Center Human Resources Policy No. 701, *Employee Standards of Performance and Conduct*, § D.

[4] Hearing Decision at 7; *see* Hearing Recording at 1:22:24-1:22:30 (testimony of Employee Relations Consultant).

[5] Va. Code §§ 2.2-1202.1(2), (3), (5).

[6] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with Agency Policy

The agency's request for administrative review argues 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.[7] The agency has requested such a review. Accordingly, its policy claims will not be discussed further in this ruling.

Hearing Officer's Consideration of the Evidence

The agency appears to claim that the hearing officer's conclusion that the grievant did not violate agency policy is not supported by the evidence in the record. Specifically, the agency asserts that there is "[n]o inherent right" for a "non-employee patient to access the EMR" and, thus, the grievant did not have the authority to access the Patient's PHI using the agency's EMR system. In essence, the agency argues that, "[w]hile Patient can provide Grievant a copy of his medical records to review," agency policy does not contemplate that the Patient could "authorize Grievant to access" that information through the EMR system. While the hearing officer's findings in this regard certainly involve mixed questions of fact and policy, the final resolution is an interpretation of policy, which is the proper purview of the DHRM policy review referenced above. As such, these claims will not be addressed in this review.

Mitigation

In the hearing decision, the hearing officer states in the alternative that, if his finding that the grievant's conduct was not an unauthorized access is overturned, then the grievant should receive no greater discipline than what was issued to her supervisor.[8] The agency alleges that this mitigation analysis was flawed. The agency asserts that the hearing officer failed to "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances." In addition, the agency claims that the evidence in the record does not support the hearing officer's conclusion that the discipline issued to the grievant was inconsistent with the treatment of her supervisor. In the event that the DHRM policy review overrules the hearing officer's findings or otherwise remands the case, this alternative finding on mitigation may apply, thus warranting EDR's review at this time.

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]."[9] 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."[10] 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

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[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Hearing Decision at 6.
[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules for Conducting Grievance Hearings* § VI(A).

> 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.[11]

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.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Deference to Agency's Assessment of Mitigating and Aggravating Factors

The agency asserts that the hearing officer did not show deference to the agency's mitigation analysis prior to the issuance of the discipline. The *Rules* provide that, in considering mitigation, "the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."[14] In this case, the discipline issued to the grievant does not indicate that any mitigating or aggravating circumstances were considered.[15] In addition, a witness for the agency testified that cases involving multiple accesses to PHI through the agency's EMR system always result in termination.[16] Regardless of whether the agency considered mitigating factors, the hearing officer is required by the grievance statutes to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency"[17] and "may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness."[18] For these reasons, there is no basis for EDR to conclude that the hearing officer's mitigation analysis on this point was contrary to the provisions regarding mitigation in the *Rules*.

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[11] *Id*. § VI(B).
[12] 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).
[13] "'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.*
[14] *Rules for Conducting Grievance Hearings* § VI(B)(2)
[15] *See* Agency Exhibit 1, Tab 2.
[16] Hearing Recording at 1:49:47-1:50:58 (testimony of Employee Relations Consultant).
[17] Va. Code § 2.2-3005(C)(6).
[18] *Rules for Conducting Grievance Hearings* § VI(B)(2).

Inconsistent Discipline

In its request for administrative review, the agency asserts that the evidence in the record is insufficient to support the hearing officer's conclusion that the grievant was subject to inconsistent discipline. 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.[19] At the hearing, the grievant argued that her supervisor, who was present when she accessed the Patient's PHI and did not report the grievant's actions to agency management, was disciplined less harshly than the grievant.[20] The supervisor received a Step 2 Formal Counseling for failing to report the grievant's actions.[21] In the hearing decision, the hearing officer found that the agency engaged in disparate treatment of the grievant compared to her supervisor and that, under the circumstances, the discipline imposed to the grievant exceeded the limits of reasonableness.[22]

There is evidence in the record to support the hearing officer's conclusion that the supervisor knew the grievant was using the EMR system to access the Patient's PHI and did not report it because she did not believe the grievant was violating agency policy.[23] However, regardless of the extent of the supervisor's knowledge, the evidence in the record does not support the hearing officer's conclusion that the grievant and her supervisor were similarly situated. The grievant's supervisor was disciplined for failing to report the grievant's conduct. The grievant, on the other hand, was disciplined for accessing the Patient's PHI multiple times through the EMR system without authorization.[24] Furthermore, the agency presented ample evidence to show that other employees who have accessed PHI through the EMR system have been disciplined consistent with its treatment of the grievant in this case.[25]

We do not disagree that the agency's discipline in this case was harsh. But while the agency certainly could have justified or imposed lesser discipline, a hearing officer nevertheless "must give due weight to the agency's discretion in managing and maintaining employee discipline" and recognize that his function is only to "assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."[26] We must conclude that the factors discussed by the hearing officer do not demonstrate that the agency's decision was outside the tolerable limits of reasonableness or that the discipline imposed on the grievant was inconsistent with its treatment of other similarly situated employees. The hearing officer has not applied the mitigation standard set forth in the *Rules* appropriately. Thus, if the DHRM policy

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[19] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[20] *See* Hearing Recording at 2:51:21-2:52:44; Hearing Decision at 5-7.
[21] Hearing Recording at 1:22:24-1:22:30 (testimony of Employee Relations Consultant).
[22] *See* Hearing Decision at 7-9.
[23] *E.g.*, Hearing Recording at 2:24:33-2:25:14 (testimony of grievant).
[24] It appears that the hearing officer partly based his decision that the agency's treatment of the grievant and her supervisor was inconsistent on the idea that "management is held to a higher standard than those that they supervise." Hearing Decision at 7. While DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees," that factor alone does not demonstrate that the grievant and her supervisor can be considered similarly situated for purposes of assessing whether the grievant's discipline was consistent with the agency's treatment of other employees. Policy Ruling of the Department of Human Resource Management, Case No. 9746, Sept. 24, 2012, at 2.
[25] *See* Agency Exhibit 1, Tab 5.
[26] *Rules for Conducting Grievance Hearings* § VI(B)(2).

review overrules or otherwise remands the hearing decision to the hearing officer, the hearing decision must also be revised for reversal of the mitigation decision consistent with the requirements of the grievance procedure as stated in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, if remanded by the DHRM policy review, the hearing decision must be remanded for revision of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling. 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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).