Issue: Administrative Review of Hearing Officer's Decision in Case No. 10672; Ruling Date: November 6, 2015; Ruling No. 2016-4258; Agency: Virginia Tech; Outcome: Remanded to AHO.

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 2016-4258
November 6, 2015

Virginia Polytechnic Institute and State University (the "University") 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 10672. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The grievant was employed by the University as a roofer/sheet metal worker.[1] On or about July 21, 2015, he was issued a Group III Written Notice with termination for falsifying records.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on September 21, 2015.[4] On October 9, 2015, the hearing officer issued a decision upholding the Group III Written Notice but mitigating the termination to a 30-workday suspension.[5] The basis of the hearing officer's decision to mitigate was a July 28, 2015 memorandum issued by the University after the grievant's termination, in which employees who self-reported similar falsification during a specified time period were promised that they would not be terminated from employment.[6] The University has now seeks administrative review by 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."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[1] Decision of Hearing Officer, Case No. 10672 ("Hearing Decision"), October 9, 2015, at 1; *see also* Agency Exhibit 2 at 1.
[2] Agency Exhibit 1 at 1.
[3] Agency Exhibit 2 at 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 6.
[6] *Id.* at 2-6.
[7] 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.[8]

Inconsistency with State Policy

The University's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The University has requested such a review. Accordingly, the University's policy claims will not be addressed in this review.

Qualification

The University also asserts that the grievance should not have been qualified for hearing, as it claims the grievant is challenging the contents of the July 28, 2015 memorandum. EDR is not persuaded by this argument. The management action challenged by the grievant's July 30, 2015 grievance is the issuance of the Group III Written Notice with termination. Pursuant to Section 2.2-3004(A) of the Code of Virginia, grievances qualifying for hearing include those involving formal disciplinary actions and dismissals resulting from formal discipline.[10] The grievant has presented the July 28, 2015 memorandum only as evidence in support of his claim that the disciplinary action should be mitigated. As the grievance challenges a Group III Written Notice with termination, qualification of the grievance for hearing was appropriate. Therefore the hearing decision will not be remanded on this basis.

Mitigation

The University further challenges the hearing officer's decision to mitigate its disciplinary action from a Group III Written Notice with termination to a Group III Written Notice with a 30-workday suspension. 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]."[11] 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."[12] 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

[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] *See also Grievance Procedure Manual* § 4.1(a) (designating Written Notices as management actions which automatically qualify for hearing).
[11] Va. Code § 2.2-3005(C)(6).
[12] *Rules for Conducting Grievance Hearings* § VI(A).

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[13]

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 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.[14] EDR will review a hearing officer's mitigation determination for abuse of discretion,[15] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the hearing officer determined that the discipline exceeded the limits of reasonableness because a week after the grievant's termination, the University issued a document in which it "provided immunity from termination for any employee who self-reported" conduct identical or comparable to the conduct for which the grievant had been terminated.[16] The hearing officer concluded that the manner in which this standard was applied favored "certain employees over a terminated one," and as such, it was unreasonable.[17] The University argues that "as of the date of the hearing, *all* of the employees known to [] management to have padded overtime hours had been terminated or had resigned in lieu of termination," and notes that the hearing officer's determination is based on the treatment of "some hypothetical similarly situated employees who might self-report . . . ." The University also questions the hearing officer's conclusion that it believed overtime falsification was a widespread problem.

Having reviewed the hearing record, EDR concludes that the hearing officer's finding of unreasonableness is not supported by the evidence in the record. While the hearing officer's concerns regarding the equity of the University's actions are understandable, mitigation should only be granted where an agency's actions are not simply questionable but rather so unconscionable as to exceed the limits of reasonableness. As reasonable distinctions may be drawn between the grievant and those employees who might subsequently have self-reported (for example, a distinction may arguably be drawn between those employees who elect to self-report

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[13] *Id.* § VI(B)(1).
[14] 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).
[15] "'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.*
[16] Hearing Decision at 2-6.
[17] *Id.* at 5-6.

and those who are caught engaged in wrongdoing), EDR finds that the hearing officer did not apply the mitigation standard appropriately in this case. In addition, it does not appear that there is sufficient evidence in the record to support the mitigation finding, in that there are a number of outstanding questions, such as whether the grievant has shown that he would have self-reported if offered an opportunity to do so, and whether the University in fact treated any employees in a manner inconsistent with the grievant. For these reasons, the hearing decision must be remanded for further consideration.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, we remand the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[18] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[19]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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[18] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[19] *See Grievance Procedure Manual* § 7.2.
[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).