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ADMINISTRATIVE REVIEW

In the matter of Longwood University
Ruling Number 2020-5097
June 9, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11493. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11493, as found by the hearing officer, are as follows:[2]

> Longwood University [the "university" or "agency"] employed Grievant for approximately 12 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> The Office had a wall-mounted air-conditioning unit attached to the bottom half of a wall separating the Office from a hallway. A person standing in the hallway could push the air-conditioning unit through the wall into the Office and create an opening in the wall. A person could then crawl through the opening and gain access to the Office interior.
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> Mr. P worked in the Office. University records for the Department of Environmental Quality were contained in the office cabinet as well as some personnel records. Drawings and training materials were also kept in the Office. The Office was not designated as a restricted area. Employees were not told they could only enter the Office with Mr. P's permission. Mr. P sometimes left the Office unlocked. Employees would use the computer inside the Office to check their email.

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11493 ("Hearing Decision"), May 4, 2020, at 2-3 (footnotes omitted).

> Mr. P learned that employees were entering the Office when he was not there. Mr. P would lock his door and when he returned on the following day, he noticed that his door was unlocked. He was the only one with a key to the Office. He was told that someone was pushing in the air-conditioning unit. Mr. P had an operator use a board and screws to secure the air-conditioning unit to the wall so that someone could not push the unit into the Office.
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> Grievant arrived to work on December 6, 2019 to begin his 11 p.m. shift. He went to the Office to retrieve his cell phone charger, which he left in the Office the night before. Grievant was adamant about obtaining his cell phone charger because he cared for an ill relative and needed to be accessible in the event of an emergency. He was scheduled to be off from work during the following weekend and did not want to spend the entire weekend without his charger. The Office door was locked.2 Mr. P was no longer at work.
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> Grievant used his hands to push the air-conditioning unit away from the wall to gain access to the Office. According to Mr. P, he was told by an operator that Grievant "forcefully pushed in" the unit. Mr. P said, "It was kicked in; it was not simply sliding something out of the way; it was pushing this thing in and nothing going to stop me; it was violent act."
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> Following the incident, the University reinstalled the air-conditioning unit and repaired the sheet rock. Two employees worked a few hours to complete the task. The cost to repair the damage to the wall was approximately two hundred dollars. The University did not assert that Grievant caused any damage to the air-conditioning unit.

On December 18, 2019, the university issued to the grievant a Group III Written Notice with termination for "intentionally damag[ing] state property."[3] The Written Notice referenced the grievant's "forcibly removing the heating/AC unit out of the wall . . . . As a result the wall was damaged."[4] The grievant timely grieved this disciplinary action, and a hearing was held on April 20, 2020.[5] In a decision dated May 4, 2020, the hearing officer determined that the university's disciplinary action was justified because the grievant had damaged state property by recklessly "kicking in" the air-conditioning unit, destroying sheet rock in the wall.[6] While the hearing officer expressed his disagreement with the university's decision to terminate the grievant's employment under the circumstances, he concluded that the disciplinary action did not exceed the bounds of reasonableness and, therefore, no mitigating circumstances existed to reduce the disciplinary action.[7]

The grievant now appeals the hearing decision to EDR.

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[3] Agency Ex. 3, at 1.
[4] *Id.*
[5] Hearing Decision at 1.
[6] *Id.* at 3-4.
[7] *Id.* at 4-5.

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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant does not appear to dispute the hearing officer's substantive findings of fact with respect to the conduct charged. Instead, the grievant seeks "a second look at the facts" with respect to his claim that he experienced workplace discrimination during his employment at the university.[11] He contends that the university's decision to remove him from employment was "highly disproportionate" to his offense and was much more severe than disciplinary actions taken against other similarly situated employees.[12] He also claims that he did not use his feet to "kick in" the air-conditioning unit as charged, that other employees also were involved in removing the unit, and that the office area he was attempting to access was not normally inaccessible to him, by rule or practice.[13]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[14] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[15] 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.[16] 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.[17] As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the hearing officer made appropriate factual determinations that the grievant committed the misconduct charged on the Group III Written Notice, *i.e.* recklessly damaging state

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

property. Specifically, he found that the grievant "used his hands to push the air-conditioning unit away from the wall to gain access to the Office."[18] The hearing officer further found that "[o]nce the unit was secured in place by a board, removal of the unit was no longer a matter of simply pushing it through the hole in the wall. Grievant should have recognized this and stopped trying to push the unit."[19] The hearing officer concluded that this conduct was within the scope of "[w]illfully or recklessly damaging state records/property," an offense that would generally merit a Group III Written Notice under DHRM Policy 1.60, *Standards of Conduct*.[20] Accordingly, the hearing officer found that the university's disciplinary action for the grievant's misconduct was consistent with law and policy. Under such circumstances, the hearing officer was required to uphold the university's discipline and could not mitigate it unless, based on the record evidence, the discipline exceeded the limits of reasonableness.[21]

Because reasonable persons may disagree over whether and 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 high.[22] Where a hearing officer finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[23] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[24] and will reverse the determination only for clear error.

In this case, as explained above, the hearing officer appropriately sustained the agency's charges of damage to state property. While the grievant connects the disciplinary action to discrimination in his request for review, the hearing officer concluded that "no credible evidence was presented to show that the [u]niversity discriminated against [the grievant] because of any protected class."[25] To prevail at a hearing on a claim that the agency's disciplinary action was

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[18] Hearing Decision at 3. As explained above, the grievant does not appear to dispute these findings of fact.
[19] *Id.* at 3-4.
[20] *Id.* at 3; DHRM Policy 1.60, *Standards of Conduct*, Att. A, at 1-2. An offense meriting a Group III Written Notice is such that "a first occurrence normally should warrant termination." DHRM Policy 1.60, *Standards of Conduct*, at 9.
[21] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[22] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[23] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[24] "'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.*
[25] Hearing Decision at 4.

motivated by prohibited discrimination, a grievant must ultimately prove by a preponderance of the evidence that the nondiscriminatory business reason the agency cites for its disciplinary action is a pretext for discrimination.[26] Here, as proof of pretext, the grievant points to the severity of the penalty he received as well as his view that he had been repeatedly passed over for promotion opportunities.[27] From EDR and the hearing officer's perspective,[28] the penalty received does appear disproportionate to the grievant's offense. However, the hearing officer correctly noted that state policy provides the university the discretion to classify damage to state property as a terminable Group III offense.[29] In addition, while the grievant's complaints regarding denied promotions might have been valid claims, there was limited evidence presented on this topic at hearing. Accordingly, the hearing officer's determination that there was "no credible evidence presented" as to the claim is reasonable. EDR's review of the hearing record does not reveal any evidence the grievant presented linking a discriminatory motive to his termination.

The grievant also contends that the university did not remove other employees who committed similar infractions.[30] While certain of the grievant's submissions detail his view of these allegations, EDR finds no error in the hearing officer's consideration of the evidence presented during the hearing, in light of the misconduct sustained.[31] EDR's review of the hearing record does not find that the grievant presented evidence to support his allegations of disparate disciplinary practices for offenses similar to the reckless damage of state property. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.[32]

Accordingly, the hearing officer appropriately upheld the university's conclusion, in its discretion, that the grievant's damage to state property amounted to a "violent act"[33] that could not be tolerated in a work environment. The grievant disagrees, arguing that his offense arose from an important personal need and that he took responsibility for repairing any damage. However, as noted in the decision, the hearing officer lacked authority to mitigate the penalty by substituting his own judgment for the university's discretion to maintain a safe work environment.[34] Thus,

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[26] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[27] *See* Request for Administrative Review at 1-2.
[28] *See* Hearing Decision at 4-5.
[29] *See id.* at 3.
[30] Request for Administrative Review at 2-3.
[31] *See, e.g.*, University Ex. 4 at 2-6. Other than the Grievance Form A and attachments, the university did not present documentary evidence regarding either the hiring processes challenged by the grievant or disciplinary actions taken or not taken against other employees. The grievant did not present any exhibits for admission into the record. *See* Hearing Recording at 55:50-56:10.
[32] *See, e.g.*, EDR Ruling No. 2020-4976.
[33] Hearing Decision at 3; *see* Hearing Recording at 28:15-28:53 (Mr. P's testimony).
[34] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings*§ VI(B)(2).

EDR cannot say that the hearing officer abused his discretion in finding that the university's Group III Written Notice with removal was within the bounds of reasonableness. As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR 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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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