EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2021-5195
February 17, 2021

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 11589/11599. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11589/11599, as found by the hearing officer, are as follows:[1]

> Old Dominion University [the "university"] employed Grievant as a Manager in one of its units. Grievant received favorable evaluations from the University. No evidence of prior active disciplinary action was introduced during the hearing.
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> Ms. 1 and Mr. 2 reported to Grievant. Grievant reported to Manager S.
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> On February 28, 2020, Manager S held a manager's meeting for the department. It was the first meeting with the Business Operations Manager and Grievant's first opportunity to introduce himself to her. Employees in the meeting took turns introducing themselves and explaining what they did for the University. In his opening statement, Grievant said, "I'm a jerk." Grievant's comment made others in the room feel uncomfortable. Manager S perceived Grievant's behavior as a "complete lack of professionalism" and "inappropriate in a business setting."
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> Ms. 1 resigned from the University. Ms. 1 filed a complaint against Grievant and Mr. 2. The University began an investigation.

[1] Decision of Hearing Officer, Case No. 11589/11599 ("Hearing Decision"), December 15, 2020, at 2-3 (footnotes and internal citations omitted).

Ms. 1 told the Investigator that in 2017 Mr. 2 exposed his penis to her. She claimed she told Mr. 2 to put his penis away and he did so. Ms. 1 said she knew she should have reported the incident to her supervisor, Grievant, and that she did not tell anyone in Human Resources because she feared negative publicity would undermine the University.

The Investigator spoke with Mr. 2 and he denied showing his penis to Ms. 1. Mr. 2 said Ms. 1 had tried to show him pictures of individuals in their underwear. Ms. 1 frequently showed another employee inappropriate videos and photos.

Ms. 1 told the Investigator she attended a supervisor's essentials training with Grievant in 2018. Ms. 1 said that she and Grievant had an argument outside of S Hall and Ms. 1 told Grievant about Mr. 2 exposing himself to her. According to Ms. 1, Grievant responded, "Well, [Ms. 1] all I want to know is was it big?" He also told Ms. 1 that she could not report the violation as "the two years" had passed. Grievant could not recall the incident at first. Grievant then recalled an argument outside of S Hall but denied being told about Mr. 2 exposing himself. Grievant told the Investigator that if Ms. 1 told him something that egregious he would have referred her to Human Resources or Institutional Equity and Diversity.

On April 20, 2020, Manager S called Grievant and told Grievant that he would be placed on administrative leave. Manager S told Grievant to call Mr. 2 and tell Mr. 2 that Mr. 2 was being placed on administrative leave as well.

On April 22, 2020, Manager S notified Grievant "effective April 21, 2020 you have been placed on administrative leave with pay in order to protect the integrity of an investigation being conducted by the Office of Institutional Equity and Diversity."

On April 24, 2020, a Case Manager with the Office of Institutional Equity and Diversity sent Grievant an email notifying him that Ms. 1 had filed a complaint alleging she was held to different standards from other employees regarding "making her find her own replacements for sick days" and not being "afforded opportunities for professional development." The Case Manager added, "Be advised that Executive Order One (2018) prohibits the intimidation of, harassment of, or retaliation against anyone who files a complaint or who takes part in this process."

The Office of Institutional Equity and Diversity completed its report on April 29, 2020.

On May 11, 2020, Manager S notified Grievant that the University intended to issue Grievant a Group II Written Notice for failure to report an incident of sexual harassment. Grievant was being placed on pre-disciplinary leave pending receipt of his response to the possible disciplinary action and the University's decision.

On May 13, 2020, Grievant, by counsel, submitted a response to the University's notice of pending disciplinary action. Grievant admitted saying "I'm a jerk" was not professional and that Grievant was trying to be funny.

Grievant was issued a Group II Written Notice dated May 27, 2020 for unprofessional behavior since July 2019. When Manager S presented Grievant with the Group II Written Notice, Manager S told Grievant that what happened in the past was in the past and that Grievant should focus on being professional in the future.

Mr. 2 was also issued a Group II Written Notice on May 27, 2020.

Grievant reported to work on May 28, 2020 as instructed. Mr. 2 was also working that day.

When Grievant and Mr. 2 were placed on administrative leave, Grievant began contacting Mr. 2 at Mr. 2's home. Mr. 2 repeatedly told Grievant he did not want to talk about the situation. This continued when they returned to work.

Mr. 2 returned to work on May 28, 2020. Upon Mr. 2's return to the office, Grievant did not want to speak with Mr. 2. When Mr. 2 entered an area where Grievant was located, Grievant left the area and went to Grievant's office. Later on, Grievant sent Mr. 2 a text message regarding what they were going to do. They set a meeting for June 3, 2020. On June 3, 2020, Grievant asked Mr. 2 about the situation and said that he was going to get a lawyer to deal with his grievance. Mr. 2 told Grievant he did not want to talk about it.

On several occasions when Grievant and Mr. 2 met during the day, Grievant "would bring it up all over again." Mr. 2 would have to repeat that he did not want to talk about it.

Mr. 2 began to avoid going to his office in order reduce the risk that he would encounter Grievant. Mr. 2 shifted more of his work outside of his office in order to avoid seeing Grievant. Grievant did not realize Mr. 2 was trying to avoid him.

On June 24, 2020, Grievant and Mr. 2 met with several other employees to discuss work tasks. After the meeting ended, Grievant wanted to talk to Mr. 2 about Grievant's situation and getting a lawyer for his grievance. Mr. 2 said, "[Grievant's first name], I do not want to talk about any of this." Grievant said, "I will ask you one thing – will you have my back or not?" Mr. 2 replied, "I will not talk about this."

Mr. 2 was concerned about his employment status because if Mr. 2 did not have Grievant's "back", it would be worse for him at work. Mr. 2 experienced anxiety when coming to work and worried about what could happen to him. He was concerned about being around Grievant. Because of his concerns, Mr. 2 sent text and email messages to University managers.

On June 24, 2020, Mr. 2 contacted Manager S alleging while Grievant and Mr. 2 were on administrative leave from April 11, 2020 to May 11, 2020, Grievant contacted Mr. 2 numerous times to discuss why they were on administrative leave. Mr. 2 told Grievant he did not want to discuss the matter but Grievant continued to contact Mr. 2.

Manager S called Mr. 2 and spoke about Mr. 2's concerns. Mr. 2 told Manager S that it was difficult to be in the office with Grievant and that Grievant kept asking Mr. 2 if Mr. 2 would have Grievant's back. Manager S considered Grievant's actions to be hostile. Manager S spoke with Grievant about his contact with Mr. 2. Grievant was mostly silent but said that that was the last time he would talk about it with Mr. 2.

On July 6, 2020, Manager S notified Grievant that the University intended to issue a Group III Written Notice with removal for disregarding ODU Discrimination Policy 1005 and DHRM Policy 2.35. Manager S notified Grievant he was removed from employment effective July 16, 2020.

On May 27, 2020, the agency issued to the grievant a Group II Written Notice for unsatisfactory performance, failure to follow policy, workplace harassment, and disruptive behavior.[2] On July 16, 2020, the agency issued to the grievant a Group III Written Notice with termination for unsatisfactory performance, failure to follow policy, violation of DHRM Policy 2.35, *Civility in the Workplace*, and threats or coercion.[3] The grievant timely grieved each of these disciplinary actions and EDR consolidated them for a single hearing,[4] which was held on November 19, 2020.[5] In a decision dated December 15, 2020, the hearing officer determined that the Group II Written Notice must be reduced to a Group I,[6] but the Group III Written Notice was warranted and appropriate because the grievant's conduct violated DHRM Policy 2.35.[7] Finding no mitigating circumstances, the hearing officer concluded that termination was supported under DHRM Policy 1.60, *Standards of Conduct*.[8]

The grievant, through counsel, appealed the decision to EDR on December 30, 2020. The grievant's counsel also requested an opportunity to submit a brief in support of the appeal and a transcript of the hearing. EDR received the brief and transcript from the grievant's counsel on February 12, 2021.[9]

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[2] Agency Ex. F.
[3] Agency Ex. M.
[4] *See* EDR Ruling No. 2021-5154.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 6-7, 9.
[7] *Id.* at 7-8.
[8] *Id.* at 8, 9.
[9] The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision." *Grievance Procedure Manual* § 7.2(a). EDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the 15 calendar days can be considered by EDR on administrative review. The grievant's February 12, 2021 brief does not appear to raise any new matters beyond those that were described in the original, timely request for administrative review and are discussed in this ruling.

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 . . . ."[10] 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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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 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.

In his request for administrative review, the grievant argues that the decision is inconsistent with DHRM Policy 1.60, *Standards of Conduct*, because he did not receive the benefit of progressive discipline. More specifically, he asserts that "there was no opportunity for [him] to improve his behavior prior to the Group III Written Notice and [his] conduct was not of such a serious nature that the first offense warranted termination."[17] The grievant also notes that the university issued the Group III Written Notice "before the Group II Written Notice was fully resolved," further undermining his ability to correct his performance prior to termination. In addition, the grievant claims that the hearing officer should have mitigated the disciplinary action because it "exceeded the limits of reasonableness" and that termination was "totally unwarranted" in this case.[18]

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[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Request for Administrative Review at 1.
[18] *Id.* at 2.

Progressive Discipline

DHRM Policy 1.60, *Standards of Conduct*, describes the Commonwealth's system of progressive discipline and corrective action for managing employee performance. In general, agencies should "follow a course of progressive discipline that fairly and consistently addresses employee behavior, conduct, or performance that is incompatible with the state's Standards of Conduct for employees and/or related agency policies."[19] Depending on the nature and severity of an employee's misconduct, a Written Notice of formal disciplinary action may be issued at the level of a Group I, II, or III offense and be accompanied by varying levels of additional action, including suspension without pay, demotion or transfer either with or without a disciplinary salary action, or termination.[20]

Although DHRM Policy 1.60 encourages progressive discipline, it is "also designed to enable agencies to fairly and effectively discipline and/or terminate employees . . . where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination."[21] An agency may therefore appropriately terminate an employee following a single instance of misconduct if the employee's offense is sufficiently serious. Indeed, the policy goes on to specifically describe Group III offenses as "acts of misconduct of such a severe nature that a first occurrence normally should warrant termination," including actions that "endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws."[22]

In this case, the grievant received a Group III Written Notice with termination for violation of DHRM Policy 2.35.[23] As the hearing officer correctly noted,[24] DHRM Policy 2.35 grants agencies the discretion to determine whether a Group I, II, or III offense is appropriate for specific misconduct, based on the severity of the offense.[25] The hearing officer assessed the evidence and determined that the university had presented sufficient evidence to support a Group III Written Notice with termination.[26] The grievant is correct that the university could have issued a lower level of disciplinary action and afforded him an opportunity to correct his behavior prior to termination. The university could have also awaited final resolution of the Group II Written Notice before proceeding with additional discipline. Nonetheless, DHRM Policy 1.60 explicitly states that progressive discipline is not required in all cases, particularly for conduct that is appropriately categorized as a Group III offense. The hearing officer determined that the university's discipline was warranted and appropriate in this case and, based on the arguments presented in the grievant's request for administrative review, EDR has no reason to conclude otherwise. For these reasons, we find no misapplication of DHRM Policy 1.60 in the hearing officer's decision and will not disturb the decision on these grounds.

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[19] DHRM Policy 1.60, *Standards of Conduct*, at 1.
[20] *See id.* at 7-9.
[21] *Id.* at 1.
[22] *Id.* at 9.
[23] *See* Agency Ex. M.
[24] Hearing Decision at 8.
[25] DHRM Policy 2.35, *Civility in the Workplace*, at 5 ("Any employee who engages in conduct prohibited under this policy . . . shall be subject to corrective action, up to and including termination, under Policy 1.60, *Standards of Conduct*."); DHRM Policy 1.60, *Standards of Conduct*, Attach. A.
[26] Hearing Decision at 7-8.

Mitigation

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]."[27] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; 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."[28] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[29]

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.[30] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[31] and will reverse the determination only for clear error.

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 issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[32] 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.[33]

In his request for administrative review, the grievant argues that the discipline exceeded the limits of reasonableness and that termination was therefore unwarranted in this case, relying on the hearing officer's conclusion that he "[did] not agree with the University's decision to

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[27] Va. Code § 2.2-3005(C)(6).
[28] *Rules for Conducting Grievance Hearings* § VI(A).
[29] *Id.* § VI(B).
[30] 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).
[31] "'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.*
[32] 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).
[33] 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).

remove Grievant from employment."[34] In particular, the grievant alleges that he "changed his behavior" when Manager S instructed him to stop talking with Mr. 2, that he "was not given an opportunity to seek out counseling," and that the prior Group II Written Notice was the subject of an active grievance at the time he received the Group III Written Notice with termination.

Acknowledging that "[t]he University should have done a better job of instructing Grievant not to speak with Mr. 2 or anyone else about the University's investigations and Grievant's pending disciplinary action," the hearing officer nonetheless found no mitigating circumstances that would support a decision to reduce the disciplinary action.[35] In support of this determination, the hearing officer noted that "[t]he University was entitled to hold Grievant to a higher standard because he was a supervisor" and, as a result, the discipline did not exceed the limits of reasonableness in this case.[36] 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.'"[37] Although the grievant disagrees with the hearing officer's analysis of mitigating factors, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, we decline to disturb the decision on these grounds.

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.[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]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[34] Hearing Decision at 8.
[35] *Id.*
[36] *Id.*
[37] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).
[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).