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## ADMINISTRATIVE REVIEW

In the matter of Norfolk State University
Ruling Number 2022-5295
August 19, 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 11676. For reasons set forth below, EDR will not disturb the hearing decision.

## FACTS

The relevant facts in Case Number 11676, as found by the hearing officer, are as follows:[1]

> Norfolk State University [the "university" or the "agency"] employed Grievant as a Teacher. She began working for the University on January 10, 2019. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Classroom had glue on the walls. When staff arrived to work on November 7, [2019], the Supervisor asked them to remove the glue from the walls. Glue should not have been placed on the walls because of its ingredients. Grievant sent several text messages to the Supervisor and her co-workers, Ms. W and Ms. G. Grievant's messages said the Supervisor was "mean spirited" and not a good supervisor.
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> The Supervisor called a staff meeting to discuss Grievant's messages and establish expectations. Grievant attended the meeting with the Supervisor, Ms. W, and Ms. G. The Supervisor began speaking. Grievant loudly interrupted the Supervisor. Grievant was angry. The Supervisor asked Grievant to lower her voice. Grievant began walking towards the Supervisor while pointing her finger at the Supervisor and speaking loudly. The Supervisor stepped backwards to avoid contact with Grievant.

[1] Decision of Hearing Officer, Case No. 11676 ("Hearing Decision"), July 26, 2021, at 2-3.

> Ms. W was sitting in a chair. Grievant was standing. Grievant approached Ms. W in a threatening manner. Grievant entered Ms. W's "personal space." Ms. W moved back in her chair. Grievant pointed her finger at Ms. W. Grievant sternly told Ms. W, "Don't look at me. I am old enough to be your mother. Show me some respect!" Grievant's voice was loud enough that she could have been overheard by students in the adjoining room. Ms. W was afraid of Grievant. Ms. W believed Grievant might hit her.
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> The Supervisor feared Grievant would become "physical," so she instructed Grievant to go home. Grievant refused. The Supervisor again asked Grievant to leave. Grievant said, "I will leave after I get the glue/adhesive off the wall." The Supervisor said, "No, just go! Leave and if you don't, I will call the police." Grievant left the classroom and walked to the Human Resources office.

On March 3, 2021, the university issued to the grievant a Group III Written Notice with termination for disruptive behavior, insubordination, and violation of DHRM 2.35, *Civility in the Workplace*.[2] The grievant timely grieved the disciplinary action and a hearing was held on July 7, 2021.[3] In a decision dated July 26, 2021, the hearing officer found that the university had "presented sufficient evidence to support the issuance of a Group III Written Notice" for "bullying and threatening behavior," and thus its "decision to remove Grievant must be upheld."[4] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[5] The grievant now appeals the decision to 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 . . . ."[6] 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.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant generally disputes the hearing officer's assessment of the evidence and conclusion that she engaged in conduct warranting a Group III Written Notice.[9] More specifically, the grievant argues that she was "falsely accused" of placing glue on the walls, that there was no rule prohibiting glue being used on walls, that she was "constantly being harassed" by the Supervisor and Ms. W, and that university's evidence was

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[2] Agency Ex. 1, at 15.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.*
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Request for Administrative Review at 1.

not credible.[10] In addition, the grievant argues that mitigating circumstances justify a reduction or removal of the disciplinary action.[11] Lastly, she alleges that the hearing officer was biased against her.[12]

*Hearing Officer's Consideration of Evidence*

The grievant primarily appears to claim the hearing officer did not give proper consideration to her evidence. For example, the grievant alleges that the Supervisor and Ms. W had previously engaged in "bullying" and "belittling" behavior toward her, which culminated in the incident on November 7, 2019.[13] The grievant states that the Supervisor "decided to go on an expedition" with the intent of harassing and retaliating against the grievant, even though there was no policy stating that glue should not be used on the walls.[14] The grievant also describes concerns that the university improperly "redacted and edited" witness statements and that the Supervisor was not "credible or truthful" when testifying about the incident.[15]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[17] 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.[18] 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.[19] 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.

The Group III Written Notice issued to the grievant in this matter charged her, in part, with violating DHRM Policy 2.35 by "rais[ing] her voice, point[ing] her finger at [the Supervisor]," and behaving "aggressive[ly] towards [Ms. W]."[20] In the hearing decision, the hearing officer assessed the evidence regarding the grievant's misconduct as follows:

> On November 7, [2019], Grievant engaged in bullying and threatening behavior. She interrupted the Supervisor, pointed her finger at the Supervisor,

[10] *Id.* at 1-2.
[11] *Id.* at 1.
[12] *Id.* The grievant also appears to claim that the university has not returned her personal belongings from the workplace. *Id.* If this is the case, the grievant should contact the university's Human Resources office for assistance. EDR does not have the authority to address or resolve this matter.
[13] Request for Administrative Review at 1.
[14] *Id.* at 2.
[15] *Id.* at 2.
[16] Va. Code § 2.2-3005.1(C).
[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.
[20] Agency Ex. 1, at 15.

> walked towards the Supervisor causing the Supervisor to retreat. The Supervisor became afraid that Grievant might harm her or Ms. W. Grievant approached Ms. W and entered her "personal space." Grievant commanded that Ms. W was not to look at her and to show her some respect. Ms. W moved back in her chair fearing for her safety.[21]

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. At the hearing, the Supervisor and Ms. W testified consistently with the hearing officer's factual determinations above.[22] Ms. W further stated that she believed the grievant was going to hit her, while the Supervisor testified that she was fearful of the grievant based on the grievant's conduct during the meeting.[23] Taken together, the evidence in the record supports the hearing officer's finding that the grievant's behavior violated DHRM Policy 2.35, which prohibits bullying and threatening conduct, including "behavior that creates a reasonable fear of injury to another person."[24] In this case, the hearing officer agreed with the university's determination that the grievant's conduct justified the issuance of a Group III Written Notice with termination.[25]

Nevertheless, the grievant alleges the hearing officer failed to consider her argument that the Supervisor and Ms. W had previously engaged in harassing and bullying behavior directed at her, and that she was responding to the allegedly false accusation that she had improperly used glue on the walls.[26] The hearing officer addressed the grievant's contention that "her behavior was not so excessive as to justify removal" and that "she had been falsely accused of placing glue on the walls."[27] The hearing officer found these arguments unpersuasive, noting that "[e]ven if Grievant believed she had been falsely accused, it would not have justified her lack of civility."[28] However, to the extent the hearing officer did not directly address all of the evidence in the record on these issues, EDR cannot find that such silence creates grounds for reconsideration. There is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular exhibit, testimony, and/or other evidence does not necessarily constitute a basis for remand. EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact.

Regarding the university's alleged redaction of evidence, the grievant's argument about this issue is unclear. The grievant appears to contend that the university's delay in issuing the discipline (from November 2019 to March 2021) provided management with an opportunity to

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[21] Hearing Decision at 4.
[22] *See* Hearing recording at 17:30-25:59 (Ms. W's testimony), 55:52-58:54 (Supervisor's testimony).
[23] Hearing recording at 26:02-26:42 (Ms. W's testimony that grievant's behavior made Ms. W afraid), 1:21:00-1:22:55 (Supervisor's testimony that the grievant invaded her personal space, pointed at her, and spoke to her in a loud, harsh tone).
[24] Agency Ex. 1, at 17, 24 (outlining the application and purpose of Policy 2.35 and defining "threatening behavior" for purposes of the policy).
[25] The range of misconduct under DHRM Policy 2.35 may vary in severity and effect on the workplace; as a result, such misconduct may constitute a Group I, II, or III offense, depending on its nature. DHRM Policy 1.60, *Standards of Conduct*, Att. A; *see* Agency Ex. 1, at 21.
[26] Request for Administrative Review at 1.
[27] Hearing Decision at 4.
[28] *Id.*

alter the witnesses' written statements.[29] In particular, the grievant cites to a specific statement provided by Ms. G, arguing that several lines were "whited out and edited."[30] Although the grievant claims that the university improperly "redacted and edited" documents, [31] we have not identified any evidence or argument in the record to support this claim.[32] Moreover, the grievant did not object to the admission of the agency's exhibits into the record at the hearing. In the absence of anything in the record for hearing officer to have considered about the alleged alteration of the university's exhibits, we perceive no basis to remand the case for further consideration of this issue.

In conclusion, and although the grievant disagrees, the hearing officer was entitled to evaluate the testimony of the witnesses about the misconduct charged on the Written Notice and to accept the university's interpretation of these events as more persuasive. 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 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.[33] Accordingly, EDR declines to disturb the hearing decision on these grounds.

*Mitigation*

The grievant next alleges that mitigating circumstances warrant a reduction or removal of the disciplinary action. In particular, the grievant appears to argue that mitigation was warranted because the university's Human Resources office failed to intervene or address her concern that she was being bullied and harassed before the incident on November 7, 2019.[34]

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]."[35] 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."[36] 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

[29] Request for Administrative Review at 2. At the hearing, the Supervisor testified that the disciplinary action was delayed because of communication between the Supervisor and Human Resources as well as operational changes during the COVID-19 pandemic. Hearing Recording at 2:16:30-2:18:00 (Supervisor's testimony).
[30] Request for Administrative Review at 2; *see* Agency Ex. 1, at 5..
[31] Request for Administrative Review at 2.
[32] At the hearing, the only evidence presented by the grievant about alleged alteration of documents appears to be when she asked Ms. W if Ms. W had "used white out" on her written statement; Ms. W responded that she had not. Hearing Recording at 32:54-33:19 (Ms. W's testimony).
[33] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[34] Request for Administrative Review at 1.
[35] Va. Code § 2.2-3005(C)(6).
[36] *Rules for Conducting Grievance Hearings* § VI(A).

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.[37]

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.[38] Where the hearing officer does not sustain all of the agency's charges and 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."[39] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[40] 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, termination is an inherently reasonable outcome.[41] Moreover, 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.'"[42] In the decision, the hearing officer considered the evidence regarding mitigation, finding that no mitigating circumstances existed to reduce the disciplinary action.[43] Having reviewed the evidence in the record regarding the grievant's claims, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we 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. Accordingly, we decline to disturb the decision on these grounds.

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[37] Id. § VI(B).

[38] 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).

[39] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[40] "'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.*

[41] 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).

[42] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

[43] Hearing Decision at 4.

*Alleged Bias*

The grievant further alleges that the hearing officer was biased against her and "had his mind made up" before the hearing without properly considering her evidence.[44] The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[45]

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[46] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[47] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[48] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[49]

The evidence presented by the grievant here is insufficient to establish bias or any other basis for disqualification. In support of this claim, the grievant notes that the hearing officer incorrectly described her as walking to the Human Resources office after the incident on November 7, 2019, when she in fact drove her car.[50] To the extent the hearing officer erred with respect to this detail, we find no grounds to conclude that it demonstrates bias or otherwise warrants remand.[51] Furthermore, the mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Additionally, EDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, EDR declines to disturb the hearing decision on this basis.[52]

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[44] Request for Administrative Review at 1.
[45] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."
[46] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[47] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[48] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[49] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[50] Request for Administrative Review at 1.
[51] *See* Va Code. § 2.2-3005.1(C) (stating that hearing officer must make "findings of fact as to the *material* issues in the case" (emphasis added)). The grievant's method of traveling to the university's Human Resources office after the incident was not material to the misconduct charged on the Written Notice.
[52] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision is inconsistent with the grievance procedure or state policy such that remand is warranted.

## 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.[53] 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.[54] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[55]

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