Issue: Administrative Review of Hearing Decision; Ruling Date: June 24, 2004; Ruling #2004-706; Agency: Virginia Commonwealth University; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Number 2004-706
June 24, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Numbers 506 & 592. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure. Specifically, the grievant maintains that: (1) the hearing officer demonstrated bias in favor of the Virginia Commonwealth University (VCU or the University), (2) the hearing officer failed to consider important evidence presented, and (3) the hearing officer failed to mitigate the discipline issued by the agency. For all of the reasons set forth below, this Department finds no reason to disturb the hearing officer's opinion.

FACTS

Formal Disciplinary Action—Group II Written Notice

On October 7, 2003, the grievant was issued a Group II Written Notice of disciplinary action. The Group Notice asserts:

> *On 9/18/2002, expectations of Custodial staff concerning entryway mats was [sic] communicated. On 9/9/2003, an email reminder was sent to [Grievant] that these standards were not being met. Mats were not aligned per standards on Fri. 9/12/03, Mon. 9/15/03 and Tues. 9/30/03 per my personal observation.*

On October 29, 2003, the grievant timely filed a grievance to challenge the University's disciplinary action. During the management step process, the University reduced the disciplinary action to a Group I Written Notice. Grievant requested a hearing which occurred on March 10, 2004. The hearing officer upheld the Group I Notice.

The Virginia Commonwealth University employs the grievant as a Housekeeping Supervisor. She supervises six employees. The purpose of her position is to "perform regular and project cleaning of the University Student Commons; and to perform regular and project cleaning outside of the Commons." No evidence of prior disciplinary action was introduced at the hearing.

On September 18, 2002, the Supervisor sent the grievant an email stating:

> *Please make sure that the custodial staff who work the Phase 1 and Phase 2 sides of the building are aware of our expectations of them concerning the entryway walk-off mats. The inside walk-off mats should be flush against the door frame or door threshold on the floor (not away from the door) and parallel to the doors. The outside walk-off mats should be no more than 1" away from the door frame or door threshold on the floor whenever possible (unless this interferes with door operation) and parallel to the doors. These mats should be checked regularly during the day shift (e.g. start of shift, before or after the restroom checks, & end of shift) plus during the night shift as well.*[1]

The grievant informed her staff that, "All floor mats are to be one inch from the doors. Please make sure you are doing this. Also please see attached e-mail." She attached a copy of the Supervisor's September 18, 2002 email.

> On September 9, 2003, the Supervisor sent the grievant an email stating:
> *Last school year, standards were set for placement of inside & outside entryway mats – as part of the 1st duties of the day, the mats were to be straightened & moved to within a few inches of the door threshold. This has not been happening yet this school year.*[2]

On October 3, 2003, the Supervisor sent the grievant an email asking if she had notified her staff of the requirements for mat placement and if she had counseled or disciplined any of her staff for failing to properly place mats.[3] The grievant had taken no action against her staff.

According to management, the mats placed near building entrances need to be straightened periodically in order to give the University building a better appearance and to ensure that twisted or folded mats do not create a safety problem for guests entering and leaving the building. There were six mats inside and five outside a building for which the grievant was responsible.

On September 12, 15, and 30, 2003, the Supervisor checked the building mats at approximately 8 a.m. and observed some of the mats askew. They were not positioned in accordance with his instructions.

The grievant contends she was issued the Written Notice as a form of retaliation. because she did not take action against another employee in 1995.

Performance Evaluation

On October 27, 2003, the grievant timely filed a grievance to challenge her 2003 evaluation. The EDR Director consolidated the grievance challenging the Written Notice

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[1] Decision of Hearing Officer, Case Number 506/592, page 4, issued April 9, 2004.
[2] *Id.*
[3] *Id.*

with the performance evaluation grievance and assigned the consolidated grievances to a March 10, 2004 hearing. The hearing officer upheld the 2003 performance evaluation.

The grievant's 2003 evaluation rates her performance in six core responsibilities. These responsibilities include: (1) Performance Management; (2) Managing Regular Cleaning of the Commons; (3) Managing Special Cleaning Projects; (4) Monitoring & Maintenance of Cleaning Equipment and Supplies; (5) Supervising Outdoor Cleaning & Landscaping Care; and (6) Monitoring the Unit's Customer Service. For each core responsibility, the grievant could receive a rating of Extraordinary Achiever, High Achiever, Achiever, Fair Performer, and Unsatisfactory Performer. She received a rating of Fair Performer for core responsibilities 2, 5, and 6 with an overall rating of Fair Performer.

The grievant's 2002 evaluation rates her performance as Fair Performer in core responsibilities 5 and 6 with an overall rating of Achiever. Her 2001 evaluation rated her performance in six core responsibilities as either Extraordinary Contributor, Contributor, or Below Contributor. She received Below Contributor in core responsibilities 5 and 6 with an overall rating of Contributor.

The grievant's 2000 evaluation rated her performance in nine job elements. She received Meets Expectation for eight elements and Exceeds Expectation for one element with an overall rating of Meets Expectations. Her 1999 evaluation rated her performance in nine job elements. She received Meets Expectation for 7 elements and Exceeds Expectation for 2 elements with an overall rating of Exceeds Expectations.

The grievant's overall performance rating was: Exceeds Expectations in 1998; Meets Expectations in 1997; Exceeds Expectations in 1996; Exceeds Expectations in 1995; Exceeds Expectations in 1994; Exceptional in 1993; and Exceeds Expectations in 1992.

The grievant asserts that her performance evaluation was lowered because she made a challenge to a back pay issue and refused to harass other employees.

DISCUSSION

Alleged Bias

The grievant claims that the hearing officer was biased in favor of the agency. The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an "orderly, fair and equitable fashion"[4] and to "maintain order, decorum and civility."[5] Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process[6] and avoid the appearance of bias.[7] However,

[4] *See Rules for Conducting Grievance Hearings*, § IV(C), page 7.
[5] *See Rules for Conducting Grievance Hearings*, § IV(A), page 6.
[6] *See Rules for Conducting Grievance Hearings*, § III(D), page 4.
[7] *See Rules for Conducting Grievance Hearings*, § II, page 2.

the Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[8] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[9]

In this case, the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed bias in this case.

Weighing Evidence

The grievant asserts that the hearing officer did not give enough weight to the evidence she presented. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and grounds in the record for those findings."[11] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[12] 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 upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the present case, the grievant claims that the hearing officer did not adequately consider the evidence she presented at hearing and that such evidence is not mentioned in the decision. She does not point to any particular evidence that was purportedly not properly considered. The grievant's general challenge simply contests the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses and evidence presented at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority and will not be disturbed when there is evidence in the record that support the findings set forth in the decision.

Here, management presented numerous e-mails that supported management's contention that the grievant had been adequately informed of how the mats should be placed. In addition, there was testimony by the Supervisor that despite instruction as to how the mats should be placed, the grievant failed to ensure that the mats were properly placed. The hearing officer rejected the grievant's argument that the mats were properly

[8] Welsh v. Commonwealth., 14 Va. App. 300, 315 (1992) (brackets in original).
[9] *See e.g.* Compliance Ruling of Director #2003-113.
[10] Va. Code § 2.2-3005(D)(ii).
[11] *Grievance Procedure Manual* § 5.9, page 15.
[12] Va. Code § 2.2-3005(C)(5).

straightened but that student traffic caused them to be moved. He concluded that this argument fails because the Supervisor observed the mats within an hour of the building opening at 7 a.m. during a period of time when student traffic is relatively light. As to the grievant's contention that the Written Notice was issued in retaliation for not taking action on an employee in 1995, the hearing officer found that the distant proximity in time precluded a finding of retaliation. Based on this evidence in the hearing record, this Department cannot conclude that the hearing officer findings or conclusion regarding the University imposed discipline are unsupported by the hearing record.

Similarly, this Department cannot conclude that the hearing officer's findings regarding the grievant's performance evaluation constituted error. The grievant had asserted that her evaluations began to decline only after 2003 when (1) the grievant complained to management regarding a back pay issue, and (2) she refused to harass coworkers. The hearing officer, however, concluded that because the grievant's performance had begun declining in 2001, he could not conclude that the grievant's performance evaluation was influenced by retaliation by management. Here, the grievant has provided no explanation of how the hearing officer's conclusions regarding the relationship of past performance evaluations to the allegation of retaliation are improper or erroneous. This Department will not disturb a hearing decision based upon a vague allegation of error.

Mitigating Circumstances

The grievant alleges that the hearing officer erred by not mitigating the discipline initiated by the agency.

The *Rules for Conducting Grievance Hearings* expressly state that in cases involving disciplinary action, a "hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct," and that "[s]hould the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so."[13] The *Rules*, however, further explain that "[i]n considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters," and that "[t]he agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."[14] Furthermore, the *Rules* recognize that the hearing officer "is not a 'super-personnel officer'" and "management is reserved the exclusive right to manage the affairs and operations of state government."[15] Thus, while it is evident that a hearing

[13] *Rules for Conducting Grievance Hearings* § VI (B)(1), page 12.
[14] *Id*.
[15] *Rules for Conducting Grievance Hearings* § VI (A), page 10. Note that the *Rules* requirement that hearing officers give deference to agency actions is entirely consistent with federal MSPB law. In LaChance v. M.S.P.B., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999) the court noted that "it is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." La Chance 178 F.3d at 1251, citing Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984). *See also* Beard v. General Serv. Admin., 801 F.2d 1318 (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of

officer *may* mitigate an agency's disciplinary action, his discretion to do so is narrower than that of the agency and must be exercised as described below.

Under the *Rules*, once the hearing officer has determined that the employee committed the charged act, that the action constituted misconduct, and that the agency's discipline was consistent with law and policy, the hearing officer may mitigate the agency's discipline only after giving due deference to the agency's right to exercise its good faith business judgment in managing employee matters and its operations. We believe this deference standard comports with that established in other merit system case law, which allows for mitigation only where the agency's penalty exceeds the tolerable limits of reasonableness.[16] In order to determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors. The *Rules* provide a non-exclusive list of factors for consideration by the hearing officer: (1) whether the employee had notice of the existence of the rule purportedly broken; (2) whether management has been consistent in the way it has dealt with similarly situated employees; and (3) whether the disciplinary action was prompted by an improper motive. If, after weighing all relevant factors, the hearing officer determines that the agency's action exceeded the bounds of reasonableness, the hearing officer may mitigate the disciplinary action.[17] Again, appropriate deference must be

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employee misconduct upon the operations of the agency . . .") Beard, 801 F.2d at 1321; Hunt v. Department of Health and Human Servs., 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").

[16] *See* Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at *5 (1981) (citing to Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981)). The MSPB "will not freely substitute its 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.'" Davis at *5-6. *See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")

[17] *See*, e.g., Douglas v. Veterans Admin., 5 M.S.P.B. 313, 331-32 (1981), in which the MSPB provided an often cited but non-exclusive list of factors to be considered when assessing the reasonableness of an agency's disciplinary decision. These include:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> (3) the employee's past disciplinary record;
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
> (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> (7) consistency of the penalty with any applicable agency table of penalties;
> (8) the notoriety of the offense or its impact upon the reputation of the agency;
> (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
> (10) potential for the employee's rehabilitation;

given to the agency[18] and the hearing officer may not serve as a "super-personnel officer" substituting his judgment for that of the agency.[19]

Under the facts of this case, this Department cannot conclude that the hearing officer erred by holding that, under the *Rules*, there were insufficient mitigating factors to warrant modifying the agency's discipline.

CONCLUSION AND APPEAL RIGHTS

For all of the reasons set forth above, this Department finds no reason to disturb the hearing officer's opinion.[20] 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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23] This Department's rulings on matters of procedural compliance are final and nonappealable.[24]

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Claudia T. Farr
Director

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(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employees or others.

[18] *Rules for Conducting Grievance Hearings* § VI (A), page 10. *See also* Guise v. Department of Justice, 330 F.3d 1376 (Fed. Cir. 2003) ("The choice of penalty is committed to the sound discretion of the employing agency and will not be overturned unless the agency's choice of penalty is wholly unwarranted in light of all the relevant factors.") *Guise*, 330 F.3d at 1382 (citing to LaChance v. Devall, 178 F.3d 1246, 1251 (Fed. Cir. 1999)).

[19] *Rules for Conducting Grievance Hearings* § VI (A), page 10. *See also*, Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1994). In reviewing an agency's penalty decision, the question is not what penalty the agency should have chosen. *Hayes*, 727 F.2d at 1540. Rather, the proper inquiry is whether the agency has selected a penalty within the tolerable bounds of reasonableness. *Hayes*, 727 F.2d at 1540; Mitchum v. Tenn. Valley Auth., 756 F.2d 82, 84 (Fed. Cir. 1985).

[20] While not each of the objections raised by the grievant will be discussed in this ruling, each has been carefully considered and this Department concludes that there is no reason to disturb the hearing officer's decision.

[21] *Grievance Procedure Manual* §7.2(d), page 20.

[22] *See Grievance Procedure Manual* §7.3(a), page 20.

[23] *Id.*

[24] Va. Code § 2.2-1001(5).