

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10997; Ruling  
Date: June 12, 2017; Ruling No. 2017-4561; Agency: Department of Behavioral  
Health and Developmental Services; Outcome: Remanded for Clarification.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution<sup>1</sup>**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2017-4561  
June 12, 2017

The Department of Behavioral Health and Developmental Services (“the agency”) 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 10997. For the reasons set forth below, EDR is remanding the matter to the hearing officer for further consideration.

FACTS

The relevant facts in Case Number 10997, as found by the Hearing Officer, as are follows:<sup>2</sup>

The Department of Behavioral Health and Developmental Services employed Grievant as a Safety and Security Technician at one of its facilities. The purpose of his position was:

To maintain security, custody, and control over a patient population ranging from ages 18 to 64 in the Forensic Unit. Responsible to maintain controlled access both inside and outside the Forensic Unit.

He had been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training in Therapeutic Options of Virginia (TOVA) regarding how to respond to physical assaults by patients. He was taught to block a Patient who was attacking him. The Agency’s witness conceded that not every confrontation with a patient can be resolved using TOVA techniques.

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<sup>1</sup> Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

<sup>2</sup> Decision of Hearing Officer, Case No. 10997 (“Hearing Decision”), May 12, 2017, at 2-4 (citations omitted).

The Patient was admitted to the Facility based on a Temporary Detention Charge after being charged with false report to a law enforcement officer, strangulation of another, and unlawful bodily injury. His primary diagnosis is post-traumatic stress disorder.

The Patient is a young man who is significantly shorter and lighter than Grievant. Grievant is taller and heavier than the average male and all of the other employees involved in the conflict.

On December 13, 2016, the Patient was in a two-to-one relationship meaning that two Forensic Mental Health Technicians were to be within arm's length of the Patient at all times.

The Patient became agitated when a nurse asked him why he removed the dressing from his left arm. He began pacing around the room and went down the hallway to his room. He scraped dry paint from the wall and stuck it into his right arm trying to create a cut. He put the paint chip in his pocket. A nurse asked him to give her the paint chip. He removed it from his pocket and dug it into his arm. The Patient looked into the nursing station and saw a nurse drawing a syringe. He believed staff intended to give him a sedative against his will. He said, "come on with it; whoever touch me will get knocked the f—k out."

An emergency response that included Grievant was called to provide assistance to the FMHTs working with the Patient. When Grievant arrived he observed the Patient cutting himself with a piece of dry paint he obtained from his room. The Patient's forearm was wrapped with a white material. Grievant heard the Patient say, "I'm gonna f-k me up somebody tonight yo I swear." The Patient ripped the water fountain off the wall of the room. He flipped a table upside down.

The Patient began pacing back and forth down the sides of the room. The two FHMTs followed the Patient attempting to verbally de-escalate the Patient. A Nurse announced that they had a "hands on" order from the doctor.

The Patient picked up a chair and began walking around with it. He stood next to the flipped table. Grievant told the Patient to put down the chair. The Patient threw the chair at Grievant who was on the other side of the flipped table. Grievant deflected the chair and slapped the chair down to the floor. The Patient moved slightly toward Grievant as he spoke to Grievant. Grievant stepped towards the Patient. A FHMT tried to move the Patient backwards. The Patient moved backwards several feet and three employees faced the Patient and were between the Patient and Grievant as Grievant walked closer to the Patient yet remaining several feet away. Once the Patient was in the corner and surrounded by employees, he brushed passed the FHMTs and faced Grievant. He began striking at Grievant as Grievant moved to his left to avoid the contact. The

Patient punched Grievant in the face and then moved back and away from the corner. The punches dazed Grievant.

The Patient quickly moved to the other side of the flipped table. Another Male Employee approached the Patient to the Patient's right. Grievant walked around the table to the Patient's left side. The Patient turned towards to his right to face Grievant and positioned himself to fight Grievant. Grievant was not advancing towards the Patient as much as he was moving from Grievant's left to his right. Grievant's body was facing in the direction he was moving as his head was turned to his left to view the Patient. The Patient crouched and positioned himself to fight. As Grievant continued his path from left to right and past the Patient, the Patient lunged forward towards Grievant with the objective of hitting Grievant in the face. Because of Grievant's height, the Patient leapt or hopped towards Grievant. Grievant attempted to stop moving from his left to his right to position himself squarely facing the Patient to enable him to block the Patient's advance. He balanced himself on his right leg and his left leg moved upward and off the ground as Grievant tilted slightly backwards. Grievant stuck his arms out to block the Patient as the Patient attempted to hit Grievant. Because the Patient's upper body stopped moving forward while his lower body continued to move forward as he moved upward, his feet moved upwards quickly as his head moved backwards. He fell backwards with his right side landing on the floor and near the flipped table.

The Patient got up from the floor and moved to his right and away from Grievant. Several FMHTs grabbed the Patient by his arms and Grievant moved towards the Patient in an attempt to restrain the Patient. The Patient was able to break free and moved back towards the flipped table. The Lieutenant grabbed Grievant's shoulder and told him to go to the nursing station. He went to the nursing station door. Once the door opened, he went inside and remained there until the Lieutenant told him to leave the nursing stations so that the Patient would not see him.

On December 30, 2016, the agency issued the grievant a Group III Written Notice with removal for client abuse.<sup>3</sup> The grievant timely initiated a grievance to challenge the Group III Written Notice, and a hearing was held on May 10, 2017.<sup>4</sup> In a decision dated May 12, 2017, the hearing officer found that evidence presented by the agency was not sufficient to support the issuance of the disciplinary action.<sup>5</sup> The hearing officer ordered that the agency rescind the Written Notice, but, because the grievant had apparently indicated he did not wish to return to work at the agency, the hearing officer did not order the grievant's reinstatement, back pay, or other relief.<sup>6</sup> The agency has now requested administrative review of the hearing decision.

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<sup>3</sup> Hearing Decision at 1; *see* Agency Exhibit 1.

<sup>4</sup> Agency Exhibit 3; Hearing Decision at 1.

<sup>5</sup> Hearing Decision at 4-6.

<sup>6</sup> *Id.* at 6.

## 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.”<sup>7</sup> 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.<sup>8</sup>

### *Inconsistency with State and/or Agency Policy*

In its request for administrative review, the agency asserts that the hearing officer’s decision is inconsistent with state and/or agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> However, for reasons described below, the subject of the agency’s policy-based claims will be re-assessed on remand by the hearing officer. Should there remain questions by either party as to whether the hearing decision is consistent with state and/or agency policy following remand, those questions may be asserted in a future request for administrative review.

### *Hearing Officer’s Consideration of the Evidence*

The agency’s request for administrative review essentially challenges the hearing officer’s findings of fact and determinations therefrom. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>10</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>11</sup> Further, in cases involving discipline, the hearing officer reviews the evidence *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.<sup>12</sup> 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.<sup>13</sup> 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

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<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>13</sup> *Grievance Procedure Manual* § 5.8.

Block vs. Push

In his decision, the hearing officer included a lengthy interpretation of the video evidence of the incident. He ultimately concluded that “[i]t is equally likely that Grievant extended one or both of his arms in the manner consistent with a ‘stiff arm’ (blocking) as it is that he extended his arms in order to push the Patient backwards.”<sup>14</sup> The hearing officer’s findings appear to be based almost entirely, if not exclusively, on the video evidence, which the hearing officer notes, has limitations in its angle and clarity, in that it is merely a series of still images.<sup>15</sup>

In its request for administrative review, the agency has pointed to other record evidence, not addressed by the hearing officer in the decision, potentially supporting the agency’s position that the grievant engaged in abuse by pushing the client. This evidence includes<sup>16</sup> 1) testimony from a security Lieutenant,<sup>17</sup> who was an eyewitness and, it appears, the principal source of testimony for the investigator that led to the finding of abuse<sup>18</sup>; 2) admissions during the grievant’s own testimony<sup>19</sup>; and 3) an admission from the grievant in his witness statement.<sup>20</sup> It may be that the hearing officer assessed this evidence and found it not credible or persuasive. However, where, as here, the hearing officer’s decision appears to be based on the lack of clarity in the video, this potentially explanatory and contradictory (to the hearing officer’s findings) eyewitness testimony (including the grievant’s admissions) must be considered and addressed in the decision<sup>21</sup> as to the question of whether the grievant’s action was a “block,” as it appears the hearing officer found,<sup>22</sup> or a “push,” which the agency determined was excessive force and abuse.<sup>23</sup> As such, EDR must remand this matter to the hearing officer on this basis for further consideration of the record evidence.

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<sup>14</sup> Hearing Decision at 5.

<sup>15</sup> *Id.* at 4 – 5.

<sup>16</sup> The agency also cited to the grievant’s statement allegedly on the Grievance Form A, but that could not be substantiated during this review. *See* Agency Exhibit 3.

<sup>17</sup> Hearing Recording at 2:21:50 – 2:24:21. The hearing officer noted in his decision that this Lieutenant “had a better opportunity to view the conflict.” Hearing Decision at 6. It should also be noted that the Lieutenant’s testimony includes discussion of the grievant hitting the client. EDR has reviewed nothing to suggest that the agency has disciplined the grievant for intentionally striking the client. For example, there does not appear to be any such evidence included in the abuse investigation report. *See* Agency Exhibit 2.

<sup>18</sup> Agency Exhibit 2 at 2, 6.

<sup>19</sup> Hearing Recording at 2:36:47 – 2:36:58 (“inadvertently ... pushed client away”), 2:40:43 – 2:40:55 (“there was one push”), 2:42:40 – 2:43:30 (“my push was not in malice”), 2:48:52 – 2:49:00 (“inadvertently just pushed”).

<sup>20</sup> Agency Exhibit 2 at 11. The hearing officer appears to have already addressed this piece of evidence in the decision, finding that it was not sufficient to show abuse. Hearing Decision at 5. However, it is not clear whether the hearing officer has considered this statement alone or in combination with the grievant’s other testimony regarding “inadvertently” pushing the client.

<sup>21</sup> “If a case is decided on issues of disputed facts, the hearing officer must identify and explain his/her reasoning in resolving the dispute(s).” *Rules for Conducting Grievance Hearings* § V(C).

<sup>22</sup> Hearing Decision at 4 – 6.

<sup>23</sup> *E.g.*, Hearing Recording at 34:17 – 35:08 (testimony of abuse investigator).

### Targeting

The agency has also raised questions about the client “targeting” the grievant and the grievant’s failure to act appropriately when being targeted. The hearing officer addressed the agency’s claims regarding the client’s targeting behavior in the hearing decision.<sup>24</sup> The agency now, presumably, contests the hearing officer’s determinations.

According to the agency, the grievant should have removed himself from the situation earlier because the client was targeting him. While this may be true, based upon EDR’s review of the record evidence, it cannot be determined how that would establish that the grievant engaged in the physical abuse of a client for which he was disciplined.<sup>25</sup> Nothing in the agency policy cited in the Written Notice addresses targeting behavior,<sup>26</sup> and nothing in the agency’s presentation demonstrated that the grievant engaged in physical abuse by not removing himself from the situation earlier due to the targeting.<sup>27</sup> Perhaps the grievant’s failure to conduct himself in a manner he should have while being targeted by a client was unsatisfactory performance or a violation of some unknown policy, guideline, or instruction. However, EDR has reviewed nothing that would explain how the grievant’s failure in this regard, if he indeed did fail to act appropriately, amounted to physical abuse of the client that is the subject of the Written Notice at issue in this case. As such, there is no basis for EDR to remand for further consideration of the issue of targeting.

### Safe Workplace/Self-Defense

The agency has also challenged the hearing officer’s apparent determinations regarding the “employer’s responsibility and the employee’s rights in the context of workplace safety.” In the decision, the hearing officer appears to find that to the extent the grievant pushed the client, his conduct was reasonable under the circumstances to protect himself.<sup>28</sup> In support of this finding, the hearing officer includes statements such as:

- “[a]gencies are obligated to create a safe workplace for employees. If an agency is unable to do so, an employee is entitled to take action to secure his or her safety.”<sup>29</sup>
- “Every employee has a right of self-defense and may exercise that right within limits.”<sup>30</sup>

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<sup>24</sup> Hearing Decision at 6.

<sup>25</sup> Agency Exhibit 1.

<sup>26</sup> Agency Exhibit 6.

<sup>27</sup> For example, the abuse investigator testified as to the basis for his finding of physical abuse, which included the grievant’s use of “excessive force” in the form of a push or shove, which the investigator found “reckless.” Hearing Recording 34:17 – 35:11.

<sup>28</sup> Hearing Decision at 5 – 6.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

The agency challenges the hearing officer's findings in this regard and questions the basis for those findings.

Based upon EDR's review of the record and the hearing decision, we are unable to determine the supporting facts, policy, or law for the hearing officer's determinations. Agencies do have a general duty to provide a safe workplace, but it is unclear what duty the hearing officer is referring to here and how it relates to the facts of the case. Employees do have a right to self-defense with limitations, but it is not clear what record evidence or authority the hearing officer is considering in making his determinations in this case. Furthermore, it is unclear what record evidence the hearing officer is relying on to find that "to the extent" the grievant pushed the client he was justified to do so in self-defense.<sup>31</sup> In short, the hearing decision is not clear on these points and must be remanded for further explanation and/or citation to supporting authority and/or record evidence. The hearing officer must reconsider and further explain his determinations with regard to self-defense, the agency's duty to provide a safe workplace, and related analysis.<sup>32</sup>

#### *Admission of Exhibits*

The agency asserts that the hearing officer failed to comply with the grievance procedure by refusing to admit into the hearing record agency exhibits regarding Notices of Improvement Needed (NOINs) previously issued to the grievant. By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.<sup>33</sup> Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding, and the technical rules of evidence do not apply.<sup>34</sup> A hearing officer's decision on the admission of evidence is squarely within the hearing officer's discretion, and EDR will generally remand a matter on such an issue only for an abuse of that discretion.

Upon review of the proposed exhibits in question, EDR has no basis to find that the hearing officer abused his discretion in excluding these exhibits as irrelevant. None of the NOINs involved a matter of client abuse, for which the grievant was disciplined in this case. Even if there is some tangential relevance to these exhibits, there is no basis on which EDR could find that the agency was prejudiced by the hearing officer's ruling. The inclusion of the NOINs in the hearing record would not have had a material impact on the case.

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<sup>31</sup> For example, evidence in the record suggests that a push would have been excessive force and/or inconsistent with TOVA techniques. *E.g.*, Hearing Recording at 34:17 – 35:08 (testimony of abuse investigator); 51:11 – 51:15, 54:35 – 56:16 (testimony of Security Manager); 1:03:10 – 1:03:56 (testimony of Training Director).

<sup>32</sup> Depending on the outcome of the hearing officer's reconsideration of the evidence on remand as discussed above, the hearing officer may not need to reach conclusions regarding workplace safety or self-defense and, accordingly, such discussion could be removed from the final decision.

<sup>33</sup> Va. Code § 2.2-3005(C)(5).

<sup>34</sup> *Rules for Conducting Grievance Hearings* § IV(D).



CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR remands this matter to the hearing officer for further consideration of the record evidence. 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 other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).<sup>35</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>39</sup>



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<sup>35</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>36</sup> See *Grievance Procedure Manual* § 7.2.

<sup>37</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>38</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>39</sup> *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).