Issue: Administrative Review of Hearing Officer's Decision in Case No. 11013; Ruling Date: June 29, 2017; Ruling No. 2017-4570; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2017-4570
June 29, 2017

The grievant 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 11013. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

On March 27, 2017, the agency issued the grievant a Group III Written Notice with removal for client abuse.[2] The grievant timely initiated a grievance to challenge the Group III Written Notice, and a hearing was held on May 16, 2017.[3] In a decision dated May 31, 2017, the hearing officer found that evidence presented by the agency was sufficient to support the issuance of the disciplinary action.[4] In short, the hearing officer concluded that the grievant "used excessive force in pushing the patient three times," which was determined to be "abuse" under the applicable agency policy.[5] Accordingly, the hearing officer upheld the Group III Written Notice and termination.[6] The grievant has now requested administrative review of the hearing decision.

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 . . . ."[7] If the hearing

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[1] 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.

[2] Decision of Hearing Officer, Case No. 11013 ("Hearing Decision"), May 31, 2017, at 1; *see* Agency Exhibit A. The relevant facts as set forth in the hearing decision in Case Number 11013 are incorporated by reference. *See* Hearing Decision at 2-6.

[3] Agency Exhibit H; Hearing Decision at 1.

[4] Hearing Decision at 4-6.

[5] *Id.* at 6.

[6] *Id.* at 8.

[7] Va. Code §§ 2.2-1202.1(2), (3), (5).

officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[8]

Inconsistency with Agency Policy

In his request for administrative review, the grievant appears to assert that the hearing officer's decision is inconsistent with state policy (DHRM Policy 1.60, *Standards of Conduct*). The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] However, upon review of the grievant's submission, EDR is unable to find any argument, not otherwise addressed herein, that raises any way in which the cited policy was not followed by the hearing officer. Accordingly, there is no basis to find that the hearing decision is inconsistent with policy and a separate policy review is unwarranted. The grievant's appeal will be addressed in this ruling in full.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review challenges the hearing officer's findings of fact and determinations therefrom, including that his behavior was "abuse." 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] 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.[12] 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.[13] 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.

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the Written Notice and that the behavior constituted abuse.[14] Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses'

[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 4-5.

credibility, and make findings of fact. In this instance, the hearing officer's determinations were based largely on the testimony of the witnesses, the investigative report, and video evidence, as discussed in more detail below.[15] EDR's review of the record finds that the hearing officer's findings are supported by this evidence. Because 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.

Exhibit Issues

The grievant has presented numerous issues related to various exhibits in this case. By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.[16] 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.[17] 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. The grievant's assertions will be addressed separately below.

Video Evidence

The grievant disputes the hearing officer's admission of and/or reliance on the video evidence in this case because it "lacks clarity," has inaccurate time stamps, is time-lapse video and not full-motion video with an appropriate frame rate, and was not presented with supporting chain of custody information. EDR finds no abuse of discretion in the hearing officer's admission and reliance on the video evidence. EDR's review did not find any alleged lack of "clarity" or inaccurate time stamps that would materially affect an assessment of the evidence.[18] As to the chain of custody challenge, nothing in the grievance procedure or the *Rules for Conducting Grievance Hearings* (the "*Rules*") requires such information for the presentation of video evidence. EDR has reviewed nothing to suggest, and the grievant does not argue otherwise, that the video evidence presented does not accurately depict the incidents for which the grievant was disciplined. Accordingly, these challenges to the video evidence are unpersuasive.

The grievant has also raised an issue related to the video evidence because the agency did not exchange a copy of the exhibit in advance of the hearing as required by the hearing officer's pre-hearing order. The hearing officer has the authority to "[r]equire the parties to exchange a list of witnesses and documents"[19] and may exclude evidence not timely exchanged.[20] Nothing in the grievance procedure or *Rules* requires the hearing officer to exclude evidence not timely exchanged. As such, the determination of whether to admit or exclude exhibits not exchanged in

[15] *See id.* at 3-6.
[16] Va. Code § 2.2-3005(C)(5).
[17] *Rules for Conducting Grievance Hearings* § IV(D).
[18] *See* Agency Exhibit J.
[19] *Grievance Procedure Manual* § 5.7(2).
[20] *Rules for Conducting Grievance Hearings* § IV(D).

advance of hearing is squarely within the discretion of the hearing officer. An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.[21]

In this instance, the agency included the video evidence on its list of proposed exhibits in advance of the hearing and indicated the video was available for review at the agency's location.[22] Although making the video available in advance of the hearing is necessary, the time it was made available to the grievant, approximately one week prior to the hearing, was not especially lengthy.[23] Nevertheless, the hearing officer's determination to accept the video into the record is understandable given the critical nature of the evidence. An appropriate remedy for any disadvantage the grievant experienced can be cured by keeping the record open to allow the grievant an opportunity to present any additional evidence or testimony that he was unable to present at the hearing because of not reviewing the video in advance. However, the grievant has raised no argument about anything he was prevented from presenting or any other material detriment due to the lack of availability of the video prior to the hearing. In short, EDR cannot find that making the video available at hearing prejudiced the grievant's presentation in any way such that remand is warranted. The grievant was free to use and reference the video during the hearing. Accordingly, EDR finds no abuse of discretion by the hearing officer's admission of the video into evidence or the denial of the grievant's related motion in limine.

TOVA Exhibit

The grievant states that he objected to the admission and/or reliability of the agency's Exhibit "I," related to training on Therapeutic Options of Virginia ("TOVA"). The grievant argues that the document appeared incomplete and was not a full "manual." The grievant's objections are generally understandable as the exhibit does not appear to be a full representation of the entirety of TOVA training and/or policy, but it does not appear the agency was presenting it for that purpose. It is squarely within the hearing officer's discretion to admit an exhibit such as this and determine its weight and reliability. Having reviewed the decision, it appears Exhibit "I" was relied upon by the hearing officer for what it showed related to what techniques are taught under TOVA.[24] EDR has no basis to find that the hearing officer's determinations in this regard were an abuse of discretion.

[21] *See, e.g.*, EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.
[22] Order to Deny Motion in Limine, Case No. 11013, May 31, 2017.
[23] In EDR Ruling Number 2012-3359, relied upon by the hearing officer and cited by the agency on this issue, EDR noted that evidence of this kind should be made available "well prior to hearing." In this case, it appears that the grievant was notified one week prior to the hearing about the availability of the video evidence. However, there is also no indication that the grievant had requested such evidence any earlier. A week might be sufficient time to review a video recording in advance of the hearing in some cases, but in others it might not be considered "well prior to hearing" such that a reasonable opportunity for review has been provided.
[24] Hearing Decision at 4.

Agency Policy

The grievant appears to challenge the applicability of the agency's policy on abuse (Departmental Instruction 201) on the ground that it states that the agency has a "philosophy" of zero tolerance for abuse and neglect (rather than a "policy").[25] The language appears in the agency's policy and, accordingly, supports the hearing officer's determination that "zero tolerance" is the agency's "policy." Even if Departmental Instruction 201 was considered only a "guidance" document, as the grievant appears to argue, and not the policy that it clearly is, the statement contained therein would be no less relevant or reliable. EDR has no basis to find the hearing officer's determinations in this regard were an abuse of discretion.

Written Notice

The grievant alleges that the Written Notice could not be substantiated or admitted into evidence because the issuing supervisor did not testify. There is nothing in the grievance procedure or any relevant policy that requires the issuing supervisor to testify for a Written Notice to be admitted into evidence. As stated above, 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.[26] The hearing officer is well within her discretion to admit the Written Notice into the record without testimony from the issuing supervisor. While the testimony of the issuing supervisor would in all likelihood be relevant and important in most cases, as long as an agency is able to substantiate the Written Notice by a preponderance of the evidence, which the hearing officer determined was done here based on the record evidence, the agency is under no requirement to present the testimony of the issuing supervisor. EDR has no basis to find the hearing officer abused her discretion in this regard.

Witness Issues

The grievant has also raised questions related to the expertise of certain witnesses. There is nothing in the grievance procedure or the *Rules* that require a witness to have a particular background or to be qualified as an expert to offer relevant, reliable testimony. The grievant has every right to argue that the witnesses' backgrounds undercut the reliability or import of their testimony. However, the assessment of the witnesses' testimony was squarely within the hearing officer's discretion and EDR has no basis to find that her findings and determinations were in any way unreasonable or an abuse of discretion. Accordingly, EDR has no basis to disturb the hearing officer's decision on this basis.

Mitigation

The grievant's request for administrative review also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. In particular, he asserts that the hearing officer did not consider "Administrative Issues," such as "no goals, objectives or interventions in

[25] Agency Exhibit D.
[26] *Rules for Conducting Grievance Hearings* § IV(D).

place for the patient who was alleged to have been abused," as well as no other staff acting to intervene in any way.

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* provide that "a hearing officer is not a 'super-personnel officer'" and that "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, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, 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]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[30] EDR will review a hearing officer's mitigation determination for abuse of discretion,[31] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[32]

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

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[27] Va. Code § 2.2-3005(C)(6).
[28] *Rules for Conducting Grievance Hearings* § VI(A).
[29] *Id.* § VI(B)(1).
[30] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).
[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] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

been properly exercised within tolerable limits of reasonableness.'"[33] Even considering all of the arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

Based on the foregoing, EDR has no basis to find that the hearing officer abused her discretion in any way or that remand is otherwise warranted.[34] 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.[35] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[33] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[34] 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 does not comply with the grievance procedure such that remand is warranted in this case.
[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).