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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5497
January 25, 2023

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 11851. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11851, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate III at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.
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> Approximately 20 patients lived in the Unit at the Facility. The Unit had a common area with four hallways leading to patient bedrooms. Some Unit staff were assigned responsibility to conduct fifteen minute checks ("Q15") of patients in the Unit. To complete a Q15 check, an employee was to walk to each patient's room, look into the room and observe the patient breathing. After observing the patient, the employee was to record the patient's location and status in a computer tablet.
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> Patients entering the Facility were not permitted to leave until they received appropriate mental health treatment and were properly discharged pursuant to the Agency's policies.
>
> Patient L was admitted to the Facility from a local Jail based on a criminal temporary detention order. He was on non-acute suicide watch due to threats of self-directed violence. Patient W was admitted to the Facility from a local Jail because he attempted to hang himself and was considered suicidal.

[1] Decision of Hearing Officer, Case No. 11851 ("Hearing Decision"), December 12, 2022, at 2-3 (citations omitted).

> Patient W's room had access to a bathroom. Patient L and Patient W dug a hole in the wall of Patient W's bathroom. They crawled through the hole and escaped the Unit. Patient W left at 10:20 p.m. and Patient L left at 10:23 p.m. on April 16, 2022. They left the Facility grounds to enter a vehicle which took them to the neighboring community. Before leaving the Unit, Patient L and Patient W arranged pillows and sheets on their beds to make it appear that someone was asleep in each bed.
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> Grievant began working on the Unit after the patients had absconded. She arrived at approximately 11:30 p.m. on April 16, 2022. Grievant was assigned responsibility to conduct Q15 checks from 11:30 p.m. until 12:50 a.m. on April 17, 2022. Grievant did not conduct Q15 checks. She did not go to the rooms of Patient L and Patient W to determine their status. Grievant wrote in the computer tablet that Patient W and Patient L were in their rooms even though she had not checked the rooms. If she had conducted Q15 checks, she would have noticed that Patient W and Patient L were not in their rooms and not in the Unit. She would have been able to report that information to Facility managers who would have notified local law enforcement personnel to find the missing patients.
>
> Another employee later conducted Q15 checks and noticed that Patient W and Patient L were missing. The Facility Director was notified of the escape on April 17, 2022 at 5:28 a.m.

On May 10, 2022, the agency issued to the grievant a Group III Written Notice with removal for falsifying records and client neglect.[2] The grievant timely grieved the disciplinary action and a grievance hearing occurred on November 23, 2022.[3] In a decision dated December 12, 2022, the hearing officer determined that the Group III Written Notice with termination should be upheld and that no mitigating circumstances existed to reduce the agency's discipline.[4]

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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."[5] 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 a party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing

[2] Agency Ex. A; *see* Hearing Decision at 1.
[3] Hearing Decision at 1.
[4] *Id.* at 4.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant appears to challenge the evidence (or lack thereof) presented by the agency regarding the justification for her termination despite other employees involved in the same incident not being terminated. She also asserts that she was not responsible for the elopement of the patients, since they eloped before she arrived for her shift. Finally, the grievant challenges her failed drug test following the incident as a basis to uphold termination with no mitigation.

Mitigation

The grievant's request for administrative review appears generally to argue that the discipline she received should be mitigated based on the evidence she submitted about how other employees were disciplined. 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]."[8] 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."[9] 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.[10]

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.[11] 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

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[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005(C)(6).
[9] *Rules for Conducting Grievance Hearings* § VI(A).
[10] *Id.* at § VI(B)(1).
[11] 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).

the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[12] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[13] and will reverse the determination only for clear error.

In his decision, the hearing officer considered the grievant's evidence regarding mitigation, finding that no mitigating circumstances existed to reduce the disciplinary action.[14] The grievant's evidence in opposition indicated that two other employees who similarly violated agency policy were given Group III Written Notices, yet their termination was mitigated down to required training.[15] According to the hearing decision, the agency determined that mitigation was proper for the other employees because of their history of good performance and lack of prior disciplinary action.[16] The agency further determined that while the grievant also has a history of good performance, mitigation was not appropriate in her case because of her subsequent failed drug test.[17] While the grievant is correct that the failed drug test is separate from the incident for which she received the Group III, the violation of agency policy (failed drug test) is a reason sufficient for the agency not to mitigate the penalty of termination.[18] Whether the hearing officer or EDR fully agrees with this judgment is irrelevant. 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.'"[19] In addition, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances."[20] 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.[21] Deciding to not mitigate one employee's discipline due to a failed drug test against agency policy is within the tolerable limits of reasonableness, regardless of mitigation granted to other employees who did not fail a drug test.

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

[13] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

[14] Hearing Decision at 4.

[15] *See* Hearing Recording at 2:14:30-2:15:00, 2:30:15-2:30:50; 2:42:45-2:43:20 (grievant's witness testimony that two other employees did not properly conduct Q15 checks in accordance with agency policy during the time of the incident, along with agency's human resources representative affirming that those two employees were given Group III Written Notices with recommended termination, but termination was mitigated for both employees).

[16] *See* Hearing Decision at 4.

[17] *Id*; *see* Agency Supp. Ex. at 5.

[18] Hearing Decision at 5; Agency Supp. Ex. at 5.

[19] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21; *e.g.* EDR Ruling No. 2014-3777.

[20] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[21] The hearing officer noted other reasons for his findings that mitigation was not warranted, which the grievant did not challenge in her request for administrative review. *See* Hearing Decision at 4.

Thus, we cannot say that the hearing officer abused his discretion in finding that the Group III with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

Grievant's Responsibility for Patients' Elopement

The grievant asserts that because she was not working her shift when the elopement actually occurred, she should not be terminated for something out of her control. Contrary to this argument, the hearing officer found that the grievant's failure to discover the elopement on her shift caused a delay in the eventual recovery of the patients, thus resulting in a delayed restoration of their mental health services.[22] The hearing officer's finding is supported by evidence in the record. The agency's Departmental Instruction ("DI") 201, a policy concerning the neglect of the facility's patients, defines "Neglect" as "[t]he failure by an individual . . . responsible for providing services . . . including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment . . . ."[23] The agency cited this policy in its Written Notice in reference to its "substantiated finding of neglect."[24] Upon a review of the evidence, EDR finds no abuse of discretion by the hearing officer in regards to this finding, and for that reason, EDR declines to disturb the hearing decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is insufficient record evidence to support the grievant's assertions and, accordingly, that EDR has no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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[22] *Id.*
[23] Agency Ex. F at 2; *see* Hearing Decision at 3.
[24] Agency Ex. A.
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).