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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5468
November 18, 2022

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 11843. For the reasons set forth below, EDR remands the hearing decision.

FACTS

The relevant facts in Case Number 11843, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer III at one of its facilities.¹ He began working for the Agency in January 2019. Grievant had prior active disciplinary action. On January 22, 2022, Grievant received a Group II Written Notice for failure to follow policy.

Grievant received training regarding Therapeutic Options of Virginia (TOVA).² TOVA sets forth the holds employees are encouraged to use when physically controlling patients.

On May 4, 2022, the Patient was agitated while in his room. A physician ordered that the Patient receive Haldol by pill or injection to treat his behavior. The Patient did not want to consume a pill so staff determined he should receive an injection. The Registered Nurse entered the Patient’s room to give him an injection. The Patient did not want to receive an injection. He exited his room and went into the hallway.

¹ Decision of Hearing Officer, Case No. 11843 (“Hearing Decision”), September 21, 2022, at 2-4 (internal citations reproduced as indented footnotes below).

¹ Grievant worked in a department that was responsible for “providing for the safety and security of patients, visitors, and staff.” See, Agency Exhibit N.

² “Therapeutic Options of Virginia is a comprehensive, humane, and effective approach to preventing and managing behavioral emergencies, but no course can guarantee that it covers all situations and circumstances.” Agency Exhibit H.

Ms. Q called for a Show of Support³ because the Patient was yelling, agitated, and threatening. This meant the Patient was a possible threat to himself or others.⁴ There was to be a “show of force” such that many staff would gather and approach the Patient “for the purpose of support for de-escalation.”⁵ Once numerous staff arrived at the Patient’s location, the Patient continued to defy staff instructions to allow them to inject him. There were approximately six women employees in the hallway along with Grievant and Mr. M. Another male employee was present but did not participate.

The Registered Nurse determined the Patient would be given the injection against his will. She instructed Grievant to use force on the Patient by holding the Patient. Grievant approached the Patient and positioned himself on the Patient’s left side. Mr. M approached the Patient and positioned himself on the Patient’s right side. They placed the Patient in a side body hold in accordance with TOVA.

To perform the side body hold, Grievant pressed the front of his body against the left side of the Patient’s body. Grievant’s chest was against the Patient’s left shoulder. Grievant had his left arm wrapped across the Patient’s front and his right arm was behind the Patient. Grievant firmly and tightly held the Patient to prevent the Patient from moving. The Patient’s back was against a wall which prevented the Patient from escaping to his rear.

The Registered Nurse attempted to inject a needle into the Patient’s upper left shoulder. She was unable to do so because the Patient struggled trying to break free of Grievant’s and Mr. M’s hold. The Patient turned his head to his left and yelled at Grievant. The Patient attempted to duck down and bump Grievant. Grievant moved his left leg to wrap it around the Patient’s left leg. Grievant squeezed the Patient in order to hold the Patient still. The Registered Nurse could not make the injection into the Patient’s left shoulder, so she stepped back and then stepped towards the Patient’s right leg. With the assistance of another nurse, the Registered Nurse injected the medication into the Patient’s right hip.

The Patient was informed he was going to be released. Upon hearing this, the Patient “fixated” on Grievant.

³ The evidence is unclear regarding whether a Code White, show of support, or show of force was announced to staff. The Agency’s policies discuss these concepts differently. For example, if there is a show of support it means Grievant’s Department, Public Safety, is not involved. If Public Safety staff become involved it is a Code White. These differences are not significant. Regardless of the terminology uses, an emergency was announced and numerous staff including Grievant responded. See, Agency Exhibit I.

⁴ Throughout the incident, the Patient was threatening to harm staff including Grievant and Mr. M.

⁵ Agency Exhibit H. A show of force was called even though “it is not used for a patient who is actively aggressive.”

Immediately after the injection, the Patient attempted to break free from Grievant's hold. The Patient raised his left arm and twisted his body. The Patient attempted to walk forward while turning to attempt to hit Grievant's head. Grievant moved forward with the Patient. Grievant had to move forward with the Patient in order to retain control of the Patient. Grievant told Mr. M to release the Patient. Mr. M began to release his hold on the Patient as the Patient began moving forward. Mr. M did not release his hold completely until the Patient had moved away from Mr. M. As Mr. M was releasing the Patient, Mr. M continued to watch the employees and the Patient "to be sure [the Patient] did not swing at them." As Grievant and the Patient moved forward, Grievant released his grip of the Patient, put his hands on the Patient's back and extended his arms to push the Patient away from the group. The Patient continued moving forward because he was walking forward and also because of Grievant's push. The Patient did not fall. Once the Patient was away from the group of employees, Grievant took two steps backwards while watching the Patient's movement. The Patient turned and began approaching Grievant while speaking angrily to Grievant. The Patient said, "Don't you ever put your hands on me again!" and "F—k you, come at me." Grievant waited to determine if the Patient would calm down. As the Patient continued to display agitation and anger, Grievant and Mr. M began moving slowly towards the Patient. The Patient began moving backwards while speaking to the employees. Once the Patient stopped gesturing, the Nursing Supervisor spoke to Grievant and told him to move away. Grievant took approximately four steps backwards while watching the Patient.

Throughout the incident, Grievant did not speak to the Patient or otherwise verbally confront the Patient. Grievant maintained a steady demeanor.

On May 17, 2022, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for client abuse.² The grievant timely grieved the disciplinary action, and a hearing was held on September 2, 2022.³ In a decision dated September 21, 2022, the hearing officer determined that the agency had not met its burden of proof to support its disciplinary action.⁴ Accordingly, the hearing officer rescinded the Written Notice and ordered the grievant to be reinstated.⁵ The agency 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."⁶ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

² Agency Ex. A; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 6-8.

⁵ *Id.* at 8.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

favor of a 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.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.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 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.

In its request for administrative review, the agency presents several challenges to the hearing decision, which EDR summarizes as follows: 1) a challenge to the hearing officer’s factual determination that the shove was not forceful; 2) reference to Departmental Instruction (DI) 201 permissible physical and mechanical restraints; 3) reference to the example in DI 201 of “assault or battery” regarding the grievant’s push of the patient; and 4) the grievant’s push of the patient was inconsistent with TOVA training.¹³ The agency essentially challenges the hearing officer’s factual findings and their interpretation under applicable agency policy (and law) that the grievant’s misconduct was not abuse. For the reasons described below, EDR must conclude that the hearing decision lacks adequate findings as to the material issues presented by the grievance and the grounds in the record for certain findings.¹⁴

The hearing decision appropriately cites to the relevant state law, regulation, and agency policy on abuse.¹⁵ The agency policy defines abuse as follows:

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ The agency also raised a question as to the hearing officer’s factual findings about whether the incident at issue was a show of support or a Code White. The hearing officer found that the evidence was unclear as to whether there was a Code White called or a show of support. Hearing Decision at 3. The hearing officer further found that the difference between the response procedures was not significant to the issues in the case. *Id.* Upon review, EDR has no basis to disturb the hearing officer’s findings. EDR is unable to deduce evidence in the record or in the agency’s administrative review request that explains why this distinction has an impact on the assessment of the grievant’s conduct in this case.

¹⁴ *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* § V(C).

¹⁵ Hearing Decision at 4-6.

any act or failure to act by an employee or other person responsible for the care of an individual in a Department facility that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment¹⁶

The hearing decision correctly identifies the key portions of this definition that require the agency to show that 1) the grievant engaged in an act that he performed knowingly, recklessly, or intentionally, and 2) the grievant's act caused or might have caused physical or psychological harm to the patient.¹⁷ While the hearing decision includes four reasons why the agency's evidence did not establish that the grievant's conduct was not abuse, the hearing decision does not contain findings on these two key portions of the definition of abuse or how the four reasons expressed by the hearing officer address these issues: 1) whether the grievant's acts were performed knowingly, recklessly, or intentionally; and 2) whether the grievant's conduct caused or might have caused physical or psychological harm. Therefore, the matter must be remanded for further findings and clarification on these questions under the applicable agency policy and law.

On remand, the hearing officer must additionally address points raised by the agency but that do not appear in the decision. First, record evidence appears to reflect the agency's contention that the grievant's act of pushing the patient was inconsistent with the TOVA training he had received.¹⁸ The agency appears to equate an action that violates TOVA with abuse.¹⁹ The hearing decision does not appear to address this key point: to what extent an action inconsistent with TOVA training is equivalent to abuse. The hearing decision is also lacking findings as to whether the grievant's conduct was a technique disallowed under or violative of TOVA. Accordingly, these issues must be addressed on remand.

Second, the agency's evidence appears to make the point that any push, however forceful, is not appropriate and that there is no authority that allows an agency employee like the grievant to push a patient in any circumstance.²⁰ This evidence has not been directly addressed in the hearing decision. The hearing officer does appear to have partially considered this issue when addressing the agency's evidence about teaching employees to step back from a patient when they are being released from a hold.²¹ However, the hearing officer essentially appears to have found that the grievant's push was appropriate as an attempt to put distance between the patient and other staff to prevent harm.²² EDR is unable to identify evidence in the record to support this finding as a matter of agency policy, or at least the basis for the hearing officer's determination is not articulated in the decision.²³ The agency's evidence appears to suggest that no push is permitted.

¹⁶ *Id.* at 6-7; Agency Ex. F at 1.

¹⁷ Hearing Decision at 6.

¹⁸ *E.g.*, Hearing Recording at 38:48-39:05, 1:01:15-1:02:26, 1:03:50-1:04:00.

¹⁹ *See, e.g.*, Agency Ex. D at 13 (investigation report).

²⁰ *See, e.g.*, Hearing Recording at 38:48-39:05, 1:01:15-1:02:26, 1:03:50-1:04:00.

²¹ Hearing Decision at 7.

²² *Id.*

²³ *See also* Hearing Recording at 54:07-55:00 (testimony that self-defense act not permitted if there is a risk of injury to the patient).

EDR cannot determine what policy or other basis the hearing officer is relying upon to find that there was a justified basis to push the patient. Accordingly, the hearing officer must address these issues on remand.

Third, the agency alleges that the grievant's push was "assault or battery" under the examples of abuse listed in DI 201. The hearing officer determined that the grievant's push was not "assault or battery" because the push was "minor."²⁴ EDR is unable to determine what definition of "assault or battery" is being applied in this context, or what definition the agency utilizes under its policy. On remand, the hearing officer must clarify his findings to explain the basis for his determination. If the hearing officer wishes to take additional evidence or argument from the parties as to this definition, the hearing officer has discretion to do so. Further, while the level of significance of the push may certainly be relevant to the question of whether the conduct amounts to "assault or battery," more critically as stated above, the hearing officer must clearly address the grievant's conduct under the definition of abuse, including the elements of intent and potential to cause harm. The hearing officer must identify the record evidence, or lack thereof, for his findings on remand.

The agency additionally argues that the grievant's conduct was an inappropriate "use of physical or mechanical restraints" as an example of abuse under DI 201. The hearing officer partially addressed this point in the decision, noting that the grievant's actual restraint of the patient was permissible, which the agency does not appear to contest.²⁵ Rather, the manner in which the grievant released the patient from restraint (the push) was allegedly improper.²⁶ EDR is not able to identify record evidence that would support a finding that the misconduct charged in the Written Notice was an example of an improper "use of physical or mechanical restraints." Accordingly, the hearing officer need not address this point again on remand.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record, and/or additional evidence or argument as he may accept into the record, under the agency policies applicable to the grievant's conduct in this case. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁷

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

²⁴ Hearing Decision at 7. Although the agency contests the hearing officer's findings about the level of force used in the push as "speculation," such a question is a factual determination properly before the hearing officer to assess from the record evidence. However, as stated in this ruling, although the level of force is relevant, the hearing officer must also consider the record evidence concerning the agency's contention that any push was improper.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *Grievance Procedure Manual* § 7.2.

decided.²⁸ 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.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰

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²⁸ *Id.* § 7.2(d).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).