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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2024-5603
September 1, 2023

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 11980. For the reasons set forth below, EDR remands the hearing decision.

FACTS

The relevant facts in Case Number 11980, as found by the hearing officer, are incorporated by reference.[1] On April 7, 2023, 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 July 12, 2023.[3] In a decision dated August 1, 2023, the hearing officer determined that the agency had not met its burden of proof to support the disciplinary action at a Group III level.[4] Accordingly, the hearing officer reduced the Written Notice to a Group II with a 15-day suspension without pay 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

[1] Decision of Hearing Officer, Case No. 11980 ("Hearing Decision"), August 1, 2023, at 3-9. Although the pages of the hearing decision are not numbered, page citations refer to the pages of the pdf document.
[2] Agency Ex. 1; *see* Hearing Decision at 1. The number of the agency's exhibits is not clear between the record and the hearing decision. For purposes of this ruling, we will refer to the tab number from the agency's exhibits submitted as the exhibit number.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 11-12.
[5] *Id.* at 12.
[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 officer's factual findings. The agency essentially challenges the hearing officer's factual findings and her application of agency policy concluding that the grievant's misconduct was not abuse. The agency also challenges the hearing officer's apparent interpretation of the agency's policy on client abuse. Finally, the agency challenges the hearing officer's determination that mitigation of the Written Notice was warranted due to the grievant's inexperience to handle the emergency that occurred. 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.[13]

Factual Findings

The hearing officer found:

> *Also, the Grievant testified at the Grievant's hearing on July 12, 2023 that he never received the Therapeutic Options of Virginia ("TOVA") training which, arguably, would have provided him with the required de-escalation skills to properly restrain a recalcitrant patient. The Grievant stated that he received his initial pre-hire training but was not re-trained in TOVA de-escalation methods when he returned*

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

> *from his one year absence from the Hospital for COVID illness. The Grievant testified that he requested, more than once, that his superiors re-train him per TOVA standards. At the hearing, the Hospital did not present evidence to dispute the Grievant's above assertions that [the Grievant] was never retrained or received TOVA training after he returned from his one year COVID absence. At the hearing, the Hospital did not demonstrate that the Grievant attained the restraint level training necessary for the Grievant to control a forensic patient and did not contradict his lack of TOVA training.*[14]

The agency disputes the hearing officer's ultimate findings that the grievant did not receive the proper level of training. The agency states that "[s]everal witnesses testified to the grievant's initial TOVA training, despite the fact that he may not have been re-trained following a lengthy absence from work." Witness testimony indicated that all employees, including the grievant, receive TOVA training.[15] The hearing officer's own factual findings indicate that the grievant admitted he received TOVA training when he was hired.[16] The hearing officer appears to find that the grievant was required to be re-trained or recertified in TOVA. Upon review of the record, no agency witness appears to have addressed the recertification point that would clarify the matter. However, included within the agency's exhibits is a policy that appears to indicate that employees like the grievant are to be recertified annually.[17] This policy appears to also indicate that employees "may not perform unsupervised duties at that TOVA level in resident areas until certified/recertified."[18] While we do not have a basis to dispute this factual finding by the hearing officer, the application of this finding in the hearing officer's analysis requires clarification, as further discussed below.

Specifically, the hearing decision's findings about the grievant's recertification (or lack thereof) cite testimony by the Hospital Director, as follows:

> *The Hospital Director admitted that the Hospital was short-handed and many DSA's, including the Grievant, were never properly trained in the TOVA restraint method for handling out-of-control patients.*[19]

> *The Hospital Director admitted that he knew that the Grievant had not been TOVA "recertified" when the Grievant was assigned to the Hospital's, Unit 5-C, the state's largest forensic unit, because he encountered a "staffing shortage."*[20]

However, upon a review of the testimony of the Hospital Director, we cannot find that the testimony supports the hearing officer's findings. We can find no evidence that the Hospital

[14] Hearing Decision at 4 (footnote omitted).
[15] Hearing Recording 2 at 38:35-39:24, Hearing Recording 6 at 10:57-11:35.
[16] Hearing Decision at 4.
[17] Agency Ex. 4 at 44-45.
[18] *Id.* at 45.
[19] Hearing Decision at 2.
[20] *Id.* at 5 (citations omitted).

Director admitted to knowing about a lack of alleged recertification of the grievant (or other staff) or that there was a staffing shortage.[21] As such, the hearing officer must reconsider these findings.

Because the hearing officer must reconsider these factual findings about the Hospital Director's testimony, she must also reconsider her overall findings about the grievant's training in TOVA and their impact on the case.[22] With the facts about recertification in doubt, we are not able to adequately assess from the record the hearing officer's determinations about the impact of the lack of recertification as to the particular facts of this case. For example, as the grievant had previously had TOVA training, the hearing officer found it appropriate for the agency to hold the grievant accountable for failing to utilize a proper restraint technique.[23] The hearing decision does not adequately explain why the grievant's previous TOVA training was sufficient to support an improper restraint technique charge[24] but the apparent lack of recertification excuses the grievant's behavior in other respects. Therefore, it is unclear from the hearing officer's analysis what weight the hearing officer is applying to the lack of recertification and to what extent these unsupported findings about the Hospital Director's testimony affect that analysis. Accordingly, the hearing officer must reconsider these findings or identify the record evidence that supports them. To the extent the findings are reconsidered, the hearing officer must additionally revise any other aspects of the decision that relied on these determinations.

As an additional fact-finding issue, the hearing decision includes a determination regarding misconduct not within the scope of the agency's disciplinary action. Namely, the hearing officer determined that "the evidence . . . did not substantiate the charge that the Grievant placed Patient A in a choke hold . . . .".[25] The agency raises concerns about the hearing officer's analysis because the agency did not allege that the grievant placed a patient in a choke hold.[26] The conduct for which the grievant was found to be in violation of agency policy is stated clearly on the Written Notice as "grabb[ing] one of the patients by his ankles, lifting the patient up off the floor to shoulder height, causing the patients to fall to the floor."[27] On remand, the hearing officer must either clarify how any "choke hold" allegations are relevant to the material issues of the grievance or omit them from the analysis, as the agency presented no such allegations in its disciplinary charges.

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[21] Based on a review of the record, it is unclear that such a staffing shortage existed. Indeed, the hearing officer's discussion in the decision states that there were enough trained staff in the unit at the time of the incident. *See* Hearing Decision at 11. However, even if there was a staffing shortage, EDR has not reviewed evidence that suggests why a staffing shortage would excuse an employee's failure to adhere to agency policy on proper restraint techniques or for engaging in client abuse.

[22] For example, the grievant's purported lack of TOVA training is cited to support the hearing officer's determination that the disciplinary action was not substantiated at the Group III level. Hearing Decision at 10-12.

[23] *Id.* at 10-11. This matter is further addressed below.

[24] *Id*.

[25] *Id.* at 11.

[26] Agency Ex. 1.

[27] *Id.* The Written Notice goes on to state that the grievant's conduct was "not an approved method of attempting to restrain a patient or lower a patient to the floor, and is neither safe nor appropriate." *Id.*

Agency Policy

The hearing decision appropriately cites to the relevant agency policy on client abuse.[28] The agency policy defines abuse as follows:

> *. . . any act of failure to act by an employee, or other person responsible for the care of an individual in a facility operated by the department that was performed, or was failed to be performed, knowingly, recklessly, or intentionally, that caused or might have caused physical or psychological harm injury or death to an individual receiving care or treatment.*[29]

However, the hearing officer's analysis and discussion addressed whether the grievant intended to cause the patient harm.[30] Indeed, the hearing officer suggests that it was the Hospital Director who specifically alleged that the grievant intended to cause the patient harm.[31] Our review of the record evidence does not find that the agency contended that the grievant intended to harm the patient. Rather, the Hospital Director testified that the grievant's action of grabbing the patient by the feet/ankles and lifting him up compromised the safety of two patients and was inconsistent with training and the appropriate use of intervention.[32] The Hospital Director further testified that any action that did or might cause harm constituted abuse under the agency policy and warranted a Group III in the absence of mitigating factors, which the agency found were not present.[33] The agency policy does not require that the agency prove that the grievant intended to harm the patient; intent can be met by either knowingly or recklessly performing an action that caused or might have caused harm to the patients. Consequently, the hearing officer's analysis of the facts of this case does not appear to be consistent with the agency policy. On remand, the hearing officer must reconsider her determinations in light of the definition of "abuse" in the agency policy.

Lastly, the hearing officer found that the agency "did not reasonably assess" the grievant's conduct as a Group III offense rather than a Group II offense.[34] As the hearing officer reconsiders matters related to the grievant's intent and lack of TOVA training/recertification on remand, she will also need to reconsider her determination of the proper level of offense that relied on such determinations. The *Rules for Conducting Grievance Hearings* state:

> In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. Therefore, 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

[28] Hearing Decision at 11.
[29] *Id.*; Agency Ex. 3.
[30] Hearing Decision at 10-11.
[31] *Id.* at 11.
[32] Hearing Recording 3 at 2:50-4:01.
[33] Hearing Recording 3 at 4:01-5:45.
[34] Hearing Decision at 10.

> upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[35]

Testimony at hearing reflected the agency's basis for assessing the grievant's conduct as a Group III.[36] While the hearing officer appears to find that the grievant did not engage in "abuse," she also finds that the grievant failed to utilize proper restraint of the patient.[37] Yet, the agency's policy includes within the definition of "abuse" the following: "Use of physical or mechanical restraints on an individual that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice, or his individualized services plan . . . ."[38] Consequently, the hearing officer is required to reconsider on remand the determination that the grievant's conduct was not "abuse" under the agency's policy. In addition, and regardless of the label applied, the types of misconduct that the hearing officer cites from DHRM Policy 1.60, *Standards of Conduct*, as typical Group III offenses include conduct that endangers others, for example.[39] Based on the agency's assessment, it would appear the grievant's conduct falls within conduct that endangered others – though this has not been specifically addressed by the hearing officer. Furthermore, the *Standards of Conduct* does not require a finding of specific intent to harm to support a Group III Written Notice.[40]

In sum, the hearing officer must reconsider or further explain her findings as to whether the grievant's conduct constituted "abuse" under the agency's policy and, if so, whether Group III discipline for such misconduct was consistent with DHRM Policy 1.60.

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 under the agency and state policies applicable to the grievant's conduct in this case.[41] If the hearing officer determines that it is appropriate, she will have the discretion to re-open the record to receive further evidence to address any remanded matter. 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.[42]

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[35] *Rules for Conducting Grievance Hearings* § VI(B), at 16 (citations omitted).
[36] Hearing Recording 3 at 4:01-5:45.
[37] Hearing Decision at 10.
[38] Agency Ex. 3.
[39] Hearing Decision at 10.
[40] *See* DHRM Policy 1.60, *Standards of Conduct*, at 8-9; DHRM Attachment A: Policy 1.60, *Standards of Conduct*, at 2.
[41] The agency also challenged the hearing officer's mitigation analysis. As we have directed the hearing officer to reconsider certain findings utilized in the mitigation analysis and, therefore, the issue of mitigation will necessarily also be reconsidered on remand, we are unable to address the final outcome of mitigation in this ruling. Any resulting mitigation determinations in the hearing officer's decision on remand can be the subject of a timely request for administrative review to EDR.
[42] *See Grievance Procedure Manual* § 7.2.

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.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

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[43] *Id.* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).