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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2024-5620
November 15, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's remand decision in Case Number 11980. For the reasons set forth below, EDR will not disturb the remand decision.

FACTS AND PROCEDURAL HISTORY

Case Number 11980 concerns a Group III Written Notice with termination of employment, issued to the grievant by the Department of Behavioral Health and Developmental Services (the "agency") based on charges of client abuse. The relevant facts, as found by the hearing officer,[1] were incorporated by reference in EDR's first administrative review ruling in this matter and are incorporated herein by reference, as well.[2] In her original decision, the hearing officer concluded that the agency had failed to satisfy its burden of proof to support the disciplinary action at a Group III level.[3] Accordingly, she reduced the Group III Written Notice at issue to a Group II and ordered the grievant to be reinstated.[4] Upon administrative review, however, EDR remanded the case to the hearing officer to reconsider certain factual findings and application of the agency policy at issue.[5]

On September 19, 2023, the hearing officer issued a remand decision,[6] which concluded that, upon consideration of EDR's administrative review ruling and reconsideration of the available evidence and testimony, "[t]he Hearing Officer UPHOLDS the written notice in its entirety."[7] The grievant has requested that EDR administratively review the remand decision on the basis that the decision violates state policy and that there were six mitigating factors the hearing officer did not properly consider. These factors include the issue of the grievant not being TOVA "recertified," an alleged staffing shortage, the Hospital Director admitting that he was unable to

[1] Decision of Hearing Officer, Case No. 11980 ("Hearing Decision"), August 1, 2023, at 3-9.
[2] *See* EDR Ruling No. 2024-5603 at 2-4.
[3] Hearing Decision at 9-12.
[4] *Id*. at 12.
[5] EDR Ruling No. 2024-5603.
[6] Hearing Officer Remand Decision, Case No. 11980 ("Remand Decision"), September 19, 2023.
[7] Remand Decision at 12.

view the assault in question, each of the witnesses stating that they felt the grievant did nothing wrong, and the aggressive history of the patient who was involved in the altercation with the grievant.

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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Reconsidered Findings

In his request for administrative review, the grievant argues that the remand decision does not contain adequate findings to support upholding the agency's disciplinary action, contrary to the conclusion in the original hearing decision.

Pursuant to EDR's previous administrative review, "[a]fter careful, extensive review of the evidence and hearing recordation Tapes Nos. 1-7, the hearing officer vacate[d] the prior grievance hearing Written Decision . . . and support[ed] the grievant's termination."[11] Based on those findings, the hearing officer concluded upon reconsideration that the agency's Group III Written Notice with removal should be upheld; *i.e.* the agency met its burden to prove that the grievant engaged in client abuse under agency policy, as charged by the Written Notice, meriting disciplinary action at the Group III level.[12] The hearing officer has cited the applicable provisions of agency policy governing the use of force against patients, which defines abuse as "any act or 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, and that caused or might have caused physical or psychological harm, injury or death to an individual receiving care or treatment."[13] Indeed, the previous administrative review ruling found that:

> Testimony at hearing reflected the agency's basis for assessing the grievant's conduct as a Group III. 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. Yet, the agency's policy includes within the definition of

[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Remand Decision at 1-2.
[12] *Id*. at 11.
[13] *Id.* at 4.

> "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 . . . ." 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.[14]

While the hearing officer acknowledged the patient's history of aggression, she nonetheless noted that the patient "was entitled to be treated with dignity and respect at the agency."[15] The hearing officer further stated that the patient "did not deserve to be catapulted from the floor by his lower extremities, summarily dropped to the floor and, in essence, assaulted arbitrarily by the grievant. At the termination hearing, the grievant admitted that he took a 'shortcut,' in grabbing [the patient's] legs and feet and abruptly lowering him abruptly to the floor, to get the patient under control.[16] The hearing officer determined that "the grievant did not employ TOVA restraint techniques," which led to her decision to find the grievant's conduct to have violated the relevant agency policy as "abuse" of a patient.[17]

EDR finds no error in the hearing officer's reconsideration of the matters referred for review in the remand decision. The reconsidered conclusion is supported by findings in the original hearing decision, the hearing officer's analysis in the remand decision, and are based on evidence in the record.

Mitigation

The grievant also alleges that the hearing officer, in her remand decision, did not properly consider a variety of mitigating factors in favor of the grievant. 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]."[18] 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."[19] 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.[20]

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[14] EDR Ruling No. 2024-5603 at 6 (internal footnotes omitted).
[15] Remand Decision at 6.
[16] *Id.*
[17] *Id.* at 12.
[18] Va. Code § 2.2-3005(C)(6).
[19] *Rules for Conducting Grievance Hearings* § VI(A).
[20] *Id.* § VI(B).

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.[21] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[22] and will reverse the determination only for clear error.

On appeal, the grievant alleges that the hearing officer did not consider a total of six mitigating factors. These factors include:

(1) the Hospital Director admitting that he knew the grievant had not been TOVA recertified because he encountered a staffing shortage;
(2) the Hospital Director admitting that the Hospital was not able to meet minimum Virginia state staffing requirements;
(3) the Hospital not presenting evidence disputing the grievant's assertion that he was not properly retrained per TOVA standards;
(4) the Hospital Director admitting that he was unable to view the alleged assault for which the grievant was terminated;
(5) each witness qualifying or reversing their statements, stating that they did not see the grievant do anything inappropriate; and
(6) a witness testifying that the patient in question had been known to have incidents of aggression.

In her original decision, the hearing officer "concur[red] with the Grievant's assertion that he was unprepared in TOVA to handle this emergency initiated by Patient A's sudden punch to his face," and found that "[t]he offense charged against the Grievant, originally classified as Group III offense, for physical abuse is hereby reduced to a Group II offense for improperly restraining a

[21] 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 F. App'x 868 (Fed. Cir. 2006).

[22] "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.").

patient and failing to comply with written policy or Hospital procedures."[23] In our first administrative review ruling, EDR concluded that:

> The hearing officer's own factual findings indicate that the grievant admitted he received TOVA training when he was hired. 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. This policy appears to also indicate that employees "may not perform unsupervised duties at that TOVA level in resident areas until certified/recertified." 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.
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> [U]pon 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 Director admitted to knowing about a lack of alleged recertification of the grievant (or other staff) or that there was a staffing shortage. As such, the hearing officer must reconsider these findings.[24]

As to the specific issue of the grievant's TOVA training, the hearing officer, after reconsidering the evidence and testimony, determined that the grievant's notion of recertification being necessary was not relevant.[25] For example, in the remand decision, the hearing officer found that it was the grievant's choice to obtain recertification, and "the fact that [he] was not recertified to TOVA at Level III was not the proximate cause of this incident."[26] After a thorough review of the evidence along with the previous administrative ruling, EDR concludes that the remand decision appropriately interprets agency policy and the record evidence in consideration of this mitigating factor.

As to the concerns of the Hospital Director allegedly never viewing the assault itself or the various witnesses stating that they did not see the grievant do anything wrong, EDR does not find that the hearing officer abused her discretion in determining that these were not proper mitigating factors. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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

[23] Hearing Decision at 10.
[24] EDR Ruling No. 2024-5603 at 3-4 (internal footnotes omitted).
[25] Remand Decision at 3.
[26] *Id.* at 6.

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.

The hearing officer notes in the remand decision that the Hospital Director did in fact review the videos of the incident in question,[27] and the Director confirms this in the hearing itself.[28] The Director then testified that based on the video, it appeared that the grievant engaged in the conduct in question, *i.e.,* grabbed the patient by the legs and threw them to the ground.[29] The hearing officer also viewed the video and confirmed this testimony.[30] As to the testimony of other witnesses, the grievant's witness, for example, a fellow RN, testified that it is against policy to grab a patient's legs and throw them to the ground.[31] While it does not appear that the witness directly stated that the grievant did something wrong in his actions,[32] interpretations of witness testimony such as this are the type of interpretations left solely to the hearing officer to determine. Here, the hearing officer found that the available testimony and other record evidence substantiated the agency's claim that the grievant violated policy by grabbing the patient's legs and throwing him to the ground.[33]

As to the remaining mitigating factors presented, the hearing officer reiterated that, with the patient's safety being of paramount importance, any other factors, such as the patient's aggressive history, his coworker's state of pregnancy, or any alleged staffing shortage, were all considered irrelevant.[34] In assessing mitigating factors, a hearing officer "will not freely substitute [their] 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.'"[35] Even when considering the grievant's proffered mitigating factors by themselves, none of the evidence as to those factors suggests that the agency's Group III Written Notice went beyond the limits of reasonableness, and EDR has found no specific evidence of mitigating factors presented in the record that were not adequately addressed in the decision or that would support a different result. Thus, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. We decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. 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

[27] *Id*. at 8.
[28] Hearing Recording Part 3 at 2:10-2:30.
[29] *Id*.
[30] Remand Decision at 8-9.
[31] *Id*. at 9.
[32] *See* Hearing Recording Part 7 at 0:45-10:15.
[33] Remand Decision at 8-10.
[34] Remand Decision at 7, 11.
[35] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

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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