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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2019-4897
May 10, 2019

The University of Virginia Medical Center (the "University" or the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11303. For the reasons set forth below, EDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11303, as found by the hearing officer, are as follows:[2]

> RN1 was an oncology nurse caring for her patient. In the early morning on or about September 22, 2018, the condition of her patient became such that she called RN2 and RN3 to come to his bedside to offer advise and assistance. After RN2 and RN3 had assessed the patient, RN3 produced a written narrative as to the patient's condition. Clearly, this patient was in severe distress and an immediate CT scan was ordered. RN1, RN2 and RN3 took the patient to where he would receive his CT scan. The Grievant was the CT scan technician who would perform that scan. When the patient arrived at the location, the patient was on the hospital bed that had carried him from his room. The relative location of that bed and the CT equipment can be seen at Agency Exhibit 1, Tab 6, Page 9. There is some disagreement and/or confusion between the testimony of RN1, RN2, RN3 and the Grievant as to where everyone was located at all times during the CT scan procedure. Generally speaking, the three RN's were on the side of the table where the patient's bed was and the Grievant was at the far side of the CT scan table. The patient had numerous monitors attached to him, all of which had to be

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11303 ("Hearing Decision"), Mar. 27, 2019, at 3-4 (citations omitted).

arranged so that he could be moved from his transport bed to the CT scan table. The patient was altered, agitated and in pain. At some point during this process, the patient struck the Grievant in her abdomen. The Grievant testified that she was struck hard enough that she had a bruise that lasted for approximately one week. RN1 testified that she heard the Grievant say, "If you hit me, so help me God, I will hit you back." Upon hearing that statement, RN1 did not say or do anything at that time.

RN2 testified that he heard the Grievant say, "Do not hit me, or I'm going to hit you back." At that time, RN2 stated to the Grievant that - "The patient was in an altered state; did not know what he was doing; could not follow commands; the Grievant ought not to have said that; and the Grievant should not speak to him in that way." RN2 further testified that was all that he was going to do in this matter.

RN3 testified that he heard the Grievant say, "Do not hit me, or I will hit you back." RN3 testified that he neither said or did anything regarding this incident.

The Grievant testified before me that, while she does not remember the specifics of what she is alleged to have said, she cannot contradict that she said it. Accordingly, for the sake of the balance of this Decision, it will be an established fact that the Grievant said something to this patient that essentially was, "If you hit me, I will hit you back."

RN1, subsequent to these events, filed Management Form 96369 with the Agency. This form is euphemistically referred to as a "Be Safe Report." This report is what triggered this matter moving forward. Because this form is rather inartfully crafted, and because it attempts to capture all possible situations in very little space, it resulted in RN1 making the allegation that the potential harm or potential impact to the patient was moderate. That translated to - He might be transferred to a higher level of care, additional stay or additional procedures. During her testimony, RN1 indicated that really was not a likely outcome. RN1, on the Be Safe Report, deemed it unlikely that this issue would ever occur again with the Grievant.

At the conclusion of all witnesses presented by the Agency, it was crystal clear that the patient was not harmed by the Grievant, the patient timely received his CT scan, and the patient was timely returned to his original room. There was agreement in the patient's complete inability to understand or comprehend anything that was said to him during this event because of his altered state and because of his severe condition.

On or about November 2, 2018, the grievant was issued a Step 4 Formal Performance Improvement Counseling Form with termination for threatening a patient with physical harm.[3]

[3] *Id.* at 1.

The grievant timely grieved the disciplinary action and a hearing was held on March 13, 2019.[4] In a decision dated March 27, 2019, the hearing officer concluded that, based on the evidence in the record, the grievant's conduct impacted neither the patient's care or safety nor the operations of the University.[5] The hearing officer further found that, in the absence of evidence showing harm to the patient or the University's operations, the level of discipline imposed was not warranted under the circumstances.[6] The hearing officer did, however, determine that the grievant made a statement to the patient "under exigent circumstances and that, in a perfect world, should not have been made," and that "the proper response to the Grievant's statement should have been a Step 3 Performance Warning and a suspension" for two work weeks (i.e., ten workdays).[7] Accordingly, the hearing officer reduced the disciplinary action to a Step 3 Performance Warning with an unpaid suspension for two work weeks, ordered the grievant reinstated to her former position or an equivalent position, and directed the University to provide her with back pay, less the suspension and any interim earnings.[8] The University now appeals the hearing decision to EDR.

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."[9] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[10] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the University essentially contends that the hearing officer did not properly apply its Policy 701, *Employee Standards of Performance and Conduct*. More specifically, the University argues the grievant was charged with threatening a patient, which constitutes Gross Misconduct under Policy 701, and that acts of Gross Misconduct justify a Step 4 disciplinary action with termination upon a first offense. In the hearing decision, the hearing officer discussed the grievant's behavior as follows:

> As is clear from the above statements found in Policy No. 701, the Agency's intent is to go through a level of disciplinary steps except where it may otherwise determine that the employee's conduct was so egregious as to allow it to move directly to termination. In this matter, the Agency takes the position that the Grievant's conduct amounted to "gross misconduct" inasmuch as it threatened a patient. Policy No. 701 sets forth four steps in management's ability to work with its employees and the fourth step is termination.

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[4] *See id.*
[5] *Id.* at 4-6.
[6] *Id.* at 5-6.
[7] *Id.* at 6.
[8] *Id.* at 6, 7.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

. . . .

> Inasmuch as the Agency skipped Steps 1, 2 and 3, of it's progressive discipline, the Agency clearly came to the conclusion that the Grievant's misconduct or deficient performance had a significant or severe impact on patient care or Medical Center operations. Yet, when the Grievant's supervisor testified before me, she stated unequivocally, that there was neither a significant nor severe impact on this patient's care. Indeed, this patient was sent to have a CT scan on an emergency basis, and the scan was performed within all of the guidelines of that emergency basis. Furthermore, the Grievant's supervisor testified that she knew of no significant or severe impact on Medical Center operations because of the Grievant's statement.
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> The issue before me in this matter has nothing to do with patient care and/or safety. The patient received excellent care and treatment. No one testified before me that the work product of the Grievant was anything other than to the standards of which this Agency requires. No one testified before me that this patient was harmed in any way. No one testified before me that the operations of this Agency were impacted in any way.[12]

In cases involving discipline, the burden is on the agency to show that the grievant engaged in the behavior charged on the disciplinary action, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.[13] While the University appears to frame the hearing officer's decision as a mitigation of the Step 4 disciplinary action with termination to a Step 3 Performance Warning with an unpaid suspension, the hearing officer essentially determined that the University had not established that the grievant's behavior constituted misconduct that warranted the issuance of a Step 4 with termination. Indeed, the hearing officer essentially found that, regardless of the nature of the grievant's misconduct, the evidence in the record did not establish that "the Grievant's misconduct or deficient performance had a significant or severe impact on patient care or Medical Center operations," and that in the absence of such evidence, the issuance of the disciplinary action was not warranted at the level issued.[14]

The Step 4 disciplinary action at issue here charged the grievant with "threatening a patient with physical harm, which is considered gross misconduct" in violation of several University policies, including Policy 701.[15] Policy 701 classified employee misconduct into two categories: "Serious Misconduct" and "Gross Misconduct."[16] Gross Misconduct is defined as "acts or omissions having a severe or profound impact on patient care or business operations."[17] "Threatening a patient, employee, or visitor with physical harm" is specifically listed as an

[12] Hearing Decision at 5-6.
[13] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[14] Hearing Decision at 5.
[15] Agency Exhibit 1, Tab 3, at 1.
[16] Agency Exhibit 1, Tab 23, at 2-3.
[17] *Id.*at 3.

example of behavior that is considered Gross Misconduct.[18] With regard to the issuance of a Step 4 disciplinary action and termination, Policy 701 states that, "[i]f, in [] management's opinion, the employee's misconduct . . . has a significant or severe impact on patient care or Medical Center operations, employment may be terminated without resorting to Steps 1 through 3."[19]

Although the hearing officer provided a detailed analysis about the impact of the grievant's behavior on patient care and/or University operations, he did not make specific findings about the nature of the behavior that prompted the issuance of the discipline. As discussed above, the grievant was charged with threatening the patient.[20] In reducing the discipline to a Step 3 Performance Warning, the hearing officer found that she made a statement to the patient "under exigent circumstances and that, in a perfect world, should not have been made."[21] He did not, however, explicitly address whether the statement was a threat. Accordingly, the hearing decision must be remanded to the hearing officer for further consideration and explanation of the evidence in the record relating to nature of the grievant's statement. In particular, the hearing officer must make a determination as to whether the grievant threatened the patient.[22]

EDR has previously discussed on administrative review the appropriate factors to be considered by a hearing officer in determining whether an employee engaged in threatening behavior that constituted workplace violence in violation of DHRM policy.[23] While the grievant in this case was not charged with workplace violence, EDR offers the following procedural guidance to the hearing officer by way of analogy:

> Agencies must assess the totality of the circumstances when determining whether an employee has made a threat, and an employee may engage in workplace violence without explicitly threatening bodily harm to another person. For example, veiled threats or other statements that could be interpreted or understood as threatening, either by the target of the statement and/or by other individuals, may constitute workplace violence. This may be the case regardless of whether the employee intends the statement as a threat. In determining whether an employee's statement was threatening, agencies should consider the context of the statement and other surrounding circumstances, such as, for example, the employee's tone of voice and other behavior when making the statement, the employee's past conduct in the workplace, explanations or other clarification provided by the employee about nature of the statement, and any subjective fear of harm experienced by the target of the statement and/or other individuals. In short, if the agency makes a reasonable interpretation of the totality of the conduct as a threat, veiled or otherwise, it would meet the definition of "threatening behavior" prohibited by the policy. Accordingly, . . . the appropriate consideration

[18] *Id.*
[19] *Id.* at 6.
[20] Agency Exhibit 1, Tab 3, at 1.
[21] Hearing Decision at 6.
[22] This ruling does not mean that EDR considers the record evidence sufficient to meet the University's burden. Rather, these questions are obviously central to the disciplinary action at issue in this case and, consequently, must be clearly considered and addressed by the hearing officer.
[23] EDR Ruling No. 2018-4654. As of January 1, 2019, DHRM Policy 2.35, *Civility in the Workplace*, superseded DHRM Policy 1.80, *Workplace Violence* and DHRM Policy 2.30, *Workplace Harassment*.

> by the hearing officer is whether the agency's interpretation of the grievant's conduct as a threat was reasonable.[24]

In short, the hearing officer should consider the totality of the circumstances surrounding the grievant's conduct in addressing the question of whether the University reasonably considered her statement to the patient as a threat here.[25]

Furthermore, Policy 701 states that acts of Gross Misconduct, which includes threatening a patient, have "a severe or profound impact on patient care or business operations" by their definition.[26] As such, if the hearing officer finds that the grievant's statement to the patient was indeed a threat, then evidence demonstrating the specific impact of that behavior was not required to justify the issuance of the Step 4 disciplinary action. If the hearing officer finds that the grievant did not threaten the patient, he must articulate the factual basis for that conclusion and, if he determines that her behavior supports the issuance of a lower level of disciplinary action, clearly identify the justification for that level of discipline, consistent with the types of misconduct specified in Policy 701. Finally, because hearing officer did not address the issue of mitigation in the original decision,[27] he should do so in the reconsidered decision, if appropriate and after providing further discussion regarding the matters above.[28]

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent discussed above. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[29] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[30]

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.[31] 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

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[24] EDR Ruling No. 2018-4654.
[25] The hearing officer appears to have discussed some of these factors already, in relation to the impact of the grievant's behavior on patient care and/or University operations. *See* Hearing Decision at 5-6. On remand, the hearing officer may apply his analysis of those factors to the issue of whether the grievant threatened the patient.
[26] Agency Exhibit 1, Tab 23, at 3.
[27] *See* Hearing Decision at 6-7.
[28] In its request for administrative review, the University also argues that the hearing officer erred by not concluding that the grievant threatened the patient and upholding the Step 4 disciplinary action on that basis. Because EDR finds that the hearing officer has not clearly discussed whether the grievant's statement was a threat, EDR will not address that matter at this time. The University may present any arguments relating to the hearing officer's factual findings regarding the nature of the grievant's statement to the patient after that issue is addressed in the reconsidered decision, if it wishes to do so.
[29] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[30] *See Grievance Procedure Manual* § 7.2.
[31] *Id.* § 7.2(d).

arose.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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