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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5332
January 13, 2022

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 11720. For the reasons set forth below, EDR will remand the hearing decision for reconsideration.

FACTS

The relevant facts in Case Number 11720, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services [the "agency"] employed Grievant as an Emergency Response Team (ERT) Lead at the Facility. Grievant described her role as an ERT to be responsible for de-escalating patients to the point where they are compliant without having to use "physical means." She began working for the Agency on January 10, 2021. She previously worked with another State agency. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant took Therapeutic Options of Virginia training where she learned how to "engage physically" with patients and to do so as a last resort.
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> Grievant took Cultural Competence training on February 2, 2021 and Cultural Diversity training on March 1, 2021.
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> The Patient was a 42 year old African-American male admitted to the Facility on a temporary detention order because he was unable to care for himself and was a danger to others.
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> Nurse J was the Nurse Manager.

[1] Decision of Hearing Officer, Case No. 11720 ("Hearing Decision"), Nov. 23, 2021, at 2-4 (footnotes omitted).

On May 12, 2021, Grievant was working as a Direct Service Associate at the Facility. She regularly worked as a member of the Emergency Response Team.

The Patient was alone in the Day Room. At approximately 6:48 p.m., the Patient pulled his pants down and yelled. At 6:50 p.m., the Patient went to his room. Several staff went to the Patient's room and stood in the open doorway of the Patient's room and talked to the Patient. The Patient looked out the room window as he gestured and talked to the staff. Staff walked away from the room and the Patient remained in the room. At 6:57 p.m., three staff went to the Patient's room. Additional staff went to the room.

A "code" was called over the radio indicating that staff were to report to the unit to assist with an emergency. The code meant that the Patient was in crisis and required an emergency response from staff.

Mr. H was working as an ERT on the evening shift and responded to the Patient's room. He knew that two days earlier the Patient had punched another patient in the face with enough force to break bones. At approximately 7 p.m., Mr. H called Grievant and asked for her assistance. Grievant had been his supervisor and he trusted Grievant. Mr. H told Grievant that the Patient was refusing his medication and that Mr. H did not feel safe and needed her assistance. Another ERT was working with Mr. H and Mr. H was unsure of that ERT's abilities since that ERT recently began working as an ERT.

Mr. H testified he had called the Patient "Sir" and the Patient told Mr. H, "Don't call me Sir."

Grievant obtained permission to leave her unit and go to the Patient's unit.

Grievant had not interacted with the Patient prior to May 12, 2021. She did not know the Patient's medical history.

Several staff were at the Patient's room. At approximately 7:03 p.m., Grievant and two other ERTs arrived at the Patient's room. Grievant walked past Nurse J without first inquiring about the Patient's status.

Grievant entered the room and said to the Patient, "Yo, Yo, what's up dawg?" The Patient heard Grievant and became upset at her words. With a stern tone, the Patient told Grievant, "Don't talk to me like that. Speak professionally to me." Grievant's tone of voice along with her statement had upset the Patient. Grievant apologized to the Patient and did not repeat her behavior.

Staff obtained a doctor's order to inject the Patient with his medication since he refused to take his medication orally.

> At 7:04 p.m., a restraint chair is brought into the Patient's room. At 7:08 p.m., staff placed the Patient in the chair. The Patient was injected with medication. At 7:13 p.m., staff rolled the chair holding the Patient out of the Patient's room.
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> Grievant referred to the Patient as "dawg" because she was attempting to build rapport with the Patient. She relied on her interpretation of cultural competency training and cultural diversity training to conclude she needed to communicate with the Patient using terms she believed he would consider culturally appropriate. Grievant described "dawg" as a term of endearment like "buddy", "dude", or "friend."
>
> The term "dawg" was not routinely used by staff at the Facility to interact with patients.

On June 3, 2021, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal.[2] The grievant timely grieved the disciplinary action, and a grievance hearing was held on November 3, 2021.[3] In a decision dated November 23, 2021, the hearing officer upheld the agency's disciplinary action and, while noting that he disagreed with the agency's chosen penalty, found that no circumstances existed to mitigate it.[4] The grievant now appeals the hearing decision.

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

In the grievant's request for administrative review, she disputes whether she ever used the word "dawg" in interacting with the patient. She also contends that she never learned prior to her termination what specific conduct gave rise to the allegations of patient abuse. In addition, she claims that she lacked notice that her conduct as charged would constitute abuse of a patient under the agency's policies and that, even if the agency had met its burden of proof in that regard, its disciplinary action should have been mitigated as excessive.

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[2] Agency Ex. A; *see* Hearing Decision at 1.
[3] Hearing Decision at 1.
[4] *Id.* at 5-6.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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.

Findings of Fact

The hearing officer found that, when the grievant entered the room with the patient, she said to him: "Yo, yo, what's up dawg?"[12] The grievant argues that she "do[es] not remember calling the patient 'Dawg'" during the incident and that only a minority of witness statements included that specific allegation.[13]

Evidence in the record supports the hearing officer's conclusion. Multiple witnesses testified that the grievant said the phrase in question,[14] and the hearing officer was entitled to give that testimony credence. 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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[15]

Due Process

The grievant also argues that the agency's disciplinary process was unfair because she did not learn prior to her termination what specific conduct gave rise to the charges of patient abuse.[16] Prior to certain disciplinary actions, the United States Constitution generally provides, for

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3.
[13] Request for Administrative Review at 2, 3.
[14] *See, e.g.*, Hearing Recording at 1:43:02-1:43:30 (Nurse J's testimony); *id.* at 2:35:25-2:36:20 (Mr. B's testimony).
[15] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[16] Request for Administrative Review at 1. The agency's due process notice to the grievant stated that an investigation had sustained allegations of verbal abuse by the grievant, and the subsequent Written Notice charged that she had "addressed a patient in an inappropriate street lingo." Agency Exs. A, B.

individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[17] In this context, pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[18] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[19] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[20]

In this instance, we cannot conclude that the grievant lacked adequate notice of the charges for which she was disciplined, *i.e.*, speaking to a patient in a way that constituted verbal abuse. While the agency's documentation does not identify the specific words or phrase charged as abuse, it does identify the date and location where the alleged abuse took place, along with other details that would reasonably put the grievant on notice of which patient interaction gave rise to the discipline. Even if this pre-disciplinary notice had not been sufficient, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. We believe, as do many courts, that based upon the full post-

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[17] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard," is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974); *see* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a). However, state policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Moreover, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence." Accordingly, because due process is inextricably intertwined with state policy and the grievance procedure, EDR will also address the issue.

[18] *Loudermill*, 470 U.S. at 545-46.

[19] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[20] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

disciplinary due process provided to the grievant, any potential deficiency in the grievant's pre-disciplinary due process would have been cured by the extensive post-disciplinary due process the grievant received in this case.[21] Accordingly, EDR will not disturb the hearing decision on due process grounds.

Level of Discipline

Finally, the grievant contends that her words or other conduct toward the patient, as found by the hearing officer, did not constitute abuse under agency policy or, if they did, no policy provided reasonable notice of the scope of "abuse."[22] Accordingly, she argues, termination exceeded the bounds of reasonableness as a penalty.

The Written Notice in this case charged the grievant with going "directly into the patient's room without consulting" the nurse already present and "address[ing] a patient in an inappropriate street lingo, which the patient took exception to . . . . Your comments to the patient further escalated the situation. Additionally, you obstructed [a nurse] as she was setting up medication for the patient."[23] These actions, the Written Notice charged, substantiated charges of abuse.[24] The hearing officer sustained the allegations that the patient greeted the patient by saying "yo, yo, what's up dawg?," which upset the patient.[25] However, the hearing officer determined that the agency did not present credible evidence to support any other acts or omissions by the grievant constituting misconduct.[26]

In analyzing whether the grievant's words constituted abuse, the hearing officer observed that, under agency policy, patient "abuse" means "any act or failure to act . . . knowingly, reckless or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse."[27] Examples of "abuse" listed in the policy included "[u]se of language that demeans, threatens, intimidates or humiliates the person."[28] Based on these provisions, the hearing officer reasoned that, in order to meet its burden of proof, the agency had to show that the grievant's words might have caused psychological harm to the patient by being demeaning, regardless of the grievant's actual intent.[29] Applying this standard to the grievant's conduct, the hearing officer determined:

> Grievant had not met the Patient before. Using "street lingo" with a patient could make that patient feel demeaned. She did not comply with her obligation to remain

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[21] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).
[22] Request for Administrative Review at 2-3.
[23] Agency Ex. A.
[24] *Id.*
[25] Hearing Decision at 3.
[26] *Id.* at 5.
[27] Hearing Decision at 4; *see* Agency Ex. E at 1.
[28] *Id.*
[29] Hearing Decision at 5.

> professional with patients. In this case, the Patient became upset by Grievant's words and asked her to speak to him professionally.[30]

It appears that the hearing officer adopted the agency's term "street lingo" to refer to casual language that is considered overly familiar for the patient care setting and, thus, unprofessional. The record presents no dispute that the phrase "yo, yo, what's up dawg?" was not a professional greeting to the patient in the agency's care, and we find no basis to question the hearing officer's conclusions to the extent he found that the grievant knew she was required to speak to patients professionally. However, it is not apparent from the hearing decision or from the record what evidence was presented to establish that a greeting or informal address would rise to the level of patient "abuse" under agency policies *solely* on grounds that it uses overly familiar or colloquial terms.[31] The hearing decision does not describe the record evidence supporting the determination that the grievant's language "could make that patient feel demeaned."[32]

For these reasons, and as further described below, EDR is remanding this matter for further consideration and elaboration of these findings by the hearing officer. The standard utilized to determine that the grievant had engaged in abuse through her use of colloquial language is not clear on review. The hearing officer suggests that it was the patient's reaction to the grievant's choice of words that rendered them demeaning.[33] It is unclear whether the record evidence demonstrates that the agency utilizes a standard in which the patient's opinion is determinative as to whether abuse has occurred under agency policy. Further, if overly casual language "could make a patient feel demeaned," this logic could be interpreted as equating any unprofessional conduct toward a patient with abuse. EDR is unable to identify the evidence in the record that demonstrates the appropriate standard to apply for the hearing officer to determine that the grievant's use of a colloquial greeting to a patient could rise to the level of "abuse" under agency policies.

Generally, an agency's interpretation of its own policies is afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless that interpretation is clearly erroneous or inconsistent with the express language of the policy.[34] In this case, however, it is not clear from the agency's evidence or arguments that it would in fact equate mere informality with demeaning "abuse" under its policies. For example, consistent with the Written Notice, the facility director testified regarding the grievant's misconduct:

> Not only was it unprofessional conduct, but in this specific situation this particular staff agitated a patient during an aggressive episode . . . . That was the concern. . . . [S]he could obviously see and hear that the patient was going to escalate further

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[30] *Id.*

[31] The hearing officer noted the grievant's view that "dawg" is a friendly term akin to "buddy" or "dude." Hearing Decision at 4. We perceive nothing in the record to suggest that the phrase "what's up, dawg" might be understood as disrespectful in informal settings. *See, e.g.*, Hearing Recording at 3:31:30-3:31:55 (Director's testimony characterizing the phrase generally "as a way to greet someone in a friendly tone as if you're at a party.").

[32] Hearing Decision at 5.

[33] The agency's investigator testified that he believed the grievant's words were demeaning based on the patient's reaction to her lack of professionalism. *Id.* at 1:20:05-1:21:55, 1:28:10-1:28:50.

[34] *See*, *e.g.*, EDR Ruling No. 2020-4998; EDR Ruling No. 2019-4803.

> due to the way she was approaching him. She continued to stay in the room and interact with the patient after being asked to stop speaking to him in that manner. . . . The unprofessional part of her conduct is one piece. The greater piece is that she did not act in a therapeutic manner at all to this patient.[35]

However, while the misconduct charged in the Written Notice was much broader, the hearing officer did not sustain any of the agency's allegations regarding the grievant's misconduct beyond her use of colloquial language to address the patient. The hearing officer specifically found that the agency did not present credible evidence to support misconduct in the form of failing to consult with the nurse in the room or by interfering with the administration of medication.[36] Therefore, we are unable to determine whether the agency failed more broadly to prove the full extent of the original charge listed on the Group III Written Notice based on the totality of the circumstances. The record is not clear as to whether the agency would have issued a Group III Written Notice with termination for abuse if the sole allegation was the use of colloquial language toward a patient.

Accordingly, we must remand the hearing decision for reconsideration. Upon reconsideration, the hearing officer must address the evidence in the record that supports the grievant's use of colloquial language as abuse and the unclear issues further identified in detail above in this ruling. The hearing officer should also clarify whether, based on the evidence, the grievant committed any misconduct beyond merely addressing a patient with a colloquial phrase. If so, the hearing officer should make findings as to whether the totality of the sustained allegations merits the Group III Written Notice with termination issued by the agency, pursuant to DHRM Policy 1.60, *Standards of Conduct*. If applicable, the hearing officer should additionally evaluate what level of discipline may be upheld for the offense of unprofessional conduct under the circumstances. The hearing officer must, as always, consider relevant mitigating and aggravating circumstances as demonstrated by the parties.

CONCLUSION AND APPEAL RIGHTS

As described above, EDR remands this case to the hearing officer for further consideration and clarification. The hearing officer is directed to issue a remand decision considering whether the totality of the grievant's interaction with the patient constituted abuse under agency policies and, if not, the level of discipline supported by the evidence for unprofessional conduct in light of all the facts and circumstances. In doing so, the hearing officer may, in his discretion, re-open the record to receive further evidence from the parties if he deems it appropriate.

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.[37] Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all

[35] Hearing Recording at 3:19:39-3:21:30 (Director's testimony).
[36] Hearing Decision at 5.
[37] *See Grievance Procedure Manual* § 7.2.

timely requests for administrative review have been decided.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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