Issue: Administrative Review of Hearing Officer's Decision in Case No. 10314; Ruling Date: May 28, 2014; Ruling No. 2014-3880; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2014-3880
May 28, 2014

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 10314. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10314 are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a License Practical Nurse at one of its Facilities. She had been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Facility provided services to adult patients including geriatric patients. When Grievant reported to the Facility she usually worked in Pod 2B, the medical unit. When patients residing in other pods became ill, they received treatment in Pod 2B. Up to five patients could be treated at one time in Pod 2B.
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> Geriatric patients resided in Pod 4. It was often difficult for staff to render services to these patients because these patients required more time than other adult patients to receive services. For example, an employee responsible for dispensing medication to a geriatric patient may have to crush the patient's pills, mix those pills with food, and assist with feeding the geriatric patient. In December 2013, several staff complained to Mr. B, a Registered Nurse Coordinator, about being moved to Pod 4. As a result of employee complaints, the Facility adopted a practice where employees moved to Pod 4 would receive an orientation before beginning their shifts and would be able to ask questions of other employees working in Pod 4 and Agency supervisors responsible for

[1] Decision of Hearing Officer, Case No. 10314 ("Hearing Decision"), April 21, 2014, at 2-3 (citations omitted).

supervising Pod 4. The Facility also adopted a practice of cross training and held a skills fair for employees.

When the Facility lacked adequate staffing in a particular pod, Facility managers would move employees from other pods into the inadequately staffed pod. Employees were selected to be moved to an understaffed pod based on a sequential rotation.

On February 15, 2014, Facility managers realized that Pod 4 would be understaffed for the day unless an additional employee was assigned to work in Pod 4. It was Grievant's turn to be moved to another pod. Grievant was notified she was expected to work her shift in Pod 4. At 7 a.m., Grievant called Ms. J, a Registered Nurse Coordinator, and said that she had been told to go to Pod 4 but that she could not do so. Grievant said she did not feel comfortable. Ms. J asked why. Grievant stated that she could not complete her tasks in a timely manner and that she was not able to do so because she did not feel comfortable working in Pod 4. Ms. J told Grievant that employees do not always feel comfortable going to another unit but that Grievant would be fine if she gave herself a chance. Ms. J said she would call staff in Pod 4 and make sure that they gave her the assistance she needed and an orientation if she needed one. Grievant said that she had worked in Pod 4 several times before and she could not do it and that she did not feel safe. Grievant then asked Ms. J what Ms. J wanted Grievant to do. Ms. J stated that she wanted Grievant to go to Pod 4 as directed. Grievant said she could not do so. Grievant asked Ms. J if she wanted Grievant to go home. Ms. J said she wanted Grievant to go to Pod 4. Ms. J told Grievant that Grievant was being directed to go to Pod 4 and that if Grievant did not do so then Grievant would not be following the directive given to her and that Grievant could suffer consequences. The telephone call ended.

At 7:15 a.m., Ms. N, the RNCB called Ms. J and said that Grievant had not reported to Pod 4. Ms. J called Pod 2B and Grievant answered the telephone. Ms. J asked Grievant if she was getting ready to go because they were waiting on her in Pod 4. Grievant said she was not getting ready to go. Grievant restated her position that she could not work in Pod 4. Ms. J told Grievant again the Grievant was refusing an assignment. Grievant insisted that she was not refusing the assignment but that she was not going to Pod 4 because she could not complete her assignment. Grievant repeated herself and became louder and louder and was insisting that she would not go to Pod 4. Ms. J hung up the phone because Grievant would not stop her arguing. Ms. J then called the Chief Nursing Executive and explained what had happened.

The Chief Nursing Executive called Grievant in Pod 2B. At approximately 7:26 a.m., the Chief Nursing Executive told Grievant that if she did not intend to go to Pod 4 she should take her keys and badge to Ms. J and leave

the Facility. Grievant went to Ms. J's office and turned in her keys and badge and left the Facility at 7:45 a.m.

On February 20, 2014, the grievant was issued a Group III Written Notice with removal for insubordination, failure to follow instructions and/or policy, and failure to comply with hospital staffing requirements.[2] She timely initiated a grievance challenging the disciplinary action.[3] On April 21, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.[4] The grievant has now requested administrative review by 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."[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 action be correctly taken.[6]

Due Process

The grievant argues, in effect, that the agency failed to provide her with due process under the grievance procedure. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[7] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[8] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (*"*Rules*"*).* Further, as discussed below, we note that the grievant has requested an administrative review by the DHRM Director. That review may determine whether the agency's actions violated the DHRM Standards of Conduct, which contain a section expressly entitled "Due Process."[9]

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those 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

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[2] *Id.* at 1. The hearing officer found that the nature of the grievant's conduct justified an elevation of the disciplinary action from a Group II to a Group III Written Notice. *Id.* at 4.
[3] *Id.* at 1.
[4] *Id.* at 1, 5.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] *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) (holding that notice prior to a hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency and held as an actual revocation hearing).
[8] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[9] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

to the charges, appropriate to the nature of the case.[10] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct her 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."[11] 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 the accuser in the presence of the decision-maker; an opportunity to present evidence; and an opportunity for the presence of counsel.[12] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[13]

Section VI(B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[14] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[15] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified cannot be remedied through a hearing."[16] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, the grievant asserts that the offense date stated on the Written Notice was incorrect. Despite this error, however, it appears that the grievant understood the conduct for which she was being charged.[17] As the grievant had adequate notice of the charge against her prior to hearing, the hearing decision will not be disturbed on this basis.

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[10] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior 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. Significantly, 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."

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

[12] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).

[13] See Va. Code § 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).

[14] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[15] *See, e.g.*, EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.

[16] *Rules for Conducting Grievance Hearings* § I.

[17] *See* Grievant Exhibit 1 at 6, 10-12 (statements by grievant identifying February 15, 2014 as the relevant date); Agency Exhibit 1 (Written Notice identifying offense date as February 16, 2014).

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review arguably asserts that the hearing officer's decision is inconsistent with state and agency policy, such as, for example, whether the disciplinary action was properly categorized as a Group III. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[18] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Findings of Fact

The grievant's request for review also challenges a number of the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and grounds in the record for those findings."[20] 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.[21] 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.[22] 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 upon 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.

Based on a review of the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant refused a work assignment directed by her supervisor.[23] In reaching his decision, the hearing officer appears to have considered witness testimony and documentary evidence.[24] While the grievant apparently disagrees with the hearing officer's factual determinations, that disagreement does not in itself constitute a basis for overturning the hearing officer's decision. Because the hearing officer's findings are based upon 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. Accordingly, we decline to disturb the decision on this basis.

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[18] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.
[23] Hearing Decision at 4.
[24] *See, e.g.*, Agency Exhibit 3; Grievant Exhibit 1 at 10-12.

Failure to Mitigate

Fairly read, the grievant's request for administrative review also arguably challenges the hearing officer's failure to mitigate the disciplinary action taken against her. Under 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]."[25] The *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."[26] More specifically, the *Rules* provide that in disciplinary grievances, 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 upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[27]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or 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 difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[28] EDR will review a hearing officer's mitigation determination for abuse of discretion,[29] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[25] Va. Code § 2.2-3005(C)(6).
[26] *Rules* § VI(A).
[27] *Id.* at § VI(B)(1) (citation omitted).
[28] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).
[29] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . . ." *Id.*

Here, the grievant asserts that the disciplinary action should be mitigated because of the difficulty in working in Pod 4.[30] The hearing officer implicitly rejected this argument in his decision, finding that "[n]o legitimate basis existed for Grievant to refuse to work [i]n Pod 4," and that no basis for mitigation existed.[31] While EDR cannot exclude the possibility that working conditions may, in extraordinary circumstances, constitute a basis for mitigation, the grievant has not shown that such circumstances exist here. Nor has she demonstrated that the hearing officer abused his discretion in finding that the disciplinary action taken by the agency did not exceed the limits of reasonableness.[32] For these reasons, the hearing decision will not be disturbed on this basis.

CONCLUSION AND APPEAL RIGHTS

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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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[30] In support of her request for administrative review, the grievant provided letters from co-workers regarding the difficulties of working in Pod 4. As these documents do not meet the criteria for admissible newly-discovered evidence, they will not be considered here. *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc* 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining "newly discovered evidence" rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure). We note that the grievant introduced at hearing other evidence of the alleged working conditions in Pod 4. *See, e.g.*, Grievant Exhibit 1 at 10-12, 16-17.
[31] Hearing Decision at 5.
[32] *Id.*
[33] *Grievance Procedure Manual* § 7.2(d).
[34] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[35] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).