Issue: Administrative Review of Hearing Officer's Decision in Case No. 10543; Ruling Date: April 29, 2015; Ruling No. 2015-4132; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-4132
April 29, 2015

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 10543. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10543, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employs Grievant as a Counselor II at one of its facilities. The purpose of her position is:
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> > To provide clinical social work services to adult mentally ill patients utilizing Recovery principles with a goal of assisting patients to be successful in the least restrictive environment consistent with their level of functioning.
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> When employees attempt to control patients, they are expected to follow the training they received regarding Therapeutic Options of Virginia (TOVA). Grievant received TOVA training and knew of her obligation to follow the principles taught during that training.
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> The Patient was admitted to the Facility from a local jail on September 23, 2014 under a Court order for restoration to competency to stand trial for assault and battery on a law enforcement officer and shoplifting. He was diagnosed with Schizoaffective Disorder, Bipolar Type, Polysubstance Dependence, and Mild Retardation.
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> On November 13, 2014, Grievant entered the Common Area of the Ward where the Patient was located. Other patients and staff were also in the Common Area. The Patient sat in a chair at a table. Grievant walked near the table. She was

[1] Decision of Hearing Officer, Case No. 10543 ("Hearing Decision"), March 27, 2015, at 2-3 (citations omitted).

carrying in her left hand and arm a three to four inch thick loose leaf binder. She held a coffee thermos in her right hand. The Patient asked if he could speak with Grievant. Grievant sat down to the Patient's right and began speaking with him. The Patient told Grievant that the Doctor told him to ask staff if he could have coffee. Grievant reminded the Patient that he had several incidents of throwing coffee on people including the day before. The Patient stood up and walked away from the table but returned to continue speaking with Grievant. He sat down at the table and continued speaking with Grievant. The Patient got up from the table and walked away from Grievant. Grievant remained seated at the table for a few seconds and stood up. She carried her binder and thermos into the nursing office.

The Patient returned to the table carrying two Styrofoam cups. He sat at the table and placed one cup in front of him and the second cup on the table in front of the seat where Grievant was sitting. The Patient began talking even though no one was in front of him listening. Dr. V walked into the Common Area and the Patient began talking towards Dr. V. The Patient stood up and walked around the table to speak with Dr. V. When their conversation ended, the Patient walked back to his seat and sat down. Dr. V left the Common Area. Grievant came out of the nursing office and walked near the table. The Patient began speaking with her and said, "There go that bi—h." The Patient became agitated and stood up and picked up a cup with his left hand. He began moving aggressively towards Grievant and pointed at her with his left hand. Grievant began stepping backwards. The Patient said, "I'm going to kill you bi—h!" Mr. V was also working in the Common Area. He walked across the room and stood with the Patient to his left and Grievant to his right. The Patient pushed his arms towards Grievant. Mr. V moved towards the Patient and moved him a few inches away from Grievant. The Patient lunged towards Grievant and slipped away from Mr. V's grasp. He punched at Grievant and Grievant moved backwards. Mr. V attempted to regain control of the Patient. Mr. V briefly held the Patient but the Patient was able to escape from Mr. V's hold. The Patient charged Grievant. Grievant walked backwards away from the Patient but he quickly closed the distance between them. She was holding the thermos with her arm down and near her hip. When the Patient was within approximately three feet of Grievant, she raised her right hand and arm above her head as she held the thermos. She moved her left arm and hand upward as she held the binder but did not raise it above her head. While her right hand was above her head, she moved it forward to throw the thermos at the Patient as she continued to step backwards. The thermos hit the top of the Patient's head causing injury. The Patient continued after Grievant and struck her. Other employees approached the Patient from behind and were able to hold him away from Grievant.

On December 9, 2014, the grievant was issued a Group III Written Notice for physical abuse of a patient in violation of agency policy and suspended for five workdays.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on March 16, 2015.[4] In a decision

[2] Agency Exhibit 1.
[3] Agency Exhibit 3.
[4] *See* Hearing Decision at 1.

dated March 27, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant engaged in physical abuse of a patient and upheld the Group III Written Notice and five-workday suspension.[5] The grievant 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."[6] 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.[7]

Inconsistency with Agency Policy

The grievant asserts in her request for administrative review that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

Admission of Agency Exhibit 6

In her request for administrative review, the grievant argues that the hearing officer failed to comply with the grievance procedure by admitting Agency Exhibit 6, which consists of a video recording of the incident, into the hearing record even though the agency, so the grievant states, did not identify or disclose that exhibit to her prior to the hearing. The grievant asserts that "[t]he day of the hearing was the first opportunity [she] had to view" the recording and that she "would have included TOVA Instructors on [her] witness list" had she known the content of the recording. By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[9] Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding,[10] and the technical rules of evidence do not apply.[11] When a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, the hearing officer may continue the hearing to allow the opposing party time to respond. However, this remedy is required only when requested and when the opposing party would otherwise be materially prejudiced by the failure to identify an exhibit. In this case, the grievant did not request that the hearing officer continue the hearing or otherwise bring the issue to the hearing officer's attention. Moreover, we find no material prejudice in admitting the evidence.

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[5] *Id.* at 3-5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[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(C)(5).
[10] *Rules for Conducting Grievance Hearings* § IV(D).
[11] *Id.*

The grievant argues that she "would like to have the TOVA instructors that have trained [her] watched the tapes [sic] and give expert testimony regarding [her] actions." However, we cannot conclude that the agency's alleged failure to identify the exhibit prior to hearing and the subsequent admission of Agency Exhibit 6 into the record at the hearing is what prevented the grievant from seeking the testimony of these instructors. As a video recording of the incident, Agency Exhibit 6 is undoubtedly relevant to the agency's assertion that the grievant engaged in abuse of a client and failed to use appropriate TOVA techniques in responding with the Patient's behavior. Having reviewed the agency's list of proposed exhibits, it is clear that the agency provided the grievant with other documentary evidence before the hearing that put her on notice that it planned to present those arguments at the hearing.[12] Indeed, the Written Notice itself clearly states that the grievant was charged with physical abuse of the Patient.[13] We understand that the grievant may now wish that she had called additional witnesses to testify at the hearing about her conduct as demonstrated in the recording. Those same witnesses, however, would have been competent to testify as to the appropriateness of the grievant's actions regardless of whether the recording of the incident was introduced into evidence. In short, there is no basis for EDR to conclude that the grievant was unable to mount an adequate defense to the charge on the Written Notice because she was allegedly unable to review Agency Exhibit 6 in advance of the hearing.

Although EDR in no way condones the agency's failure to disclose Agency Exhibit 6 in a timely manner, if it actually failed to do so, we have also not identified anything in the record to suggest that the grievant's ability to prepare and present her case was unfairly prejudiced because the hearing was not continued to allow her additional time to respond to Agency Exhibit 6. Therefore, under the particular circumstances of this case, we cannot find that the hearing officer erred either in admitting that exhibit into evidence or in not continuing the hearing to allow the grievant additional time to respond such that remand is warranted. Accordingly, we decline to disturb the decision on this basis.

Hearing Officer's Consideration of Evidence

The grievant asserts in her request for administrative review that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[14] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[15] 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.[16] 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.[17] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that

[12] *See, e.g.*, Agency Exhibit 2 at 3-8, 23-24.
[13] Agency Exhibit 1 at 1.
[14] Va. Code § 2.2-3005.1(C).
[15] *Grievance Procedure Manual* § 5.9.
[16] *Rules for Conducting Grievance Hearings* § VI(B).
[17] *Grievance Procedure Manual* § 5.8.

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.

In the hearing decision, the hearing officer assessed the evidence and concluded that agency policy required a showing "that (1) Grievant engaged in an act that she performed knowingly, recklessly, or intentionally and (2) Grievant's act caused or might have caused physical or psychological harm to the Client."[18] Based on the evidence presented by the parties, he determined that "[t]hrowing a thermos at a patient is an action that might cause physical harm," and that the "Grievant threw a thermos at the Patient as he approached her with the objective of harming her."[19] He further stated that "the video of the incident does not show she limited her actions to self-defense" and that the "Grievant's action was not consistent with TOVA . . . ."[20]

The grievant claims that "there was no proof presented during the hearing" to show that she engaged in abuse of the Patient and disputes the hearing officer's conclusion that she was "winding up" her arm to throw the thermos in the recording. She further claims that "[t]he tape does not include the entire incident" and asserts that the Patient could have been injured after his encounter the grievant. While the grievant may disagree with the hearing officer's findings of fact, there is evidence in the record to support the hearing officer's conclusion that, under agency policy, the grievant engaged in an act of physical abuse.[21] The video recording of the incident shows that the grievant threw her thermos in the Patient's direction,[22] and there is evidence in the record to show that the grievant admitted as much.[23] The agency investigator testified that the Patient suffered physical injury as a result of the grievant's actions.[24] Multiple witnesses stated that the grievant did not use TOVA techniques to defend herself from the Patient and that throwing the thermos was not an appropriate response to the situation.[25] The grievant appears to correctly argue that the video recording does not show the entirety of what occurred after the grievant threw her thermos and the Patient was successfully restrained.[26] Even assuming for the sake of argument that the Patient was injured by something other than the thermos, however, agency policy provides that any action that might cause physical harm to a client constitutes abuse, even if no actual injury occurs.[27] Furthermore, the agency investigator testified that, whether the grievant intended to strike the Patient with the thermos or not, the intentional act of throwing it at the Patient was sufficient to constitute an act of abuse.[28]

The grievant also argues that "none of the participants in the hearing including the Hearing Officer are trained TOVA Instructors," and thus they were not qualified to testify about

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[18] Hearing Decision at 4.
[19] *Id.*
[20] *Id.* at 5.
[21] *See* Agency Exhibit 5 at 5.
[22] *See* Agency Exhibit 6.
[23] Hearing Recording at 4:10-4:16 (testimony of Investigator H); Agency Exhibit 1 at 4; Agency Exhibit 2 at 4-5, 10-11.
[24] Hearing Recording at 17:01-17:27 (testimony of Investigator H).
[25] *E.g., id.* at 15:55-16:40 (testimony of Investigator H), 53:52-54:21 (testimony of Manager L), 1:09:59-1:10:28 (testimony of Mr. V), 1:28:09-1:29:32 (testimony of Witness B).
[26] *See* Agency Exhibit 6.
[27] *See* Agency Exhibit 5 at 5.
[28] Hearing Recording at 17:32-17:47 (testimony of Investigator H).

or determine whether her actions complied with TOVA training. That the hearing officer and/or any of the witnesses who testified at the hearing are not trained TOVA instructors has no bearing on the hearing officer's ability to assess the facts and reach a conclusion as to whether the discipline should be upheld. As discussed above, hearing officers have the statutory authority to review the facts in disciplinary cases and determine whether the grievant engaged in the behavior charged on the Written Notice, whether the behavior constituted misconduct, and whether the agency's discipline was consistent with law and policy.[29] There is no requirement under the grievance procedure that a hearing officer have specialized training in or knowledge of agency policies in order carry out this duty. It is instead up to the parties to present all the relevant evidence necessary for the hearing officer to consider in making a decision, including the facts of the case and any applicable state and/or agency policies.

In sum, there is evidence in the record to support the hearing officer's conclusion that the grievant intentionally threw her thermos at the Patient and that her actions caused or might have caused physical harm to the Patient. Determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. 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. In this case, the hearing officer's findings are based upon evidence in the record and the material issues of the case, and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on these bases.

Newly-Discovered Evidence

In her request for administrative review, the grievant states that she has "located additional witnesses that were present but never interviewed" and asserts that the agency investigator was biased. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[30] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[31] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[32]

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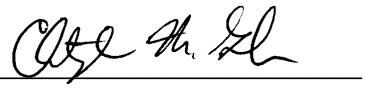
[29] *Rules for Conducting Grievance Hearings* § VI(B).
[30] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[31] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[32] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

In this case, the grievant has provided no information to support a contention that the information these additional witnesses would present should be considered newly discovered evidence under this standard. The grievant has presented nothing that would indicate she was unable to obtain this evidence prior to the hearing. She had the ability to call all necessary witnesses at the hearing and to elicit relevant testimony from those witnesses. It was the grievant's decision as to which witnesses should be called to testify on her behalf. While the grievant may now realize she could have ask other witnesses to testify about the incident, this is not a basis on which EDR may remand the decision.[33] Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]



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[33] EDR may only remand a decision where the grievant has shown that the hearing officer has failed to comply with the grievance procedure. *See Grievance Procedure Manual* § 6.4(3).
[34] *Grievance Procedure Manual* § 7.2(d).
[35] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).