Issue: Administrative Review of Hearing Officer's Decision in Case No. 10528, 10529, 10530; Ruling Date: June 1, 2015; Ruling No. 2015-4137, 2015-4138; 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 Numbers 2015-4137, 2015-4038
June 1, 2015

Both the grievant and the Department of Behavioral Health and Development Services (the "agency") have both 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 10528/10529/10530. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10528/10529/10530, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Registered Nurse at one of its Facilities. She had been employed by the Agency since 2006. No evidence of prior active disciplinary action was introduced during the hearing.
>
> When a nurse takes the "vitals" of a patient, the nurse determines the patient's temperature, blood pressure, pulse, and oxygen saturation.
>
> A patient's temperature can be taken rectally, orally, and auxiliary. The most accurate temperature is one taken rectally. For example, if a patient's rectal temperature is 97 degrees, his or her actual core body temperature would be 97 degrees. A patient with a 97 degree rectal temperature would have approximately a 96 degree oral temperature and a 95 degree auxiliary temperature. Some employees circle the letter "r" and write it next to the temperature to indicate a rectal temperature. Some employees write "ax" to indicate the temperature is auxiliary.
>
> On May 9, 2014, the Medical Staff Coordinator sent several Facility employees including Grievant an email stating:
>
> > Per [Dr. B] a reminder to inform the PHCP if an individual's vital signs fall within the guidelines below:

[1] Decision of Hearing Officer, Case No. 10528/10529/10530 ("Hearing Decision"), April 3, 2015, at 2-4 (citations omitted).

Temperature >101 [degrees] F or < 95 [degrees] F
Pulse <50 or >130
Respirations >40/min or <12/min
BP systolic >160 or <90
BP diastolic >90 or <50

The Patient had profound intellectual disabilities including hypothermia. Hypothermia occurs when the body temperature falls below 95 degrees Fahrenheit. If the Patient's core body temperature fell below 95 degrees, staff were to implement a hypothermia protocol. The protocol included placing warming blankets on the Patient, checking his skin condition, and checking his temperature every 30 minutes. Part of this protocol included notifying the Facility's Medical Clinic Doctor.

Grievant reported to work at 3 p.m. on September 25, 2014. She was responsible for several residents including the Patient. Grievant asked the CNA to take the vital signs of the Patient. At 4 p.m., the CNA took the Patient out of his wheel chair and placed him on his bed. She took his rectal temperature. The temperature was 94.7 degrees. She wrote the temperature and other vital signs on a piece of paper and handed it to Grievant. The CNA put blankets on the Patient to warm him. Grievant was in the same room with the Patient and the CNA when the CNA took the Patient's temperature.

At approximately 9:30 p.m. on September 25, 2014, Grievant typed in the Open Event Report that the Patient had no signs or symptoms of distress. She wrote that at 4 p.m., the Patient's temperature was 94.7 and pulse was 48. She also made a handwritten entry in the Patient's Interdisciplinary Notes saying his temperature was 94.7. The "4.7" numbers were written over two other numbers. Grievant did not indicate how the temperature was taken.

Grievant left the Facility at the conclusion of her shift at 11:30 p.m.

At approximately 1:30 a.m. on September 26, 2014, Ms. Sa took the Patient's rectal temperature. The temperature was 93.8 degrees and 94.2 degrees the second time. She placed a heating pad and blankets from the warmer on the Patient. About one hour later, she rechecked the Patient's rectal temperature and it was 94.8 degrees. She checked the Patient's temperature every 30 minutes and all vital signs every hour. Ms. Sa's shift ended at 7:30 a.m. on September 26, 2014.

On September 26, 2014 at 7:40 a.m., the LPN reported to the Agency that the Patient may not have received needed care regarding his Hypothermia protocol.

Grievant was on short term disability status from October 3, 2014 through October 13, 2014. She did not report to work during that time. The Investigator called Grievant on October 6, 2014. Grievant said she had a lawyer. An interview was scheduled for October 14, 2014 and the Investigator interviewed Grievant on that day.

On November 14, 2014, the grievant was issued a Group III Written Notice with termination for client abuse, a Group II Written Notice for failure to follow established procedures related to the reporting and recording of patient data, and Group II Written Notice for failure to follow policy because her decision to obtain legal representation delayed the agency's investigation of the incident.[2] The grievant timely grieved the disciplinary actions[3] and a hearing was held on January 27, 2015.[4] In a decision dated April 3, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant engaged in client abuse and upheld the Group III Written Notice and termination, but concluded the agency had not demonstrated the Group II Written Notices were warranted and rescinded both.[5] The grievant and the agency now appeal 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]

Grievant's Claim Regarding Sufficiency of the Evidence

In her request for administrative review, the grievant asserts that the hearing officer "relied entirely on the statement made by" the CNA, and that "[n]o other evidence was offered which indicated that the testimony of [the CNA] was more credible than [the grievant]." The grievant argues that, as a result, the agency failed to prove by a preponderance of the evidence that a Group III Written Notice for client abuse was warranted and appropriate under the circumstances.

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] Where the evidence conflicts or is subject to varying

[2] Agency Exhibit 1.
[3] Agency Exhibit 2 at 1-8.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 4-6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[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.

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.

In this case, the hearing officer stated the following with regard to the evidence presented about the Patient's temperature on the date the incident occurred:

> Grievant argued that when she wrote 94.7 degrees as the Patient's temperature she was referring to the Patient's auxiliary temperature which would be approximately 96.7 if taken rectally (and thus above the 95 degree threshold). The evidence showed that the CNA took the Patient's rectal temperature at 4 p.m. and provided that temperature to Grievant. The CNA testified she was certain she took the Patient's rectal temperature and that the temperature was 94.7. Her testimony was credible.[12]

There is evidence in the record to support the hearing officer's conclusion that the CNA measured the Patient's temperature rectally at approximately 4:00 p.m.,[13] that his rectal temperature was 94.7 degrees at that time,[14] and that the grievant was required under those circumstances to follow the Patient's treatment protocol for raising his body temperature.[15] While there is some evidence in the record to show that the Patient's temperature may not have fallen below the threshold that would have required treatment,[16] determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. 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.[17] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

Grievant's Claims Regarding Newly-Discovered Evidence

In addition, the grievant claims that she has discovered additional evidence since the conclusion of the hearing and argues that the hearing decision should be remanded to the hearing officer for consideration of this evidence. Specifically, she states that the Virginia Employment Commission ("VEC") awarded her unemployment benefits as of February 10, 2015, and that the CNA was interviewed by the Virginia Department of Health Professions ("DHP") in connection with an investigation related to the grievant's nursing license and "gave a different account of the facts" that is inconsistent with her testimony at the hearing.

---

[12] Hearing Decision at 4-5.
[13] *E.g.*, Hearing Recording at 1:28:14-1:28:22, 1:28:53-1:29:43 (testimony of CNA); Agency Exhibit 3 at 10-11.
[14] *E.g.*, Hearing Recording at 1:30:34-1:31:32 (testimony of CNA); Agency Exhibit 3 at 10-11; Agency Exhibit 5 at 1.
[15] *E.g.*, Hearing Recording at 31:03-32:05 (testimony of Witness F); Agency Exhibit 7 at 5-6; Agency Exhibit 9 at 1.
[16] *E.g.*, Hearing Recording at 3:21:59-3:22:42, 3:27:13-3:27:41 (testimony of grievant); Agency Exhibit 3 at 12-14.
[17] *See, e.g.*, EDR Ruling No. 2012-3186.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[18] 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.[19] 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.[20]

As an initial matter, we note that under Virginia law, information provided to the VEC and decisions rendered by the VEC cannot be used in any other judicial or administrative proceeding.[21] As such, the VEC determination would have no bearing on whether the hearing officer abused his discretion or exceeded the scope of his authority under the grievance procedure in upholding the grievant's termination, regardless of whether it could be considered newly-discovered evidence.

Furthermore, the grievant has provided no information to support a contention that any information provided by the CNA during the course of the DHP investigation should be considered newly discovered evidence under this standard. There is nothing to indicate that any materials related to the DHP investigation, including documents containing the CNA's alleged statements, existed at the time of the hearing. It appears instead that the DHP investigation began after the conclusion of the hearing. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of additional evidence on this issue.[22]

Agency's Claim Regarding Inconsistency with State and/or Agency Policy

The agency asserts in its request for administrative review that the hearing officer's decision is inconsistent with state and/or agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[23]

---

[18] *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).

[19] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

[20] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

[21] *See* Va. Code § 60.2-623(B) ("Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620 or § 60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title . . . .")

[22] This ruling makes no determination as to whether there may be any other legal or equitable remedy available to the grievant in relation to this claim, or whether it may be a basis on which the hearing decision could be appealed to the circuit court of the locality in which the grievance arose. *See Grievance Procedure Manual* § 7.3(a).

[23] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

The agency has requested such a review. Accordingly, the agency's policy claims will not be discussed in this ruling.

Agency's Claim Regarding Grievant's Right to Legal Counsel

The agency further argues that the hearing officer failed to comply with the grievance procedure by "establishing a new right that is not recognized by either law or policy" and thus "exceed[ed] the scope of his authority to grant relief." Specifically, the agency asserts that the hearing officer erred in stating that the grievant had "the absolute right to consult with her attorney before speaking with the Investigator."[24]

The agency is correct that, in general, state employees do not have a legally-protected right to legal counsel at all stages of the investigatory and/or disciplinary process. Due process safeguards require that employees with a property interest in continued employment must be given the opportunity for a hearing before an impartial decision-maker and for the presence of counsel at that hearing, among other things,[25] and these protections are incorporated into the grievance statutes and procedure through the administrative hearing process.[26] EDR is not aware, however, of any law or policy applicable in this circumstance that would guarantee a state employee who is the subject of an administrative investigation for alleged misconduct the "absolute right" to consult with an attorney prior to the issuance of disciplinary action.[27] Thus, employees may be compelled to give statements during the course of such an investigation under threat of discipline or discharge under applicable state and/or agency policy.[28] Nothing prohibits state employees from meeting with or retaining legal counsel prior to issuance of discipline. However, they may be required to cooperate with or participate in an investigation without first being given an opportunity to consult an attorney.

To the extent the hearing officer only relied on the grievant's "absolute right" to consult with an attorney prior to participating in the investigation, the hearing officer's determination would be incorrect.[29] Nevertheless, the agency has not sought remand for the hearing officer to

---

[24] Hearing Decision at 6.

[25] 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))).

[26] 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).

[27] Similarly, it would appear that agency employees who are witnesses to employee misconduct do not have a right to consult with an attorney before providing statements at the direction of agency management during the course of an administrative investigation.

[28] There are, however, some meaningful limitations on the use of statements given by employees during an administrative investigation. The Supreme Court, for example, has held that self-incriminating statements made by government employees under threat of discharge may be not be used in subsequent criminal proceedings. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

[29] There could have been other bases in the record to support the hearing officer's determination that the grievant "complied with the request of the Agency's Investigator and provided information to the Investigator." Hearing Decision at 6. For instance, the grievant was on short-term disability leave at the time she was contacted by the

reassess whether the Group II for failure to follow policy should be upheld without reference to a right to counsel. Further, as the issue of whether the Group II should be upheld or rescinded has no bearing on the ultimate outcome of this case, i.e., the grievant's termination being upheld, we find little reason to remand the matter to the hearing officer to correct any statements about the legal right to counsel. EDR hearing decisions are non-precedential and EDR does not interpret the decision in this case to have created a new right or protection for state employees unsupported by law or policy.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

Investigator. The grievant's status on disability leave may have been another consideration in the hearing officer's determination, although it is not explicitly considered in the decision.

[30] *Grievance Procedure Manual* § 7.2(d).

[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).