Issue: Administrative Review of Hearing Officer's Decision in Case No. 10580; Ruling Date: May 28, 2015; Ruling No. 2015-4153; 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 2015-4153
May 28, 2015

The Department of Behavioral Health and Developmental Services (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10580. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10580, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a [Direct Service Associate] at one of its facilities. She was responsible for providing care to patients at the facility. No evidence of prior active disciplinary action was introduced during the hearing.
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> Patient 1 resided at the Facility and used a wheelchair. Patient 2 also resided at the Facility. On January 29, 2015, Patient 1 was at the medication window. Patient 2 was in the common area and began yelling at Patient 1. Patient 2 approached Patient 1 and made a punching motion over Patient 1 but without hitting Patient 1. Grievant yelled to Patient 2 to stop what he was doing and to sit down. She waved her hand to get the attention of another employee, Mr. H, but he did not see her. At some point, Grievant walked to the Nurse and informed her of Patient 2's behavior.
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> Shortly after punching towards Patient 1, Patient 2 pushed Patient 1 from behind causing his mouth to hit the window sill and his body to fall to the floor. Staff approached Patient 1 to help him and Patient 2 continued to yell at Patient 1.

On March 4, 2015, the grievant was issued a Group III Written Notice with termination for failing to "protect a patient from a physical assault by another patient" in violation of agency

[1] Decision of Hearing Officer, Case No. 10580 ("Hearing Decision"), May 6, 2015, at 2 (citations omitted).

policy that prohibits abuse and neglect of clients.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on April 30, 2015.[4] In a decision dated May 6, 2015, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant had failed to protect a patient in violation of agency policy, rescinded the Group III Written Notice, ordered the grievant reinstated to her former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.[5] The agency 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]

Hearing Officer's Consideration of the Evidence

In its request for administrative review, the agency asserts that the hearing officer failed to properly consider the evidence in the record in rendering a decision. Specifically, the agency claims that the investigative report "clearly supports the occurrence of a violation" of agency policy. The agency further asserts that the hearing officer should have upheld the discipline because agency policy "requires the issuance of a Group III [W]ritten [N]otice when an abuse and/or neglect investigation has been substantiated," and appears to argue that it is "outside the authority of a grievance hearing officer" to reduce or rescind disciplinary actions based on "allegations of abuse and neglect" when the agency has conducted an investigation and determined that abuse or neglect occurred.

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

[2] Agency Exhibit 1.
[3] Agency Exhibit 2.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 2-3.
[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).

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 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 the hearing decision, the hearing officer assessed the evidence presented by the agency and stated the following:

> The Agency called the TOVA Coordinator as its witness. He testified that the Therapeutic Options of Virginia course teaches employees how to respond to aggressive patients. He testified that Patient 2's act of swinging at Patient 1 was a warning sign that Patient 2 was aggressive. He said an employee observing Patient 2 would be expected to make a "verbal intervention" and attempt to notify other staff to provide assistance. He indicated he did not expect an employee of Grievant's size to respond with physical force to Patient 2 because Patient 2 was much larger in size than Grievant. He testified that he had observed a video (without audio) of the incident and assuming Grievant told Patient 2 to stop in response to Patient 2's punch in the air that Grievant did nothing wrong.[12]

No other witnesses testified for the agency at the hearing.[13] Based on the testimony of the TOVA Coordinator, the hearing officer determined that "[t]he agency [had] not presented sufficient evidence to support its allegation" that the grievant had failed to protect Patient 1 in violation of agency policy.[14]

Hearing officers are tasked with reviewing the evidence presented by the parties and deciding whether the agency has proved, by a preponderance of the evidence, that the grievant engaged in the behavior described in the Written Notice, that the behavior constituted misconduct, and that the discipline imposed by the agency is consistent with law and policy.[15] The hearing officer's authority to determine whether disciplinary action was appropriate and warranted under the circumstances is not constrained by the findings of an agency investigation, though certainly the information gathered during the investigation and the resulting findings are important evidence. However, in cases properly before a hearing officer for adjudication, the agency must present sufficient evidence to support the issuance of disciplinary action for the action to be upheld.

EDR's review of the hearing record indicates that there is evidence in the record to support the hearing officer's factual conclusions. The TOVA Coordinator stated that the grievant should have verbally redirected Patient 2 when he displayed aggressive behavior and then alerted

[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 2-3.
[13] Hearing Recording at 14:30-14:33.
[14] Hearing Decision at 2.
[15] *Rules for Conducting Grievance Hearings* § VI(B)(1).

the nurse about the situation.[16] Although he reviewed the video recording of the incident, the TOVA Coordinator could not verify whether the grievant verbally intervened or notified the nurse because there was no sound on the video recording.[17] Another witness ("Witness H") who was present when the incident occurred explained that, when Patient 2 initially became aggressive, both she and the grievant intervened verbally and that the grievant got up to inform the nurse about what had happened.[18] The TOVA Coordinator further testified that the grievant would not be expected to physically intervene to stop Patient 2 because of the difference in size between her and Patient 2.[19] Although the agency's investigative summary was presented as an exhibit,[20] no witnesses were present to testify about, explain, or verify the information contained in the report. The agency's only witness, the TOVA Coordinator, who was interviewed in connection with the investigation, testified at hearing that the grievant had done nothing wrong.[21] Under these circumstances, we cannot conclude that the hearing officer's consideration of the evidence presented by the parties was in error.

Finally, there is no basis for EDR to conclude that the hearing officer erred in finding the testimony of the TOVA Coordinator and Witness H more credible than the investigative report's conclusion that the grievant's actions constituted abuse or neglect. Patient 1, Witness H, and the grievant were all interviewed in connection with the investigation, and they all recalled that the grievant and Witness H verbally redirected Patient 2 when he initially displayed aggressive behavior.[22] The TOVA Coordinator informed the investigator that "some type of verbal and physical intervention should be utilized" when a patient displays aggressive behavior and explained that Patient 2's actions were a "warning sign of aggressive behavior," but also acknowledged that "TOVA teaches staff to know their limitations."[23] Another TOVA trainer characterized the "limited response" to Patient 2's behavior as "poor judgment," but also stated that "physical intervention could have posed a risk to staff as well as to [Patient 1] and [Patient 2]" and reiterated that "TOVA reinforces to know your limitation [sic]."[24] It is also noteworthy that both the grievant and Witness H are female and that no male staff members were in the immediate area when the incident occurred,[25] as multiple employees noted the effect and importance of "male staff presence" in maintaining control "on an all male unit," including the TOVA Coordinator and the other TOVA trainer.[26] Considering the equivocal nature of the evidence in the investigative report and the lack of testimonial evidence at hearing to explain and establish how the grievant had engaged in abuse or neglect of a patient, it would appear the hearing officer had little choice but to rescind the Written Notice.

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[16] Hearing Recording at 5:31-5:45, 9:52-10:19 (testimony of TOVA Coordinator); *see* Agency Exhibit 4 at 5, 17.
[17] Hearing Recording at 5:45-5:51, 14:25-14:28 (testimony of TOVA Coordinator).
[18] *Id.* at 17:12-17:34, 20:29-22:09 (testimony of Witness H).
[19] *Id.* at 12:50-13:10, 13:50-14:02 (testimony of TOVA Coordinator).
[20] *See* Agency Exhibit 4.
[21] Hearing Recording at 14:08-14:15 (testimony of TOVA Coordinator).
[22] Agency Exhibit 4 at 4-5, 17.
[23] *Id.* at 5, 19.
[24] *Id.* at 7, 29.
[25] *See* Agency Exhibit 3; Agency Exhibit 4 at 4-7.
[26] Agency Exhibit 4 at 6, 12, 19, 21, 29.

In sum, the evidence in the record supports the hearing officer's conclusion that the grievant did not engage in the conduct charged in the Written Notice. 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 this basis.

Newly-Discovered Evidence

In addition, the agency requests that the case be remanded to the hearing officer for consideration of a video recording that it contends should be considered newly-discovered evidence. It appears the agency's advocate mistakenly submitted a video recording that was unrelated to this case as Agency Exhibit 8, which was entered into the hearing record.[27] In the hearing decision, the hearing officer noted that "Agency Exhibit 8 has no relevancy to the Agency's allegations in this case."[28] The agency appears to claim that the hearing officer should have discovered this error before or during the hearing and "ask[ed] the agency to provide additional information" to correct the situation. The agency further asserts that the correct video recording of the incident should be considered newly discovered evidence and that the case should be remanded to the hearing officer for reconsideration on this basis.

Hearing officers depend upon the parties to present their proposed exhibits at the hearing and explain the relevance of those exhibits to the case. While a hearing officer may "question the witnesses" and "request a party to provide further documentation" if necessary, that authority is typically exercised "during the course of the hearing."[29] The agency did not offer to play the incorrect video that was entered into the record as Agency Exhibit 8 during the hearing, and thus there was no reasonable way for the hearing officer to discover that Agency Exhibit 8 was irrelevant until after the close of the hearing record. Though the agency implies that the hearing officer should have reviewed the agency's proposed exhibits prior to the hearing and notified the agency of its mistake, it could impact the hearing officer's ability to conduct the hearing "in an orderly, fair, and equitable fashion . . . ."[30] For example, some exhibits proposed by the parties may not be admitted into the record, and if a hearing officer reviewed all of the proposed exhibits before the hearing, his or her impartiality and ability to decide the case based solely on the evidence in the record could be jeopardized.[31]

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[27] *See* Hearing Recording at 14:33-15:40.
[28] Hearing Decision at 3.
[29] *Rules for Conducting Grievance Hearings* § IV(C).
[30] *Id.*
[31] *See id.* § V(C) (stating that the hearing decision must contain "findings of fact on material issues and the grounds in the record for those findings").

Furthermore, because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[32] 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.[33] 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.[34]

The agency asserts that the video recording of the incident should be considered newly discovered evidence. It is clear that the recording was in existence at the time of the hearing and was discovered by the agency after the hearing decision was issued. Even assuming, however, that the agency exercised due diligence in discovering the recording, remanding the case to the hearing officer for consideration of this evidence would not have a material effect on the decision in this case. The agency argues that the video recording demonstrates the grievant "had an opportunity to use [TOVA] techniques" and instead "remained seated and made no attempts to report the incident." However, a witness would have been necessary to describe the grievant's actions in the video, explain what was expected of her under agency policy, and state whether she had fulfilled those responsibilities. Although he did not have the aid of the recording at the hearing, the TOVA Coordinator testified that he had watched the video and explained that the grievant should have verbally redirected Patient 2 and alerted the nurse.[35] Witness H testified that the grievant did so.[36] There is no sound on the video recording,[37] and thus the hearing officer would have been unable to further evaluate the credibility of Witness H's testimony by watching it. Furthermore, the TOVA Coordinator testified that the recording is incomplete and does not capture the entire sequence of events,[38] which would reduce its probative value even further. Because directing the hearing officer to consider the video recording would have no impact on the outcome of the case, it does not constitute newly discovered evidence under the standard discussed above. As a result, there is no basis for EDR to re-open or remand the hearing decision for consideration of this video.

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[32] *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).

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

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

[35] Hearing Recording at 5:31-5:45, 9:52-10:19 (testimony of TOVA Coordinator). The TOVA Coordinator also confirmed that he had watched the recording prior to the hearing. *Id.* at 14:25-14:28 (testimony of TOVA Coordinator).

[36] *Id.* at 17:12-17:34, 20:29-22:09 (testimony of Witness H).

[37] *Id.* at 5:45-5:51 (testimony of TOVA Coordinator).

[38] *Id.* at 5:52-6:02, 13:26-13:34 (testimony of TOVA Coordinator).

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.[39] 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.[40] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[41]

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