Issue: Administrative Review of Hearing Officer's Decision in Case No. 10574; Ruling Date: June 3, 2015; Ruling No. 2015-4161; 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 2015-4161
June 3, 2015

The grievant 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 10574. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10574, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Unit Manager at one of its facilities. He also served as a Therapeutic Options of Virginia (TOVA) instructor meaning that he taught other employees how to respond when patients were abusive and confrontational. Under TOVA, an employee faced with an aggressive patient should respond by maintaining a safe distance from the patient and attempting to de-escalate the conflict. Grievant was employed by the Agency for approximately 6 years prior to his removal. No evidence of prior active disciplinary action was introduced during the hearing.
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> On January 6, 2015, the Patient threw coffee on another person at the Facility. Agency staff decided to place the Patient in seclusion as punishment. The Patient sat on a bench in a room at the Facility. Several employees including Grievant and the Facility Manager stood facing the Patient. The Patient was verbally threatening staff and arguing with staff. The Patient was told he would be placed in seclusion. The Patient refused to leave the room. The Patient said that staff did not have the power to "do that." Grievant responded that "I do have the power." The Patient said, "If you man enough to take me then come on". Grievant stepped forward toward the Patient as the Patient began rising from his seat. Grievant said "I'm going to give you what you want". The two men stood face-to-face. The Facility Manager positioned himself in front of Grievant and redirected Grievant several times to back away. Grievant did not back away so the Facility Manager pushed Grievant backward to get him away from the Patient. A Security

[1] Decision of Hearing Officer, Case No. 10574 ("Hearing Decision"), May 12, 2015, at 2-3.

> Officer working in the control booth pulled Grievant into the control booth. A few seconds later, Grievant left the control booth and reentered the room. He told the Facility Manager "I'm good". The Facility Manager and other employees continued their discussion with the Patient. Grievant positioned himself several paces from the Patient but within the Patient's view. The Patient observed Grievant and continued his discussion directing it towards Grievant. The Patient began moving towards Grievant. The Patient repeatedly told Grievant to "suck my d—k." Grievant responded, "pull that little mother f--ker out then." Grievant's comment referred to the Patient's penis. The Facility Manager pushed Grievant into the nursing station and away from the Patient.

On or about February 4, 2015, the grievant was issued a Group III Written Notice with termination for verbal abuse of the Patient.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on May 1, 2015.[4] In a decision dated May 12, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had engaged in verbal abuse of the Patient and upheld the issuance of the Group III Written Notice with termination.[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]

Hearing Officer's Consideration of Evidence

The grievant appears to assert in his 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"[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

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[2] Agency Exhibit 1. It appears that while the Written Notice was originally dated February 4, 2015, a subsequent corrected copy was created with an issue date of February 5, 2015.
[3] Agency Exhibit 2.
[4] *See* Hearing Decision at 1.
[5] *See 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 § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).

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 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 and concluded that agency policy required a showing "that (1) Grievant engaged in an act that he performed knowingly, recklessly, or intentionally and (2) Grievant's act caused or might have caused physical or psychological harm to the Client."[12] Based on the evidence presented by the parties, he determined that the grievant used "language that demeans, threatens, intimidates, and humiliates a client" throughout the incident and that "[n]one of Grievant's responses were appropriate under the TOVA training he received."[13] As a result, the hearing officer concluded that these actions constituted verbal abuse sufficient to justify the issuance of a Group III Written Notice.[14] In his request for administrative review, the grievant broadly disputes the hearing officer's decision, claiming that the hearing officer "quot[ed] statements that [he] didn't make and bas[ed] his decision on inaccurate statements." He further asserts that the hearing officer erred in relying on the testimony of the Facility Manager in making his decision because the Facility Manager was not "credible [as] a witness," and argues that his "witnesses were not shown the video to further substantiate [his] case."

There is evidence in the record to support the hearing officer's conclusion that the grievant's actions constituted abuse of the Patient. Agency policy states that abuse may include the "[u]se of language that demeans, threatens, intimidates, or humiliates" a patient.[15] Two agency witnesses testified about the interaction between the grievant and the Patient during the incident and confirmed that the grievant's interaction with the Patient was inappropriate.[16] The agency investigator further testified that the grievant used inappropriate language with the Patient and that his actions violated the agency policy that prohibits abuse of patients.[17] While the grievant did present some evidence to suggest that he may not have engaged in abuse of the Patient,[18] 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.[19]

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[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3.
[13] *Id.* at 4.
[14] *Id.*
[15] Agency Exhibit 4 at 1.
[16] Hearing Recording at 3:45-6:57, 12:38-14:41, 16:17-17:59 (testimony of Facility Manger), 22:52-24:15, 25:05-25:18 (testimony of Witness H).
[17] *Id.* at 27:18-30:49 (testimony of Investigator); *see* Agency Exhibit 3 at 2-8.
[18] *E.g.*, Hearing Recording at 44:42-45:56 (testimony of Witness A), 1:05:05-1:06:04 (testimony of Witness F).
[19] *See, e.g.*, EDR Ruling No. 2012-3186.

Although the grievant now argues that the Facility Manager's testimony was not credible, EDR has not identified any evidence or argument presented by the grievant at the hearing to support this claim.[20] Hearing officers must base their decisions on the evidence admitted into the hearing record.[21] Similarly, the grievant was free to show the video recording of the incident to any witnesses who testified on his behalf, but he made no such request at the hearing. The grievant mentioned playing the recording for one witness, but that witness stated that she could describe her recollection of the video and explain her opinion about the grievant's actions.[22] More importantly, there is no reason for EDR to conclude that playing the recording for any or all of the grievant's witnesses would affect the outcome of this case. Two of the grievant's witnesses, for example, were present during the incident and testified about their memory of events.[23] The grievant has presented no information to suggest that playing the recording for them would have changed the impact or persuasiveness of their testimony in some way.[24] These are not bases on which EDR may remand the hearing decision in this case.[25]

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the grievant's interaction with the Patient during the incident was in any way unreasonable or not based on the actual evidence in the record. 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. Because the hearing officer's findings in this case 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.

Mitigation

The grievant also appears to argue that the disciplinary action should have been mitigated based on his length of employment and prior satisfactory work performance. By 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]."[26] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[27] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[20] To the extent the grievant's claims on this point may be construed as a request to reopen the hearing record for consideration of newly discovered evidence, he has provided no information to support a contention that this information should be considered newly discovered under the standard applied by EDR. *See, e.g.*, EDR Ruling Number 2015-4132 (citing Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989)).
[21] *Grievance Procedure Manual* § 5.9; *see Rules for Conducting Grievance Hearings* § V(C).
[22] Hearing Recording at 1:03:26-1:04:37 (testimony of Witness F).
[23] *Id.* at 44:42-45:56 (testimony of Witness A), 47:21-48:56 (testimony of Witness J).
[24] This is particularly true because the hearing officer watched the recording during the hearing, and thus could have asked the grievant's witnesses about their description of the incident if had question about the content of the video. *See id.* at 7:06-7:33.
[25] 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).
[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules for Conducting Grievance Hearings* § VI(A).

> (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.[28]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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 the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[29] EDR will review a hearing officer's mitigation determination for abuse of discretion,[30] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's claim that his length of employment and otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot be said that length of service or prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[31] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's length of employment and prior satisfactory performance are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group III Written Notice for conduct that was determined by the hearing officer to be terminable due to its severity. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

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[28] *Id.* § VI(B)(1).

[29] 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).

[30] "'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.*

[31] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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