

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10361; Ruling
Date: July 28, 2014; Ruling No. 2015-3930; Agency: Department of Behavioral
Health and Developmental Services; Outcome: Hearing Decision in Compliance.



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 2015-3930
July 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 10361. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10361, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a [Psychiatric Nurse Assistant] at one of its facilities. She had been employed by the Agency for approximately 8 years prior to her removal effective March 18, 2014. No evidence of prior active disciplinary action was introduced during the hearing.

The Patient resided at the Facility where Grievant worked. She was 20 years old and had a diagnosis of: Axis I, Anxiety Disorder not otherwise specified and Axis II, Borderline Personality Disorder. The Patient liked to hug employees and sometimes kissed them on the cheek. The Patient sometimes engaged in self injurious behavior by “cutting” herself. Staff were required to be in a “direct” observation of the Patient to ensure her safety. This meant staff were to be in a position to observe the Patient’s hands and her behavior. The Patient had a Treatment Team of mental health professionals who developed a Treatment Plan governing how staff were to interact with the Patient.

On February 4, 2014, Ms. H was sitting “direct” with the Patient in the Patient’s bedroom. The Patient told Ms. H that she had a romantic relationship with Grievant. The Patient stated that Grievant told the Patient that Grievant did not like f-gs and that it hurt the Patient’s feelings but the Patient “let it go” because it wasn’t the Patient’s business to judge Grievant. The Patient said that Grievant asked the Patient for money and food and that the Patient gave those items to Grievant. The Patient said that Grievant was asking the Patient to pass “love notes” to other patients and that she had seen Grievant kiss another patient.

¹ Decision of Hearing Officer, Case No. 10361 (“Hearing Decision”), June 16, 2014, at 2-4.

The Agency conducted an investigation of the allegations against Grievant. The Investigator met with the Patient to discuss the allegations. The Patient stated “I figure I might as well tell you the rest of the story ... things that actually went beyond just kissing and stuff.” The Patient claims she had intimate physical contact with Grievant on at least 10 to 15 occasions when the Patient was in the shower and Grievant was also in the shower room. The Patient claimed that she wanted to break up with Grievant and when the Patient told Grievant that their relationship should end, Grievant became angry and said “all fa—ots are like that. Why don’t you go and off yourself.”

The Investigator spoke with Grievant and she admitted giving the Patient the nickname “toad.” Grievant denied she and the patient had ever kissed but later on in the interview said that the Patient had kissed Grievant on the cheek and was immediately told by Grievant that such behavior was inappropriate and not to do it again. Later on during the interview, Grievant stated that the Patient had kissed her several times in her bedroom and also given her hugs. Grievant said she had not reported this behavior to the Registered Nurse or to the Patient’s treatment team. Grievant said she did not report the behavior because the Patient was just being friendly and Grievant was comfortable with the behavior.

Initially, Grievant told the Investigator that nothing personal was ever discussed between her and the Patient. Later in the interview, Grievant revealed that she had told the Patient personal information. Grievant admitting telling the Patient that Grievant had a boyfriend and Grievant had a daughter. Grievant explained that she told the Patient about her personal life so the Patient could learn, understand and move on and make something of herself. Grievant stated that she had recently had surgery and that the Patient and “everyone knew about it”. Grievant admitted to bringing in a 2 liter soda bottle and writing the Patient’s name on a label on the bottle to reserve the bottle for the Patient.

Grievant was playful and friendly towards the Patient. Grievant would sit “side-by-side” and “shoulder to shoulder” with the Patient even though Grievant was on direct observation. Because Grievant was on direct observation, Grievant should have been sitting across from the Patient in order to observe the Patient’s hands. Several other staff perceived Grievant to have a “buddy to buddy” relationship with the Patient.

Grievant received training regarding “boundaries” between staff and patients. She should have known not to develop a personal friendship with a patient.

Grievant should not have been “playful” with the Patient because doing so amounted to a crossing of the boundaries between a professional and personal relationship.

After Grievant had been removed from employment, the Patient told another employee, Ms. B, that the Patient thought she had gotten Grievant fired.

The Patient said that the Patient had lied about Grievant having a relationship with the Patient. Ms. B had worked with the Patient in the past and was familiar with the Patient. Ms. B believed the Patient was telling the truth because of the emotions being expressed by the Patient.

On March 18, 2014, the grievant was issued a Group III Written Notice with termination for psychological abuse and exploitation of the Patient in violation of agency policy.² In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had engaged in psychological abuse and exploitation of the Patient, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with removal.³ 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.”⁴ 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.⁵

Content of the Written Notice

The grievant asserts that she did not engage in “sexual [sic] inappropriate” behavior with the Patient, that “there was no evidence to show” any such behavior happened, and that she wants any reference to the alleged sexually inappropriate conduct “off [her] record.” While it appears that the agency's investigation was prompted by the Patient's report that she and the grievant “had a romantic relationship,”⁶ the Written Notice states that the charged conduct was “psychological abuse and exploitation” in violation of agency policy.⁷ There is no mention of a physical or intimate relationship between the grievant and the Patient on the Written Notice.⁸ Furthermore, the hearing officer specifically found that the agency “[had] not established that Grievant had an inappropriate intimate physical relationship with the Patient.”⁹

There is, however, evidence in the record to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice,¹⁰ that the behavior constituted misconduct,¹¹ and that the discipline was consistent with law and policy,¹² and the grievant does not appear to dispute these factual findings. While the grievant may disagree with

² Agency Exhibit 1 at 2.

³ Hearing Decision at 4-6.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Hearing Decision at 2.

⁷ Agency Exhibit 1 at 2.

⁸ See *id.*

⁹ Hearing Decision at 5 (emphasis in original).

¹⁰ See, e.g., Agency Exhibit 4.

¹¹ See Agency Exhibit 3.

¹² See DHRM Policy 1.60, *Standards of Conduct*, Attachment A (stating that “abuse or neglect of clients” would typically warrant the issuance of a Group III Written Notice).

the content of the agency's internal investigation report, which describes the alleged inappropriate physical relationship between the grievant and the Patient,¹³ neither EDR nor the hearing officer has the authority to modify that document. Accordingly, we decline to disturb the hearing decision on this basis.¹⁴

Mitigation

Fairly read, the grievant's request for administrative reviews claims that the hearing officer's mitigation analysis was flawed. Specifically, the grievant claims that she "did no more or no less than over half the staff" at her facility and that the Patient engaged in similar behavior with other agency employees who were not disciplined.

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]."¹⁵ 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."¹⁶ 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.¹⁷

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.¹⁸

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 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

¹³ See Agency Exhibit 4.

¹⁴ The grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹⁵ Va. Code § 2.2-3005(C)(6).

¹⁶ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁷ *Id.* § VI(B).

¹⁸ *Id.*

totally unwarranted.¹⁹ EDR will review a hearing officer's mitigation determination for abuse of discretion,²⁰ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's request for administrative review appears to allege that the agency did not apply disciplinary action to her consistent with other similarly situated employees, and that the hearing officer erred by failing to consider this evidence in his mitigation analysis. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.²¹

At the hearing, one witness testified that the Patient had kissed her on the cheek in the past.²² Another witness stated that Ms. B heard gossip from the Patient about other employees and patients at the facility and that this constituted a crossing of boundaries.²³ In addition, the grievant claimed in her due process response that other employees at the facility engaged in behavior with patients that was similar to the conduct for which she was disciplined.²⁴ The facility director testified that the grievant did not provide any evidence to substantiate those claims and that the agency had not received any report of conduct similar to the grievant's that may have occurred with the Patient.²⁵ EDR has not identified any evidence presented at the hearing that showed other employees "developed a friendship with the Patient, crossed many 'boundaries' with the Patient, and shared family and other personal information with the Patient" in a manner that was similar to the way the grievant engaged in these types of behavior with the Patient.²⁶

While the hearing officer did not refer to this evidence in his mitigation analysis, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to certain witness' testimony does not constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. In this case, there is nothing to indicate that the hearing officer abused this discretion with respect to his consideration of mitigating factors. Rather, it would appear that the hearing officer did not discuss the evidence relating to other employees who may have crossed boundaries with the Patient because he did not find that it demonstrated those employees had engaged in conduct that was similar to the grievant's. Based on a review of the record, it appears that the evidence presented at the hearing was sufficient to support the hearing officer's mitigation determination

¹⁹ 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).

²⁰ "'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.*

²¹ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

²² Hearing Recording at 3:27:21-3:27:28.

²³ *Id.* at 3:43:30-3:43:57.

²⁴ Agency Exhibit 1 at 7.

²⁵ Hearing Recording at 2:02:31-2:04:41.

²⁶ Hearing Decision at 5.

and that his determination was otherwise not arbitrary and capricious. Accordingly, we will not disturb the hearing decision on this basis.

Unemployment Benefits

The grievant further states in her request for administrative review that “[she] want[s] [her] unemployment approved.” EDR has no role in determining whether a grievant is entitled to receive unemployment benefits.²⁷ The grievant should direct any concerns she may have with that process to the Virginia Employment Commission.

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.²⁸ 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.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰



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²⁷ Virginia Code Section 60.2-111 states that “it shall be the duty of the [Virginia Employment Commission] to administer” those provisions of the Code of Virginia relating to unemployment compensation.

²⁸ *Grievance Procedure Manual* § 7.2(d).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).