Issue: Administrative Review of Hearing Officer's Decision in Case No.10387; Ruling Date: August 29, 2014; Ruling No. 2015-3978; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-3978
August 29, 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 10387. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10387, 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 II at one of its facilities. The purpose of her position was:
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> > Provide direct patient care to adult and geriatric psychiatric patients that conforms to care and treatment policies and procedures and demonstrates knowledge of population specific needs and competencies.
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> Facility employees holding Grievant's position were required to conduct safety checks of patients. When a patient was asleep in his or her room, a safety check involved opening the patient's door, looking inside the room to see the patient's condition, and then recording that observation on an Intermittent Supportive Observation sheet. The sheet showed times in fifteen minute increments. Next to each time was a space for an employee to write the patient's behavior at the time of the observation. Next to the space describing a patient's behavior was a space for the observer to write his or her initials.
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> Grievant received in-service training regarding how to conduct safety checks. The Agency verified that she knew how to conduct a safety observation. She also received training specifying that "[d]o not document what you did not do."

[1] Decision of Hearing Officer, Case No. 10387 ("Hearing Decision"), August 16, 2014, at 2-3 (citations omitted).

> Grievant was working at the Facility from 1 a.m. until 4 a.m. on April 27, 2014. She was responsible for conducting patient checks. Most or all of the patients were asleep in their rooms. Grievant did not walk to any patient's room and open the door to observe each patient. Grievant filled in an Intermittent Supportive Observation sheet for that time period. For each fifteen minute period, Grievant wrote the location of each patient, the behavior she claimed to have observed such as "sleep" and her initials. Someone reading the sheets would believe that Grievant had conducted safety checks of each patient every 15 minutes beginning at 1 a.m. and ending at 4 a.m. on April 27, 2014.
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> Two other employees were working at the time Grievant was working. They engaged in similar behavior to Grievant. The Agency issued those employees disciplinary action with removal.

On May 7, 2014, the grievant was issued a Group III Written Notice with termination for failure to follow policy and falsification of records.[2] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had engaged in falsification of records, 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]

Bias

In her request for administrative review by EDR, the grievant asserts that the hearing officer's "decision was crafted with bias and partiality in favor of" the agency. Specifically, she appears to claim that the hearing officer exhibited bias against her because she disagrees with the outcome of the case and with details of some of the factual findings set forth in the hearing decision.[6] EDR's *Rules for Conducting Grievance Hearings* (the "*Rules*") address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for

> [v]oluntarily recusing himself or herself and withdrawing from any case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules

[2] *See* Agency Exhibit 1.
[3] Hearing Decision at 3-4.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] The grievant's assertions relating to the hearing officer's findings of fact and mitigation analysis will be discussed further below.

> governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[7]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[8]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing" is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.[9] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[10] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[11]

The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[12] The evidence presented by the grievant here is insufficient to establish bias or any other basis for disqualification. Further, EDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, we decline to disturb the hearing decision on this basis.

Hearing Officer's Findings of Fact

Fairly read, the grievant's request for administrative review argues 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. Specifically, she argues that several of the hearing officer's factual conclusions are not supported by the evidence in the record and that the hearing officer did not offer an explanation as to certain other findings of fact.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] Thus, in disciplinary actions the

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[7] *Rules for Conducting Grievance Hearings* § II.
[8] EDR Policy 2.01, *Hearing Officer Program Administration*, at 3.
[9] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive. *See, e.g.*, EDR Ruling No. 2015-3969.
[10] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[11] EDR Ruling No. 2012-3176.
[12] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).

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.[16] 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 this case, the grievant claims that the evidence in the record does not support the hearing officer's determination that, "[w]hen a patient was asleep in his or her room, a safety check involved opening the patient's door, looking inside the room to see the patient's condition, and then recording that observation on an Intermittent Supportive Observation sheet."[17] She argues that this conclusion is inconsistent with agency policy regarding safety checks. At the hearing, the Chief Nurse Executive testified that safety checks require staff to visually observe the patient every fifteen minutes and record the patient's location and behavior, including those times when patients are asleep.[18] While the grievant is correct that the relevant agency policy does not specifically prescribe the manner in which agency staff is to conduct safety checks,[19] there is evidence in the record to support the hearing officer's conclusion about how safety checks should be properly conducted.

The grievant further asserts that the hearing officer's conclusion that, "[f]or each fifteen minute period, Grievant wrote the location of each patient, the behavior she claimed to have observed such as 'sleep' and her initials"[20] is not supported by the evidence in the record. She claims that her notations on the relevant safety check sheets contained the phrase "Bed-quiet," not the word "sleep." While it appears the grievant is correct that her own notations on the safety check sheets describe the patients' behavior as "quiet" rather than "sleep,"[21] any error in the hearing decision on this point is harmless, as there is evidence in the record to support the hearing officer's conclusion that she did not observe the patients before filling out the safety check sheets.[22] In other words, the hearing officer determination that the grievant falsified the safety check sheets is supported by evidence in the record, regardless of whether she described the patients' behavior as "quiet" or "sleep." Remanding the case to the hearing officer for clarification of this issue would have no effect on the outcome here.

Finally, the grievant also argues that the hearing officer "did not offer an explanation based on the evidence" to support his determination that "it was unlikely that someone seated in the nutrition room or hallway where Grievant was located could hear each patient breathing and determine they were asleep."[23] At the hearing, the grievant "argued that she could hear patient's [sic] breathing while in the hallway."[24] The Chief Nurse Executive testified that the grievant would not be able conclusively verify that the patients were asleep by monitoring their breathing

[16] *Grievance Procedure Manual* § 5.8.
[17] Hearing Decision at 2.
[18] Hearing Recording at 33:54-34:11, 48:42-49:42.
[19] *See* Agency Exhibit 7.
[20] Hearing Decision at 3.
[21] *See* Agency Exhibit 6.
[22] *See* Agency Exhibits 4, 5, 6.
[23] Hearing Decision at 3.
[24] *Id.*

sounds from the hallway, and that the general practice at the grievant's facility is verify the patients' condition by visual observation.[25] While the grievant argued otherwise, there is evidence in the record to support the hearing officer's factual finding on this point.

For the reasons discussed above, the hearing officer's conclusion that agency policy required the grievant to visually observe patients while conducting safety checks, that the grievant did not do so, and that the grievant would not have been able monitor the patients' condition by listening to their breathing sounds is supported by the evidence in the record. While the grievant may disagree, 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. Because 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. Accordingly, we decline to disturb the decision on these bases.

Mitigation

The grievant also appears to challenge the hearing officer's decision not to mitigate the agency's disciplinary action. She argues that the hearing officer's consideration of evidence relating to whether she had notice of the policies she was charged with violating was in error and that the hearing officer failed to consider evidence relating to similarly situated employees who were not disciplined by the agency. 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:

> (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"

[25] Hearing Recording at 48:42-49:42.
[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules for Conducting Grievance Hearings* § VI(A).
[28] *Id*. § VI(B).

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.

Notice of the Policy

In this case, the grievant asserts that she did not have notice of the agency policy relating to safety checks or the potential consequences of violating the policy. Section VI(B)(2) of the *Rules* states that mitigating circumstances may include "whether an employee had notice of" a rule or policy, as well as "the possible consequences of not complying with the rule." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[31] In the hearing decision, the hearing officer stated that "[t]he evidence showed that Grievant received training regarding how to conduct safety checks and that she signed a statement indicating she had read and understood" the safety check policy.[32] The grievant claims that the hearing officer disregarded evidence that shows she was not aware of the safety check policy. She further argues that the hearing officer "gave weight that favored the employer" to the statement indicating she had read and understood the safety check policy (hereinafter referred to as the "Record of Understanding"), even though she presented evidence that she had "never seen" the document before.

The grievant did present some evidence to show that she did not receive a copy of the safety check policy when she was initially hired by the agency.[33] While the hearing officer did not discuss this evidence in the hearing decision, the hearing officer's failure to do so does not demonstrate that he abused this discretion with respect to the consideration of mitigating factors. Rather, it would appear that the hearing officer did not discuss this exhibit because he did not find it to be persuasive in determining whether the grievant was aware of the safety check policy and the potential consequences of violating the policy at the time the misconduct occurred over three years after she was hired.[34] That the grievant may not have been aware of the policy when she was hired is not conclusive evidence that she was also not aware of the policy before she engaged in the conduct for which she was disciplined. Accordingly, there is no basis for EDR to conclude that the hearing officer's consideration of the evidence presented by the grievant on this point was in error.

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

[32] Hearing Decision at 4 (citation and internal quotations marks omitted).

[33] *See* Grievant's Exhibit 3 at 1.

[34] The grievant began working for the agency in 2011 and was disciplined in 2014. *See* Grievant's Exhibit 3 at 2; Agency Exhibit 1.

The grievant further claims that the hearing officer improperly relied on evidence presented by the agency that showed the grievant had notice of the safety check policy. At the hearing, the agency presented evidence that the grievant had signed the Record of Understanding on March 21, 2012.[35] The grievant argues that she did not receive a copy of the safety check policy or sign the Record of Understanding on that date. In essence, the grievant appears to assert that the Record of Understanding was "crafted after the fact" by the agency without her knowledge to support the issuance of the discipline here. Having conducted a review the hearing record, there is no basis for EDR to conclude that the hearing officer's consideration of the Record of Understanding was in error or constituted an abuse of discretion in this case. While the grievant may disagree with the hearing officer's assessment of the evidence, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is nothing to indicate that the hearing officer's consideration of the Record of Understanding was in any way unreasonable or not based on the actual evidence in the record.

Furthermore, even assuming for the sake of argument that the hearing officer should not have considered the Record of Understanding in making his decision, there is other evidence in the record to show that the grievant had notice of the safety check policy prior to engaging in misconduct. The agency presented evidence that the grievant attended two staff development sessions at which the safety check policy was discussed.[36] The grievant claims that one of these meetings only related to the application of the safety check policy "when it comes to transporting the patients," which is not a part of her job duties.[37] However, the Unit Supervisor testified that the safety check policy was the topic of this session and that the grievant was in attendance.[38] In addition, notes from the second staff development session state the following: "A primary word about counts: DO THEM! DO THEM ON TIME! If you miss a count, contact the supervisor. Do not document what you did not do!"[39] There is, therefore, evidence in the record other than the Record of Understanding to support the hearing officer's conclusion that the grievant was aware of the safety check policy and the potential consequences for violating the policy.

For these reasons, EDR cannot conclude that the hearing officer's decision not to mitigate based on the grievant's claim that she did not have notice of the safety check policy was contrary to the evidence in the record or constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

Inconsistent Discipline

The grievant further argues that the agency did not apply disciplinary action to her consistent with other similarly situated employees and, thus, the hearing officer erred by finding that no mitigating circumstances exist to reduce the disciplinary action issued. 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.[40] In the hearing decision, the hearing officer found that "[t]he evidence showed that other

[35] Agency Exhibit 18.
[36] Agency Exhibits 15, 16.
[37] *See* Agency Exhibit 15 at 3.
[38] Hearing Recording at 58:46-1:00:49.
[39] Agency Exhibit 16 at 2.
[40] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

employees who engaged in similar behavior were removed from employment. Grievant was not singled out for disciplinary action."[41] In her request for administrative review, the grievant asserts that the hearing officer did not consider evidence regarding other employees who conduct late safety checks have not been disciplined by the agency.

At the hearing, a witness testified that when he is working at the facility and nursing staff do not conduct safety checks on time, he calls the assigned employee or that employee's supervisor as a way of reminding the employee or the supervisor to come and conduct the safety check.[42] The witness testified that, to his knowledge, none of the nursing staff has been disciplined for completing late safety checks in this manner.[43] In her request for administrative review, the grievant asserts that "[t]his testimony was not addressed or taken into consideration" in the hearing decision. While the grievant appears to be correct that the hearing officer did not explicitly discuss this testimony in the hearing decision, 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 a witness's testimony does not necessarily constitute a basis for remand. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. In this case, the witness' testimony did not demonstrate that the employees in question were similarly situated to the grievant. While he testified that some employees conduct late safety checks, there was no evidence to show that any other employees falsified safety check sheets.[44] The grievant, on other hand, was disciplined for failing to conduct safety checks and falsifying the safety check sheets by indicating that she had done so.[45] In this case, therefore, it would appear that the hearing officer did not discuss the witness's testimony because he did not find it to be credible and/or persuasive on the issue of whether there were other employees who were similarly situated to the grievant.[46]

Based on EDR's review of the hearing record, there is nothing to indicate that the hearing officer's mitigation analysis relating to other similarly situated employees was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and we cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

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[41] Hearing Decision at 4.
[42] Hearing Recording at 1:17:47-1:18:16. It appears that, in the section of the facility in which the witness works, nursing staff are not on hand at all times to conduct safety checks. *See id.* at 1:17:20-1:17:51.
[43] *Id.* at 1:18:52-1:19:23.
[44] Indeed, evidence presented at the hearing showed that two other employees were terminated for falsification of safety check sheets in a manner that was similar to the grievant's conduct. *See id.* at 36:03-37:16; *see also* Agency Exhibit 4.
[45] Agency Exhibit 1.
[46] The grievant also appears to argue that the agency applied the policy inconsistently to her at different times during her employment. In 2012, the grievant was verbally counseled about properly conducting safety checks. *See* Agency Exhibit 17. The grievant claims that the agency's decision to issue a Group III Written Notice with termination for falsification of records is inconsistent with her prior treatment. The grievant was counseled in 2012 for not conducting safety checks; she was terminated for falsification of records because she filled out the safety check sheets without conducting safety checks. *Id.*; Agency Exhibit 1. The evidence does not show that the agency's treatment of the grievant was inconsistent because the misconduct at issue in these instances was different.

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.[47] 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.[48] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[49]

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