Issue: Administrative Review of Hearing Officer's Decision in Case No. 10415; Ruling Date: September 10, 2014; Ruling No. 2015-3987; Agency: Department of Veterans 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 Veterans Services
Ruling Number 2015-3987
September 10, 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 10415. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10415, as found by the hearing officer, are as follows:[1]

> The Department of Veterans Services employed Grievant as a Certified Nursing Assistant. She was responsible for providing care to residents at the Facility. She had prior active disciplinary action consisting of a Group I Written Notice issued on December 20, 2013.
>
> The Resident was often combative with staff. He was a difficult resident for staff to assist.
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> On May 27, 2014 between 7 a.m. and 7:25 a.m., Grievant was providing assistance to the Resident. She came out of the resident's room and met Ms. M. Ms. M offered to help Grievant with assisting the Resident. They entered the Resident's room. The Resident was in his bed lying flat on his right side. They began to put clothing on the Resident. The Resident moved as clothing was put on him. At one point, he raised his right arm above his head and pulled it back as if to hit someone. The Resident's hand was balled to form a fist. Grievant was standing next to the Resident and would have been hit if the Resident moved his arm forward. Grievant observed that the Resident was ready to strike her. Grievant pulled her right arm backwards and moved it forward quickly to use her right hand to slap the left side of the Resident's face. Ms. M observed the slap and was stunned by what she had witnessed.
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> Grievant's shift ended at 7:25 a.m. and she left the Facility.

[1] Decision of Hearing Officer, Case No. 10415 ("Hearing Decision"), August 12, 2014, at 2.

On June 4, 2014, the grievant was issued a Group III Written Notice with removal for physical abuse of a resident.[2] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had abused a resident, 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]

Hearing Officer's Findings of Fact

The grievant's request for administrative review essentially 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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.[8] 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.[9] 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 she "engaged in physical abuse" of the Resident.[10] The

[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] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] Hearing Decision at 3.

hearing officer concluded that the grievant physically abused the Resident based on "the testimony of Ms. M who was present in the room when Grievant hit the Resident."[11] The grievant asserts that two other agency employees, and not Ms. M, were in the room with her on the day the incident occurred. She further argues that, even if Ms. M did witness the incident, she did not report it for several days, which was contrary to agency policy.

Here, there is evidence in the record to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice,[12] that the behavior constituted misconduct,[13] and that the discipline imposed by the agency was consistent with law and policy.[14] In the hearing decision, the hearing officer considered the evidence presented by the grievant in support of her argument that "she did not strike the Resident" and determined that that "Ms. M's testimony was credible," "the Agency [had] presented sufficient evidence to show that Grievant hit the Resident," and that the grievant "did not present any evidence to show that Ms. M had a motive to be untruthful about her."[15] Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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.[16] 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.

With regard to Ms. M's reporting of the incident, the grievant correctly points out that agency policy requires "[a]ny employee who suspects an alleged violation" of the policy prohibiting abuse of residents "will immediately notify" agency management.[17] At the hearing, Ms. M testified that she was not initially certain to whom she should report the grievant's behavior, but that she did report the incident at the first opportunity she had to meet with a member of agency management, which was several days after the incident occurred.[18] Ultimately, whether and to what extent this fact affects the grievant's disciplinary action is a function of how the hearing officer considered the record evidence and weighed the facts. We cannot find that this fact is so significant that the hearing officer's findings and conclusions as to the grievant's misconduct were an abuse of discretion such that a remand is warranted. The assessment of this evidence again appears to fall squarely within the hearing officer's authority and EDR will not substitute its judgment for that of the hearing officer in this regard.[19] As a result, we will not disturb the hearing decision on this basis.

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[11] *Id.*
[12] Agency Exhibit 4 at 4; Hearing Recording at 10:50-11:12 (testimony of Ms. M).
[13] Agency Exhibit 10 at 1, 4.
[14] DHRM Policy 1.60, *Standards of Conduct*, Attachment A (classifying "abuse or neglect of clients" as misconduct warranting the issuance of a Group III Written Notice).
[15] Hearing Decision at 3.
[16] *See, e.g.*, EDR Ruling No. 2012-3186.
[17] Agency Exhibit 10 at 3.
[18] Hearing Recording at 16:46-17:33.
[19] To the extent the grievant's assertion can be construed as a claim that the hearing officer should have mitigated the Written Notice because she was not disciplined consistent with other similarly situated employees, that argument fails. Section VI(B)(2) of the *Rules for Conducting Grievance Hearings* provides that mitigating circumstances may

Newly-Discovered Evidence

In her request for administrative review, the grievant attempts to present additional evidence related to the employees who were in the Resident's room with her on the day the incident occurred. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[20] 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.[21] 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.[22]

In this case, the grievant has provided no information to support a contention that the evidence presented in her request for administrative review should be considered newly discovered evidence under this standard. The grievant had the ability to obtain this evidence prior to the hearing, a well as the ability to call all necessary witnesses at the hearing and to elicit relevant testimony from those witnesses. Indeed, the two employees whom the grievant claims were present in the Resident's room with her on the day the incident occurred both testified at the hearing.[23] Consequently, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

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.[24] Within 30 calendar days of a final hearing decision, either party may appeal the

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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. *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B). In this case, the grievant and Ms. M were not similarly situated because Ms. M did not engage in physical abuse of a resident. Furthermore, the grievant did not present any evidence related to mitigation at the hearing.

[20] *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).

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

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

[23] *See* Hearing Recording at 32:54-35:25 (testimony of Ms. A), 38:21-42:11 (testimony of Ms. W).

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

final decision to the circuit court in the jurisdiction in which the grievance arose.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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