Issue: Administrative Review of Hearing Officer's Decision in Case No. 10623; Ruling Date: September 16, 2015; Ruling No. 2016-4209; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

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 2016-4209
September 16, 2015

The Department of Behavioral Health and Developmental Services ("agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10623. For the reasons set forth below, EDR remands the case to the hearing officer for reconsideration and clarification.

FACTS

A portion of the relevant facts as set forth by the hearing officer in Case Number 10623 are as follows:[1]

> The facts in this case are largely uncontradicted. The issue is what inference to draw from those facts. The Grievant, on or about February 24, 2015, was a member of a team from the Agency that escorted DM to [Facility]. [Facility] is a facility in Fredericksburg, and it was hoped that DM could transition from the Agency's location to [Facility]. On February 24, 2015, the Grievant showed two staff members of [Facility], AB and JJ, how to shower DM. During the course of this shower, a pre-existing scab that was on DM's back, approximately one centimeter in size, became dislodged and bled. AB and JJ, who were present during this incident, testified before me and both testified that they felt that the Grievant was scrubbing DM's back too strongly and that caused the scab to be removed.
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> Following his shower, DM laid on a sofa with his head in the lap of AB and his feet in the lap of the Grievant. Pursuant to the testimony of AB, over the course of one to two hours, DM would - attempt to scratch his face; the Grievant would take DM's hands and hold them in DM's lap for a short period of time; DM would leave the sofa; and then DM would return to the sofa. AB did not testify as to what she did during this time period to prevent DM from scratching his face other than to eventually suggest that she and the Grievant walk with DM.

On or about April 24, 2015, the grievant was issued a Group III Written Notice with termination for violating Departmental Instruction 201, *Reporting and Investigating Abuse and*

[1] Decision of Hearing Officer, Case No. 10623 ("Hearing Decision"), July 29, 2015 at 3- (citations omitted).

Neglect of Clients.[2] The grievant timely grieved the disciplinary action and a hearing was held on July 21, 2015.[3] In a decision dated July 29, 2015, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant engaged in the charged misconduct, rescinded the disciplinary action, ordered the agency to reinstate the grievant, and directed that he be provided with back pay for the period of his removal.[4] 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 . . . ."[5] 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 a party; the sole remedy is that the action be correctly taken.[6]

Inconsistency with Agency Policy

The agency argues that the hearing officer's decision is inconsistent with DHRM Policy 1.60 and Departmental Instruction 201. The Director of DHRM has the sole authority to interpret all policies affecting state employees, and to make a final determination on whether the hearing decision comports with policy.[7] The agency has requested such a review. Accordingly, EDR will not address these claims further, except to the extent that they are intertwined with EDR's charge to its hearing officers as outlined in the *Rules for Conducting Grievance Hearings* ("*Rules*") and further discussed below.[8]

Hearing Officer's Consideration of the Evidence

The agency's request for administrative review challenges the hearing officer's findings of fact in several areas based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The agency argues that the hearing officer abused his discretion in this case by "basing his decision on inappropriate speculation that is inconsistent with" the testimony and evidence presented at the hearing. Specifically, the agency asserts that the hearing officer dismissed probative eyewitness testimony without a proper basis for doing so, and instead substituted his own judgment to determine that the grievant's actions did not constitute a violation of Departmental Instruction 201.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and grounds in the record for

[2] Agency Exhibit 1. The hearing decision incorrectly states the date of the Written Notice as March 31, 2015. *See* Hearing Decision at 1.
[3] Hearing Decision at 1.
[4] *Id.* at 8.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] See *Rules for Conducting Grievance Hearings* § II.
[9] Va. Code § 2.2-3005.1(C).

those findings."[10] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[11] 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.[12] 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.

Witness Credibility

Based upon a review of the record, it is not clear why the hearing officer concluded that the eyewitness testimony of agency witness CO[13] had "changed substantially" regarding the issue of the grievant's alleged statement about threatening to place the patient in handcuffs such as to find that CO's entire testimony lacked credibility.[14] On April 5, 2015, the agency's investigator asked CO via a written question, "What can you tell me about a staff member of [Facility] telling [Patient] that he would be handcuffed if he did not stop picking his face and head?" CO wrote in response, "I did hear these remarks; however, lack knowledge of detail as I was distracted with other resident."[15] On April 9, 2015, the investigator again asked CO on a telephonic interview, "What can you tell me about staff members of [Facility] telling [Patient] he would be handcuffed if he did not stop picking at his face and head?" Per the investigator's notes, CO responded, "I do not remember when it was but [Patient] would not stop whining and the guy [Facility] staff said if he did not stop he would put handcuffs on [Patient]. I heard this but I do not remember where we were at the time."[16]

While admittedly vague as to the details surrounding the circumstances in which the grievant allegedly made such a comment, CO's statements to the agency's investigator on April 5 and 9, 2015, do not support a conclusion that her testimony "changed substantially" on this one point, much less that the entirety of her testimony about other allegations on the Written Notice is lacking credibility. The hearing officer also appears to interpret CO's testimony as changing on this point because she did not testify about the handcuff comments at hearing.[17] However, CO was not asked about the issue of the grievant's alleged statement regarding the threat of handcuffs, so it is not surprising that she did not provide testimony as to the same.

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[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] It appears that the agency correctly points out that witness CO is incorrectly identified in the hearing decision as witness "AB." For purposes of this ruling, the witness in question will be referred to as "CO." The hearing officer is further directed to clarify this fact in his reconsidered decision through the use of an accurate placeholder or title for the witness.
[14] Hearing Decision at 5.
[15] Agency Exhibit 4(b), at 2.
[16] Agency Exhibit 4(c), at 1.
[17] Hearing Decision at 5 (noting "deafening silence regarding the handcuffs" in CO's hearing testimony).

While a hearing officer's credibility and evidentiary determinations are due appropriate deference, here, the hearing officer has abused that discretion in that the stated basis relied upon for finding the witness lacked credibility (because of alleged changes in her statements regarding the handcuffs) is not supported by the record. Further, finding a witness's entire testimony wholly incredible, if that is what the hearing officer has concluded here, based upon varied testimony on one fact is not an appropriate assessment of witness credibility absent extreme circumstances not present here.

Many of the hearing officer's findings in this case are the result of credibility determinations and/or a lack of credible evidence presented by the agency. Because EDR is not able to determine to what degree the entirety of this witness's testimony was disregarded and how that affected the hearing officer's findings, this case must be remanded to the hearing officer. Upon remand, the hearing officer must reassess his findings as to CO's credibility and his findings generally in light of CO's testimony, including as discussed below.

Re-Opened Wound

The allegation that the grievant violated Departmental Instruction 201 is primarily based upon two instances of conduct outlined in the Written Notice.[18] First, the agency states that the grievant, while providing a shower to the patient, scrubbed his back too vigorously, re-opening an old wound.[19] The hearing officer determined that there was no credible evidence that the grievant acted "knowingly, recklessly, or intentionally in the removal of the scab,"[20] and that the grievant did not scrub the patient's back with excessive force.[21] There appears to be conflicting evidence between the various witnesses, including the grievant, on how vigorously the patient was scrubbed. Because the hearing officer must reassess the evidence in light of CO's testimony, as discussed above, the determinations on the issue of the re-opened wound must be reassessed as well.

Ultimately. 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. Because the hearing officer's determinations and assessment of the evidence will be revisited on remand, EDR has no basis to further address the agency's claims as to the re-opened wound at this stage.

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[18] It is troubling in this case that arguably the worst allegation against the grievant, a third instance of misconduct listed on the Written Notice, was apparently not discussed at all at the hearing. The hearing officer found that the agency "completely abandoned any thought" of its allegation that the grievant threatened to place the patient in handcuffs. Hearing Decision at 3. EDR's review of the record demonstrates that the agency did not produce evidence at the hearing, beyond those documents already in the agency's notebook of exhibits, regarding the statement about the handcuffs. Thus, we cannot find the hearing officer's determination that the handcuff allegation was abandoned at all contrary to the record. Indeed, this third allegation is not discussed in the agency's request for administrative review, either.

[19] Agency Exhibit 1.

[20] Hearing Decision at 6.

[21] *Id.* at 7.

Unauthorized Restraint

The agency alleges that the grievant used an unauthorized restraint technique to hold the patient's arms down, keeping him pinned to a couch, to prevent him from picking his face and head.[22] The agency provided as an exhibit the patient's Behavior Support Plan, which specifies that when the patient is scratching himself, staff can "gently redirect his hands away from his head and face."[23] The investigator's report concluded that the actions of the grievant were "not specified in [the patient's] Behavior Support Plan, and are not documented as an emergency measure needed to protect" the patient.[24] The hearing decision states that the agency produced "no credible evidence that the Grievant did anything other than comply with [the Behavior Support Plan]."[25]

The *Rules for Conducting Grievance Hearings* provide that the hearing officer "must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations."[26] In addition, EDR has long held that an agency's interpretation of its own policies is generally afforded great deference. Where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[27] Thus, when the agency presents evidence that the record-supported facts amount to abuse under the agency's interpretation of its policy, the agency's determination is due appropriate deference by the hearing officer. Accordingly, in this case, it would appear that the agency's determination that holding the patient's hands down inconsistently with the Behavior Support Plan[28] violated the agency's abuse policy would be a finding to which the hearing officer must give appropriate deference.[29] The crux of this particular issue, however, is what factual determinations did the hearing officer make as to the grievant's alleged misconduct and whether those determinations are supported by the record evidence.

An assessment as to whether the unauthorized restraint occurred as alleged in the agency's findings will likely require a discussion and weighing of the various factors about the grievant's conduct, such as, but not limited to, the manner of redirection (how the patient was grabbed/redirected), how many times the patient was redirected, how long the patient's hands were held down in each instance, how forcefully the patient's hands were held down, etc. Based

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[22] Agency Exhibit 1.
[23] Agency Exhibit 6.
[24] Agency Exhibit 3, at 12.
[25] Hearing Decision at 8.
[26] *Rules for Conducting Grievance Hearings* § VI(B)1.
[27] *E.g.*, EDR Ruling No. 2014-3648; EDR Ruling No. 2001-064.
[28] The agency is correct to point out on appeal that the Behavior Support Plan does not include any language about holding the patient's hands down, but rather only states that a staff member can "gently redirect" the patient's hands away from his face. *See* Agency Exhibit 6, at 6. In addition, as noted in the hearing decision, the investigative report in this case contains evidence from the Psych Associate that the restraining conduct described by the witness statements was not consistent with TOVA. *See* Agency Exhibit 3, at 9. The hearing decision does not adequately address these issues and, thus, the hearing officer must reassess his findings and more specifically consider this matter in the remand decision accordingly.
[29] Although the hearing officer finds that the grievant was only attempting to prevent self-injurious behavior, if that action was done in such a way that also violated agency policy, the grievant's conduct would be appropriately subject to discipline even if the grievant was well-intentioned.

on EDR's review of the record, the hearing officer's discussion of the evidence demonstrating the specifics of this claim is unclear. For example, while the investigative report contains a statement of a Psych Associate that the restraining conduct described to the investigator in the witness statements was not consistent with TOVA,[30] this Psych Associate did not testify at hearing. It does not appear that the agency provided any testimony at hearing from any witness assessing the evidence of the grievant's conduct and explain as to what specifically was done that amounted to an unauthorized restraint and why.

Nevertheless, the discussion in the hearing decision does not sufficiently address the evidence presented as to the charge of the unauthorized restraint. At a minimum, the hearing officer is required to reassess his findings on this allegation already in light of the remand as to the credibility of witness CO, discussed above. The hearing decision also lacks specific findings as to what the record evidence supports that the grievant actually did in redirecting the patient's hands and holding them down. Thus, a remand is required for the hearing officer to make these findings specifically and assess whether the record-supported conduct amounts to abuse in consideration of all of the above consistent with the pronouncements in this ruling.

On remand, the hearing officer must also reassess his findings as to his statement that he "heard no evidence as to what the Agency thinks that the Grievant should have done."[31] The hearing officer appears to state that he needed to hear evidence of what techniques the grievant should have employed that would have been consistent with agency policy to be able to find that the grievant violated agency policy. While we can certainly understand why such evidence would be helpful to an understanding of the facts of the case, such evidence does not appear to be a required element of any determination as to whether the grievant's conduct violated policy. If it is found that the grievant held down the patient's hands as an unauthorized restraint, misconduct would have occurred regardless of whether there was evidence of an alternative. Moreover, the hearing officer's determination that there was no credible evidence as to alternative approaches is not supported by the record. Witness testimony, the investigative report, and Behavior Support Plan contain record evidence as to alternate strategies for redirecting the patient, none of which included holding his hands down.[32] As such, the hearing officer must reconsider and reassess these facts on remand.

Alleged Bias of Hearing Officer

The agency further alleges that the hearing officer demonstrated bias by discounting the testimony of its witness as described above.

The *Rules* provide that a hearing officer is responsible for:

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

[30] Agency Exhibit 3. at 9.
[31] Hearing Decision at 8.
[32] *See* Hearing Record at 36:09 – 36:45 (testimony of witness CO), Agency Exhibit 3, Agency Exhibit 6.

applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[33]

The applicable standard regarding EDR's requirement of a voluntary disqualification 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 reviews recusal cases.[34] 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.'"[35] 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.[36] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[37]

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. To the extent that the agency argues that the hearing officer's questioning of its witnesses demonstrated bias, EDR has reviewed the record in its entirety and finds the hearing officer's questions to be relevant and reasonable in tone and substance.[38] The agency's representative had the opportunity to further inquire of witnesses on the topics raised by the hearing officer. Therefore, EDR finds no reason to disturb the hearing officer's decision for this reason.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration and explanation of the findings of fact and determinations as to whether the grievant's conduct in this instance constituted a violation of Departmental Instruction 201. The hearing officer should issue his remand decision before DHRM addresses the agency's request for administrative review based on questions of compliance with state and/or agency policy. Following the remand decision, DHRM will have the opportunity to address all issues of policy that have been timely raised or that may be raised after the remand decision is issued.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e.,

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[33] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[34] 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.

[35] 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.").

[36] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[37] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[38] *See Rules for Conducting Grievance Hearings* § IV(C), stating that "[t]he tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."

any matters not previously part of the original decision).[39] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.[40] 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.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[39] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[40] *See Grievance Procedure Manual* § 7.2.
[41] *Id.* § 7.2(d).
[42] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).