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SECOND ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2019-4938
July 9, 2019

The University of Virginia Medical Center (the "University" or the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's reconsideration decision in Case Number 11303. For the reasons set forth below, EDR will not disturb the remanded hearing decision.

FACTS AND PROCEDURAL BACKGROUND

The hearing officer's findings of fact in his March 27, 2019 decision in Case Number 11303, as recounted in EDR's first administrative review in this case, EDR Ruling Number 2019-4897, are hereby incorporated by reference.[2] In brief, the grievant was issued a Step 4 Formal Performance Improvement Counseling Form with termination for threatening a patient with physical harm.[3] In the original hearing decision, the hearing officer determined that the grievant's conduct impacted neither the patient's care or safety nor the operations of the University and that, as a result, the level of discipline imposed was not warranted under the circumstances.[4] The hearing officer found that the grievant's conduct justified the issuance of a Step 3 Performance Warning with an unpaid suspension for two work weeks, ordered the grievant reinstated to her former position or an equivalent position, and directed the University to provide her with back pay, less the suspension and any interim earnings.[5] The University requested administrative review from EDR on the basis that the decision was inconsistent with agency policy.[6]

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[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] *See* Decision of Hearing Officer, Case No. 11303 ("Hearing Decision"), Mar. 27, 2019.
[3] *Id.* at 1.
[4] *Id.* at 4-6.
[5] *Id.* at 6-7.
[6] *See* EDR Ruling No. 2019-4897.

In EDR Ruling Number 2019-4897, this Office found that the hearing officer had not made "specific findings about the nature of the behavior that prompted the issuance of the discipline" because he did not address whether the grievant's statement to the patient was a threat.[7] EDR remanded the case to the hearing officer for "further consideration and explanation of the evidence in the record relating to nature of the grievant's statement" and directed the hearing officer to "make a determination as to whether the grievant threatened the patient."[8] As guidance, EDR advised the hearing officer to "consider the totality of the circumstances surrounding the grievant's conduct in addressing the question of whether the University reasonably considered her statement to the patient as a threat here."[9]

The hearing officer issued a reconsideration decision on May 17, 2019.[10] In the reconsideration decision, the hearing officer provided the following additional discussion of the evidence in the record:

> There were five people in the room when the Grievant made the aforesaid statement. The Grievant herself, the patient, RN1, RN2 and RN3. As between the three nurses and the Grievant, there was unanimous agreement that the patient, because of his status, was simply incapable of being threatened. Accordingly, I must look at how the three nurses and the Grievant reacted when the statement was made. As set forth in my original Findings of Fact, RN1 did nothing at the time of the statement. RN2 told the Grievant that the patient was in an altered state; did not know what he was doing; could not follow commands; and the Grievant ought not to have said that and should not speak to him in that way. Thereafter, RN2 did nothing further. RN3 testified that he neither said nor did anything regarding this incident.
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> Accordingly, neither RN1, RN2 or RN3 in their testimony before me, expressed any concept of fear or threat that they may have felt when this statement was made. RN2 chastised the Grievant for making the statement and did nothing more. RN3 did nothing at all. RN1, subsequently and later that day, filed Management Form 96369, the Be Safe Report. That report indicated that even RN1 did not feel this was an issue that would occur again with the Grievant.
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> I had no testimony before me that: the Grievant raised her hand to strike the patient, the Grievant's fist was closed as if she was going to strike the patient, the Grievant used a raised voice, or anyone in the room was even remotely threatened. Interestingly enough, RN1 who was the only person to file a report,

[7] *Id.* at 5.
[8] *Id.*
[9] *Id.* at 6. EDR further found that, if the hearing officer concluded that the grievant threatened the patient, evidence about the impact of the grievant's statement was not necessary to support the issuance of the discipline because Policy 701 states that such behavior has a severe impact on patient care and/or University operations by definition. *Id.* EDR also directed the hearing officer to "clearly identify the justification for" a lower level of discipline, if he found that it was warranted based on the grievant's conduct. *Id.*
[10] *See* Reconsideration Decision of Hearing Officer, Case No. 11303 ("Reconsideration Decision"), May 17, 2019, at 1 (citations omitted).

> testified directly before me that she was not fearful or threatened at all. Accordingly, the three Agency employees who were present when the statement was made, were not threatened and offered no evidence that they were threatened. The Grievant testified that the statement was made and clearly was not meant.
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> The Grievant's supervisor, who issued the original Formal Performance Counseling Form, and who was not present when this incident occurred, testified before me that she could only surmise that, because the Grievant made the statement, she meant it. Of course, this is the same supervisor who set forth as grounds for firing that the conduct was such as to significantly or severely impact patient care or Medical Center operations. The one person who was not in the room to hear the statement seems to be the only person who felt threatened. No one else who was present when the statement was made, including RN1who is the only person who took the time to file a report, felt threatened. As previously stated, RN1 directly testified before me that she was not threatened.
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> No one testified before me as to the employee's tone of voice and, accordingly, I must assume that tone was neutral. No one testified that the Grievant's body language was such as to indicate a threat or danger to the patient or to anyone else in the room. The Grievant has worked with this Agency for approximately 30 years and, as set forth in my original Decision, the Formal Performance Improvement Counseling Form stated as follows, "...Although [Grievant] does not have any prior counseling..."
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> Accordingly, based on the testimony of those present, I find specifically that the Grievant did not threaten the patient, nor did the Grievant threaten any of the nurses that were in the room at the time the statement was made.[11]

In the reconsideration decision, the hearing officer determined that "[t]he Agency's interpretation of the totality of the conduct . . . [was] not reasonable," and therefore concluded that the evidence was not sufficient to show that the grievant threatened the patient as charged on the Step 4 disciplinary action.[12] The hearing officer found that the grievant's conduct was appropriately considered a Step 2 violation and reduced the discipline accordingly.[13] The University now appeals the reconsideration 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."[14] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[11] *Id.* at 2.
[12] *Id.* at 3.
[13] *Id.* at 3-4.
[14] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[15] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[16] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the University essentially asserts that the hearing officer's findings of fact as set forth in the reconsideration decision, based on the weight and credibility that he accorded to the testimony at the hearing, are not supported by the evidence. More specifically, the University contends that the hearing officer abused his discretion by finding that the totality of the circumstances did not support a conclusion that the grievant's statement was a threat. In support of its position, the University argues that it reasonably concluded the grievant had threatened the patient based on (1) the words she used, (2) the three RNs' interpretation of and response to the statement, (3) the grievant's behavior and tone of voice when she made the statement, and (4) the grievant's previous conduct, including excessive tardiness that prompted the issuance of unrelated disciplinary action.[17]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[18] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[19] 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.[20] 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.[21] 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.

EDR concurs with the University's position that it should take all potentially threatening behavior seriously and consider relevant factors to determine the best course of action in a particular situation. Here, it is clear the University did so, and believed that the grievant's

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[15] *See Grievance Procedure Manual* § 6.4(3).
[16] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[17] The University also appears to characterize the hearing officer's decision that the disciplinary action was not warranted and appropriate under the circumstances as one of mitigation. As noted in EDR's original administrative review, the hearing officer again "determined that the University ha[s] not established that the grievant's behavior constituted misconduct that warranted the issuance of a Step 4 with termination" on reconsideration. EDR Ruling Number 2019-4897 at 4. EDR will therefore address the University's arguments regarding the hearing officer's findings of fact and consideration of the evidence as a question of whether disciplinary action was justified at the level of a Step 4.
[18] Va. Code § 2.2-3005.1(C).
[19] *Grievance Procedure Manual* § 5.9.
[20] *Rules for Conducting Grievance Hearings* § VI(B).
[21] *Grievance Procedure Manual* § 5.8.

statement was threatening to the patient. The University's Policy 701 states that "[t]hreatening a patient, employee or visitor with physical harm" constitutes misconduct that would justify the issuance of a Step 4 disciplinary action and termination.[22] Policy 701 does not, however, define what the University considers to be threatening behavior, other than to state that the University will generally "consider multiple factors, including but not limited to the nature of the performance issue, the employee's intent, the consequences of the employee's actions, the employee's past performance/disciplinary record, and other mitigating or aggravating circumstances" when evaluating the appropriate level of discipline to address a particular instance of misconduct.[23] In the absence of a definition or other additional guidance in its policies, the University may assess what it considers to be the relevant factors when determining whether an employee has threatened a patient; however, in cases involving discipline, the burden is on the agency to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.[24] At a hearing to determine whether discipline was warranted for allegedly threatening behavior toward a patient, the University must present evidence to show be a preponderance of the evidence that it reasonably determined the conduct was a threat. Furthermore, the question to be addressed on administrative review is not whether EDR agrees with the decision reached by the hearing officer, but whether there are facts in the record to support that decision.

In the original hearing decision, the hearing officer found that the grievant said, "If you hit me, I will hit you back," to the patient.[25] The hearing officer determined that RN1 did nothing at the time and later filed the Be Safe report; RN2 reprimanded the grievant for speaking to the patient that way and took no further action; and RN3 took no action during or after the incident.[26] On reconsideration, the hearing officer further noted that the patient was "incapable of being threatened" due to his medical status and that none of the RNs "expressed any concept of fear or threat . . . when the statement was made."[27] The University asserts that the grievant's words were "an explicit bald threat of bodily harm to another person," and that the RNs "understood the statement as being threatening to the Patient and were threatened on his behalf."

As an initial matter, the patient's inability to understand the grievant's words is not conclusive to whether the University reasonably considered the statement to be a threat. All three RNs testified that they heard the grievant make the statement.[28] The RNs' testimony about the grievant's statement could be sufficient evidence to support the issuance of disciplinary action even where the subject of the threat never hears or understands it. However, EDR has thoroughly reviewed the hearing record and has no basis to conclude that the hearing officer abused his discretion by finding that the University did not reasonably consider the grievant's statement to be a threat, based on the totality of the circumstances and the evidence presented at the hearing.

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[22] Agency Ex. 1, Tab 23, at 3-4.
[23] *Id.* at 1.
[24] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[25] Hearing Decision at 3.
[26] *Id.*
[27] Reconsideration Decision at 2.
[28] *See* Hearing Decision at 3.

At the hearing, for example, RN1 and RN2 characterized the grievant's behavior as "inappropriate,"[29] and the Be Safe Report described the incident as one involving "Inconsiderate/Rude/Hostile/Inappropriate" conduct.[30] Only RN2 intervened verbally when the grievant made the statement, explaining that it was inappropriate and "struck" him enough to say that she should treat the patient more gently.[31] RN1's account of the incident in the Be Safe Report does not state that the grievant threatened the patient,[32] and she testified at the hearing that she submitted the report because she believed the grievant's behavior was "inappropriate."[33] RN2 stated that he did not plan to file a Be Safe Report himself, but supported RN1's decision to file the report.[34] While this is not all the relevant evidence considered by the hearing officer in assessing the totality of the circumstances, there is such evidence in the record to support the hearing officer's ultimate conclusions. The University asserts reasonable disagreement with the hearing officer's findings and description of the evidence as to these issues. However, based upon a full review of the record, EDR cannot determine that the hearing officer's factual findings were an abuse of discretion such that they are subject to remand on administrative review.

The outcome of a case such as this one will necessarily depend on the hearing officer's assessment of the evidence presented by the parties, including the credibility of the witnesses who testified at the hearing and the corresponding weight given to their testimony. Indeed, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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.[35]

The University further asserts that the grievant's history of expressing "anger and frustration . . . with regard to her personal life" supported its conclusion that the statement was a threat. In 2016, the grievant was referred for a Fitness for Duty assessment based on an alleged incident of "threatening harm to [her]self or others."[36] A physician determined that the grievant was "fit to perform her duties" at that time,[37] and the University appears to have ultimately found that these allegations were "unsubstantiated."[38] There is further evidence in the record about additional instances where, in the University's words, the grievant's demeanor was allegedly

[29] Hearing Recording at 46:11-46:17 (testimony of RN1), 1:38:12-1:38:20 (testimony of RN2), 1:55:02-1:56:00 (testimony of RN3).
[30] Agency Ex. 1, Tab 6, at 1; *see* Hearing Recording at 59:28-59:44 (testimony of RN1).
[31] Hearing Recording at 1:32:19-1:32:32, 1:38:12-1:38:20 (testimony of RN2).
[32] *See* Agency Ex. 1, Tab 6, at 4.
[33] Hearing Recording at 46:11-46:17 (testimony of RN1).
[34] *Id.* at 1:35:14-1:36:04 (testimony of RN2).
[35] *See, e.g.*, EDR Ruling No. 2014-3884.
[36] Agency Ex. 1, Tab 20, at 1.
[37] *Id.* at 8.
[38] *Id.* at 7.

"angry," "unhappy," or "upset."[39] The hearing officer did not discuss any of this evidence in relation to his consideration of whether the grievant's statement was a threat, presumably because he did not find it persuasive on that issue. While the University's stated concerns about the grievant's well-being are understandable, EDR has no basis to conclude that this evidence had any bearing on the nature of the grievant's statement to the patient.

Finally, the University contends that the hearing officer incorrectly stated that the grievant had not received any previous disciplinary action.[40] The University notes that the grievant was issued a Step 2 disciplinary action for excessive tardiness in July 2018, and that it was planning to issue her a Step 3 disciplinary action for continued tardiness at the time the incident with the patient occurred.[41] However, the University also acknowledges that the Step 4 disciplinary action that is the subject of this case incorrectly states that the grievant "d[id] not have any formal counseling,"[42] and should have instead said that she had no formal counseling "related to patient care." To the extent the hearing officer erred in stating that the grievant had no disciplinary history with the University, EDR finds that such error was harmless. As with the University's evidence about the grievant's previous behavior in the workplace, EDR finds that this evidence about the grievant's disciplinary history for tardiness was not relevant to the issue of whether the University reasonably considered the grievant's statement to be a threat. The hearing officer's failure to consider such evidence in relation to the misconduct charged on the Step 4 disciplinary action had no impact on the outcome of the case.

Having reviewed the hearing record and considered the totality of the circumstances in this case, EDR cannot find record evidence to demonstrate that the hearing officer abused his discretion in making the factual conclusion that the University had not carried its burden of demonstrating that the grievant's statement to the patient was reasonably considered a threat. 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, EDR declines to disturb the decision.[43]

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[39] *See id.* Tabs 7, 19.
[40] *See* Reconsideration Decision at 3.
[41] Agency Ex. 1, Tabs 7, 18.
[42] *See id.* Tab 3.
[43] The University also appears to argue that the hearing officer's order of relief was "improper" because he found that the "more appropriate action would be counseling of the Grievant to seek time off when under the type of stress her supervisor testified that the Grievant was experiencing." Reconsideration Decision at 4. In cases involving termination, a hearing officer may order reduction or rescission of the disciplinary action(s), reinstatement, award back pay and attorneys' fees, and restore benefits and seniority—in other words, restore the grievant to the position in which she would have been if the disciplinary action had not been issued. *See Grievance Procedure Manual* § 5.9(a); *Rules for Conducting Grievance Hearings* §§ VI(B)(4), VI(D)(1), VI(D)(2). If the hearing officer had ordered the University to approve leave for the grievant to seek counseling or other treatment, such an order would have been outside the scope of his authority. The language cited by the University, however, appears to be advisory in nature. In the original decision, the hearing officer reduced the Step 4 disciplinary action to a Step 3 Performance Warning with an unpaid suspension for two work weeks. Hearing Decision at 7. In the reconsideration decision, he amended his original decision to remove the unpaid suspension. Reconsideration Decision at 4. EDR has no basis to conclude that the relief ordered by the hearing officer was inconsistent with the grievance procedure

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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