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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2019-4944
July 9, 2019

The grievant 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 decision in Case Number 11340. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11340, as found by the hearing officer, are as follows:²

The Department of Behavioral Health and Developmental Services employed Grievant as a Certified Nursing Assistant at one of its facilities. She had been employed by the Agency for approximately 4 years. Grievant had prior active disciplinary action. On May 23, 2018, Grievant received a Group II Written Notice of disciplinary action for refusal to work overtime as required.

The Patient uses a wheelchair and must be lifted from his wheelchair into his bed using a lift. The Agency requires two employees to be involved in moving its patients using a lift. One employee operates the lift while the second employee serves as a spotter in case the lift topples.

On February 21, 2019, Grievant and the Patient were in the Patient’s room. Grievant was ready to move the Patient from the Patient’s wheelchair into the Patient’s bed. At approximately 2:15 p.m., the Nursing Director was making her “rounds” and observed Grievant with the Patient. The Nursing Director asked Grievant who would be assisting Grievant with moving the Patient into his bed.

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 Decision of Hearing Officer, Case No. 11340 (“Hearing Decision”), June 11, 2019, at 2-3 (citations omitted).

Grievant told the Nursing Director that Ms. J would be assisting Grievant with the transfer. The Nursing Director walked away from Grievant and continued her rounds.

Grievant used the lift to move the Patient from the Patient's wheelchair to the Patient's bed. Grievant did not obtain assistance from any other employee.

Several minutes later, the Nursing Director returned to the Patient's room and observed that he was in his bed. The Nursing Director walked to another part of the floor and spoke with Ms. J. The Nursing Director asked Ms. J if she helped Grievant transfer the Patient. Ms. J said "No". The Nursing Director asked the LPN and another woman working on the floor if they had helped Grievant transfer the Patient. Both employees told the Nursing Director that they had not helped Grievant.

The Nursing Director reported Grievant to Facility managers who began an investigation. The Investigator spoke with several employees including Grievant. On February 25, 2019, the Investigator spoke with Ms. J and asked Ms. J [i]f she helped Grievant. Ms. J said she had not helped Grievant. On February 27, 2019, the Investigator conducted a follow-up interview with Ms. J to confirm and clarify Ms. J's prior statement. Ms. J said, "I have never helped [Grievant] transfer anybody to their bed."

On February 27, 2019, the Investigator asked Grievant who assisted Grievant with the transfer of the Patient on February 21, 2019. Grievant said that Ms. J helped her on that date.

On March 7, 2019, the grievant was issued a Group III Written Notice with removal for client neglect.³ The grievant timely grieved the disciplinary action and a hearing was held on June 10, 2019.⁴ In a decision dated June 11, 2019, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant's actions constituted neglect of the Patient and upheld the Group III Written Notice and her termination.⁵ 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 . . ."⁶ 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.⁷ The Director of DHRM also has the sole authority to make a final

³ *Id.* at 1.

⁴ *See id.*

⁵ *Id.* at 3-5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant 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"⁹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁰ 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.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.

In the hearing decision, the hearing officer noted that agency policy requires two staff members to assist with moving a patient from a chair to a bed using a lift.¹³ The hearing officer further discussed the grievant's conduct as follows:

On February 21, 2019, the Nursing Director asked Grievant who would be assisting her with transferring the Patient from the Patient's wheelchair to the Patient's bed. This question should have reminded Grievant of the Agency's policy requiring that two employees transfer a patient from a wheelchair to a bed using a lift. Grievant used a lift to transfer the Patient from the Patient's wheelchair to the Patient's bed without the assistance of another employee. Grievant was responsible for providing safe care and treatment to the Patient. By failing to obtain the assistance of another employee when using a lift to transfer the Patient, Grievant increased the risk of injury to the Patient in the event the lift malfunctioned or toppled.¹⁴

Based on these findings, the hearing officer concluded that the "Grievant's behavior constituted neglect under the Agency's policy,"¹⁵ thus justifying the issuance of the Group III Written Notice and her termination.¹⁶ In support of her position that the hearing officer erred in upholding the disciplinary action, the grievant contends that the allegation against her was

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 3-4; *see Agency Ex. F* at 2, 3.

¹⁴ Hearing Decision at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 5.

“false,” that the agency’s witnesses were untruthful and/or inaccurate in describing the incident, and that the agency investigation that resulted in the issuance of the discipline was “unfair.”

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer’s determination that the grievant engaged in behavior that constituted neglect of the Patient. The Investigator prepared a report after questioning the grievant, Ms. J, and the Nursing Director, concluding that the grievant moved the Patient without assistance from another staff member in violation of agency policy, and that the grievant’s behavior was considered neglect.¹⁷ According to the report, the grievant told the Investigator that Ms. J helped her move the Patient, while Ms. J said that she had not assisted the grievant with the Patient.¹⁸ Ms. J also testified at the hearing that she did not help the grievant with the Patient.¹⁹ The Nursing Director explained that she spoke with the other employees assigned to the floor who would have assisted the grievant with moving the Patient, and that those employees denied helping the grievant.²⁰ At the hearing, the grievant argued that it was actually Ms. A who had helped her, and presented a written statement from Ms. A to that effect.²¹ The hearing officer found that the grievant’s arguments and evidence that Ms. A had assisted her with the Patient were not persuasive.²² Conclusions as to the credibility of witnesses 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.²³

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer’s consideration of the evidence regarding the grievant’s misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts 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 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 hearing decision.

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

¹⁷ Agency Ex. C.

¹⁸ *Id.* at 4-9.

¹⁹ Hearing Recording at 48:44-49:50 (testimony of Ms. J).

²⁰ *Id.* at 14:30-17:59 (testimony of Nursing Director).

²¹ Grievant’s Ex. 1.

²² Hearing Decision at 4.

²³ *See, e.g.*, EDR Ruling No. 2014-3884.

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

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).