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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5121
July 23, 2020

The grievant 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 11454. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11454, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services [the "agency"] employed Grievant as a Safety Security Treatment Technician at one of its facilities. She had been employed by the Agency for over two years. No evidence of prior active disciplinary action was introduced during the hearing.
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> On July 30, 2019, Grievant was working in the Unit at the Facility. Approximately 35 patients were in the Unit. Grievant was assisting Ms. W who was dispensing medication to patients. Grievant was on the "floor" while Ms. W was inside an area with a "plexiglass window." Patients would form a line called a "pill line" and wait their turns to approach Ms. W. Ms. W would dispense medication to each patient as the line advanced.
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> Mr. V was a convicted felon and resident at the Facility. He was receiving treatment from the Agency. Mr. V was in the pill line and receiving medication from Ms. W. He was taking an unnecessary amount of time to obtain his medication. Grievant noticed that Mr. V was delaying the pill line so she asked him to move along through the line. Mr. V told Grievant to, "let me do this." Mr. V started talking to another resident and said, "la para". Grievant understood this word to mean "bi-ch" in Spanish. Grievant redirected Mr. V and told him, "don't call me

[1] Decision of Hearing Officer, Case No. 11454 ("Hearing Decision"), June 15, at 2-3 (citations omitted).

a Bi-ch in Espanola. Grievant told Mr. V words to the effect, "you are in the United States and should speak English; if you want to speak Spanish, go back to Mexico."

Approximately three weeks later, Mr. V reported Grievant's comment to the Agency and it began an investigation. The Investigator spoke with Mr. V. Mr. V told the Investigator Grievant's language was demeaning and humiliated him in front of a group of people. Mr. V told the Investigator he was born in the United States and was a US citizen. He said he was not from Mexico. He said he was regressing in his treatment and questioned the potential of harm because of what Grievant said to him. He told the Investigator he was fearful of retaliation from Grievant because he made this complaint.

Grievant told the Investigator that Mr. V was taking a long time in the pill line and she was trying to move him along. Mr. V told Grievant to "let me do this." Mr. V then started speaking Spanish to another resident and said "labara" which was slang Spanish for "bi-ch." The Investigator asked Grievant if she told Mr. V "to speak Spanish, you're not in Mexico anymore. You're in the U.S. so speak English, If you want to speak Spanish go back to Mexico." Grievant said she did not recall saying, "Go back to Mexico." Grievant also said, "I don't recall saying go back to Mexico – I may have said it but I don't recall. There was so much going on – I could have said it, I just don't recall."

Grievant wrote an Observation Note where she explained that Mr. V. was standing by the pill window being inconsiderate of other residents. Grievant wrote that she re-directed Mr. V for taking a long time during bill call. She wrote that Mr. V told her, "Let me do this." After Mr. V moved, he started speaking in Spanish to another resident and called Grievant a bi-ch in Spanish. Mr. V said, "La Parra." Grievant told Mr. V not to call her a bi-ch in Espanola. Mr. V told Grievant, "This is the [United] States of America, I can speak Spanish or English whatever and whomever I chose [to]."

On September 30, 2019, the agency issued to the grievant a Group III Written Notice with removal for client abuse based on an allegation made by a resident on August 20, 2019, sustained after investigation.[2] The grievant timely grieved this disciplinary action, and a hearing was held on June 10, 2020.[3] In a decision dated June 15, 2020, the hearing officer determined that the grievant's removal "must be upheld" because the grievant directed demeaning or humiliating language to Mr. V.[4] Observing that the agency "could have addressed Grievant's behavior by issuing discipline without removal," the hearing officer nevertheless concluded that removal was consistent with DHRM Policy 1.60, *Standards of Conduct*, and he therefore lacked authority to mitigate the penalty.[5]

[2] *Id.* at 1; *see* Agency Ex. 1, at 1; Agency Ex. 4, at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.* at 5-6.

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 a 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 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 contends that the hearing did not satisfy her due process rights because the agency refused to produce facility residents as witnesses. She further argues that, even if she had told Mr. V to "go back to Mexico" if he wanted to speak Spanish, the statement would not rise to the level of client "abuse" meriting termination. Finally, the grievant alleges that the hearing officer failed to consider multiple mitigating factors.

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] As long as the hearing officer's findings are based on 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.

Due Process

The grievant contends that the hearing failed to satisfy her due process rights because she had no opportunity to elicit testimony from certain witnesses.[13] Prior to the hearing, the grievant requested that the agency make available 11 witnesses. Ten of these were identified as residents

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[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); 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] Request for Administrative Review at 3-4.

of the facility. The agency declined to make these or any residents available, citing ethical concerns that the adversarial hearing proceedings could cause psychological harm to the residents, who were receiving rehabilitative services in the care and custody of the state.[14] At the hearing, the grievant did not proffer what the residents would have testified to,[15] but she alleges that they could have provided eyewitness testimony to corroborate her denial of any verbal abuse. On that basis, and because the agency's investigator apparently did not interview the named residents,[16] the grievant contends the hearing officer should have applied an adverse inference as to how the residents would have testified.

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[17] In this context, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[18] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[19]

Here, it appears that the grievant, represented by counsel, participated in a hearing before an impartial decision-maker, where she had the opportunity to present evidence relevant to the agency's accusations against her and to question all witnesses called. As a matter of the

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[14] Agency Response to Grievant's Witness List; *see* Hearing Recording at 13:15-13:50.

[15] The grievant's counsel indicated that the facility had similarly declined his requests to interview the residents to learn what they knew about the incident. Hearing Recording 15:45-16:15.

[16] *See* Agency Ex. 3, at 3-4.

[17] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[18] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[19] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

grievance procedure, EDR perceives no procedural impairment due to the grievant's inability to question additional individuals in the agency's care and custody. To support its accusations against the grievant, the agency produced as witnesses the investigator who sustained the accusation and another employee who was present during the incident at issue. Both witnesses were subject to live cross-examination by the grievant. In addition, consistent with his duty to consider the weight of hearsay in light of other evidence, the hearing officer also posed his own questions to the agency's investigator relating to the integrity of her investigation and the credibility of residents who made claims against the grievant.[20] He also indicated in the hearing decision that he discounted the weight of the residents' hearsay statements.[21] Nevertheless, the hearing officer pointed to inconsistencies in the grievant's account and was ultimately "not persuaded" by her testimony denying the abusive statement.[22]

The grievant appears to argue that the hearing officer's credibility determination should have accounted for potential testimony from other eyewitnesses. The grievant contends that, in the absence of such testimony, the hearing officer should have applied an adverse inference to infer that the residents' testimony would have been favorable to the grievant. Under the grievance procedure, when a party disregards a hearing officer's order to make available relevant witnesses, and does so without just cause, a hearing officer *may* draw an adverse inference "with respect to any factual conflicts resolvable by the ordered . . . witnesses."[23]

Here, the hearing officer did not find that the agency lacked just cause to prevent examination of mentally incapacitated individuals in its care,[24] and EDR perceives no support in the record for such a finding. While generally providing for an employees' ability to call witnesses under the agency's influence or control, the *Rules for Conducting Grievance Hearings* ("*Rules*") also recognize the state's "strong interest" in protecting mentally incapacitated individuals in state custody "from aggressive direct or cross-examination."[25] As a result, "no law or policy . . . requires the agency to produce that individual to testify as a witness."[26] Nevertheless, in grievance hearings, like other administrative proceedings, "the technical rules of evidence do not apply and most probative evidence . . . is admitted."[27] As such, hearing officers have substantial discretion to admit statements by individuals in state custody as hearsay evidence, although as factfinders they must also "exercise great care when considering and weighing the reliability of the evidence received."[28] Ultimately, however, where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh

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[20] Hearing Recording at 59:40-1:04:20; *see generally Rules for Conducting Grievance Hearings* § IV(C).
[21] Hearing Decision at 5.
[22] *Id.* at 4-5.
[23] *Rules for Conducting Grievance Hearings* § V(B).
[24] Hearing Recording at 14:30-14:50.
[25] *Rules for Conducting Grievance Hearings* § IV(E). The *Rules* contemplate alternatives to in-person examination of such an individual by the parties, *e.g.* examination by the hearing officer or admission of the individual's audio or written statement. *Id.* It does not appear that any such alternatives were proposed or considered at the hearing.
[26] *Id.*
[27] *Id.* § IV(D); *see* Hayes v. Dep't of Navy, 727 F.2d 1535, 1538-39 (Fed. Cir. 1984) (holding that hearsay is generally admissible as substantial evidence in administrative proceedings if a reasonable person could consider it credible under the circumstances).
[28] *Id.*

that evidence, determine the witnesses' credibility, and make findings of fact. EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where, as here, the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer.[29]

Because it appears that the grievant participated in a full and fair hearing with the opportunity to question the adverse witnesses presented by the agency to carry its burden of proof, and because nothing in the record would have required the hearing officer to apply an adverse inference regarding the unavailable residents' testimony, EDR will not disturb the hearing decision based on the absence of these residents from the hearing.

Misconduct under Agency Policy

The grievant further argues that telling Mr. V to "go back to Mexico," even if she had made such a statement, would not constitute "abuse" under agency policy.[30] The grievant essentially argues that, given that she was a "young female responding to a violent sexual predator" who insulted her, her "comeback" as alleged was not so severe that it rose to the level of abuse meriting termination of her employment.[31]

The agency's Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities*, defines abuse as "any act or failure to act by an employee . . . responsible for the care of an individual in a facility operated by the [agency] that was performed or was failed to be performed knowingly, recklessly, or intentionally, and that caused or might have caused physical or psychological harm, injury, or death to an individual receiving care or treatment for mental illness, developmental disability, or substance abuse."[32] As an example, the policy lists the "[u]se of language that demeans, threatens, intimidates or humiliates the individual."[33] Generally, an agency's interpretation of its own policies is afforded great deference. EDR has previously held that 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 that interpretation is clearly erroneous or inconsistent with the express language of the policy.[34]

Here, the agency considered it within the scope of the verbal abuse described in its policy for an employee to tell a resident to "go back to Mexico" if he wanted to speak Spanish; the hearing officer made appropriate factual determinations that the grievant made this statement to Mr. V. The hearing officer reasoned that this type of statement "could demean and humiliate an individual," consistent with the definition of abuse provided by agency policy, because Mr. V was confined in a state facility and thus could not leave the United States.[35] EDR perceives no

[29] *See, e.g.*, EDR Ruling No. 2014-3884.
[30] Request for Administrative Review at 4-5.
[31] *Id.* at 5.
[32] Hearing Decision at 3-4; Agency Ex. 4, at 1.
[33] *Id.*
[34] *See, e.g.*, EDR Ruling No. 2020-4998; EDR Ruling No. 2019-4803.
[35] Hearing Decision at 4.

error in this conclusion, recognizing that hostility to individuals based on the language they speak – usually by virtue of their national, racial, and/or cultural heritage – is inherently demeaning and humiliating. Further, the agency's definition of "abuse" does not require actual harm or excuse verbal abuse if provoked by an individual confined to the state's care and custody.[36] While the grievant clearly disagrees with the agency's view of the seriousness of her statement, EDR cannot find that the hearing officer erred in concluding that the statement constituted "abuse," which may be a terminable offense.[37]

Mitigation

Finally, the grievant contends that she "could not have known that the Agency would consider her comeback 'abusive' such that it would merit a first-offense termination."[38] The grievant appears to argue that the penalty should be mitigated because Mr. V initiated the exchange of insults and "was not as vulnerable to [her] remark . . . as the mentally ill individuals the Agency's abuse policy was designed to protect."[39] She asserts that the hearing officer failed to consider these factors.[40]

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]."[41] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "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."[42] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[43]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is

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[36] *See id*. The grievant argues that "[n]o reasonable person would consider a woman responding to a violent sexual predator calling her a bitch by telling him to speak English or go back to Mexico 'abuse.'" Request for Administrative Review at 6. However, the agency's definition of abuse relates to acts or omissions by its employees, regardless of gender, and their effect on individuals in the agency's care, regardless of legal status. *See* Agency Ex. 4, at 1.
[37] *Id*. at 4 (citing DHRM Policy 1.60, *Standards of Conduct*, Att. A).
[38] Request for Administrative Review at 6.
[39] *Id.*
[40] *Id.*
[41] Va. Code § 2.2-3005(C)(6).
[42] *Rules for Conducting Grievance Hearings* § VI(A).
[43] *Id*. § VI(B).

high.[44] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[45] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[46] and will reverse the determination only for clear error.

In this case, as explained above, the hearing officer appropriately sustained the agency's charge of abuse, as defined by its policy, constituting misconduct. Thus, he appropriately upheld the agency's conclusion, in its discretion, that the grievant's abusive statement was irreparably at odds with its mission to care for individuals in its custody, notwithstanding the absence of prior offenses. As a general matter, the grievance procedure does not require that a hearing officer specifically discuss every argument or fact presented by a party; thus, a hearing decision's mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand.[47] Here, however, the hearing officer found affirmatively that Mr. V insulted the grievant and that she responded with a demeaning statement.[48] To the extent the grievant argues that her and/or Mr. V's status rendered the statement less serious, EDR cannot find that the hearing officer failed to properly consider these arguments. As the hearing officer noted, he lacked authority to amend the discipline to the level he himself might have imposed.[49] As explained above, EDR affords deference to agencies not only in the interpretation of their own policies but also in the exercise of their discretion to impose discipline that is consistent with law and policy. Accordingly, EDR cannot find that the hearing officer's mitigation analysis presents a basis for remand.

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.[50]

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[44] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

[45] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[46] "'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.*

[47] *See, e.g.*, EDR Ruling No. 2020-5075; EDR Ruling No. 2020-5073.

[48] Hearing Decision at 2, 4.

[49] *Id.* at 5-6; *see* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings*§ VI(B)(2).

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

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.[51] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[52]

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