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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5001
November 18, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11386. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Number 11386, as found by the hearing officer, are as follows:²

The Department of Behavioral Health and Developmental Services [the “agency”] employed Grievant as a Registered Nurse at one of its locations. Grievant’s Employee Work Profile specified that, “All communications will be open, factual, clear, and respectful.” She began working for the Agency on March 25, 2016. Grievant had prior active disciplinary action. She received a Group II Written Notice on April 15, 2019 for failure to follow instructions and/or policy.

The Facility offered training to its physicians. This training was called Grand Rounds. Nursing staff were permitted but not required to attend Grand Rounds. Grand Rounds were conducted at the Facility once per month. Grand Rounds usually began at noon and lasted for approximately one hour. Employees who were unable to attend Grand Rounds could view online a recording of each session. The Grand Rounds on April 24, 2019 was entitled “Food for Thought: A Case Review for Eating Disorder” which was presented by Dr. S.

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. 11386 (“Hearing Decision”), October 1, 2019, at 2-3 (internal citations omitted).

The Patient had a history of choking and needed to be observed more closely when she was eating her meals in the Dining Room.

Facility nursing employees were allowed 30 minutes for lunch. The general practice at the Facility was that if an employee could not perform his or her shift duties, the employee was obligated to ask another employee “cover” for that employee. Dr. M described the standard practice as, “before leaving a post, make sure your job will be done by someone else.” The general practice at the Facility was that if an employee wanted to take an extended lunch period, the employee had to obtain permission from the Nurse Coordinator.

On April 24, 2019, Grievant was assigned responsibility to “Monitor Dining Room during Meals.” This meant she was to be in the Dining Room during lunch to monitor patients who might need assistance. Lunch for patients began at noon.

Two Charge Nurses were working on April 24, 2019. Grievant reported to both Charge Nurses.

At 11:30 a.m., Charge Nurse K went to the Cafeteria where Grievant was working to relieve her so she could take her lunch break. Charge Nurse K relieved Grievant at 11:30 a.m. so that she could be back from lunch at noon. Grievant asked Charge Nurse K, “Can I go to Grand Rounds as part of my lunch.” Charge Nurse K said, “Yes.” Grievant did not ask Charge Nurse K to obtain “coverage” for Grievant. If Grievant had asked for coverage, Charge Nurse K would have assigned another employee in Grievant’s place for the noon meal.

Since Grand Rounds were not scheduled to begin until noon, Grievant went to Building P (where the Dining Room was located). At approximately 11:50 a.m., Grievant spoke with Charge Nurse A. Grievant said, “I’m going for Grand Rounds.” Charge Nurse A said, “OK.” Grievant left and went to the Grand Rounds presentation.

At approximately noon, Charge Nurse K went to the Dining Room and began passing out food trays to patients. He was working in a room with a doorway that opened into the Dining Room.

Approximately five patients were in the Dining Room eating lunch.

Charge Nurse K gave the Patient a tray of food and the Patient took the tray to a table. She sat with her back to Charge Nurse K and began eating. Approximately ten minutes after noon, the Patient began choking on a bite of her food. Two other patients noticed the Patient choking and notified Charge Nurse K. Charge Nurse K entered the Dining Room, patted the Patient on her back,

stood up the Patient and performed the Heimlich maneuver several times. The Patient stopped choking.

Grievant returned from Gr[a]nd Rounds at approximately 1:15 p.m. She took a short break in the conference room to eat.

Agency managers learned that the Patient had choked on her food and began an investigation. The Agency realized Grievant was not at her post in the Dining Room beginning at noon. Agency managers believed that if Grievant had been at her post in the Dining Room she would have been in a position to see the Patient choking before the other patients realized the Patient was choking.

On May 16, 2019, the agency issued to the grievant a Group II Written Notice³ of disciplinary action. Citing DHRM Policy 1.25, *Hours of Work*, the Written Notice charged that the grievant “left her assigned area at 11:49 a.m. to have lunch and did not return from lunch until 1:04 p.m., totaling 1 hour and 15 minutes, exceeding her allotted break time by 45 minutes.”⁴ The Written Notice detailed that the grievant’s lunch break coincided with her assignment to monitor the dining room at mealtimes and that, during her absence, a patient had choked in the dining room.⁵ Based on an earlier, active Group II Written Notice, the agency terminated the grievant’s employment based on accumulation of discipline.⁶

The grievant timely grieved the Written Notice, and a hearing was held on September 11, 2019.⁷ In a decision dated October 1, 2019, the hearing officer concluded that “the [a]gency acted within the scope of its discretion” in this case because the grievant’s permission to attend Grand Rounds “did not include extending her lunch period to perform other activities.”⁸ However, the hearing officer also determined that the agency’s “disciplinary action related to where Grievant was working[,] and the evidence showed she was not working at her post at noon.”⁹ The hearing officer reasoned that “Grievant was expected to be clear in her communications and should have informed her supervisors that she did not intend to report to her post in the Dining Room at the end of her lunch break.”¹⁰ The hearing officer found no mitigating circumstances to reduce the disciplinary action.¹¹

The grievant now appeals the hearing decision to EDR.

DISCUSSION

³ Agency Ex. 1 at 1. The effective Group II Written Notice is amended from an earlier Written Notice, erroneously dated May 10, 2019. *See* Hearing Recording at 2:02:05-2:04:20; Grievant’s Ex. 16. The agency issued a due process notice on May 15, 2019, advising the grievant that she had 24 hours to respond; it later re-issued an amended Written Notice dated May 16, 2019, the date of the grievant’s termination. *See* Agency Ex. 1.

⁴ Agency Ex. 1 at 1.

⁵ *Id.*

⁶ *See id.*; Agency Ex. 4 at 1.

⁷ Hearing Decision at 1.

⁸ *Id.* at 4, 5.

⁹ *Id.* at 5.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 5.

By statute, EDR has 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.”¹² 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.¹³ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁴ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant argues that the hearing officer abused his discretion in numerous ways, including by (1) interpreting the evidence to find a violation of DHRM Policy 1.25; (2) analyzing alleged misconduct not charged in the Written Notice; (3) upholding discipline based on “practices” neither supported by evidence nor cited in the Written Notice; and (4) failing to mitigate the disciplinary action.¹⁵

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁷ 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.¹⁸ 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.¹⁹ 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 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.

The grievant’s request for administrative review raises multiple arguments that, in essence, challenge whether the agency met its burden to prove that the the grievant engaged in the behavior described in the Written Notice and whether this behavior constituted misconduct under the policy cited. For the reasons that follow, EDR concludes that the hearing decision is unclear as to whether the grievant in fact was on a break from work lasting for 75 minutes, as charged in the Written Notice under DHRM Policy 1.25.²⁰ Relatedly, the decision does not

¹² Va. Code §§ 2.2-1202.1(2), (3), (5).

¹³ See *Grievance Procedure Manual* § 6.4(3).

¹⁴ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁵ See generally Grievant’s Request for Administrative Review. On October 24, 2019, the agency advised EDR of its intention not to offer a rebuttal to the grievant’s request.

¹⁶ Va. Code § 2.2-3005.1(C).

¹⁷ *Grievance Procedure Manual* § 5.9.

¹⁸ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁹ *Grievance Procedure Manual* § 5.8.

²⁰ See Agency Ex. 1 at 1.

contain clear findings as to the time period, if any, during which the grievant's behavior constituted misconduct, whether under DHRM Policy 1.25 or any other policy or practice, that would reasonably merit a Group II Written Notice. Accordingly, the decision must be remanded for clarification on these issues.

In this case, the hearing officer found that when Charge Nurse K came to relieve the grievant for her lunch break at 11:30 a.m., the grievant asked him if she could "go to Grand Rounds as part of [her] lunch"; he approved.²¹ The hearing officer found that Grand Rounds sessions "usually began at noon and lasted for approximately one hour."²²

Despite Charge Nurse K's approval for the grievant to go to Grand Rounds, the hearing officer concluded that Charge Nurse K "expected Grievant to be at her post following her lunch break" and "did not realize Grievant intended to exceed her allowed lunch period."²³ The hearing officer further reasoned that the grievant "should have informed her supervisors that she did not intend to report to her post in the Dining Room at the end of her lunch break."²⁴ The hearing officer acknowledged that the grievant "had permission to attend the Grand Rounds but that permission did not include extending her lunch period . . ."²⁵ But this analysis does not elucidate when the grievant's authorized break in fact ended, *i.e.* whether her attendance at Grand Rounds was an extended break from work as charged in the Written Notice or, instead, whether it occurred during her work hours under DHRM Policy 1.25.

The hearing officer opined: "Whether Grievant was working while she was attending Grand Rounds was not the basis for the Agency's disciplinary action. The disciplinary action related to where Grievant was working . . ."²⁶ This interpretation is not, however, consistent with the disciplinary documents. The due process letter presented to the grievant on May 15, 2019 cited her absence from 11:49 a.m. to 1:04 p.m. as a "failure to adhere to DHRM Policy 1.25 'Hours of Work (Lunch Periods and Breaks)'" by "exceeding [her] allotted break time by 45 minutes."²⁷ The final Written Notice issued on May 16, 2019 relied on the same language.²⁸ Without determining whether the agency proved that the grievant was on break from 11:49 a.m. to 1:04 p.m. under DHRM Policy 1.25, as charged on the Written Notice, the hearing officer abused his discretion in upholding the agency's discipline for that conduct.

Even if the Written Notice had put the grievant on notice that the discipline was based more generally on unauthorized absence from her assignment, neither the Written Notice nor the hearing decision elucidate the period, if any, during which the grievant was in fact unauthorized

²¹ Hearing Decision at 3.

²² *Id.* at 2.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 5.

²⁷ Agency Ex. 1 at 3.

²⁸ *See id.* at 1. Hearing testimony from the agency's RN Coordinator, who prepared the Written Notice in consultation with the agency's human resources department, confirmed that the basic offense leading to discipline was considered to be misuse of state time, with aggravating factors. *See* Hearing Recording at 1:24:50-1:26:15 (RN Coordinator's testimony).

to be at Grand Rounds. The Written Notice explains that the grievant's absence from 11:49 a.m. to 1:04 p.m. exceeded the 30 minutes she would normally be allowed for lunch under DHRM Policy 1.25.²⁹ It follows from this explanation that the grievant could have avoided the cited misconduct by reporting to the Dining Room at 12:19 p.m. Thus, to the extent that the hearing officer found that the grievant was not authorized to be either at Grand Rounds *or* at lunch between noon and 12:19 p.m., this finding appears to be inconsistent with the Written Notice's allegations.

The hearing decision also is unclear as to whether and when the grievant was authorized to be at Grand Rounds *after* 12:19 p.m. The hearing officer found that when Charge Nurse K came to relieve the grievant for her lunch break at 11:30 a.m., the grievant

asked Charge Nurse K, "Can I go to Grand Rounds as part of my lunch." Charge Nurse K said, "Yes." . . . At approximately 11:50 a.m., Grievant spoke with Charge Nurse A. Grievant said, "I'm going for Grand Rounds." Charge Nurse A said, "Ok."³⁰

Yet the hearing officer concluded that "Charge Nurse K expected Grievant to be at her post following her lunch break," and that the charge nurses "did not realize Grievant intended to exceed her allowed lunch period."³¹ As the finder of fact, the hearing officer had authority to determine, based on the evidence, whether it was reasonable for any of the involved nurses to assume a mutual understanding of when the grievant would return. But the hearing decision's findings of fact make clear that the charge nurses communicated authorization for the grievant to go to Grand Rounds, which was held from approximately noon to 1 p.m. Without additional findings as to when the grievant's authorized break ended (or when the charge nurses, as her supervisors, reasonably believed it would end), EDR is unable to properly review the determination that the agency met its burden to prove that the grievant engaged in misconduct by being at Grand Rounds instead of her Dining Room assignment.

The agency's presentation of its case at the hearing suggests that a crucial motivation for its disciplinary action was understaffing in the Dining Room during the grievant's absence, allowing a patient who had a risk of choking to eat unmonitored.³² Indeed, witness testimony supported the contention that other staff could have monitored the Dining Room if the grievant had proactively sought re-staffing and that, in fact, the facility's general practice required the grievant to do so before being absent.³³ However, whether the grievant failed to assume

²⁹ Agency Ex. 1 at 1.

³⁰ Hearing Decision at 3.

³¹ *Id.* at 4. EDR notes that, because the hearing decision did not address whether the grievant's Grand Rounds attendance constituted a break from work under DHRM Policy 1.25, *Hours of Work*, and DHRM Policy 5.05, *Employee Training and Development*, the basis for a finding that the grievant "exceed[ed] her allowed lunch period" is unclear.

³² See Hearing Recording at 1:20:30-1:23:15, 1:46:36-1:47:20 (RN Coordinator's testimony) ("Your responsibility to make sure that someone took over your assignment, . . . to ensure that someone was monitoring that day room, when we have patients who are choking risks, that was the key thing for us . . . That was our main concern.")

³³ See, e.g., *id.* at 29:00-29:30 (Charge Nurse K's testimony), 2:59:20-3:02:30 (Charge Nurse A's testimony), 1:35:20-1:36:13 (RN Coordinator's testimony).

responsibility for re-staffing her assignment is outside the scope of the misconduct described by the Written Notice. In cases involving discipline, the agency bears the burden to show that the grievant engaged in the behavior charged on the Written Notice,³⁴ that this behavior constituted misconduct, and that the discipline for such conduct was consistent with law and policy. Thus, upholding the agency's discipline in this case based on acts and omissions not charged, as the hearing decision appears to do in this case, represents an abuse of discretion.

Finally, without sufficient findings as to whether and when the grievant took an unauthorized break from work that misused state time and/or compromised patient safety, EDR is unable to identify a reasonable basis for the conclusion that the grievant's conduct merited discipline at the level of a Group II Written Notice. Group II offenses "include acts of misconduct of a more serious and/or repeat nature" that "significantly impact business operations and/or constitute neglect of duty"³⁵ Here, the hearing decision is silent as to why the grievant's conduct constituted a serious or repeat offense that significantly impacted business operations. While the Written Notice referenced the choking incident that occurred at approximately 12:10 p.m., it is far from clear why the grievant's absence at that time – only 20 minutes into her alleged break period – was unauthorized such that the incident merited discipline against her. Based on a thorough review of the hearing officer's findings of fact to date and on the record as a whole, EDR is unable to identify support for disciplinary action above the level of a Group I Written Notice for unsatisfactory performance.³⁶

For the foregoing reasons, EDR finds that the hearing decision does not adequately determine whether the employee engaged in the behavior described in the Written Notice or whether this behavior constituted misconduct, as required by the *Rules for Conducting Grievance Hearings*.³⁷ Without these determinations, the hearing officer's conclusions that the Group II Written Notice must be upheld and that mitigation was not warranted must be re-evaluated as well. Accordingly, the hearing decision is remanded for further consideration by the hearing officer.

CONCLUSION AND APPEAL RIGHTS

³⁴ See *Rules for Conducting Grievance Hearings* § VI(B) ("In all circumstances, . . . the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge. . . . Thus, a hearing officer's review is limited to the conduct charged in the Written Notice and attachments.")

³⁵ DHRM Policy 1.60, *Standards of Conduct*, at 8.

³⁶ See *id.* While the agency's RN Coordinator testified that she felt the grievant violated numerous standards (*e.g.* performing duties with the highest degree of public trust, devoting full efforts to job responsibilities during work hours, supporting efforts to ensure a safe and healthy work environment, meeting performance expectations, and acting in the best interests of the agency), the hearing decision contains no findings as to whether the agency met its burden to prove any of these offenses. See Hearing Recording at 1:44:20-1:45:25 (RN Coordinator's testimony). EDR further notes that the Group II Written Notice is not necessarily supported by prior disciplinary action for misuse of state time as the agency contended, since the hearing decision is silent as to whether the grievant's conduct in this case in fact constituted a new misuse of state time. See Hearing Recording at 1:24:10-1:26:15 (RN Coordinator's testimony) (citing the grievant's recent prior counseling for misusing state time); Agency Ex. 4 at 3. The agency's RN Coordinator also testified that the May 16, 2019 Written Notice was elevated for reasons other than the grievant's April 15, 2019 Group II Written Notice. Hearing Recording at 2:26:05-2:26:50 (RN Coordinator's testimony).

³⁷ See *Rules for Conducting Grievance Hearings* § VI(B)(1).

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision considering whether the agency met its burden to prove, by a preponderance of the evidence, that (1) the grievant engaged in the behavior charged in the Written Notice issued as of May 16, 2019; (2) this behavior constituted misconduct; and (3) the Group II Written Notice was consistent with law and policy.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.³⁸ 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.³⁹ 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.⁴⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴¹



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³⁸ See *Grievance Procedure Manual* § 7.2.

³⁹ *Id.* § 7.2(d).

⁴⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴¹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).