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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5002
November 26, 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 11366/11367. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11366/11367, as found by the hearing officer, are as follows:²

The Department of Behavioral Health and Developmental Services employs Grievant as a DSA II at one of its facilities. She has been employed by the Agency for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

Active treatment is a concept found in Medicaid regulations which describes the responsibility of each staff member to provide quality services and appropriate interactions in all settings at all times. Active treatment applies to formal and informal interactions and directs that all staff members interact with individuals in a manner which is consistent with training objectives, is age-appropriate, and treats all with dignity. Staff members are assigned to conduct education/training and other services in day activity centers. Staff must perform services professionally and cooperatively.

On April 9, 2018, Grievant received verbal counseling that:

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. 11366/11367 (“Hearing Decision”), October 9, 2019, at 2-3 (citations omitted).

No loud, abusive, or threatening communication is permitted. Each staff member should interact with other staff members pleasantly and positively and demonstrate a continuous focus on active treatment and services.

On February 4, 2019, Grievant was working with a client in the Day Support Program. The Art Instructor conducted an Art class as part of the Facility's therapeutic treatment program. The Art Instructor paired staff with individuals and they participated in the class instruction to make art projects. An objective for the program was for individuals to benefit from interacting with staff and to learn to handle and manipulate project materials.

Grievant walked into the Art class and observed the Art Instructor's planned project for the individuals. Grievant was not cooperative. Grievant complained, "Are we going to do this again?" The Art Instructor asked Grievant to sit between two individuals and work with them on an art project. Grievant said she "could not work with two people." The Art Instructor offered to let Grievant work on another activity but said she "could not do that." In order to avoid conflict, the Art Instructor gave Grievant some markers and a clip board to work with Client L. The Art Instructor told Grievant, Grievant could help Client L grasp the marker and Grievant could move the clip board as Client L marked the page.

Grievant was concerned about the quality of assistance provided by Ms. W. Grievant asked other employees what Ms. W did on their shifts. Grievant called Ms. A outside of work hours and asked if Ms. W was "pulling her weight" on Ms. A's shift. Ms. W learned of the telephone call and became upset by Grievant's claim.

On March 1, 2019, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy, disruptive behavior, and violation of DHRM Policy 2.35, *Civility in the Workplace*, arising out of her behavior on February 4, 2019.³ The grievant also received a Group I Written Notice on March 1, 2019 for failure to follow instructions and/or policy and violation of DHRM Policy 2.35 based on her conduct in relation to Ms. W and Ms. A.⁴ The grievant timely grieved the disciplinary actions and a hearing was held on August 14, 2019.⁵ In a decision dated October 9, 2019, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant failed to follow instructions regarding workplace behavior on February 4, 2019 and upheld the Group II Written Notice.⁶ The hearing officer further determined that the agency had not established that the grievant engaged in misconduct justifying the issuance of the Group I Written Notice and rescinded that disciplinary

³ Agency Ex. 3.

⁴ Agency Ex. 4.

⁵ See Hearing Decision at 1.

⁶ *Id.* at 3-4.

action.⁷ The grievant now appeals the hearing decision to EDR, challenging the hearing officer's decision to uphold the issuance of the Group II Written Notice.

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”⁸ 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.⁹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁰ 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. In particular, the grievant denies that she engaged in the conduct charged on the Group II Written Notice and contends that the testimony of one of her witnesses contradicted the agency's allegations about her behavior during the incident. The grievant also argues that the Art Instructor engaged in inappropriate behavior directed at the grievant on February 4, 2019.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹² 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.¹³ 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.¹⁴ 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 made the following factual findings about the grievant's behavior on February 4, 2019:

⁷ As neither party has challenged the hearing officer's findings and conclusions relating to the Group I Written Notice, it will not be addressed further in this ruling.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁴ *Grievance Procedure Manual* § 5.8.

On February 4, 2019, Grievant complained and objected to [] how the Art Instructor was conducting her class for residents. Grievant was not positive regarding the class and demonstrated a negative attitude towards the class and the individuals' ability to implement the treatment program. Grievant did not interact pleasantly and positively with the Art Instructor. Grievant was unnecessarily argumentative and did so in front of individuals.¹⁵

The hearing officer further noted that, on April 9, 2018, the grievant had been instructed to "interact with other staff members pleasantly and positively and demonstrate a continuous focus on active treatment and services."¹⁶ Based on these findings, the hearing officer concluded that the agency had "presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow instructions."¹⁷ In support of her position, the grievant appears to argue that the hearing officer failed to consider evidence presented by one of her witnesses, Ms. L, that the grievant's behavior on February 4, 2019 was appropriate.¹⁸ The grievant further points to testimony from Ms. L that Ms. L, and not the grievant, objected to performing an activity involving yarn because she was allergic to certain types of fabric. Finally, the grievant alleges that the Art Instructor's behavior toward the grievant was inappropriate because the Art Instructor "took the project out of [the grievant's] hand several times and told [her] that [she] was not doing it right," as confirmed by Ms. L's testimony.

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. At the hearing, the agency presented evidence to show that the grievant had been counseled several times in 2018 about appropriate interactions with other staff members and was instructed to interact "pleasantly and positively" with other staff at the facility.¹⁹ The agency's notes from its investigation of the grievant's conduct indicate that it determined her conduct on February 4, 2019 was "disrespectful, argumentative, [and] uncooperative,"²⁰ and the Art Instructor testified about the grievant's behavior in those terms.²¹ Several other agency witnesses further testified that, based on the grievant's conduct as reported by the Art Instructor, the grievant was disruptive, made negative comments that detracted from clients' and employees' ability to participate in the activity, and did not support a therapeutic environment for clients.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

¹⁵ Hearing Decision at 4.

¹⁶ *Id.*

¹⁷ *Id.* The hearing officer also specifically found that the grievant "did not engage in harassment, bullying, or workplace violence." *Id.*

¹⁸ While the grievant refers to statements she made during the hearing in her request for administrative review, she did not testify under oath and her comments were not, therefore, before the hearing officer as evidence in the hearing record. See *Grievance Procedure Manual* § 5.9 (stating that a hearing officer's decision must "contain findings of fact on the material issues and the grounds in the record for those findings" (emphasis added)).

¹⁹ See Agency Exs. 9, 11, 12.

²⁰ Agency Ex. 8, at 6.

²¹ Hearing Recording at 54:31-55:38, 58:30-59:13, 1:00:33-1:00:52 (Art Instructor's testimony).

²² *Id.* at 8:52-9:46, 10:27-11:47 (Ms. M's testimony), 28:30-30:38 (Mr. B's testimony), 39:46-42:33, 45:58-46:47 (Ms. S's testimony).

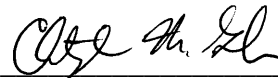
the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²³

The hearing officer did not discuss Ms. L's testimony that the Art Instructor told the grievant she was not performing one of the activities correctly, and that Ms. L, rather than the grievant, asked to perform an activity during the class that did not involve yarn.²⁴ However, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to specific testimony and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. Here, it would appear that the hearing officer did not address Ms. L's testimony because he did not find it to be credible and/or persuasive on the issue of whether the grievant had failed to follow instructions about engaging in appropriate interactions with staff at the facility.

In summary, and while 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.²⁵ 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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷



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

²⁴ Hearing Recording at 1:46:26-1:47:11, 1:49:01-1:49:13 (Ms. L's testimony).

²⁵ *Grievance Procedure Manual* § 7.2(d).

²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).