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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5031
January 10, 2020

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 11432. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11432, as found by the hearing officer, are as follows:²

1. The agency is a facility under the Department of Behavioral Health and Developmental Services. The facility consist[s] of at least three (3) administrative buildings/offices and five (5) homes. The agency had employed Grievant as a Direct Support Professional (DSP) to provide services to residents of the homes within the facility. Grievant had been so employed for a little over 3 years. He worked the night shift and had been assigned to home #1. His responsibilities included providing supports and services to residents to include, among others, conducting bed checks every 30 minutes and providing toiletry assistance to residents.
2. Grievant worked the night shift on July 28, 2019, and July 29, 2019, in home #1. As of those dates, Grievant had worked eight (8) consecutive days and 12 days with only 1 day off due to a staffing shortage.
3. Grievant describes his working condition on those shifts as stressful because he had not had adequate time away from work. In addition, he indicates 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. 11432 (“Hearing Decision”), Dec. 2, 2019, at 3-6 (citations omitted).

- because of having practically little time off and his being constantly on his feet while at work, he was experiencing ankle pain.
4. The staff office (office) in home #1 is furnished with a video camera which was operating during Grievant's shifts on July 28 and 29, 2019. Grievant was aware of this.
 5. Grievant spent a portion of his shifts on the referenced days in home #1's office. And a video recording exists of at least some of the time Grievant spent in the office on one or both of those shifts. This evidentiary fact is derived from Security Guard's testimony indicating that he viewed at least one hour of the video recording which showed Grievant during his work hours on those days in this office. Security Guard was a credible witness. His testimony revealed that he was familiar with the office. In addition, Grievant testified that he was aware there was a camera operating in the office during his shifts. What is more, Grievant did not contest Security Guard's testimony indicating there was a video recording of Grievant spending some time in the office on July 28 and 29, 2019.
 6. Specifically, Security Guard reviewed at least 1 hour of the video recording of the time Grievant was in the office on July 28 and 29, 2019. Security Guard's observations of Grievant in the video were:
 - (i) Grievant remained still long enough that the motion lights in the office went off and remained off for an extended period;
 - (ii) Grievant was positioned seated in a reclined position in one chair with his leg(s) propped up on the second chair;
 - (iii) Grievant remained in this position for more than a brief period;
 - (iv) Grievant stood up one or two times and stretched. He then resumed his seated and reclined position with his leg extended and propped up in a second chair;
 - (v) at one point Grievant positioned a cabinet door so that it was opened and hiding his face.
 7. From what Security Guard observed of this video, Security Guard's impression was Grievant was sleeping during his work shift.
 8. Grievant admits he positioned himself in a reclining position and elevated his feet to obtain relief from ankle pain he was experiencing. Grievant denies sleeping during work.

9. Nevertheless, during the hearing, Grievant testified that “after a short time, he woke up.” Grievant’s acknowledgement, coupled with credible testimony of Security Guard, provides sufficient evidence that Grievant fell asleep during his working hours on July 28 or 29, 2019.

Bed Checks

10. Bed checks of residents in home #1 are not conducted in the staff office. The evidence only shows that the video recording reviewed by Security Guard was of Grievant in the office area and not the section of home #1 where residents would be sleeping and Grievant would be conducting bed checks or assisting residents during the night shift.
11. Security Guards do visit homes periodically during a shift to provide security to the facility. However, agency policy does not specify how frequent the visits must be. The specific language stated in the relevant agency policy indicates that visits must take place “several times per shift.” In this case, Security Guard testified that he made rounds every 3 hours.
12. From his review of the video, Security Guard suspects that Grievant did not conduct bed checks of residents every 30 minutes during Grievant’s shifts on July 28 and 29, 2019. However, assuming rounds were made every 3 hours by security personnel or Security Guard (as Security Guard indicated was his protocol), the Hearing Officer finds that the agency is unable to meet its burden and show by a preponderance of the evidence that Grievant failed to conduct the bed checks every 30 minutes.
13. In addition, Security Guard’s impression after reviewing the video is that Grievant left the office for short periods. The Hearing Officer finds it is reasonable to infer that the bed checks could have taken place at the times Grievant left the office. Moreover, security personnel reported to home #1 to obtain Grievant’s signatures confirming the checks had been conducted on July 28/29, 2019. Grievant signed that he had conducted the checks and denies that he did so without having performed the tasks.
14. Considering this evidence, the Hearing Officer finds the evidence is insufficient to establish that Grievant failed to conduct bed checks and falsified records when he signed indicating he had done so.
15. Accordingly, the Agency has not met its burden regarding its claims that Grievant did not conduct bed checks pursuant to policy and falsified records.

POLICIES

16. DHRM Policy 1.60 Standards of Conduct identifies “sleeping during work hours” as a Group III offense that may subject an employee to termination even if the conduct is a first offense.
17. Agency Programming Guideline Number 48 (Agency Policy 48) provides in pertinent part that “[i]ndividuals receiving general supervision will be visually checked ...at least every 30 minutes when sleeping.” Further this policy states that bedroom monitoring is required at least every 30 minutes when a resident is asleep.
18. Agency Programming Guideline Number 49 (Agency Policy 49) also provides in pertinent part that “[n]ight shift staff members must be certain to complete all scheduled bed checks and toileting sessions as scheduled.”
19. Furthermore, Agency Policy 49 § 8(I) states the following:
 - I. Staff members should never be stretched out on a couch or chair and never with pillow, sheets and/or blankets. This position indicates inadequate job performance and gives the appearance of sleeping on duty.

GROUP NOTICE AND OTHER FACTS

20. Security Guard is also an Agency investigator for abuse, neglect, and unexplained injuries of residents. Security Guard was investigating an unexplained injury of a resident that occurred on July 28 through 29, 2019. Upon reviewing the video of the shifts on those days, Security Guard observed Grievant’s actions suggesting he was sleeping on duty. Subsequently, the Agency issued Grievant a Group III Written Notice for (i) sleeping during work hours, (ii) falsifying records, and (iii) not completing rounds.
21. Grievant has no prior disciplinary record with the Agency. He believes management was too harsh with him when they removed him from his employment.

On August 27, 2019, the grievant was issued a Group III Written Notice with termination for sleeping during work hours, falsifying records, and failure to follow instructions/policy.³ The grievant timely grieved the disciplinary action and a hearing was held on November 12, 2019.⁴ In a decision dated December 2, 2019, the hearing officer determined that the evidence was not

³ Agency Ex. 1, at 1; *see* Hearing Decision at 1.

⁴ *See* Hearing Decision at 1.

sufficient to support disciplinary action for falsifying records.⁵ The hearing officer went on to conclude, however, that “the Agency ha[d] shown by a preponderance of the evidence that the Grievant slept while on duty and this behavior [was] misconduct,”⁶ that the discipline was consistent with policy and law,⁷ and that there were no mitigating circumstances warranting reduction of the disciplinary action.⁸ The grievant now appeals the hearing decision to EDR. **[request]**

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”⁹ 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.¹⁰ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer’s Consideration of Evidence

In his request for administrative review, the grievant essentially argues that the hearing officer’s findings of fact, based on the weight and credibility that she accorded to testimony presented at the hearing, are not supported by the evidence. **[see request]** Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹² and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹³ 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.¹⁴ 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.¹⁵ 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

⁵ *Id.* at 8.

⁶ *Id.*

⁷ *Id.* at 8-9.

⁸ *Id.* at 9-10.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ *See Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹² Va. Code § 2.2-3005.1(C).

¹³ *Grievance Procedure Manual* § 5.9.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *Grievance Procedure Manual* § 5.8.

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 July 28 and 29, 2019:

Consideration of the evidence reveals that Security Guard testified that he reviewed at least an hour of a video pertaining to shifts Grievant worked on July 28 and 29, 2019. Security Guard testified that he observed Grievant on the video in the staff's office. Specifically, he described the video depicting Grievant in one chair with his leg(s) stretched out in another chair. According to Security Guard, Grievant positioned himself to recline. Moreover, Security Guard observed Grievant being motionless in this position for more than a brief period, as evident by the office's motion lights remaining off. Further, Security Guard described Grievant adjusting the door to a cabinet in the office such that it remained opened which had the effect of hiding Grievant's face. Security Guard also testified that he did observe Grievant elevate himself from the reclining position once or twice, but this was only to stretch. Then Grievant returned to the reclining position. From his review of the video, Security Guard formed the opinion that Grievant may have been asleep.

While Grievant testified at one point during the hearing that the "sleeping while at work" claim was a lie, later when testifying Grievant admitted to falling asleep. Specifically, in response to a question asked during the hearing Grievant stated, "after a short while, I woke up."

The Hearing Officer had an opportunity to observe the witnesses during the hearing and finds the Security Guard's testimony credible. Moreover, the evidence demonstrates that Grievant was in a reclining position in the staff office for more than a brief period of time. This gave the appearance of his being asleep. In fact, Grievant admitted having his leg stretched out. In addition, the evidence establishes Grievant had worked 12 days with only one day off during this period. This condition presumably made him susceptible to fatigue and prone to fall asleep. In addition, Grievant's testimony contradicted itself. After careful consideration of the evidence, the Hearing Officer finds that more likely than not, Grievant was sleeping while on duty. Such behavior is misconduct.¹⁶

Based on these findings, the hearing officer concluded that "the Grievant slept while on duty,"¹⁷ and that his behavior constituted misconduct supporting the issuance of a Group III Written Notice under DHRM Policy 1.60, *Standards of Conduct*.¹⁸ Accordingly, the hearing officer upheld the disciplinary action and the grievant's termination.¹⁹

¹⁶ Hearing Decision at 7-8.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 8-9.

¹⁹ *Id.* at 10.

Upon conducting a review of the hearing record, EDR finds that there is evidence to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the issuance of a Group III Written Notice with termination was consistent with law and policy. At the hearing, the Security Guard testified consistent with the hearing officer's description of his testimony. More specifically, the Security Guard explained that, as part of his investigation, he reviewed a video recording of the grievant in the office on July 28 and 29, 2019, and that he believed the grievant was sleeping during work hours on those days.²⁰ The Security Guard based this conclusion on the length of the time the grievant stayed still, his body posture, and his failure to conduct bed checks at routine intervals.²¹ He further explained that the lights in the room were motion sensitive, that the grievant was still long enough for the lights to turn off, and that the lights stayed off for an extended period of time.²² The Security Guard also stated that the grievant opened a cabinet door to obscure his face while he was seated and that it was unusual for the grievant to have done so based on the Security Guard's experience.²³ 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.²⁴

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. 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.

Agency's Production of Video Recording

The grievant appears to further argue that the agency failed to comply with the hearing officer's prehearing order regarding the exchange of proposed exhibits because it did not provide him with a copy of Agency Exhibit 7 in advance of the hearing. **[see request]** Based on EDR's review of the hearing record, Agency Exhibit 7 consisted of a video recording of the office that the agency relied upon in issuing the discipline to the grievant. **[see request]** By statute, hearing officers have the duty to receive probative evidence and to exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.²⁵ Importantly, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court

²⁰ Hearing Recording at Track 2, 5:10-5:58, 8:34-9:16 (testimony of Security Guard).

²¹ *Id.*

²² *Id.* at 6:17-6:37 (testimony of Security Guard).

²³ *Id.* at 7:00-8:02 (testimony of Security Guard).

²⁴ *See, e.g.*, EDR Ruling No. 2014-3884.

²⁵ Va. Code § 2.2-3005(C)(5).

proceeding,²⁶ and the technical rules of evidence do not apply.²⁷ Nonetheless, the hearing officer also has the authority to exclude evidence that was “not timely exchanged consistent with the hearing officer’s orders.”²⁸

In this case, the hearing officer ordered the parties to exchange their witness lists and proposed exhibits no later than 5:00 p.m. on November 5, 2019.²⁹ At the hearing, the grievant objected to the admission of Agency Exhibit 7 because he had not received a copy of the recording in advance of the hearing.³⁰ The agency’s advocate explained that it could not release the recording outside the facility due to privacy concerns, but that the grievant could have viewed the recording at the facility before the hearing.³¹ The hearing officer sustained the grievant’s objection and excluded the recording.³² To the extent the agency failed to comply with the hearing officer’s prehearing order, her decision to exclude the recording from the evidentiary record was an appropriate exercise of discretion. Although the Security Guard testified about the content of the recording based on his recollections as discussed above, the hearing officer did not review the recording herself or otherwise consider it as evidence in making her decision. Under the circumstances presented here, EDR cannot find that the hearing officer erred or that any further remedy was available under the grievance procedure with regard to this issue. Accordingly, EDR declines to disturb the decision on this basis.

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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵



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²⁶ *Rules for Conducting Grievance Hearings* § IV(D).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Hearing Officer Ex. 1; Hearing Officer Ex. 3, at 2.

³⁰ See Hearing Recording at Track 1, 20:50-29:21.

³¹ See *id.* There appears to be no evidence in the record showing that the agency afforded the grievant an opportunity to view the recording at the facility in advance of the hearing.

³² See Hearing Recording at Track 1, 20:50-29:21.

³³ *Grievance Procedure Manual* § 7.2(d).

³⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁵ *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).