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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2020-5082  
April 27, 2020

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)<sup>1</sup> administratively review the hearing officer’s decision in Case Number 11468. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11468, as found by the hearing officer, are as follows:<sup>2</sup>

The Department of Behavioral Health and Developmental Services [the “agency”] employed Grievant as a Unit Manager at one of its facilities. She was employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.

The Resident was a sex offender residing at the Facility. He was placed in the Behavior Unit for several days because of his poor behavior at the Facility. The Resident did not like Grievant and frequently targeted her with threats and abuse. He had threatened to harm her and her family. The Resident had been targeting Grievant for over a year.

The Control Room had several tables abutting a wall with glass windows. Employees inside the Control Room could see into a Unit where there were residents. To the side of the Control Room was a hallway connecting the Unit. The Control Room had a tray slot that opened to the hallway. An employee inside the Control Room could open the tray slot to pass trays, papers, or other items

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<sup>1</sup> 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.

<sup>2</sup> Decision of Hearing Officer, Case No. 11468 (“Hearing Decision”), March 23, 2020, at 2-3.

from the Control Room to someone standing in the hallway. The hallway had a yellow line close to the tray slot. Residents were not supposed to pass the yellow line without permission.

Sound travelled from inside the Control Room into the hallway and into the Unit when the tray slot was open. Grievant and other staff were aware that what they said in the Control Room could be heard by someone standing in the hallway or Unit if the tray slot was open.

On September 25, 2019, Grievant entered the Unit. The Resident approached Grievant and spoke her name. Grievant did not “fully engage with him in undivided attention” because of his history of targeting her. She continued to walk from one resident’s room doorway to another. The Resident turned to the floor officer and said, “Get me an informal complaint [form].”

Grievant walked out of the Unit and into the Control Room to help Ms. G look for a complaint form to give to the Resident. They had difficulty finding a complaint form.

While in the Control Room, Grievant was standing approximately five feet from the open tray slot. Ms. G was standing in front of Grievant closer to the Control Room window. Ms. G was looking for forms requested by the Resident. Grievant said aloud that the Resident was a “fa—ott ass bi—h” and “fa—ott bi—h”. Grievant repeated her insults. She also said the Resident would still be there and she would be going home. The Resident was in the Unit and standing closer than ten feet from the slot window. He heard her comments about him. He became angry about her comments.

Two Emergency Response Team Officers entered the Unit with Grievant following them. The Officers stood shoulder to shoulder and approached the Resident. They began walking slowly towards the Resident which forced the Resident to move backwards. The Resident was looking at Grievant and yelling and cursing at her. Grievant spoke to the Resident as the Resident continued to yell and argue with Grievant. Grievant had been trained to remove herself from the area when a resident targeted her. Grievant remained at the entry doorway as the Officer moved the Resident farther away from her. Grievant nodded her head and wrote on her paper as she listened to the Resident yelling at her.

The Agency investigated the incident. The Investigator spoke with the Resident. The Resident said he felt degraded and humiliated by Grievant’s comments because she was calling him out by his name and she was being inappropriate as a supervisor for the Facility.

On November 25, 2019, the grievant was issued a Group III Written Notice with termination for client abuse.<sup>3</sup> The grievant timely grieved the disciplinary action and a hearing

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<sup>3</sup> Agency Ex. 1; *see* Hearing Decision at 1.

was held on March 2, 2020.<sup>4</sup> In a decision dated March 23, 2020, the hearing officer determined that the “Grievant used language that demeaned and humiliated the Resident thereby justifying the issuance of a Group III Written Notice,” and thus the “Grievant’s removal must be upheld.”<sup>5</sup> The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary action.<sup>6</sup> 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 . . . .”<sup>7</sup> 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.<sup>8</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> 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”<sup>10</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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:

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<sup>4</sup> See Hearing Decision at 1.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 4-5.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>13</sup> *Grievance Procedure Manual* § 5.8.

On September 25, 2019, Grievant engaged in client abuse. Grievant repeatedly called the Resident a “fa—ott ass bi—h” and “fa—ott bi—h”. The Resident heard Grievant’s comments. Grievant knew or should have known that the Resident could hear her through the slot window. Grievant used language that demeaned and humiliated the Resident . . . .

Grievant denied insulting the Resident. The evidence showed that Ms. G heard Grievant insult the Resident and that Grievant knew or should have known that the Resident would hear her comments.<sup>14</sup>

The grievant contends that the hearing officer’s decision “was inconsistent with [the] witnesses[’] statements” at the hearing. More specifically, she notes that she “was not viewed on surveillance with Ms[.] G at any time,” alleges that Ms. G “was not present during the incident,” and denies that she engaged in the behavior charged on the Written Notice.

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. The agency’s Departmental Instruction 201 provides that client abuse includes the “[u]se of language that demeans, threatens, intimidates or humiliates the individual.”<sup>15</sup> At the hearing, Ms. G’s testimony was consistent with the hearing officer’s description of the grievant’s behavior.<sup>16</sup> Ms. G further stated that the Resident was able to hear the grievant’s comments through the tray slot in the control room.<sup>17</sup> The agency’s investigator testified that she interviewed the Resident, who said that he felt humiliated by the grievant’s comments.<sup>18</sup> The investigator further explained that she determined the grievant’s behavior met the definition of verbal abuse and psychological harm.<sup>19</sup> The grievant, on the other hand, denied engaging in the behavior or making the statements described by Ms. G when she testified.<sup>20</sup> With regard to her presence during the incident, Ms. G testified that she had taken a 30-minute break before the incident occurred but that she observed the grievant engage in the charged misconduct after she returned from her break.<sup>21</sup> While the grievant is correct that Ms. G does not appear in the agency’s video recording of the incident,<sup>22</sup> Ms. G testified at length about her recollection of the grievant’s conduct as discussed above, and the hearing officer found her testimony credible.

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

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<sup>14</sup> Hearing Decision at 4.

<sup>15</sup> Agency Ex. 4, at 1.

<sup>16</sup> Hearing Recording at 56:52-1:13:25 (Ms. G’s testimony); *see* Agency Ex. 3, at 4-5, 18-20.

<sup>17</sup> *E.g.*, Hearing Recording at 1:00:34-1:03:38 (Ms. G’s testimony); *see* Agency Ex. 3, at 4-5, 18-20.

<sup>18</sup> Hearing Recording at 36:41-37:43 (investigator’s testimony); Agency Ex. 3, at 4, 13.

<sup>19</sup> Hearing Recording at 40:41-41:11 (investigator’s testimony); *see* Agency Ex. 3, at 1.

<sup>20</sup> Hearing Recording at 2:28:34-2:29:32 (grievant’s testimony).

<sup>21</sup> *Id.* at 1:13:37-1:15:25 (Ms. G’s testimony).

<sup>22</sup> *See id.* at 46:15-47:43 (investigator’s testimony); Agency Ex. 8.

the version of facts adopted by the hearing officer, as is the case here.<sup>23</sup> 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. 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 on this basis.

#### *Documents Issue*

In addition, the grievant submitted a supplement to her request for administrative review, in which she argues that she requested documents showing "the times [Ms. G] would have been present or absent" during the incident, which the agency failed to produce. The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and **received by** [EDR] within 15 calendar days of the date of the original hearing decision."<sup>24</sup> EDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the 15 calendar days can be considered by EDR on administrative review. The grievant presented no argument about the agency's alleged failure to produce documents in her original, timely request for administrative review, and EDR received the grievant's additional submission after the 15-calendar-day deadline for administrative review of the hearing decision had expired. Accordingly, EDR finds that this claim is untimely.

More importantly, EDR also notes that there is nothing in the hearing record to show the grievant requested an order from the hearing officer for documents showing Ms. G's break times. While the grievant appears to have mentioned her request for the documents during the hearing,<sup>25</sup> the hearing officer did not issue an order for the production of the records in question, nor did the grievant address any concerns about the agency's production of documents with the hearing officer in advance of the hearing. Moreover, EDR has not reviewed anything to indicate that the agency's failure to produce the documents, if it actually occurred as described by the grievant, impacted the outcome of the case such that the grievant suffered any material prejudice. Records of Ms. G's break times on the date the incident occurred, if such evidence exists, would have been relevant to impeach the credibility of Ms. G's testimony about the grievant's conduct; however, Ms. G testified that she took a 30-minute break before the incident occurred, as discussed above, and the hearing officer determined that her testimony was credible. Moreover, another employee who relieved Ms. G for her break before the incident occurred corroborated at least a portion of Ms. G's testimony about the timing of her break.<sup>26</sup> As a result, EDR finds no error with respect to this issue.

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<sup>23</sup> See, e.g., EDR Ruling No. 2014-3884.

<sup>24</sup> *Grievance Procedure Manual* § 7.2(a) (emphasis in original).

<sup>25</sup> Hearing Recording at 1:32:38-1:32:55.

<sup>26</sup> *Id.* at 1:25:51-1:26:29 (Ms. S's testimony); see Agency Ex. 3, at 4-5, 8-9.

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.<sup>27</sup> 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.<sup>28</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>29</sup>



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<sup>27</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>28</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>29</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).