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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5248
May 6, 2021

The Department of Behavioral Health and Developmental Services (“the agency”) 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 11629. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11629, as found by the hearing officer, are as follows:

The [agency] employed Grievant as a Direct Service Associate III at one of its facilities. Grievant began working for the Agency in October 2007.

Ms. E worked at the Facility as a Program Administrator. She was in charge of programming treatment for patients. Grievant reported to Ms. E for many years. Ms. E trained Grievant and served as a mentor for Ms. E for many years. Ms. E encouraged Grievant and other employees to reach out to former patients as a part of the patient recovery process.

Ms. E has contacted former patients as a regular part of her duties as an employee at the Facility. She testified that employees are allowed to have friendships with former employees. Cutting a former patient’s hair would be consistent with a friendship and not be inappropriate according to Ms. E. Ms. E had gone to hockey games with former patients. She had visited a former patient while the former patient was working in a restaurant. She had a cookout at her house and invited former patients to celebrate how well they were doing. Grievant had attended several events Ms. E held for former patients and Grievant learned how to interact with former patients by observing Ms. E. Grievant understood she was supposed to try to keep in touch with former patients. On one occasion in 2019, Mr. B was about to begin a new job and went to Grievant’s house. Grievant “fixed his hair” in order to improve Mr. B’s chance of success at his new job.

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As patients are in the process of being discharged from the Facility, the patients create a wellness recovery action plan. It is written by patients, not staff. Patients put staff names and contact information in their wellness recovery action plans. Wellness recovery action plans help former patients know what to do and who to contact in the event a former patient suffers a mental health crisis.

One of Grievant's duties was to be in charge of a Facility reunion with former patients. During reunions, the Facility requests and often obtains the current telephone numbers and addresses of former patients.

The practice at the Facility was for staff to "reach out" to former patients.

Mr. B is a 26-year-old male who was admitted to the Facility on December 10, 2015 because he was determined to be Not Guilty by Reason of Insanity. Mr. B was discharged from the Facility on July 14, 2017. At the time Mr. B was discharged, Grievant was within Ms. E's chain of supervision. Mr. B returned to the Facility for several years to attend the former patient reunions.

In August 2020, Mr. B was in Virginia. Mr. B's Mother lived in another state.

Mr. B's Mother contacted Grievant through Facebook because she was concerned about her son. On August 19, 2020 at approximately 1 a.m., Mr. B's Mother called Grievant. Mr. B's Mother told Grievant that she had been paying for hotel rooms for Mr. B because he claimed there were bugs and mold in his home causing him headaches. Mr. B refused to go to his home, according to Mr. B's Mother. Mr. B's Mother called Grievant because she did not know how else to call for assistance.

Grievant began calling Mr. B but Mr. B did not answer so Grievant left him voice messages. Eventually Mr. B called Grievant. Grievant asked him if he knew where he was. Mr. B said he did not know. She asked him if he was safe and he said he did not know. Grievant asked Mr. B to come to her house. Grievant did so because she was worried about Mr. B's mental health and wanted to help him. Grievant did not direct Mr. B to go directly to the hospital because she did not know his state of mind or whether he would actually seek treatment. She believed if she could get Mr. B to her house, she would be more likely to get him to the hospital.

On August 20, 2020, Mr. B drove his vehicle to Grievant's house. He parked the vehicle in the middle of the road blocking traffic. Mr. B went to the front door.

Grievant's 26-year-old Son opened the door to greet Mr. B. The Son had not met Grievant before that time. The Son said, "What's up?" Mr. B said he had to go to the bathroom. The Son said "yes." Grievant was near the Son and observed

that Mr. B's vehicle was parked in the middle of the street and mentioned this to Mr. B. Mr. B handed his keys to Grievant as he walked to the bathroom. Grievant understood that Mr. B wanted her to move his vehicle. Grievant went outside of the house and to Mr. B's vehicle in order to park it appropriately.

Mr. B remained in the bathroom for approximately an hour. He took a shower. He came out of the bathroom and sat on the couch. Mr. B told Grievant he was tired. Mr. B began making bizarre statements and behaving manic.

Grievant told Mr. B that Mr. B's Mother was concerned about him. Grievant suggested that they go to the Hospital for an evaluation. Mr. B agreed and Grievant took him to the Hospital for an evaluation. She remained at the Hospital while Mr. B was evaluated. Mr. B was released to another person. Grievant had no further contact with Mr. B after that date.

Throughout her interaction with Mr. B, Grievant was contacting Grievant's supervisor to provide updates about her interaction with Mr. B. The Supervisor did not tell Grievant to end her interaction with Mr. B.

Mr. B's Mother later called Grievant and told her that Mr. B had been hospitalized at another hospital.

Ms. H worked at the Facility. On September 23, 2020, Dr. B told Ms. H that Mr. B had contacted Grievant. The Agency began an investigation.

Ms. E testified that she did not believe Grievant engaged in unethical behavior. She testified that one of the biggest parts of patient recovery is making connections and making sure former patients are doing well.¹

On October 16, 2020, the agency issued to the grievant a Group III Written Notice with removal for violating agency policies related to patient interactions and boundaries as well as ethical behavior.² The grievant timely grieved her separation, and a hearing was held on March 10, 2021.³ In a decision dated March 30, 2021, the hearing officer concluded that "[t]here is no basis for disciplinary action in this case."⁴ Accordingly, he reversed the Group III Written Notice and ordered the grievant to be reinstated.⁵ The agency now appeals the hearing decision to EDR.

DISCUSSION

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 . . .

¹ Decision of Hearing Officer, Case No. 11629 ("Hearing Decision"), March 30, 2021, at 2-4.

² Agency Ex. A; *see* Hearing Decision at 1.

³ Hearing Decision at 1.

⁴ *Id.* at 6.

⁵ *Id.*

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.

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 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.

In its request for administrative review, the agency objects to the hearing officer’s determination that the grievant did not engage in misconduct under agency policies. The agency maintains that, contrary to the hearing officer’s findings, the plain language of the policies at issue pertains to former patients such as Mr. B.¹¹ The agency also argues that the hearing officer erred in crediting Ms. E’s testimony about the meaning of the policies over agency management’s interpretation, and that certain circumstances prevented effective rebuttal of Ms. E’s testimony.¹² In addition, the agency contends that the hearing officer failed to consider evidence that did not support his conclusions, such as the testimony of the human resources director, and that his reasoning was improperly influenced by personal sentiment.¹³ For all these reasons, the agency claims, the hearing officer erred in not deferring to the agency’s interpretation of its own policies and upholding the disciplinary action.

Misconduct Under Agency Policy

In this case, the Written Notice charged that the grievant violated ESH 050-020, *Staff and Patient Interactions and Boundaries*, and ESH 050-095, *Ethical Behavior*, by “engag[ing] in an inappropriate relationship with former patient [Mr. B] while he was a patient . . . and continuing after his discharge [The grievant] remained in contact with [Mr. B] after his discharge as well as his mother.”¹⁴ In assessing the misconduct charged, the hearing officer found that “Mr. B’s Mother contacted Grievant through Facebook” out of concern for her son and sought assistance.¹⁵

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 See Request for Administrative Review at 2.

¹² *Id.* at 2-3.

¹³ *Id.* at 3-6.

¹⁴ Agency Ex. 1.

¹⁵ Hearing Decision at 3.

The grievant then “began calling Mr. B” and leaving him voice messages.¹⁶ Mr. B eventually called her back, and the conversation left the grievant “worried about Mr. B’s mental health.”¹⁷ She “asked Mr. B to come to her house” because she believed that by doing so, “she would be more likely to get him to the hospital.”¹⁸ During her interaction with Mr. B, the grievant updated her supervisor, who “did not tell Grievant to end” the interaction.¹⁹ The hearing officer concluded that this conduct did not amount to an “inappropriate relationship” under agency policy:

[The grievant] did not exploit Mr. B or take any action that might have harmed him. She did not have any conflicting non-professional relationship with Mr. B. Grievant did not engage in any relationship with Mr. B that could be considered contrary to Mr. B’s past mental health treatment or that might undermine his current mental health status.

Grievant did not initiate contact with Mr. B or his Mother. Mr. B’s Mother contacted Grievant as a cry for help. Rather than disregarding someone in need, Grievant agreed to assist Mr. B’s Mother by attempting to contact [Mr. B]. Once Grievant was able to contact Mr. B, she provided assistance to him at [a] time when he did not know where he was or if he was safe. She persuaded him to seek an evaluation and then drove him to a place where he could be evaluated. She had no further contact with Mr. B.²⁰

The agency maintains that the grievant’s conduct did in fact violate its policies. Its request for administrative review points out that, under Policy 050-095, employees “must not engage in dual relationships with current or former patients.”²¹ The policy defines “dual relationships” as “situations in which staff members and patients maintain a professional relationship and a conflicting non-professional relationship.”²² Such conflict exists under the policy whenever “(1) the staff person has a professional role as the provider or supervisor of services to the patient that involves access to information about or the exertion of control over the provision of services;” and “(2) the staff person and patient are involved in a hierarchical, dependent or influential relationship that is not part of the patient’s treatment plan.”²³ Specific examples of prohibited conduct include “sexual or romantic relationships,” exchanges of personal favors or chores, and selling items to patients.²⁴

Here, the agency suggests that the grievant’s conduct of “attempting to contact Mr. B several times and leaving several messages for him; letting him into her home; moving his car; and driving him to [a hospital]” were acts that demonstrated an “inappropriate relationship” under

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5-6.

²¹ Agency Ex. C at 17; *see* Request for Administrative Review at 2.

²² Agency Ex. C at 17.

²³ *Id.*

²⁴ *Id.* at 17-18.

Policy 050-095.²⁵ However, even assuming that policy prohibited any “dual relationship” with a former patient, the policy language does not plainly prohibit rendering assistance outside of work to an individual who appears to be in crisis and who was discharged from agency care over three years earlier. In assessing whether the underlying conduct would in fact fall within the scope of the “dual relationship” prohibition, the hearing officer reasonably considered that the grievant was responding to a request to assist Mr. B and was acting for Mr. B’s benefit, not her own. Moreover, the hearing officer found that the grievant contacted her supervisor during this interaction, consistent with Policy 050-095’s instruction to “seek guidance from their supervisors” when uncertainty about a patient interaction exists.²⁶ EDR has reviewed no record evidence disregarded by the hearing officer that demonstrates how the grievant violated the policy or was on notice of such conduct being a policy violation under the circumstances. Accordingly, EDR perceives no reversible error in the hearing officer’s analysis.

Ms. E’s Testimony and Agency Proffer of Rebuttal Evidence

Nevertheless, the agency objects to the hearing officer’s interpretation of its policy in reliance on the testimony of Ms. E. The agency claims that, contrary to the hearing officer’s findings, Ms. E is not a member of management and, in addition, her testimony was not accurate: “[i]t is not the practice for staff to reach out and form personal, social relationships or friendships with former patients.”²⁷

To rebut Ms. E’s testimony on this point, the agency has proffered an affidavit by the facility’s Director of Clinical Services, who reportedly was unavailable for testimony at the hearing, and it requests “for the record to be reopened for a full and fair exploration of these issues.”²⁸ Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”²⁹ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.³⁰ The party proffering such evidence must show that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.³¹

²⁵ Request for Administrative Review at 1-2.

²⁶ Agency Ex. C at 18.

²⁷ Request for Administrative Review at 2.

²⁸ *Id.* at 3.

²⁹ *Cf. Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

³⁰ *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

³¹ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the agency asserts that it was not aware until shortly before the hearing that the Director of Clinical Services would be unavailable to testify.³² Further, the agency indicates it did not anticipate the substance of Ms. E's testimony and, while the Director would have offered a rebuttal, the agency was not aware of the possibility of keeping the evidentiary record open for potential rebuttal evidence.³³ The agency claims that Ms. E's testimony prompted an independent investigation of her statements, which is reflected in the proffered affidavit.

EDR cannot find that these circumstances present a basis to reopen the record or ultimately call into question whether a full and fair hearing occurred in this matter. Even if the substance of the Director's testimony (not the results of a post-hearing investigation) was "in existence at the time of the hearing" yet not known to the agency until afterward, the agency has not demonstrated that it exercised due diligence to learn of such evidence and give the hearing officer an opportunity to consider it in making his decision. The proffered affidavit indicates that the Director was on scheduled leave and therefore unavailable to testify. Ms. E was listed on the grievant's witness list, and the agency was represented by an experienced advocate. While the agency asserts that its advocate contacted the agency "immediately after the hearing" on March 10 to discuss these matters,³⁴ EDR is not aware of any request to the hearing officer to re-open the record before the decision was issued on March 30.

Moreover, upon review of the proffered affidavit, EDR is not persuaded that it would be "likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended." As indicated above, EDR has not reviewed evidence in the record that substantiates how the prohibition on "dual relationships," as articulated in Policy 050-095, plainly encompasses the grievant's behavior in this case. Therefore, while the Director's affidavit might reasonably establish management's interpretation of its policy on behalf of the facility, it does not offer new facts to the effect that the grievant should have understood how the policy applied under the circumstances. Similarly, although the affidavit could be accepted to disavow Ms. E's interpretation of policy, it appears that the hearing officer found Ms. E's testimony credible regarding her own actual practice of interactions with former patients for many years, including when she was the grievant's supervisor. Nothing in the affidavit suggests that Ms. E's personal actions and policy understandings were not as she testified. At most, then, the Director's rebuttal affidavit might establish that the grievant received conflicting messages about healthy and appropriate interactions with former patients during her employment at the agency.

Because the agency's proffered affidavit does not meet the standard required for newly-discovered evidence, and nothing in the record suggests the hearing officer erred in his consideration of Ms. E's testimony, EDR will not disturb the decision on these grounds.

Other Issues

In addition, the agency contends that the hearing officer failed to comply with the grievance procedure by not considering testimony by the human resources director, by ignoring the

³² Request for Administrative Review at 3.

³³ *Id.*

³⁴ *Id.*

grievant's false testimony and history of boundary issues with patients, by disregarding the original complaint by Mr. B, and by inserting his own "personal sentiment" into the analysis of whether the grievant violated agency policy.³⁵

Upon a thorough review of the record, EDR cannot find that the hearing officer failed to consider the evidence in compliance with the requirements of the grievance procedure. As a general matter, there is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand. In addition, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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. Here, it is not clear how the agency's cited testimony and evidence of the grievant's previous "boundary issues" would be inconsistent with the hearing officer's findings. In any event, weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and nothing in the record suggests that the hearing officer in this case abused his discretion in that regard.

EDR further perceives no error in the hearing officer's consideration of evidence regarding Mr. B's complaint. While the agency argues that the grievant "improperly inserted herself into Mr. B's personal life,"³⁶ the hearing officer concluded that the evidence did not show that the grievant's actions rose to the level of an inappropriate relationship. The agency had the burden to prove that the grievant committed misconduct; it does not appear that the hearing officer's discussion of Mr. B's complaint imposed a higher standard of proof in this regard.

Finally, the agency takes issue with the hearing officer's reasoning that the grievant did not violate agency policy because she was "trying to save a man's life."³⁷ The agency argues that the hearing officer passed his own judgment on how agency policy should account for the grievant's motives – effectively taking on the role of "super personnel officer."³⁸ While the grievance procedure does not permit hearing officers to override decisions reserved to agency management,³⁹ we do not read the hearing decision to suggest that the hearing officer usurped the agency's authority in this case. At issue at the hearing was whether the grievant's conduct demonstrated an "inappropriate relationship" with a former patient under agency policies. The hearing officer concluded, based on the evidence presented, that the grievant's actions reflected not a "dual" or otherwise inappropriate relationship, but a desire to assist a person in distress. Nothing in the hearing decision, or in this ruling, should be interpreted to conclude that the agency's policies are invalid or that the agency may not prohibit conduct like the grievant's in this case.⁴⁰ Should the grievant return to her position at the agency, the agency will maintain its discretion to communicate

³⁵ *See id.* at 3-6.

³⁶ *Id.* at 5.

³⁷ *Id.* at 6; *see* Hearing Decision at 6.

³⁸ Request for Administrative Review at 6.

³⁹ *See Rules for Conducting Grievance Hearings* § VI(A).

⁴⁰ The grievant has asserted other legal challenges to the agency's policies as applied. *See* Rebuttal at 3-4. However, those issues are not before EDR upon administrative review.

performance expectations to the grievant and to enforce them through appropriate personnel management actions.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision.⁴¹ 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.⁴² 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.⁴³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁴

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⁴¹ The agency has requested an order to the grievant to disclose interim earnings and other information relevant to the hearing officer's award of back pay and benefits. Request for Administrative Review at 7. Although EDR will not disturb the hearing decision, it is not yet final pending determination of any attorneys' fees that are due based on the grievant's request. See *Grievance Procedure Manual* § 7.2(e). As such, any requests for orders and other issues related to the award set forth in the decision should be presented to the hearing officer as appropriate.

⁴² *Grievance Procedure Manual* § 7.2(d).

⁴³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).