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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5274
July 12, 2021

The grievant 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 11662. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11662, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services [the “agency”] employed Grievant as a Direct Service Associate II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility issued coats and other clothing to patients. Patient 1 received a coat from the Facility and kept that coat in her room. Patient 2 had a history of going into the rooms of other residents and removing items that did not belong to Patient 2. Patient 2 was admitted to the Facility in May 2020. She had a history of being impulsive, aggressive, yelling, spitting at staff, and denying having a mental illness.

On January 12, 2021, Grievant was working in the Pod with several residents. Patient 2 went into Patient 1’s room and took the coat issued by the Facility to Patient 1. Grievant observed Patient 2 wearing the coat and wanted to have the coat returned to Patient 1 in order to avoid a fight between Patient 1 and Patient 2. Grievant approached Patient 2 and repeatedly asked Patient 2 to take off the coat. Grievant told Patient 2 that Grievant needed to have the coat. Patient 2 refused to give Grievant the coat. Patient 2 became loud, aggressive, and delusional. Patient 2 claimed the coat was her coat. Grievant approached Patient 2 and began pulling the sleeves of the coat in order to pull the coat off of Patient 2. As Grievant

¹ Decision of Hearing Officer, Case No. 11662 (“Hearing Decision”), May 26, 2021, at 2-3.

was removing Patient 2's coat, Patient 2 was screaming and resisting. Grievant scratched Patient 2's left arm leaving three vertical scratches. Grievant walked away from Patient 2. The RN noticed bleeding from the scratches on Patient 2's arm. The RN cleaned and treated Patient 2's wound.

The Facility had an adequate supply of coats. Grievant could have obtained another coat to give to Patient 1 instead of removing Patient 2's coat.

On February 1, 2021, the agency issued to the grievant a Group III Written Notice with termination for client abuse.² The grievant timely grieved the disciplinary action and a hearing was held on May 25, 2021.³ In a decision dated May 26, 2021, the hearing officer found that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse," and thus its "decision to remove Grievant must be upheld."⁴ The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.⁵ The grievant now appeals the 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"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 either 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.

In her request for administrative review, the grievant argues that the agency "did not make a concerted effort" to have the witnesses she wished to call available to testify and failed to provide her with a video recording of the incident.⁹ The grievant further appears to claim that the evidence was insufficient to demonstrate that she engaged in misconduct and disputes the characterization of her conduct as client abuse because she did not intend to harm Patient 2.¹⁰

Documents and Witness Issues

The grievant raises issues with the agency's production of documents and the appearance of witnesses at the hearing. In particular, the grievant claims that the agency failed to comply with

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

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.* at 4-5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Request for Administrative Review at 2.

¹⁰ *Id.* at 1-3. The grievant also states that she is no longer seeking reinstatement, but rather the removal of the termination for client abuse from her employment record. *Id.* at 3. EDR's authority on administrative review is limited to reviewing the hearing decision for compliance with the grievance procedure and ordering the hearing officer to correct any such noncompliance. *See Grievance Procedure Manual* § 7.2(a).

the hearing officer's order to produce a video recording of the incident, which the grievant believes would have supported her position that she did not engage in misconduct.¹¹ The grievant further appears to argue that the agency did not make witnesses who had been ordered to appear available to testify at the hearing.¹²

Pursuant to the *Rules for Conducting Grievance Hearings*, a hearing officer may "issue an order for . . . the production of documents" upon request by a party.¹³ The *Rules* further state that it is the agency's responsibility to require the attendance of agency employees who, as in this case, are ordered by the hearing officer to attend the hearing as witnesses.¹⁴ In cases where a party fails to produce relevant documents or does not "make available relevant witnesses" who have been ordered to attend, hearing officers have the authority to draw an adverse inference against that party if warranted by the circumstances.¹⁵

Agency's Production of Video Recordings

The grievance statutes further provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved, shall be made available upon request from a party to the grievance, by the opposing party."¹⁶ EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Just cause is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."¹⁷ For purposes of document production, examples of just cause include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.¹⁸

In this case, the hearing officer issued an order directing the agency to produce any video recordings of the incident. At the hearing, the agency's investigator testified that the video cameras in the area were not working when the incident occurred, and thus no recordings existed.¹⁹ On administrative review, the grievant states that it is "hard to believe" that none of the cameras in the areas were working at the time.²⁰ The hearing officer considered this issue in the decision:

Grievant objected to the absence of video evidence of the incident. The Agency did not present video evidence because the cameras in the room were not working. Although the lack of video evidence seems unusual, the Hearing Officer has no basis to conclude the Agency's claim was untruthful.²¹

¹¹ Request for Administrative Review at 2.

¹² *Id.*

¹³ *Rules for Conducting Grievance Hearings* § III(E).

¹⁴ *Id.* ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.")

¹⁵ *Id.* § V(B).

¹⁶ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

¹⁷ *Grievance Procedure Manual* § 9.

¹⁸ See, e.g., EDR Ruling No. 2020-4970; EDR Ruling Nos. 2008-1935, 2008-1936.

¹⁹ Hearing Recording at 35:31-35:47 (investigator's testimony).

²⁰ Request for Administrative Review at 2.

²¹ Hearing Decision at 4.

The hearing officer essentially determined that the agency had presented just cause for not producing video recordings of the incident as ordered because they did not exist. 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. EDR has not reviewed anything to contradict the agency's representation that there was no video footage of the incident or to suggest that the hearing officer abused his discretion by declining to sanction the agency for failing to comply with the documents order in this case.

Appearance of Witnesses

In her request for administrative review, the grievant has raised questions about some of the witnesses on her list not being present at the hearing, and that the agency's advocate required additional time during the hearing to locate one of the witnesses who did testify.²² Pursuant to the *Rules for Conducting Grievance Hearings*, agencies are required to make available any employee who has been ordered by the hearing officer to appear.²³

The hearing officer issued orders for six witnesses to appear at the hearing. The grievant explained at the hearing that, of the six employees ordered to appear, one was deceased.²⁴ The agency's investigator confirmed that two of the six witnesses were no longer employed by the agency.²⁵ The agency's advocate further stated that one of witnesses was not an agency employee, but instead worked for a staffing agency.²⁶ The two remaining witnesses who worked for the agency and were ordered to appear both testified at the hearing.²⁷ In addition to these six witnesses, the grievant's witness list included a seventh employee for whom no witness order was issued.²⁸ At the hearing, the agency's advocate stated that they were unable to identify an employee with the seventh witness's name.²⁹ The grievant clarified that the seventh witness also worked for a staffing agency.³⁰

It appears the hearing officer did not draw an adverse inference based on the nonattendance of any witnesses who were ordered to appear, as there is no discussion about these issues in the hearing decision.³¹ One of the grievant's witnesses was deceased and two were no longer employed by the agency; the witness employed by the staffing agency was also not an agency employee. Under these circumstances, EDR find no error in the hearing officer's choice not to draw an adverse inference against the agency for failing to make these four witnesses available because they were not within the agency's control, *i.e.* they were not agency employees. The remaining

²² Request for Administrative Review at 2.

²³ *Rules for Conducting Grievance Hearings* § III(E).

²⁴ See Hearing Recording at 37:29-37:36, 59:32-59:39.

²⁵ *Id.* at 20:22-20:46, 23:58-24:15 (investigator's testimony).

²⁶ *Id.* at 1:03:27-1:03:34.

²⁷ *Id.* at 42:08, 1:47:33.

²⁸ The grievant requested an order for the seventh witness, but it appears that the agency could not identify any employee with the name provided by the grievant. The grievant did not have any other contact information for the seventh witness, and thus there was no way to direct an order to them.

²⁹ Hearing Recording at 1:03:53-1:04:00.

³⁰ *Id.* at 1:04:03-1:05:20.

³¹ Because no order was issued for the appearance of the seventh witness, there was no basis for the hearing officer to draw an adverse inference against the agency for that witness's failure to testify. See *Rules for Conducting Grievance Hearings* § V(B) (stating that the hearing officer may draw an adverse when a party "has failed to make available relevant witnesses as the hearing officer or EDR had ordered").

two witnesses who were ordered to appear, both of whom were agency employees, testified at the hearing. Though the grievant takes issue with the agency's apparent difficulty in locating one of these witnesses, the agency ultimately made the witness available to testify.

Having considered the grievant's arguments on administrative review, EDR finds no basis to conclude that the hearing officer erred or otherwise abused his discretion in relation to the agency's alleged failure to produce documents or make witnesses available to testify. Accordingly, we decline to disturb the decision on these procedural grounds.

Sufficiency of Evidence

In the remainder of her request for administrative review, the grievant appears to allege 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. Specifically, the grievant claims that employees at the facility "gossip . . . and recall situations based upon hearsay versus what they personally witnessed," arguing that the witnesses to the incident did not provide truthful information about what happened.³² In addition, the grievant contends that she did not engage in client abuse because she did not act with the intent to harm Patient 2 and claims that Patient 2 was the actual aggressor during the incident.³³

Hearing officers are authorized to make "findings of fact as to the material issues in the case"³⁴ and to determine the grievance based "on the material issues and the grounds in the record for those findings."³⁵ 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.³⁶ 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.³⁷ 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 Group III Written Notice issued to the grievant in this matter charged her with client abuse because she "approached [Patient 2] and forcibly took a coat off [Patient 2] that belonged to another patient," which "caused 3 linear scratches to [Patient 2's] left forearm that caused bleeding."³⁸ The hearing officer assessed the evidence regarding the grievant's conduct toward Patient 2 as follows:

³² Request for Administrative Review at 1-2.

³³ *Id.* at 2-3.

³⁴ Va. Code § 2.2-3005.1(C).

³⁵ *Grievance Procedure Manual* § 5.9.

³⁶ *Rules for Conducting Grievance Hearings* § VI(B).

³⁷ *Grievance Procedure Manual* § 5.8.

³⁸ Agency Ex. A.

On January 12, 2021, Grievant approached Patient 2 and pulled the sleeves of the coat Patient 2 was wearing and pulled the coat off of Patient 2. Patient 2 expressed to Grievant that Patient 2 was refusing to have the coat removed. Grievant acted contrary to Patient 2's refusal. Grievant engaged in client abuse by removing the coat from Patient 2 without Patient 2's consent and by scratching Patient 2 during the struggle to remove the coat. . . .

Grievant argued that she had to remove the coat from Patient 2 in order to avoid a fight between Patient 1 and Patient 2. She asserted she was screaming for help but no one helped her.

It was unnecessary for Grievant to remove the coat from Patient 2. The Facility had additional coats that Grievant could have given to Patient 1. Other staff knew Patient 2 sometimes removed items from the rooms of other patients. If Patient 2 refused to return items, staff would wait for a reasonable period of time and then approach Patient 2 again to request and obtain the items. The conflict was created when Grievant chose to remove the coat from Patient 2. Grievant's perception of an emergency was not a sufficient basis to justify her actions.³⁹

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's investigator testified that he interviewed several witnesses about the incident and concluded the grievant had engaged in abuse of Patient 2. In particular, the investigator described the witnesses' statements about the incident consistent with the hearing officer's findings,⁴⁰ noting specifically that the grievant caused three scratches on Patient 2's arm while pulling off the coat.⁴¹ The investigator further clarified that he determined the grievant had engaged in abuse because Patient 2 experienced physical harm due to the grievant's conduct.⁴² In addition to the investigator, an employee who witnessed the incident also testified at the hearing. The employee described their recollection of the incident, stating that the grievant "forcibly" removed the coat from Patient 2 and scratched Patient 2's arm.⁴³

Nevertheless, the grievant objects that the witnesses to the incident could not have seen what happened because they were not close enough to her and Patient 2, that she did not act aggressively towards Patient 2, and that she removed that coat to prevent a fight between Patient 1 and Patient 2.⁴⁴ Although the grievant disagrees, the hearing officer was entitled to evaluate the testimony of the witnesses on these matters and to accept the agency's interpretation of these events as more persuasive. 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

³⁹ Hearing Decision at 4.

⁴⁰ *E.g.*, Hearing Recording at 15:48-16:32 (investigator's testimony); *see* Agency Ex. C at 6-9.

⁴¹ Hearing Recording at 18:20-18:38 (investigator's testimony); *see* Agency Ex. C at 6-9.

⁴² Hearing Recording at 31:50-32:32 (investigator's testimony); *see* Agency Ex. C at 9-10.

⁴³ Hearing Recording at 43:28-45:34 (DSA's testimony); *see* Agency Ex. C at 11-13.

⁴⁴ *See* Request for Administrative Review at 1-3.

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.⁴⁵

Regarding the grievant's intent, the agency's Departmental Instruction ("DI") 201 addresses abuse and neglect of clients.⁴⁶ As relevant here, DI 201 defines "client abuse" as "any act . . . by an employee . . . responsible for the care of an individual in a facility operated by the department that was performed . . . knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm . . . to a person receiving care or treatment"⁴⁷ Significantly, and contrary to the grievant's argument, a finding of client abuse or neglect under DI 201 is not necessarily conditional on the intent of the accused employee; indeed, the hearing officer specifically noted that it was "not necessary for the Agency to show that Grievant intended to abuse [Patient 2] – the Agency must only show that Grievant intended to take the action that caused the abuse."⁴⁸ The hearing officer determined that the grievant engaged in conduct that resulted in physical harm to Patient 2; namely, "removing the coat from Patient 2 without Patient 2's consent" and "scratching Patient 2 during the struggle to remove the coat."⁴⁹ This determination was based on the evidence in the record, as discussed above.

Taken together, the above evidence supports the hearing officer's finding that the grievant's behavior was appropriately considered client abuse in this case. Accordingly, EDR declines to disturb the hearing decision on these grounds.

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.⁵⁰ 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.⁵¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁵²

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⁴⁵ See, e.g., EDR Ruling No. 2020-4976.

⁴⁶ See generally Agency Ex. F.

⁴⁷ *Id.* at 2.

⁴⁸ Hearing Decision at 3.

⁴⁹ *Id.* at 4.

⁵⁰ *Grievance Procedure Manual* § 7.2(d).

⁵¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁵² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).