Issue: Administrative Review of Hearing Officer's Decision in Case No. 9515; Ruling Date: May 19, 2011; Ruling No. 2011-2929; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision Affirmed.

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

## ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2011-2929
May 19, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9515. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

### FACTS

The relevant facts as set forth in Case Number 9515 are as follows:

> The Department of Behavioral Health and Developmental Services employs Grievant as a Certified Nurse Aide at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> When a patient has behavior that is difficult to manage, the Agency will sometimes place that patient in a "one-to-one relationship" with an employee. For example, a patient who poses a risk to himself or herself or to others may be placed in a one-to-one relationship with employee at the Facility. The Agency teaches its employees that they should be within arm's reach of a patient and be in a position to observe the patient as part of the one-to-one relationship.
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> The Client was admitted to the Facility on August 27, 2010 in accordance with a Temporary Detention Order. He had been an inmate at a local jail. He may have suffered a nervous breakdown before incarceration. The Client showed bizarre behavior during the crime he was alleged to have committed and was arrested on August 15, 2010. The client was not eating, he was drinking, pacing around, plugging the toilet and saying bizarre statements to staff. His Axis I diagnosis was Psychotic Disorder, NOS.
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> On October 14, 2010, Grievant was working in a one-to-one relationship with the Client. The Client was lying horizontally in his bed and was asleep. Grievant sat on the Client's bed and placed her right leg and foot on the bed. The

door to the Client's room was ajar. Ms. P was able to see inside the room and observed Grievant. Ms. P realized Grievant's behavior was inappropriate and walked down to speak with the Registered Nurse. Ms. P said "come look at this" to the Registered Nurse. The Registered Nurse walked down to the Client's room and looked into the room. The Registered Nurse observed Grievant lying horizontally on the Client's bed on top of the bedcovers. Both of her feet were on the Client's bed and she was positioned next to the Client's side. Grievant was awake but the Client was asleep. The Registered Nurse entered the room. Grievant seemed startled to see the Registered Nurse. The Registered Nurse questioned the appropriateness of Grievant's behavior. Grievant explained that she was in the Client's bed because she was "just trying to calm him down and to get him to sleep." [1]

Based on these facts, the hearing officer reached the following Conclusions of Policy:

> Human Resources Policy RI 050–20 sets forth the Agency's policy governing Staff and Resident Interaction and Boundaries. This policy provides:
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> > All hospital staff will conduct themselves in a professional manner at all times in accordance with the cited DI's, policies, and within the standards of practice for their discipline. Staff will continue this professional interaction with residents for the entire period that the resident is hospitalized and for as long as the staff is employed, or by any service (volunteer or otherwise) at the [Facility]. All professional staff will follow the respective Code of Ethical Conduct Standards, licensing board regulations and/or [Facility] Credentialing/Privileging standards concerning interaction with residents.
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> > Behaviors considered inappropriate and to be unacceptable in a professional interaction between hospital staff and residents include, but are not limited to:
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> > - Implementing restrictions for any resident that are not in the approved program rules ordered for an individual by the attending physician;
> > - Giving or loaning money or goods to residents;
> > - Taking residents off grounds or meeting the resident off grounds for any reason other than those approved by the physician for the treatment of the resident documented in the treatment plan;
> > - Using profanity, vulgarity, and/or abusive language with anyone at any time while working;

[1] Decision of the Hearing Officer in Case 9515, issued February 28, 2011("Hearing Decision"), at 2-3.

- Selling, giving, and/or purchasing items for and from residents, except through accepted hospital channels;
- Accepting gifts for personal services for personal favors from residents with their families;
- Addressing residents by "pet" names, or in affectionate terms, e.g. honey, darling, sweetie, or similar slang references, unless it is the expressed preference of the resident;
- Using words, tone, body language, and or other action done deliberately or repeatedly to provoke, antagonize, or upset a resident;
- Stereotyping a resident based on the individual's culture and background for diagnosis;
- Taunting, i.e., staff consuming foods/beverages before residents, talking about food, activities, or entitlements residents can not share;
- Staff use of cell phones while on the unit or in the vicinity of residents (except in the event of a resident emergency), disclosure to a resident of personal telephone numbers, or allowing residents to use a personal cell phone;
- Staff discussion/disclosure of personal information in the vicinity of residents;
- Staff disclosure of personal information/correspondence regarding other staff members and/or residents in any format (e-mail/paper hard copy/verbal) to residents;
- Staff contacting residents outside of normal work hours, unless cleared with the staff person's direct supervisor and included specifically in all involved residents' treatment plans.

Failure to follow written policy is a Group II offense. The offense of lying on a patient's bed while a patient sleeps is not enumerated as an offense under the Agency's policy. The policy, however, is not all-inclusive. Based on the testimony of the witnesses, there exists a sufficient basis for the Hearing Officer to conclude that Grievant knew or should have known that lying horizontally on a patient's bed while the patient slept was a non-therapeutic interaction contrary to the Agency's policy. Grievant was in a one-to-one relationship with the Client. She was expected to remain within a short distance of the Client and be in a position to observe him for his safety and for her safety. The Client had demonstrated unpredictable, irrational, and sometimes violent behavior. By placing herself next to the Client in a horizontal position, Grievant was unable to protect herself in the event the Client awoke and became violent. Grievant had received training entitled Therapeutic Options of Virginia. None of that training would have supported her lying on the bed next to a sleeping patient. The

> negative reaction of Ms. P and the Registered Nurse when they observed Grievant shows that Grievant's behavior was not consistent with the Agency's norms. There is sufficient evidence to support the conclusion that Grievant's behavior was contrary to Agency policy governing the interactions between employees and patients. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, the Agency may suspend an employee for up to 10 work days. Accordingly, Grievant's suspension must be upheld.
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> Grievant argued that it was a common practice at the Facility for staff to sit on a patient's bed. For example, an employee might sit on a patient's bed in order to feed, clean, and give medication to a patient. This argument is unpersuasive. Grievant was in a one-to-one relationship. She was not feeding, cleaning, or giving medication to the Client. Grievant was not merely sitting on the bed, she laid down in a horizontal position on the bed and was positioned next to the Client.[2]

Based on the foregoing, the hearing officer upheld the charged offense of a Group II Written Notice of disciplinary action with a 10 workday suspension for a non-therapeutic interaction with a patient. The hearing officer found no mitigating circumstances that warranted a reduction in the discipline.

## DISCUSSION

By statute, this Department 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."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

*Findings of Fact*

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[6] 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

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[2] *Id.* at 3-5. (Footnotes from the Hearing Decision have been omitted here.)
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.

disciplinary action, or aggravating circumstances to justify the disciplinary action.[7] 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.[8] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the grievant simply contests the hearing officer's findings of fact, particularly those associated with the two witnesses who observed the grievant in bed with a patient. The grievant asserts that the testimony of these witnesses was untimely, conflicting, and they should be viewed as unreliable witnesses.[9] As reflected above, determinations regarding witness credibility are the dominion of the hearing officer. Because the record contains testimony that supports the hearing officer's findings, this Department will not disturb those findings or his conclusions regarding the credibility of testifying witnesses.[10]

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[7] *Rules for Conducting Grievance Hearings* § VI(B).

[8] *Grievance Procedure Manual* § 5.8.

[9] While the grievant does not identify the purported contradiction in witness testimony, one possible distinction between the two eyewitness accounts seems to center on whether the grievant was lying or sitting on the bed. The Hospital Director testified that it was immaterial whether the grievant was lying in the bed or sitting--either would have supported a Group II Written Notice. Testimony beginning at 1:11:00. The alleged untimely nature of this testimony is not explained or set forth in the grievant's request for administrative review.

[10] *See* testimony beginning at 30:00 (eyewitness testimony). The grievant asserts that some witnesses who had testified may have discussed questions posed and their corresponding testimony with witnesses who had not yet testified. As to the specifics of these conversations, the witness testifying as to what transpired outside of the hearing stated that a witness who had testified was upset about being involved with something that "she didn't have anything to do with." Testimony beginning at 2:05:00 Also, according to the observing witness who overheard discussions, witnesses were upset by some of the questions that were posed by the grievant's representative. The observing witness also stated that she heard the Hospital Director direct employees to testify truthfully.

While any discussion between those who have testified and those who have not are to be avoided, the specifics as described by the observing witness do not appear to reflect any sort of misconduct that would require a new trial. The testimony of the two eyewitnesses called by the agency was consistent with earlier statements given to an agency investigator. *See* hearing testimony beginning at 30:00 and Agency Exhibit 7 (Investigative Report and Witness Statements). Moreover, according to the grievant's own witness, the Hospital Director directed witnesses to testify truthfully. This Department cannot conclude that such a directive was inappropriate.

Also, the grievant asserts that the agency's investigation yielded a result of insufficient evidence. However, it is important to note that while the investigation was originally opened as a sexual abuse investigation, the grievant was disciplined for a non-therapeutic and unprofessional interaction with a patient. The determination as to whether <u>sexual abuse</u> had occurred was "unsubstantiated based on insufficient evidence." The final report, however, went on to conclude that the grievant's behavior was "deemed both inappropriate and non-therapeutic." Agency Exhibit 7 and Investigator's testimony beginning at 13:00.

As a final note, the grievant delivered to this Department an audio recording of a conversation purportedly between her and a registered nurse. The tape was not introduced at hearing. A tape, the contents of which was not entirely evident, was discussed at the beginning of the hearing and the grievant (through her representative) indicated that she did not wish to introduce it as evidence. Hearing recording beginning at 1:00. If this Department assumes that the tape provided to this Department now for consideration upon administrative review is the one discussed at hearing, the grievant made a decision not to introduce it as evidence and it will not be considered by this Department upon review. If we are to assume that the tape is one other than that discussed at hearing, the grievant has provided

## CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[11] 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.[12] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[13]

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Claudia T. Farr
Director

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no evidence that it is newly discovered evidence which could not have been presented at hearing. Accordingly, it will not be considered now upon review.

[11] *Grievance Procedure Manual* § 7.2(d).

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

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