JANET L. LAWSON
DIRECTOR

# COMMONWEALTH OF VIRGINIA

***Department Of Human Resource Management***

***Office of Employment Dispute Resolution***

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

## ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2024-5704
June 13, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12036. For the reasons set forth below, EDR will not disturb the hearing decision.

## FACTS

The relevant facts in Case Number 12036, as found by the hearing officer, are as follows:[1]

> Prior to his dismissal, the Agency employed Grievant as a Psychology Associate II at the Facility. As a Psychology Associate at the Facility, Grievant's core responsibilities included direct patient care. At other times relevant to this case and prior to December 2022, Grievant had been a Health Care Specialist II as part of the Facility's quality management group. In that role, Grievant's duties included identifying and reporting potential triggers of patient aggression, reporting on quality improvement efforts and coordinating the "near misses" program. No evidence of prior active disciplinary action was introduced during the hearing.
>
> At all times relevant to this case, Grievant had Level One HIPAA Access. Grievant's Employee Work Profile described his Level One Access as "complete access to all Patient related Protected Health Information."
>
> Attorney is Grievant's brother.
>
> On August 18, 2021, at 3:29 pm, a paralegal in Attorney's office emailed Grievant at Grievant's Agency email address regarding Patient G. The paralegal requested information from Grievant and stated that "[t]his is one of Attorney's clients who has been admitted into [Facility], [Attorney] asks what is his status?" Grievant replied on that same date at 4:39 pm from his Agency email account with a narrative summary of information from the patient's health record, including

[1] Decision of Hearing Officer, Case No. 12036 ("Hearing Decision"), Apr. 12, 2024, at 5-9 (footnotes omitted).

information regarding the patient's criminal record, his ethnicity, former city of residence (noting that also was the location of the patient's authorized representative), prior injury (including type and date) and drug use history. Grievant also made the observation that "[t]he evaluations are different here depending on who he talks with."

On September 8, 2021, at 11:57 am, the Attorney's paralegal again emailed Grievant at his Agency email address, this time informing Grievant that Attorney had been court-appointed to represent two patients, Patient C and Patient L, and requesting Grievant to "let him know their status." At 1:10 pm, Grievant replied to ask the paralegal for clarification, writing "[d]o you mean what their classification is, their diagnosis, or how they are behaving?"

On September 20, 2021, at 10:01 am, Attorney's paralegal emailed Grievant at his Agency email address stating that "[Attorney] asks if you could please send him any information you have on [Patient C] while he was a patient at [Facility]." Grievant replied from his Agency email account on September 21, 2021, at 11:09 am and provided a narrative summary of information that included, the month the patient transferred to the Facility from another facility, the reason Patient C was admitted to the other facility, and information that the patient had "been found unrestorable" at a prior time. Grievant also provided information about the patient's discharge to another facility, the patient's transfer, information about a notation from "Social Work," information about anticipated future study involving the patient, the name of a community services board member following the patient and that "his mother is involved."

On March 9, 2022 at 9:49 am, Attorney's paralegal emailed Grievant at his Agency email address with the request from Attorney that Grievant "let him know [Patient L's] status." Grievant replied from his Agency email account at 4:45 pm that same day and provided screen shots of documents and information from Patient L's electronic health records, including information about the patient's admission status and admission date, birth date, medications, readiness for discharge, behavior, social worker notes, and diagnoses in addition to screen shots of court documents.

On June 13, 2022, at 2:12 pm, Attorney's paralegal emailed Grievant at his Agency email address and asserted that Attorney "represents this gentleman in Court tomorrow." The paralegal requested from Grievant "what can you tell him about [Patient N]?" Grievant replied from his work email account at 3:31 pm that same day and provided a narrative summary of information including where Patient N was from, prior criminal and medical history, specific information about behavioral history, information from notes, name of a former psychiatrist, a quote from a notation made by the patient's psychologist and a screen shot of notes from the patient's social worker (including the social worker's name).

Writer contributes articles to Blog and newspapers across Virginia. Writer testified that his investigative reporting focuses on issues related to healthcare and education in Virginia.

On March 16, 2023, at approximately 11:30 am, Grievant sent an email to the editor of Blog. Grievant provided the editor with Grievant's personal email address and requested that the editor put Grievant into contact with Writer, a contributor to Blog. Grievant wrote:

> Hello. In many of your [Blog's] articles I participate in some of the discussions with the pseudo name [penname]. I have commented on some of the systemic abuse I have seen in particular with regards to SARs-2 restrictions in state psychiatric facilities. I have much information – first hand and documented I would like to share with [Writer]. He has been kind enough to invite me to connect with him and asked that I contact you. . . .

Writer responded to Grievant at 11:44 am on that same day, as follows:

> Good morning [Grievant]. As background, I was on [Governor's] transition team. The gubernatorial appointees in the Department of Health and Human Resources have been very forthcoming with me up until now.
>
> They don't want bad things to go uncorrected and in my experience with them won't try to cover anything up. I fully expect that they will be very aggressive in pursuing your observations and will get back to me on what they find and do about it.
>
> They will need as much detail as you have – locations, observations, dates, times, names – in order to pursue it. Pass it on to me and I will provide it to them with or without your name and contact information attached as you may specify.

Grievant responded to Writer and the editor at 5:07 pm on March 16, 2023. Grievant thanked editor for putting him in touch with Writer and then provided Writer with additional information about Grievant:

> [Writer] I work at [Facility]. Please let me know what information may be helpful to you as I have much and have spoken with OSIG both by phone and in person, as well as the state human rights advocate. I have contacted [Delegate] via email several times, as well as [Senator A and Senator B]. However actions at this hospital continue to be abusive and I will continue loudly advocate for these patients to whomever may be able to help.

Writer emailed Grievant later that evening:

> I am going to elevate this information above the people you talked to. Let me know if I can use your name or not and whether you would be willing to meet with senior state officials to discuss. I would like details of a couple of specific incidents to make the point.

Writer continued to communicate with Grievant and advised that he was speaking with administration officials of his intent to assist Grievant. On March 21, 2023, at 8:05 am, Writer sent Grievant an email writing:

> The time is very opportune for you to go forward with your complaint about conditions at [Facility]. I have contacted [Cabinet Secretary], and he will personally ensure your complaints are investigated properly. But again, he will need specifics. If you send them to me I will provide them to him, also personally. He really wants any abuse to stop.

On March 22, 2023, at 10:31 am, Grievant wrote to Writer:

> Thank you. Sorry for the delay but I have a large document I am editing that I would like to send. I am hoping to get that to you today. If not, tomorrow – latest. Since the bulk of it is refers to specific pt. abuse/neglect – is it ok to include their names? Some of it is captured directly from the record.

Writer replied to Grievant at 10:47 am on March 22, 2023, "[t]hat is great. Looking forward to it. I will get it to the Secretary. He will absolutely take action." Later that evening, Writer emailed Grievant and stated: "I have been advised to ask you to redact all patient names."

On March 24, 2023, at 10:01 am, Grievant sent a Word document named "[Facility] Abuse.docx" from his work email account to his personal email account.

On March 24, 2023, at 10:05 am, Grievant sent a document to Writer from his personal email account. Writer replied at 10:09 am, asking "[i]s there anything new here [Grievant]? I already forwarded the other one. It was very powerful."

On March 31, 2023, the Agency's Deputy Commissioner met with the Facility Director and the Facility HR Director to discuss a document that the Office of the State Inspector General had received and then shared with the Deputy Commissioner. The Deputy Commissioner provided a copy of the document, entitled "Statement of [Grievant]" to the Facility Director and directed the Facility Director to develop an action plan to address issues raised by the document. The

> Facility Director directed the Facility's risk manager to investigate the allegations regarding patient care and alleged abuse raised in the document. The HR Director was instructed to coordinate the investigation into the potential release of confidential patient health information.
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> The Agency's investigation included a review of information on Grievant's Agency-issued computer and an electronic record of patient electronic health records accessed by Grievant.
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> On April 7, 2023, Grievant was placed on administrative leave pending an investigation. The Agency's investigation included an interview of Grievant, a review of information on Grievant's Agency-issued computer, and a review of electronic health records Grievant had accessed.

On September 12, 2023, the agency issued to the grievant five Written Notices: a Group I Written Notice for abuse of state time, a Group II Written Notice for unauthorized use of state property or records and computer/internet misuse, and three Group III Written Notices with termination.[2] Specifically, the Group III Written Notices were for unauthorized access of electronic patient health records, unauthorized disclosure of health records to an attorney unaffiliated with the agency, and unauthorized disclosure of health records to a writer unaffiliated with the agency, respectively.[3] The grievant timely grieved these disciplinary actions, and a hearing was held on March 13, 2024.[4] In a decision dated April 12, 2024, the hearing officer determined that for the Group II Written Notice, the Group III Written Notice for disclosure of health records to an unaffiliated attorney, and the Group III Written Notice for disclosure of health records to an unaffiliated writer, the agency had met its burden to prove the grievant's misconduct, that the disciplinary actions were not the result of retaliation, and that there was no basis to mitigate.[5] As to the Group I Written Notice and the Group III Written Notice for unauthorized access of patient health records, the hearing officer found that the agency had not met their burden of proof and therefore rescinded those two Written Notices.[6] Ultimately, the hearing officer upheld the grievant's resulting termination.[7] The grievant 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 . . . procedural compliance with the grievance procedure."[8] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

[2] Agency Ex. 4-8; *see* Hearing Decision at 1-4.
[3] *Id.*
[4] *See* Hearing Decision at 4.
[5] *Id.* at 13-20, 22.
[6] *Id.* at 10-13.
[7] *Id.* at 23.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).

favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

*Document Request Issues*

The grievant contends in his appeal that the agency engaged in noncompliance by failing to produce any documents requested by the grievant. Specifically, he disputes the hearing officer's finding that there was no evidence of noncompliance, arguing that the evidence was the fact that the agency never provided the requested documents.[11] The grievance statutes 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."[12] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.[13] As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.[14] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[15] A hearing officer's decision on such a matter will be disturbed only if it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule.

On January 2, 2024, the grievant requested that the hearing officer issue an order requiring the agency to provide the grievant access to all agency policies in effect at the time of the alleged violations, as well as access to the grievant's work email account.[16] The agency objected on grounds of relevance and undue burden, as well as for concerns of patient privacy.[17] The hearing officer determined, after holding a conference call on January 11 with both parties to discuss the requests, that the relevance did not outweigh the burden and privacy concerns expressed by the agency.[18] The grievant then indicated that he could possibly narrow the request, and the hearing officer granted a continuance in order for the parties to resolve the document dispute, but the hearing officer did not receive further correspondence from either party prior to the hearing

[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Request for Administrative Review at 18.
[12] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[13] *Rules for Conducting Grievance Hearings* § III(E).
[14] *See, e.g.*, EDR Ruling No. 2012-3053.
[15] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).
[16] Hearing Decision at 20.
[17] *Id*.
[18] *Id*. at 20-21.

regarding this dispute.[19] Additionally, after a thorough review of the hearing recording, EDR has not found any discussion of this particular dispute by either party during the hearing. Ultimately, the hearing officer found that because the grievant "has not identified issues in dispute that would have been resolved by emails or policies that were allegedly requested from the Agency and withheld by the Agency," the grievant "has not met his burden of proving that he was denied due process or that the Agency failed to comply with the grievance procedures with respect to document production."[20]

The grievant argues in his appeal that the agency's failure to provide the current agency policies that the grievant was requesting showed that such policies relevant to the grievant's dismissal did not exist, or were at least not up-to-date.[21] The grievant contends that his previous job duties with the agency included updating the policies related to communications between the agency and attorneys. He testified that many of those policies were outdated.[22] As to the request for access to his work email account, the grievant argues on appeal that the agency had ample opportunity to grant access during the four months they had access to his computer for forensic review.[23]

In consideration of the above sequence of events, the hearing officer appears to have provided both parties an opportunity to argue whether production of the requested documents was proper, both by holding a conference call and by granting a continuance. EDR has found no evidence of any further request prior to the deadline to seek an extension or otherwise attempt to address the agency's alleged noncompliance until the request for administrative review following the hearing. Furthermore, the grievant has not provided any explanation as to which policies in particular the grievant was requesting, why such policies were relevant, and why certain policies seen as outdated would no longer be in effect (or how this would have affected the hearing officer's conclusions).[24] At the hearing, there was extensive testimony of agency witnesses as to why the disclosure of patient health information was improper, as indicated by the multiple relevant policies that the agency submitted as exhibits.[25] Similarly, the hearing officer found that the grievant did not identify issues in dispute that would have been resolved by having access to the grievant's work email account.[26] Therefore, we cannot find the hearing officer's handling of this evidentiary issue to have been an abuse of discretion or non-compliant with the grievance procedure such that remand is warranted.

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[19] *Id*. at 21.
[20] *Id*.
[21] Request for Administrative Review at 18.
[22] Hearing Recording at 6:41:40-6:42:35 (Grievant Testimony); *see also* Hearing Recording at 2:14:50-2:15:30 (Agency Witness Testimony); *see, e.g.*, Agency Ex. 15-17 (relevant agency policies mentioned).
[23] Request for Administrative Review at 18.
[24] Hearing Decision at 19, 21.
[25] Hearing Recording at 1:27:25-1:28:55, 2:28:25-2:31:40, 3:42:55-3:43:50 (Agency Witness Testimony); *see, e.g.*, Agency Ex. 15, 17, 18, 19.
[26] Hearing Decision at 21.

*Findings of Fact*

In his request for administrative review, the grievant points out a portion of the hearing officer's findings of fact that he does not view as accurate. The portion is as follows:

> On March 31, 2023, the Agency's Deputy Commissioner met with the Facility Director and the Facility HR Director to discuss a document that the Office of the State Inspector General had received and then shared with the Deputy Commissioner. The Deputy Commissioner provided a copy of the document, entitled "Statement of [Grievant]" to the Facility Director and directed the Facility Director to develop an action plan to address issues raised by the document. The Facility Director directed the Facility's risk manager to investigate the allegations regarding patient care and alleged abuse raised in the document.[27]

The grievant argues that these findings are inconsistent with one of the agency exhibits, which appears to state that the agency was only told to investigate the grievant, rather than the abuse he reported. He adds that a third party (who he identified as the writer to whom he sent the document at issue) testified that he never released the grievant's information to the Office of the State Inspector General ("OSIG") as the above portion suggests, but rather to the "Department of Health and Human Resources" ("HHR").[28] He also contends that OSIG violated policy by providing the grievant's name to the Deputy Commissioner.[29]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[30] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[31] 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.[32] 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.[33] 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

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[27] *Id*. at 8 (footnotes omitted).
[28] Request for Administrative Review at 10-11. While the record supports the contention that the writer used the specific terminology of "Department of Health and Human Resources," EDR recognizes that the writer appears to be referring to the Secretary of Health and Human Resources, an entity within the Governor's Office. To clarify, this is not a separate Department within the state, as the writer's terminology suggests. Regardless, this distinction has little to no bearing on the analysis of this case, but henceforth in this ruling, "HHR" refers to the office of the Secretary of Health and Human Resources.
[29] *Id.*
[30] Va. Code § 2.2-3005.1(C).
[31] *Grievance Procedure Manual* § 5.9.
[32] *Rules for Conducting Grievance Hearings* § VI(B).
[33] *Grievance Procedure Manual* § 5.8.

and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

A review of the mentioned agency exhibit does indicate that the Deputy Commissioner directed the agency to conduct an investigation specifically regarding the grievant's unauthorized release of patient personal health information.[34] Additionally, the Agency Director testified that the primary motivation behind the investigation was to determine whether the grievant engaged in the alleged misconduct of disclosing confidential patient information outside of the agency.[35] However, the Agency Director also testified that the allegations of patient abuse within the document the grievant disclosed had been sufficiently investigated, stating that he directed the agency's risk manager to look into each of the allegations.[36] The Director added that much of what was alleged in the document were allegations of abuse the grievant had brought to the Director in the past, and the Director confirmed that the allegations, past or most recently found in the document, "did not align with facts."[37] This testimony was also supported by the testimony of the agency's HR Director.[38]

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.[39] Here, even if the agency's primary intent behind the investigation was to investigate the grievant's wrongdoings, rather than the abuse reported in the document, agency witnesses testified that the grievant's allegations have been sufficiently investigated whenever brought to their attention – either in the past or most recently in response to the grievant's document coming to light. While the hearing officer perhaps could have made this distinction clearer, such a distinction would likely not have affected the material determinations made by the hearing officer in her decision. Accordingly, EDR has no basis to disturb the hearing officer's specific finding as to the purpose of the administrative investigation.

As to the claim of inaccurate findings of fact regarding the third party who released the grievant's information, this, for similar reasons, will not be disturbed as it would not have any material effect on the hearing officer's decision. The hearing officer makes clear in her findings of fact that there was no presented evidence "identifying the party that provided the document to the Office of the State Inspector General."[40] While the writer the grievant is referring to did testify that he relayed the grievant's document to HHR, rather than to OSIG,[41] the hearing officer was only stating that there was no evidence as to the identity of the "third party" mentioned in the investigation. Regardless, the entity to which the third party sent the information would not represent a material inaccuracy within the hearing officer's decision, but rather of the investigation

[34] Agency Ex. 3 at 1.
[35] Hearing Recording at 2:28:25-2:31:40 (Agency Witness Testimony).
[36] *Id*. at 2:31:45-2:32:35.
[37] *Id*. at 2:32:35-2:34:05.
[38] *Id*. at 1:41:30-1:42:45 (Agency Witness Testimony).
[39] *See, e.g.*, EDR Ruling No. 2020-4976.
[40] Hearing Decision at 8 n.35.
[41] Hearing Recording at 5:20:20-5:21:10 (Agency Witness Testimony).

report itself. While it is heavily implied throughout the case that the third party is the writer who testified, this issue ultimately has no bearing on anything material in the decision.

Finally, as to the claim of OSIG violating policy by revealing the grievant's name, testimony by the agency's HR Director supports the notion that OSIG has an obligation to decide whether to investigate a report of abuse, is able to send that report directly back to the agency, and cannot confirm whether the grievant would have confidential immunity for submitting such document to OSIG. The grievant has not in his appeal identified a particular policy that OSIG may have been violating, but even if there was, such a policy would fall outside the scope of authority of the grievant's agency, and would therefore be irrelevant for the purposes of the discipline at issue here.

*Findings of Misconduct*

Group III Written Notice -- Disclosure of Patient Information to Writer

The grievant also contests the hearing officer's conclusion regarding the disclosure of information to the writer. Specifically, the hearing officer found that:

> To the extent that Grievant suggested that his disclosure to Writer fell within the protections of Virginia's Fraud and Abuse Whistle Blower Protection Act, this Hearing Officer is not persuaded. Both Grievant and Writer testified that Grievant approached Writer in Writer's capacity as a contributor to Blog. Writer was not a regulatory or oversight body for the Facility. Writer was not otherwise authorized to receive the Facility patients' protected health information.[42]

The grievant argues in his appeal that the writer "identified himself as being instructed by the office of HHR to find abuse and in fact cited specifics for [the grievant] to report. He asked if [the grievant] wished to remain anonymous and over the course of numerous emails provided clarity with his relationship to the department, the requests of the department, and clearly the department's willingness and cooperation with my information."[43]

After reviewing the record, EDR is unable to identify evidence or testimony that supports the notion that the writer had proper authority to receive confidential patient information from the grievant. Regardless of how the writer identified himself, the writer nonetheless testified that he has never had any involvement or affiliation with the agency in any manner, and did not have any direct oversight authority over the agency.[44] While the grievant includes in his appeal multiple provisions of state law related to whistleblowing, the relevant provisions of the cited statutes only identify OSIG or a "duly authorized" law-enforcement entity or administrative agency to receive whistle-blower complaints, in addition to the "local [social services] department" or the "adult

[42] Hearing Decision at 15-16 (footnotes omitted).
[43] Request for Administrative Review at 14.
[44] Hearing Recording at 5:22:45-5:23:35 (Grievant Witness Testimony).

protection services hotline."[45] The grievant did in fact report to these appropriate authorities, but he was not disciplined for those specific reports.[46]

More importantly, as the hearing officer emphasized in her decision, the crux of the issue here is not whether the writer had a legitimate relationship with a qualified entity to receive such information, but simply whether the grievant violated policy by sending patients' protected health information to an external entity without prior authorization from the agency.[47] As the hearing officer held in the decision, "the fact that the entities with which Grievant may have been authorized to share protected health information did not act on Grievant's concerns or, did not advise Grievant that they were acting on Grievant's concerns, did not relieve Grievant of his obligation to protect patients' protected health information consistent with Agency policies."[48] Regardless of whether the writer had an appropriate relationship with a certain oversight authority, the record supports the hearing officer's determination that the grievant violated policy by sending confidential patient information without proper authorization granted by his employer.

Even so, EDR also cannot find that the hearing officer abused her discretion in determining that the writer was not an appropriate authority to receive the confidential information sent by the grievant. While the writer did testify that they were directed by HHR to receive the information, there is testimony in the record that the writer was not in any way affiliated with the agency.[49] 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. Consequently, the hearing officer could reasonably accept the agency's assessment of the writer's authority, as she appears to have done here, when comparing that with the conflicting evidence of the grievant's witness testimony. Evidence in the hearing record supports the hearing officer's factual findings, and EDR cannot substitute its own judgment for that reflected in the hearing decision. For the foregoing reasons, EDR will not disturb the hearing decision on this basis.

Group II Written Notice

The grievant also contests the agency's decision to discipline him for sending patient information from his work email account to his personal email account and compiling such information on his non-work computer, arguing that such a policy "is a catch 22 to which there is no solution."[50] The grievant is essentially arguing that if policy forbids him to report illegal actions from his work computer as well as from his home computer, there is no proper way to report abuse. He also adds that "many people including [his] supervisor . . . used [their] home computer for work on days [they] worked from home."

[45] Va. Code §§ 32.1-127.1:03(D), 63.2-1606(A).
[46] Hearing Recording at 1:02:40-1:04:35 (Agency Witness Testimony).
[47] Hearing Decision at 15-16.
[48] *Id.* at 15.
[49] *See* Hearing Recording at 5:22:45-5:23:35 (Grievant Witness Testimony).
[50] Request for Administrative Review at 15.

While EDR understands the grievant's argument in theory, he does not present an actual impediment to reporting abuse. EDR's review of the record found there was extensive testimony explaining the proper channels for reporting abuse, but none of those channels allow for the gathering of confidential patient information without proper authorization by the agency or an oversight authority.[51] As was mentioned above, the grievant has properly reported abuse in the past by reporting it to his supervisor, the Agency Director, and OSIG. Further, the hearing officer found that the grievant transmitted detailed information on patients, far more than would be needed to make a good faith report of abuse.[52] EDR concurs with the hearing officer's assessment of the evidence and testimony and application of relevant policy regarding this particular Written Notice, and for these reasons, will not disturb the hearing decision on this matter.

Group III Written Notice – Disclosure of Patient Information to Attorney

The grievant argues on appeal that there was evidence to support the lack of valid agency policies regarding the disclosure of patient information to an attorney unaffiliated with the agency. This was primarily addressed in the discussion regarding the grievant's preliminary document request, and for similar reasons expressed therein, EDR will not disturb the hearing decision on this basis. The grievant argues that the supposed evidence "is that an earlier policy was requested and not given,"[53] arguing that he cannot cite to which specific policies he is requesting when he has no way of knowing to which specific policies the agency is referring to support their issued discipline. The grievant argues that the length of time he worked at the agency does not necessarily mean he was properly trained on the relevant policies, adding that he testified to never being informed or aware of "such specifics as how to communicate information to an officer of the court who is entitled to it."[54] Regardless, the hearing officer relied on agency testimony and evidence attesting to the policies and internal practices forbidding disclosure of patient information to outside attorneys in this manner, and stating that the grievant was trained on patient confidentiality policies as a requirement of his employment.[55] The record therefore supports the version of facts adopted by the hearing officer, and for these reasons, as to this particular argument on appeal, EDR will not disturb the hearing decision.

The hearing officer also found that while the attorney at issue testified that he had contacted other agency employees who had provided him information about his clients, he "did not specify which employees provided such information or whether those employees had the patient's authorization to release such information," nor did he "provide any information as to whether Agency or Facility management were aware of such disclosures."[56] The grievant contends on appeal that "[b]ecause he was not asked specifics does not mean it should be construed his testimony is without merit."[57] However, it is still within the discretion of the hearing officer to

[51] *See, e.g.*, Hearing Recording at 1:27:25-1:28:55, 3:42:55-3:43:50 (Agency Witness Testimony); s*ee also* Agency Ex. 15, 17.
[52] *See* Hearing Decision at 17.
[53] Request for Administrative Review at 16.
[54] *Id*.
[55] *See* Hearing Recording at 3:35:40-3:40:15 (Agency Witness Testimony); Agency Ex. 20.
[56] Hearing Decision at 20.
[57] Request for Administrative Review at 16.

weigh conflicting evidence and testimony and determine credibility of witnesses. The hearing officer appears to have weighed this testimony, lacking any specifics as to the particular agency employees or whether the agency was aware of the disclosure with those employees, against the testimony of the agency. Doing so was not an abuse of discretion and for these reasons, EDR declines to disturb the hearing decision on this basis.

The grievant also adds that "Virginia law states that privileged information can be given to their lawyer under the circumstances requested."[58] The Virginia law to which the grievant is referring is not clear. EDR does not find provisions in those quoted in the grievant's appeal that supports his position in this case. As the agency extensively testified, primarily through the Director of the grievant's former department, while certain information can be disclosed to attorneys, there are limits as to the type of information disclosed, and regardless of the type, there must be proper authorization given to do so.[59] This testimony added that the particular communication the grievant sent to the attorney violated agency policies and practices.[60] The hearing officer properly exercised her discretion to weigh all of this evidence and testimony as appropriate, and did not abuse her discretion in determining that the agency's testimony and evidence was more credible. For these reasons, EDR declines to disturb the hearing decision on this basis.

*Retaliation*

Finally, the grievant asserts that the discipline and subsequent termination at issue in this case were retaliatory, citing to his activities as a whistleblower.[61] The grievant argues that he had been reporting patient abuse through several proper avenues for a long time, including his supervisor, two hospital directors, the Quality Management team within the agency, the Patient Advocate, the Patient Liaison, and the Disability Law Center.[62] Eventually, when he felt there was nowhere else to go, he reached out to a writer who claimed to be a part of the Governor's Transition Team, who stated that he would forward the abuse allegations to the "higher-ups" (referring to HHR, along with OSIG) and keep the grievant's name anonymous.[63] The hearing officer considered the grievant's argument, finding that while the grievant engaged in protected activity when properly reporting the abuse through the appropriate channels, and suffered an adverse employment action upon formal discipline and termination, the agency "had non-retaliatory business reasons for the disciplinary action taken."[64] The hearing officer further analyzed the grievant's claim as follows:

> The Agency has demonstrated that Grievant engaged in misconduct when he repeatedly violated Agency policies designed to protect patients' protected

[58] *Id*. at 17.
[59] Hearing Decision at 3:38:10-3:40:15 (Agency Witness Testimony).
[60] *See, e.g., id*. at 3:40:15-3:48:00.
[61] The grievant cites provisions within Virginia Code Section 1 VAC 42-30-90, *Whistle blower protections*, in support of his claim.
[62] Request for Administrative Review at 19; *see* Hearing Recording at 6:36:15-6:37:15, 6:42:35-6:45:00 (Grievant Testimony).
[63] *Id*. at 6:45:00-6:47:30; Hearing Decision at 6-8.
[64] Hearing Decision at 22.

> health information. The clear evidence shows that the Agency's concerns related to Grievant's failure to follow policies designed to protect patient information and his repeated disclosures of protected health information to entities that were not authorized to receive such information in violation of such policies. Because the Agency had non-retaliatory reasons for its disciplinary action and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met his burden to prove the Agency's disciplinary action was retaliation.[65]

Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, the agency presented sufficient evidence to support its decision to issue the Written Notices to the grievant. EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. We cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Considering that the grievant bore the burden to prove retaliation by a preponderance of the evidence,[66] EDR will not disturb the hearing 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.[67] 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.[68] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[69]

*Christopher M. Grab*
Director
Office of Employment Dispute Resolution

[65] *Id.*
[66] *See Rules for Conducting Grievance Hearings* § VI(B)(1).
[67] *Id.* § 7.2(d).
[68] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[69] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).