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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5812
January 24, 2025

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 12170. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12170, as found by the hearing officer, are as follows:¹

Prior to her dismissal, Grievant was a Direct Service Associate III at a Department of Behavioral Health and Developmental Services Facility. Grievant had worked at the Facility for more than two years. A prior evaluation of Grievant's work indicated that Grievant's work had been satisfactory to the Agency.

The Employee Work Profile for Grievant's position included among Grievant's Core Responsibilities that she "[i]mmediately intervene in dangerous situations" and "[a]pply physical restraints to prevent a patient who presents an[] imminent danger to self/others from causing harm." Measures of this core responsibility included that Grievant:

- Utilizes therapeutic communication and role-modeling.
- . . .
- Immediately resolves safety issues such as spills, objects impeding traffic flow, removal of unsafe items.
- Ensures all patients are present prior to movement within the facility.
- Uses TOVA techniques when intervening in dangerous patient behaviors and follows all expectations. In the case of environmental

¹ Decision of Hearing Officer, Case No. 12170 ("Hearing Decision"), Dec. 18, 2024, at 2-4 (footnotes omitted).

dangers, remains with the dangerous situation keeping patients away from the area until help arrives.

...

- Identifies, intervenes in and reports early cues to agitation using a graded approach of least restrictive interventions.

Grievant had been trained on Therapeutic Options (previously Therapeutic Options of Virginia (TOVA)) and Therapeutic Communications. This training teaches Facility staff approved methods for managing aggressive behaviors. Therapeutic Options Instructor testified that the Therapeutic Options training teaches staff to physically intervene to control patients in emergency situations, specifically when there is risk that the patient will harm themselves, harm others, or destroy state property.

On June 29, 2024, Grievant was on duty in a Day Room on a Unit of the Facility.

Video footage showed that at approximately 19:35:42, Patient 1 entered the Day Room. At approximately 19:35:45, Patient 1 appeared to see Patient 2 sitting in an alcove on the telephone. Patient 1 walked toward Patient 2. At approximately 19:35:48, Patient 1 can be seen to begin to repeatedly hit Patient 2. Grievant is across the room from Patient 1 and Patient 2. At approximately 19:35:50, Grievant and Witness 2 can be seen to begin to walk across the room toward Patient 1 and Patient 2. Tech-4 also is in the room and appears to begin to move toward Patient 1 and Patient 2. Based on testimony during the hearing, Grievant called out for someone to call for a response or a "10-33." Witness 3 can be seen to grab what appears to be a phone or radio to call for a "10-33." In this case, the call for a "10-33" was a call for assistance over the radio to alert staff to respond to the Day Room to assist. Witness 2 and Grievant are the first staff members to arrive to the alcove where Patient 1 is continuing to assault Patient 2. Witness 2 approaches from the back, right side of Patient 1 and Grievant approaches from the back, left side of Patient 1. As Witness 2 approaches Patient 1, she can be seen to immediately attempt to grab Patient 1's right arm. While Witness 2 attempts to grab Patient 1's right arm, Grievant also has stepped to within reach of Patient 1, but Grievant does not appear to try to physically intervene. Tech-4 also can be seen to approach the alcove. Grievant steps slightly to the left and away from Patient 1 and Patient 2. Witness 2 continues to try to grab Patient 1's right arm and Patient 1 swats her hand away. Witness 1 has entered the Day Room from the nurses' station and Witness 1 and Witness 3 also now approach the alcove area. Witness 1 attempts to grab Patient 1's right arm and Tech-4 also now appears to attempt to grab Patient 1's left arm. A security staff person enters the Day Room and runs across the room to the alcove. By approximately 19:36:11, the security staff person and Witness 1 appear to have stopped Patient 1 from hitting Patient 2 and are beginning to pull Patient 1 away from Patient 2 and toward the door. Patient 1 then leaves the Day Room. Patient 2

has stood up from where he had been sitting in the alcove and steps away from the alcove. The entire incident lasted approximately 23 seconds.

Following the incident, the Facility Investigator investigated the incident to determine whether the staff involved had neglected Patient 2 by failing to intervene to stop the assault by Patient 1. The Facility Investigator made a finding of “unsubstantiated for neglect.” The Facility Investigator explained that his finding of “unsubstantiated for neglect” was as to the group of staff involved in the incident as a whole and was not a finding with respect to any individual staff member involved. Facility Investigator testified that he recommended a finding of unsubstantiated for neglect for the group as a whole because four of the six staff available to respond attempted to physically intervene to stop Patient 1’s assault of Patient 2. The Facility Director reviewed the report and determined that a finding of neglect was substantiated for individual staff members, including Grievant.

On August 30, 2024, the agency issued to the grievant a Group III Written Notice with termination, citing patient abuse and/or neglect.² The grievant timely grieved this disciplinary action, and a hearing was held on November 12, 2024.³ In a decision dated December 18, 2024, the hearing officer found that the agency’s discipline was consistent with law and policy and upheld the Written Notice with termination, finding no mitigating circumstances.⁴ The grievant now appeals the hearing decision to EDR. She maintains she “was wrongly terminated and . . . should have not lost [her] job.”

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.”⁵ 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.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ 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”⁸ and to determine the grievance based “on the material issues and the grounds in the record

² Agency Exs. at 3; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 6-7.

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

⁶ *See Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Va. Code § 2.2-3005.1(C).

for those findings.”⁹ 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.¹⁰ 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.¹¹ 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.

Applying this standard to the present matter, and upon a thorough review of the record, EDR finds that there is evidence to support the hearing officer’s conclusions that the grievant engaged in the misconduct cited in the Written Notice and that the disciplinary action was consistent with law and policy. The grievant does not appear to dispute her conduct as reflected in the hearing officer’s findings.¹² Rather, the grievant appears to argue that this conduct was not terminable misconduct. We interpret this challenge essentially to argue that the misconduct at issue either was not terminable under DHRM or agency policy or should have been mitigated.

Consistency with Policy

The Written Notice charged the grievant with “fail[ing] to intervene appropriately during a physical altercation between two patients,” constituting “patient neglect” under the agency’s Departmental Instruction 201.¹³ The hearing officer found:

Grievant was one of the first two Facility staff members to reach the area of the Day Room where Patient 1 was assaulting Patient 2. . . . Grievant did not physically intervene when she first reached the patients or at any point during Patient 1’s on-going assault of Patient 2.

. . . .

The Employee Work Profile for Grievant’s position made clear that she was required to “immediately intervene in dangerous situations” and “apply physical restraints to prevent a patient who presents an imminent danger to self/others from causing harm” as part of her responsibility to “maintain a safe and therapeutic environment.” . . . Facility staff, including Grievant, were required, and trained, to physically intervene to stop patients from engaging in behavior that could cause harm to the patient or others. . . .

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Decision at 3-4.

¹³ Agency Exs. at 3.

Although Grievant believed that her response to Patient 1's assault of Patient 2 was sufficient, the Agency has met its burden of proving that Grievant's job responsibilities included a duty of care to Patient 2 that required her to do more.¹⁴

The hearing officer further found that the grievant's "failure to act in this case was a serious neglect of her duty of care to Patient 2 and a serious violation of policy that might have allowed Patient 2 to suffer physical or psychological harm."¹⁵ Therefore, "a Group III Written Notice with termination was consistent with law and policy."¹⁶ EDR concludes that the evidence in the record supports the hearing officer's reasoning and conclusions in this regard.¹⁷

Mitigation

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."¹⁸ The *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."¹⁹ More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²⁰

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.²¹ Where the hearing officer does not sustain all of the agency's charges and finds that

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 6.

¹⁶ *Id.*

¹⁷ See, e.g., Agency Exs. at 27, 48; Hearing Recording at 28:15-29:54, 33:21-34:06, 34:35-37:48, 41:11-42:00, 42:18-47:35 (testimony of agency trainer); 49:03-59:00 (testimony of chief nurse); 1:11:28-1:15:30 (facility director's testimony); see also Agency Video Ex. at 19:35:42-19:36:11 (facility video footage).

¹⁸ Va. Code § 2.2-3005(C)(6).

¹⁹ *Rules for Conducting Grievance Hearings* § VI(A).

²⁰ *Id.* at § VI(B)(1).

²¹ The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. E.g., EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." *Batten v. U.S. Postal Serv.*, 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

mitigation is warranted, they “may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges.”²² EDR, in turn, will review a hearing officer’s mitigation determination for abuse of discretion²³ and will reverse the determination only for clear error.

In her decision, the hearing officer specifically addressed several of the grievant’s arguments in mitigation:

Grievant argued that the discipline was too harsh and that the Agency failed to appropriately consider mitigating factors, including her efforts during the incident to assist Patient 2 by directing Witness 3 to call for assistance and by attempting to verbally redirect Patient 1. Grievant asserted that the incident happened very quickly and with security personnel arriving on the scene quickly to assist. Grievant also argued that the Agency had made Grievant wary of Patient 1 by advising staff that he was “dangerous”

. . . .

That the Agency could have further mitigated the discipline based on the facts of this case . . . is not a reason for the Hearing Officer to conclude that the Agency’s action exceeds the limits of reasonableness.²⁴

The hearing officer also rejected the grievant’s contention that the discipline she received was harsher than that issued to other employees who responded to the incident. A finding of inconsistent discipline would have required the grievant to prove that other specific employees were situated similarly to her for purposes of the particular misconduct alleged, and yet received lesser or no disciplinary actions. The hearing officer found that the grievant’s proffered comparators were not similarly situated to the grievant because

Grievant was among the first staff to arrive [at the incident] and Grievant did not attempt to physically intervene when she was first within reach of Patient 1 or at

²² *Rules for Conducting Grievance Hearings* § VI(B)(1).

²³ “An abuse of discretion can occur in three principal ways: ‘when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.’” *Graves v. Shoemaker*, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011)). The “abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it.” *Lambert v. Sea Oats Condo. Ass’n*, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* *United States v. Jenkins*, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion “when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.”).

²⁴ Hearing Decision at 6.

any time after that as she watched other staff try to intervene and Patient 1's assault on Patient 2 continue. Grievant was also the first to arrive on the left side of Patient 1 and . . . she never attempted to assist by attempting to physically intervene from Patient 1's left side.²⁵

These findings are supported by the record,²⁶ and the grievant has not offered any basis for EDR to disturb them.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision in this matter. 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.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹

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²⁵ *Id.*

²⁶ See Agency Video Exs. at 19:35:42-19:36:11.

²⁷ *Grievance Procedure Manual* § 7.2(d).

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

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