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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5792
December 19, 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 12154. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12154, as found by the hearing officer, are as follows:¹

Prior to his dismissal, Grievant was a Psychiatric Technician III at a Department of Behavioral Health and Developmental Services Facility. Grievant had worked at the Facility for more than 8 years and had worked for the State for more than 25 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 he provide patient care and implement treatment plans, including interacting with assigned patients according to treatment plan to meet treatment plan goals, promote self-care whenever possible, and provide or assist patients to meet activities of daily life (ADLs), including basic hygiene, room maintenance, and clothes maintenance. One measure of this core responsibility, included that Grievant's position:

assists patients with ADLs such as bathing, grooming, dressing, eating and laundry to the extent required based on patient functionality. Affords the patient the opportunity to do as much as possible for themselves and performs activities with the patient when they cannot. Follows policy regarding the care of patients who

¹ Decision of Hearing Officer, Case No. 12154 ("Hearing Decision"), Nov. 8, 2024, at 2-5 (footnotes omitted).

are incontinent and those who have difficulty with ambulation and/or are wheelchair bound.

Another core responsibility for Grievant's position was to maintain a safe and therapeutic environment, including applying physical restraints to prevent a patient who presents an imminent danger to self/others from causing harm. The measures for this core responsibility included:

Interactions and activities with patients are consistent with the treatment plan, generally accepted psychiatric nursing principles and/or policies and procedures.

Utilizes therapeutic communication and role-modeling.

Uses TOVA techniques when intervening in dangerous patient behaviors and follows all expectations.

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, including methods for communicating with patients to understand patient needs and promote positive behaviors. Therapeutic Options Coordinator testified that the Therapeutic Options training teaches staff to physically intervene to control patients only in emergency situations, specifically when there is risk that the patient will harm themselves, harm others, or destroy state property.

Patient X is a 54-year-old man who was admitted to the Facility in July 2023. Patient X's diagnosis at the time was schizoaffective disorder, bipolar type as well as intellectual disability. Patient X also had multiple chronic medical issues that contributed to delirium. Assistant Medical Director testified that by May 30, 2024, Patient X had become difficult to manage due to his symptoms. According to Medical Director, Patient X was impulsive, hyperactive, not sleeping or sleeping very little, and hypersexual. Patient X also experienced delirium and confusion.

On May 30, 2024, Patient X was under an order for a 2:1 special observation status, meaning that Patient X was required to be under constant observation by two staff who were assigned to observe and assist Patient X. Grievant was assigned as one of the dedicated staff to observe and assist Patient X on that date.

At approximately 3:54:00 a.m., Grievant was on duty in a Facility dayroom with Patient X. Video from the dayroom showed that in addition to Grievant and Patient X, there appeared to be four other individuals in the dayroom. At least one other individual in the room was a Facility employee. Patient X is seated on a sofa and there appeared to be another individual seated on the sofa. Grievant is seated in a chair that appears to be more than six feet behind the sofa. At approximately 3:54:14 a.m., Patient X stands up and walks to his right (generally away from

Grievant) and then toward a table that was to the right and behind the sofa where Patient X had been seated. Patient X picks up what appear to be papers from the table. Patient X then turns to his right and begins to walk in a direction away from the table so that he is walking back behind where he had been seated on the sofa. Grievant stands up from his chair. The video shows that as Patient X is walking away from the table, he drops at least one piece of paper on the floor. After dropping the paper, Patient X continues to walk away from the table. Grievant walks toward Patient X. When Grievant approaches Patient X they are facing one another, and Patient X appears to hand the remaining paper (or papers) to Grievant. Grievant then appears to point over Patient X's left shoulder toward the paper that Patient X dropped on the floor. Grievant, with his left hand, then appears to take a hold of Patient X's right arm above the elbow and appears to try to turn Patient X toward Patient X's left. Patient X does not immediately move in the direction that Grievant appears to try to steer him. It appears that as Grievant is holding on to Patient X's right arm he also is pushing Patient X's right arm in the direction he wants Patient X to go, such that Patient X takes a sidestep toward the table (and the paper on the floor), but still is facing toward Grievant and away from the direction that Grievant is trying to direct him. With Grievant still holding Patient X's right arm and moving toward the paper on the floor, Patient X turns his body toward the direction that Grievant wants him to go but is still facing Grievant and they take a few steps toward the paper with Grievant still holding Patient X by the arm and directing Patient X's movement toward the paper. At approximately 3:54:36 a.m., Grievant and Patient X have stopped near where the paper lies on the floor and Grievant appears to try to get Patient X to bend down toward the paper on the floor. Grievant adjusts his grip on Patient X's arm by taking his left hand and moving it from above Patient X's elbow to below the elbow such that Grievant's left hand is gripping the top of Patient X's right forearm. Patient X appears to try to twist his right arm to his left and shrug his right shoulder to try to get his arm out of Grievant's grip, but Grievant continues to hold on to Patient X's forearm. Grievant bends down toward the floor still holding and taking Patient X's arm down toward the paper on the floor until Patient X picks up the paper. Grievant takes the paper from Patient X and releases Patient X's arm. Grievant places the papers back on the table. Grievant then points toward where Patient X had been seated on the sofa and Patient X steps away from Grievant and walks toward the sofa and sits down. Grievant then returns to the chair where he had been seated and sits down.

The other psychiatric technician assigned to work with Patient X on May 30, 2024, reported Grievant's interactions with Patient X to a nurse who reported the incident to the nursing unit manager who reported the incident to Facility management. The Agency began an investigation of the incident. On June 5, 2024, the Agency's Investigator issued his investigative report recommending a finding of "substantiated for physical abuse."

On June 28, 2024, the agency issued to the grievant a Group III Written Notice with termination, charging him with physical abuse of a patient.² The grievant timely grieved the

² See Agency Exs. at 4.

disciplinary action, and a hearing was held on September 24, 2024.³ In a decision dated November 8, 2024, the hearing officer determined that the agency presented sufficient evidence to support its disciplinary action.⁴ The hearing officer further found that “no mitigating circumstances exist to reduce the disciplinary action.”⁵ The grievant now appeals the 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.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant maintains that his contact with Patient X was not physical abuse but rather “assisting/guiding him in picking up a piece of paper by gently holding his right elbow” He further states that he “rarely called in for a day off, worked overtime every day except on my days off because of the needs of the institution and my dedication,” and “never had a written disciplinary write up” at the agency. EDR interprets the latter claims as arguments in favor of mitigation.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.¹² 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.

³ See Hearing Decision at 1.

⁴ *Id.* at 7-8.

⁵ *Id.* at 8.

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

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

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

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

Consideration of Evidence

In her decision, the hearing officer found that, in video evidence of the relevant incident, the grievant

appears to take a hold of Patient X's right arm above the elbow and appears to try to turn Patient X toward Patient X's left. Patient X does not immediately move in the direction that Grievant appears to try to steer him. It appears that as Grievant is holding on to Patient X's right arm he also is pushing Patient X's right arm in the direction he wants Patient X to go . . . Grievant appears to try to get Patient X to bend down toward the paper on the floor. Grievant adjusts his grip on Patient X's arm . . . Patient X appears to try to twist his right arm to his left and shrug [his] right shoulder to try to get his arm out of Grievant's grip, but Grievant continues to hold on to Patient X's forearm.¹³

This description appears to be consistent with the video contained in the record.¹⁴

In his appeal, the grievant does not necessarily dispute the sequence of actions described in the hearing decision, as supported by the video evidence. Rather, his request for review characterizes the actions as "guiding" Patient X's arm "gently" – which we presume he argues was not misconduct. However, the agency's Departmental Instruction 201 defines abuse to include "[u]se of physical . . . restraints on an individual that is not in compliance . . . with his individualized services plan."¹⁵ The hearing officer credited agency witness testimony that its "staff, including Grievant, were trained not to physically intervene with patients in order to control behavior unless they were faced with an emergency situation where a patient was engaging in behavior that would cause harm to himself or others or would destroy property."¹⁶ EDR's review of the record supports these findings,¹⁷ and the hearing officer's overall conclusion that the grievant's action to physically intervene with Patient X was not consistent with Patient X's treatment plan. Accordingly, we will not disturb the hearing officer's conclusion that the grievant's conduct constituted abuse, a terminable offense, under agency policy.

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

¹³ Hearing Decision at 4.

¹⁴ See Agency Supp. Ex.

¹⁵ Hearing Decision at 5; Agency Exs. at 101-102.

¹⁶ Hearing Decision at 6.

¹⁷ See, e.g., Hearing Recording at 14:30-15:20, 17:50-19:20 (assistant medical director's testimony); 43:45-45:33 (trainer/instructor's testimony); 1:18:50-1:20:55 (chief nurse executive's testimony).

¹⁸ Va. Code § 2.2-3005(C)(6).

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

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 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 noted that the agency had "considered Grievant's years of service, satisfactory performance evaluation, and good time and attendance record."²⁴ Nevertheless, she found, the discipline issued did not exceed the limits of reasonableness.²⁵ EDR finds no error in the hearing officer's analysis. Even assuming that the grievant had a long tenure with good performance, neither the hearing officer nor EDR is empowered to overrule the agency's judgment that such factors were not sufficient to require mitigation of termination as a reasonable disciplinary action in this case, given the agency's policies and practices as reflected in the record. Accordingly, EDR finds no basis to disturb the hearing decision on these grounds.

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).

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 8; *see* Hearing Recording at 2:29:11-2:32:14 (facility director's testimony).

²⁵ Hearing Decision at 8.

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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

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²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).