

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10951; Ruling Date: May 5, 2017; Ruling No. 2017-4526; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2017-4526
May 5, 2017

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 10951. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10951 are as follows:²

The Grievant was formerly employed as a Safety, Security and Treatment Technician (“SSTT”) by the Agency at a facility (the “Facility”) which securely houses and treats civilly committed sex offenders. The residents of the Facility are all sexually violent predators and the Facility’s mission is to rehabilitate them and return them to the least restrictive environment (the community or elsewhere).

The Grievant was responsible for monitoring the day-to-day activities of the residents. SSTTs share the responsibility for community development of up to 40 residents on a living unit; monitor the unit to assure a safe environment; perform room inspections; provide interaction with residents and intervention to assure a therapeutic milieu, and document observations of residents.

[Resident] was a resident at the Facility where the Grievant was employed. [Resident] was civilly committed to the Facility as a sex offender.

While at the Facility, [Resident] and the Grievant formed a relationship. The Facility has over 8 hours of recorded phone calls between [Resident] and the

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² Decision of Hearing Officer, Case No. 10951 (“Hearing Decision”), March 10, 2017 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant. Many of the phone calls are of a romantic and sexual nature. The Grievant has admitted to the calls.

[Resident] committed a crime at the Facility and accordingly, while staying a ward of the Facility, was transferred to a regional jail to serve his sentence.

On September 26, 2016, while still employed by the Agency, the Grievant visited [Resident] at the jail. The Grievant admits that she visited [Resident] at the jail.

The Agency issued a Group III Written Notice terminating the Grievant's employment for fraternization with a patient/inmate/client.

The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

The grievant timely grieved the disciplinary action and a hearing was held on February 24, 2017.³ On March 10, 2017, the hearing officer issued a decision upholding the disciplinary action.⁴ The grievant has now requested administrative review of the hearing officer's decision.

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 action be correctly taken.⁶

Inconsistency with Agency Policy

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with state and agency policy. She essentially argues that she was not afforded appropriate due process during the investigation process, or when the agency issued a Written Notice to her. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ Accordingly, the grievant's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

³ *Id.* at 1.

⁴ *Id.* at 3-6.

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).

Due Process

The grievant argues that she was not afforded due process throughout the disciplinary procedure. She argues that the investigation into her alleged conduct occurred without her knowledge, and she asserts that she was not fully informed of the charges against her. She argues that she was never provided with a due process notification that alleged she violated Facility Instruction 504. Finally, she alleges that the agency should not have issued her a due process notification without first allowing a human resources representative to review it. She points out that the agency issued an original Written Notice to her, which was subsequently rescinded, amended, and re-issued.

Constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”⁸ is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.⁹ Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. Further, as discussed above, the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct*, contains a section expressly entitled “Due Process.”¹⁰

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.¹¹ Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an “initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”¹²

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the

⁸ *E.g.*, *Davis v. Pak*, 856 F.2d 648, 651 (4th Cir. 1988); *see also* *Huntley v. N.C. State Bd. Of Educ.*, 493 F.2d 1016, 1018-21 (4th Cir. 1974).

⁹ *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁰ *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

¹¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (“Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person’s rights to liberty or property.”). State policy requires that

[p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency’s evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth’s Written Notice form instructs the individual completing the form to “[b]riefly describe the offense and give an explanation of the evidence.”

¹² *Loudermill*, 470 U.S. at 546.

presence of counsel.¹³ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁴

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the amended Written Notice.¹⁵ While the due process notice of November 18, 2016¹⁶ did mention Facility Instruction 503 rather than Facility Instruction 504, nevertheless, the alleged misconduct was detailed within that letter such that the grievant should have known the nature of the charges against her. Further, the Written Notice was amended to correct this error and re-issued to the grievant.¹⁷ The grievant had a full hearing regarding the conduct detailed on the amended Written Notice before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.¹⁸ However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.¹⁹ Accordingly, EDR finds no due process violation under the grievance procedure.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review further challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²⁰ and to determine the grievance based "on

¹³ *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983); *see Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995) ("The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985))).

¹⁴ *See Virginia Code Section 2.2-3004(E)*, which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See Va. Code §§ 2.2-3005, 2.2-3006; see also Grievance Procedure Manual §§ 5.7, 5.8* (discussing the authority of the hearing officer and the rules for the hearing).

¹⁵ *See Agency Exhibit 1.*

¹⁶ *See Agency Exhibit 8.*

¹⁷ *See Agency Exhibit 1.*

¹⁸ *See, e.g., Cotnoir v. University of Me. Sys.*, 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

¹⁹ *E.g., Va. Dep't of Alcoholic Bev. Control v. Tyson*, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also EDR Ruling No. 2013-3572* (and authorities cited therein).

²⁰ Va. Code § 2.2-3005.1(C).

the material issues and grounds in the record for those findings.”²¹ Further, in cases involving discipline, the hearing officer reviews the evidence *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.²² 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.²³ 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant essentially argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In support of this assertion, she denies participating in phone calls with the resident in question, and asserts that she never stated she was in a relationship with him. Further, the grievant challenges the credibility of the agency’s witnesses and the investigative report, which identified her as having visited the resident at the jail.²⁴ The grievant states that if the unit manager and human resources representative from the facility had testified at the hearing, their testimony would have supported her case.

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer’s findings that the grievant engaged in the behavior described in the December 6, 2016 Written Notice and that the behavior constituted misconduct.²⁵ Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. In this instance, the hearing officer’s determinations were based largely on the grievant’s own testimony and admissions about her relationship with the Resident.²⁶ For instance, the grievant testified that she did visit the Resident at the jail, though she denied violating any policies “while at the facility.”²⁷ The agency’s investigator testified that she reviewed the phone recordings at issue, and considered the phone calls and the grievant’s visit to the Resident as acts that violated Facility Instruction 504, and she ultimately concluded that these acts constituted psychological abuse by the grievant.²⁸ When the hearing officer considered this evidence alongside the grievant’s testimony, he concluded that the agency “appropriately determined that the Grievant’s violations

²¹ *Grievance Procedure Manual* § 5.9.

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

²³ *Grievance Procedure Manual* § 5.8.

²⁴ See Agency Exhibit 2.

²⁵ Hearing Decision at 4-5.

²⁶ See Hearing Decision at 2.

²⁷ Hearing Recording at 01:18:03 through 01:18:13.

²⁸ Hearing Recording at 01:13:30 through 01:14:23.

of Departmental Instruction 201 constituted abuse of [Resident] by the Grievant. Additionally, the Agency appropriately determined that the Grievant violated Facility Instruction 504.²⁹ Because the hearing officer's findings are based upon 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.³⁰

To the extent that the grievant argues the facility's unit manager and human resources representative should have been available at the hearing, a review of the hearing record reveals that, while the agency listed these employees as potential witnesses on their witness list, no witness order exists for the appearance of either. The *Rules for Conducting Grievance Hearings* ("Rules") allow a hearing officer to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as ordered.³¹ It is the duty of a party who wishes to question a particular individual at hearing to request that the hearing officer issue such a witness order, which the grievant apparently did not do. In the absence of such an order, an adverse inference would not be appropriate.

The grievant's request for administrative review also asserts that the hearing officer erred by not allowing her to submit documents as exhibits, specifically copies of text messages and timesheets. Receiving probative evidence is squarely within the purview of the hearing officer.³² Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.³³ To this end, the hearing officer has the authority to "[r]equire the parties to exchange a list of witnesses and documents."³⁴ An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.³⁵ In this instance, a review of the record does not indicate that the grievant attempted to have any documents admitted as evidence, and the hearing officer confirms she did not do so.³⁶ Thus, EDR will not disturb the hearing decision on this basis.

²⁹ Hearing Decision at 4.

³⁰ To the extent that the grievant argues that the hearing officer did not address her claim that the agency had a retaliatory motive for issuing her the Written Notice, EDR notes that the hearing decision explicitly states that the grievant "did not fully develop or begin to meet her burden of proof concerning any affirmative defenses." See Hearing Decision at 6.

³¹ *Rules for Conducting Grievance Hearings* § V(B).

³² Va. Code § 2.2-3005(C).

³³ *Grievance Procedure Manual* § 5.7; see also Va. Code § 2.2-3005.

³⁴ *Grievance Procedure Manual* § 5.7(2).

³⁵ See, e.g., EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.

³⁶ See Hearing Decision at 1 n.1.

Alleged Bias of Hearing Officer

The grievant further alleges, in effect, that the hearing officer demonstrated bias against the grievant by speaking to the agency's representative before and after the hearing, and allowing an observer to sit in during the hearing. The *Rules* provide that a hearing officer is responsible for:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.³⁷

The grievant has not identified any applicable rules or requirements to support her position that the hearing officer demonstrated bias against her, nor are we aware of any. The applicable standard regarding EDR's requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.³⁸ The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"³⁹ EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.⁴⁰ The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.⁴¹

In this particular case, there is no such evidence. The mere fact that a hearing officer had a brief opportunity to engage in an *ex parte* communication prior to or during a break in the hearing does not mean that anything improper occurred. The grievant has not provided any description of such alleged communications to suggest that inappropriate *ex parte* conversations took place. Further, even had such a communication occurred, that would not in and of itself demonstrate bias or prejudice warranting a remedy.⁴² EDR has thoroughly reviewed the hearing record, and finds no indication that any improper influence or conversations affected the outcome of the hearing decision. Further, the hearing record does not indicate that an observer

³⁷ *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

³⁸ While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

³⁹ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

⁴⁰ *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

⁴¹ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

⁴² EDR Ruling No. 2014-3820.

was permitted to be present at this hearing, and the hearing officer confirms that none was. EDR therefore declines to disturb the decision on this basis.⁴³

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.⁴⁴ 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.⁴⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁶



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⁴³ To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

⁴⁴ *Grievance Procedure Manual* § 7.2(d).

⁴⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).