Issue: Administrative Review of Hearing Officer's Decision in Case No. 10959; Ruling Date: May 16, 2017; Ruling No. 2017-4534; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded for Clarification.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2017-4534
May 16, 2017

The agency has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management direct the hearing officer to revise his decision in Case Number 10959.

FACTS

The relevant facts in Case Number 10959, as found by the hearing officer, are as follows:[2]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its facilities. She had been employed by the Agency for approximately 20 years. Grievant had prior active disciplinary action. On September 14, 2016, Grievant received a Group II Written Notice for failure to call the Facility two hours in advance of her shift start time on a day she did not report to work as scheduled.
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> When Grievant reported to work, she was a "very good" employee.
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> Grievant worked at a Facility that had to be adequately staffed every hour of its operation. If an employee failed to report to work, the Facility had to force an employee working on an existing shift to continue working or obtain assistance from an employee who was not otherwise scheduled to work. If the Facility was not adequately staffed, the safety of employees and patients at the Facility could be placed at risk.
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> To ensure adequate staffing and minimize overtime payments, the Facility required its employees providing direct care services to call the Facility at least 2 hours before their shifts to report unscheduled absences. This requirement

[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. 10959 ("Hearing Decision"), April 5, 2017, at 2-3 (citations omitted).

provided the Facility with an opportunity to timely assign other staff to work at the Facility. This call in procedure was applied to employees with and without FMLA approved leave.

Grievant's work shift began at 7 a.m. This meant she had to call in by 5 a.m. to notify the Facility when she could not report to work as scheduled.

Grievant has a 20 year old Daughter with Down syndrome. The Daughter has had open heart surgery, two ear surgeries, her adenoids removed, and five stomach surgeries. She suffers from reflux, gastritis, constipation, asthma, and fainting. The Daughter receives continuing health care provider treatments.

With the exception of medical professionals, Grievant is the only caregiver for her Daughter. Grievant is not able to predict when her Daughter will become ill.

At approximately 6 a.m. on December 12, 2016, Grievant's Daughter started vomiting. The Daughter's stomach began swelling and Grievant knew that the Daughter would not stop vomiting until her stomach was empty. Grievant had to monitor the Daughter to ensure the vomit did not enter the Daughter's lungs. The Daughter periodically stopped vomiting, but then resumed. Once the Daughter stopped vomiting, Grievant had to monitor her Daughter's condition. The Daughter's vomiting resulted from her serious health condition.

On December 12, 2016 at 6:12 a.m., Grievant called the Facility and said she would not be reporting to work as scheduled. A Supervisor completed a Leave Request Form and checked a box for "FMLA."

The Daughter's medical problems continued to the following day. On December 13, 2016 at 5:05 a.m., Grievant called the Facility and said she would not be reporting to work that day. A Supervisor completed a Leave Request Form and checked a box for "FMLA."

On December 29, 2016, Grievant wrote that:

> 12-12-2016 and 12-13-2016 were call ins for [daughter] which I have a FMLA for.

On January 4, 2017, the grievant was issued a Group II Written Notice for failure to follow policy and was removed from employment due to the accumulation of disciplinary action.[3] The grievant timely grieved the disciplinary action and a hearing was held on April 3, 2017.[4] In a decision dated April 5, 2017, the hearing officer found that the grievant's

[3] *See* Hearing Decision at 1.
[4] *See id.*

termination violated the grievant's rights under the Family and Medical Leave Act and rescinded the disciplinary action.[5] The agency has asked the hearing officer to revise portions of his decision, although it does not challenge the hearing officer's conclusion that the disciplinary action is rescinded.

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."[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 either party; the sole remedy is that the hearing officer correct the noncompliance.[7]

In this case, the agency does not challenge the hearing officer's conclusion that the disciplinary action must be rescinded. Rather, the agency asserts that two statements in the decision are without a factual basis and should be removed. In particular, the agency requests that the hearing officer be directed to revise his decision to remove the statement that "the Agency's decision reflects an improper motive," which appears on page four of the decision, and to remove the statement that the agency "discipline[d] Grievant for requesting FMLA," which appears on page five of the decision.

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 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] 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.

As noted, the agency does not assert that the hearing officer's ultimate decision in this case—that the disciplinary action must be rescinded—is not supported by record evidence. The

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[5] *Id* at 1, 3-5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.

agency instead challenges the factual basis for two particular statements made by the hearing officer in his decision. As the hearing decision does not clearly explain the basis for these statements, it is difficult for EDR to determine whether the agency's challenge to the statements is warranted. Because it appears that a more thorough explanation by the hearing officer of the particular findings challenged by the agency would be beneficial, the hearing officer is directed to revise the hearing decision to provide such an explanation. However, as the ultimate findings of the decision are not challenged by the agency and the relief granted will remain unchanged, the hearing decision will be considered final after revision in accordance with this ruling.

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.[12] Within thirty 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]

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[12] *Grievance Procedure Manual* § 7.2(d).
[13] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).