

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10935, 10936, 10937; Ruling Date: June 8, 2017; Ruling No. 2017-4554, 2017-4558; 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<sup>1</sup>**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health & Developmental Services  
Ruling Numbers 2017-4554, 2017-4558  
June 8, 2017

The Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) has received two requests for administrative review of the hearing officer’s decision in Case Number 10935/10936/10937. For the reasons set forth below, EDR remands this case to the hearing officer for further consideration.

FACTS

The grievant was employed as a Direct Care Associate III by the Department of Behavioral Health & Developmental Services (“agency”).<sup>2</sup> On October 28, 2016, the grievant was issued three disciplinary actions: 1) a Group II Written Notice with termination, for an alleged failure to follow policy, 2) a Group III Written Notice with termination, for alleged workplace violence, and 3) a Group III Written Notice with termination, for allegedly falsifying records.<sup>3</sup> The grievant timely grieved all three disciplinary actions, which were consolidated by EDR for a single hearing.<sup>4</sup> The hearing was held on February 8, 2017.<sup>5</sup> On May 15, 2017, the hearing officer issued a decision rescinding the Group II Written Notice and the Group III Written Notice for workplace violence, but upholding the Group III Written Notice, with accompanying termination, for falsifying records.<sup>6</sup> Both the grievant and the agency have 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

---

<sup>1</sup> 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.

<sup>2</sup> Grievant’s Exhibit 23.

<sup>3</sup> Agency Exhibit 1 at 1, 5, 64.

<sup>4</sup> See EDR Ruling No. 2017-4454.

<sup>5</sup> See Decision of Hearing Officer, Case No. 10935/10936/10937 (“Hearing Decision”), February 8, 2017, at 1.

<sup>6</sup> *Id.* at 6-8.

matters related to . . . procedural compliance with the grievance procedure . . . .”<sup>7</sup> 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.<sup>8</sup>

### *Inconsistency with Agency Policy*

In its request for administrative review, the agency contends that the hearing officer’s decision is inconsistent with DHRM Policy 1.60, *Standards of Conduct*, and DHRM Policy 1.80, *Workplace Violence*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> However, for the reasons described below, the subject of the agency’s policy-based claims will be re-assessed on remand by the hearing officer. Should there remain questions by either party as to whether the hearing decision is consistent with state and/or agency policy following remand, those questions may be asserted in a future request for administrative review.

### *Hearing Officer’s Consideration of the Evidence - Falsification*

Fairly read, the grievant’s request for administrative review essentially challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The grievant disputes the hearing officer’s finding that he falsified an agency record,<sup>10</sup> asserting that he was being honest with the agency and pointing out that the third party administrator had already approved his leave based upon the medical information he had provided. Thus, he essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>11</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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

---

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> Hearing Decision at 7.

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

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.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant falsified medical provider notes that were submitted to the agency.<sup>15</sup> An agency human resources manager testified that two particular notes from medical providers had been brought to her attention by her staff as potentially having been altered.<sup>16</sup> The two medical offices in question were contacted by the agency, and it was confirmed that the dates on both notes were not correct as originally written by the medical providers.<sup>17</sup> The grievant admitted altering one note, but asserted his alteration was with the permission of the doctor, and he denied altering the second note.<sup>18</sup> Ultimately, the hearing officer found the agency's evidence sufficient to show that the grievant falsified medical provider notes that constituted agency records.<sup>19</sup>

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 his hearing decision, the hearing officer found that the agency presented sufficient evidence to support the issuance of a Group III offense for the grievant's conduct with respect to the altered agency record.<sup>20</sup> 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. Accordingly, we decline to disturb the decision on this basis.

#### *Hearing Officer's Consideration of the Evidence – Workplace Violence*

The agency's request for administrative review challenges the hearing officer's rescission of the Group III Written Notice for alleged workplace violence. The agency claims that the hearing officer improperly substituted his judgment for that of the agency, acting as a "super-personnel officer," which is prohibited by the *Rules for Conducting Grievance Hearings*.<sup>21</sup> In its request for administrative review, the agency disputes the hearing officer's finding that no disciplinary action was warranted in this circumstance, as it argues that it met its burden to establish that the grievant did send the messages in question, and those messages caused the grievant's supervisor to be in fear. The agency further argues that the communications sent by the grievant "fell well within the range of misconduct identified" in DHRM Policy 1.60, *Standards of Conduct*, and applicable state and agency Workplace Violence policies.

---

<sup>15</sup> Hearing Decision at 7.

<sup>16</sup> See Hearing Recording at 1:26:05-1:28:58, 1:29:46-1:31:16; Agency Exhibit 1 at 64, 67, 71.

<sup>17</sup> Hearing Recording at 1:26:05-1:28:58, 1:29:46-1:31:16; see Agency Exhibit 1 at 66, 69.

<sup>18</sup> See Hearing Recording at 2:28:03-2:30:42, 2:33:55-2:35:09.

<sup>19</sup> Hearing Decision at 7.

<sup>20</sup> *Id.*

<sup>21</sup> See *Rules for Conducting Grievance Hearings*, §§ VI(A), VI(B)(1).

Having reviewed the evidence in the record, EDR cannot find that the hearing officer has squarely addressed why the messages sent by the grievant to his supervisor and/or others did not constitute misconduct. Though the hearing officer characterized the grievant's communications with his supervisor as "random thoughts. . . express[ing] frustration with his circumstances,"<sup>22</sup> the grievant's supervisor testified to feelings of fear and concern that she was being threatened following her receipt of such messages.<sup>23</sup> It may be that the hearing officer did not find this testimony credible or persuasive. However, the decision lacks sufficient analysis of the applicable policies, which prohibit "harassment of any nature"<sup>24</sup> as well as "threatening behavior"<sup>25</sup> and why the grievant's communications were not misconduct in light of the supervisor's testimony. In short, the hearing officer must reconsider and further explain his determinations with regard to the Group III Written Notice for alleged workplace violence.<sup>26</sup>

### 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.<sup>27</sup> 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.<sup>28</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>29</sup>



Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>22</sup> Hearing Decision at 6.

<sup>23</sup> See Hearing Recording at 20:07-20:34.

<sup>24</sup> DHRM Policy 1.80, *Workplace Violence*.

<sup>25</sup> See Agency Exhibit 5 at 21. Agency Joint Instruction 8-3, *Workplace Violence*, further prohibits engaging in behavior that "creates a reasonable fear of injury to another person" or "subjects another individual to extreme emotional distress." *Id.* at 22.

<sup>26</sup> Depending on the outcome of the hearing officer's reconsideration of the evidence, the hearing officer may find that the particular conduct in question did not warrant a Group III Written Notice, but under state and agency policies, may be sanctionable as a lower level offense..

<sup>27</sup> *Grievance Procedure Manual* § 7.2(d).

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

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