

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10919; Ruling Date: March 14, 2017; Ruling No. 2017-4499; 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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2017-4499
March 14, 2017

The Department of Behavioral Health and Developmental Services (“agency”) has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10919. For the reasons set forth below, the hearing decision is remanded to the hearing officer for reconsideration.

FACTS

The relevant facts in Case Number 10919, as found by the hearing officer, are as follows:²

The Department of Behavioral Health and Developmental Services employed Grievant as a Safety and Security Treatment Technician. She began working for the Agency in May 2011. Grievant had prior active disciplinary action. On September 13, 2016, Grievant received a Group II Written Notice for fraternizing with a former resident.

The Former Resident was a patient at the Facility until January 29, 2015. When he left the Facility, he was required to wear a GPS tracking device. At some point, the Former Resident learned that he could not contact an employee of the Facility for at least a year after a resident was released from the Facility.

On February 13, 2016, the Former Resident and Grievant spoke by telephone. He invited her to visit him at his home. She preferred to meet at her home for safety reasons. They agreed that the Former Resident would come to Grievant’s house. On February 13, 2016, the Former Resident went to Grievant’s house. They talked and walked around Grievant’s property to see some of 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. 10919 (“Hearing Decision”), January 25, 2017, at 2.

animals Grievant kept at her property. They ate together and the Former Resident left. Grievant and the Former Resident had a “strictly plutonic” relationship.

Grievant believed that she was prohibited from contacting a resident for one year after his release date. When she met with the Former Resident on February 13, 2016, she did not believe she was acting contrary to Facility Policy because more than a year had passed since his release.

On or about October 17, 2016, the grievant was issued a Group II Written Notice for engaging in an intimate or personal relationship with a current or former resident of the facility.³ Due to the accumulation of discipline, the grievant was terminated from employment.⁴ The grievant filed a grievance to challenge the disciplinary action⁵ and a hearing was held on January 24, 2017.⁶ In a decision dated January 25, 2017, the hearing officer concluded that the agency had not presented sufficient evidence to meet its burden and rescinded the Written Notice.⁷ The agency now appeals the hearing decision to EDR.

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.”⁸ 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.⁹

Facility Instruction 503

The agency’s request for administrative review asserts that the hearing officer erred in finding that Facility Instruction 503 was not in effect on the date of the charged conduct, February 13, 2016. In his decision, the hearing officer concluded that the agency had failed to “present[] any policy in effect on February 13, 2016 prohibiting Grievant from meeting with the Former Resident.”¹⁰ This conclusion appears to have been based primarily on the copy of Facility Instruction 503 introduced by the agency as its Exhibit C, which has an effective date of March 1, 2016.

³ See Agency Exhibit A. In the Written Notice, the agency wrongly identified the facility instruction prohibiting such conduct as Facility Instruction 504. *Id.*; Hearing Decision at 3 n.1. The instruction containing this prohibition is actually Facility Instruction 503. See Hearing Decision at 3 n.1; Agency Exhibit C.

⁴ See Agency Exhibit A.

⁵ Agency Exhibit J; see Hearing Decision at 1.

⁶ See Hearing Decision at 1.

⁷ *Id.* at 1, 3-4.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Hearing Decision at 3.

In its request for administrative review, the agency has provided a copy of a previous version of Facility Instruction 503, and has indicated that the version produced at hearing showed an “incorrect” effective date. The agency asserts that the operative language of Facility Instruction 503 was in effect on February 13, 2016, has been in effect since September 3, 2013, and contains the same prohibition on “personal” and “intimate” relationships as contained in Exhibit C. The agency asks in effect, to have the hearing reopened to allow the hearing officer to consider this prior version of Facility Instruction 503.

After review, the hearing officer’s conclusion regarding the applicability of Facility Instruction 503 to this case was understandable based on the evidence presented at hearing. However, the clarifying evidence presented by the agency on administrative review raises critical questions that cannot simply be ignored. For instance, if accurate, the clarifications provided in relation to Facility Instruction 503 would mean that the hearing officer’s determination that this policy was not in effect is inaccurate. As such, the case is remanded to the hearing officer for further consideration to determine the operative policy language. To the extent needed to provide the parties with a full and fair hearing, as part of the remand the hearing officer may, in his discretion, reopen the hearing record to allow additional evidence and/or testimony.

Other Grounds

The agency argues that the hearing officer erred in not relying on previous verbal counseling of the grievant regarding inappropriate relationships as a basis for upholding the disciplinary action. As the hearing officer noted in his decision, the facility director specifically denied any intent to discipline the grievant for violation of those instructions.¹¹ In light of the agency’s representations, EDR does not find the hearing officer erred in failing to uphold the disciplinary action on this basis.

The agency also appears to argue that, even if Facility Instruction 503 was not in effect, the grievant nevertheless violated the ethical provisions of Facility Instruction 504 by failing “to disclose the relationship to management.” A review of the Written Notice indicates, however, that the agency did not charge the grievant with a failure to disclose a relationship; rather, she was charged for her involvement in an alleged personal or intimate relationship.¹² Moreover, as the hearing officer concluded, Facility Instruction 504 specifically applies only to conduct with current residents.¹³ This narrow scope of Facility Instruction 504 was confirmed at hearing by the facility director.¹⁴ As such, EDR does not find the hearing officer erred in failing to uphold the disciplinary action on the basis of Facility Instruction 504.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration as set forth above. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original

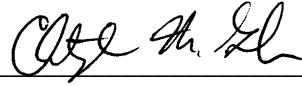
¹¹ See *id.* at 3 n.3; Hearing Recording at Track 2, 1:10:37-1:10:57.

¹² See Agency Exhibit A.

¹³ See Hearing Decision at 3; Agency Exhibit D.

¹⁴ Hearing Recording at 1:00:44-1:01:23.

decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).