

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10807; Ruling Date: July 12, 2016; Ruling No. 2016-4387; 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 Resolution

ADMINISTRATIVE REVIEW

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2016-4387
July 12, 2016

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 10807. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10807, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Support Associate II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for providing services to adolescent patients at the Facility. She received training regarding respecting professional boundaries with patients and client abuse.

Grievant was instructed to monitor a Patient P in a one on one relationship. Grievant told the Supervisor and Manager that she would not work with Patient P. Patient P had autism and spectrum disorder. Grievant made derogatory comments about Patient P’s diagnosis and facial wounds. Grievant said she would not work the Patient P because of his condition. Grievant said Patient P was “gross” and “disgusting”. Grievant did not work with Patient P.

Grievant displayed negative attitudes when speaking to patients. For example, Grievant discussed withholding medication to patients. Grievant told patients that clinicians did not know what they were doing and were sitting in the office doing nothing all day.

Grievant made untruthful and harmful statements to patients including Patient T. Patient T was a 15 year old female with acute and severe psychotic mania. She had rapid mood swings. Within an hour, she could have ten cycles in

¹ Decision of Hearing Officer, Case No. 10807 (“Hearing Decision”), June 20, 2016, at 2-3.

mood. She would change from angry to crying to euphoric and then to aggressive within an hour. She had delusions. Grievant told Patient T that clinicians at the Facility were withholding her medication and that they did not know what they were doing when treating her. Grievant's statements were untrue and contrary to professional standards for treatment of patients. Grievant made statements about decisions to place Patient T in ambulatory restraints. These statements fed into Patient T's paranoia.

Grievant's untruthful statement to Patient T contributed to her violent behavior. On March 23, 2016, Patient T was in ambulatory restraints. She was enraged by statements Grievant made to her. She burst into a conference room where parents were meeting with staff about their child. Patient T threatened violence against staff because she believed they were withholding medication from her. Patient T grabbed the table in the conference room and lifted it upwards and pushed the table causing papers on the table to "fly." Visitors and staff in the conference room were fearful of Patient T's behavior.

On March 21, 2016, Grievant was in a room with other staff chatting and eating when they should have been working. Patient T2 walked to the window of the office. Grievant knew she was supposed to respond to the patient's needs. Grievant did not acknowledge Patient T2. Patient T2 began banging his forehead against the window in frustration. Grievant continued to ignore Patient T2. A Supervisor observed Patient T2. She approached him and asked what he needed.

In the first week of March 2015, Patient 3 had a psychiatric emergency. He removed his clothing and was seeking assistance. Grievant observed the patient and began laughing and clapping her hands. She should have spoken to Patient 3 to intervene. Patient 3 observed Grievant's inappropriate behavior.

As of February 9, 2016, Grievant had accumulated 498 minutes of tardiness. She had more than three periods of tardiness in the prior three months.

On or about March 25, 2016, the grievant was issued a Group I Written Notice for excessive tardiness and a Group III Written Notice with termination for disruptive behavior and insubordination.² The grievant timely grieved the disciplinary action³ and a hearing was held on June 16, 2016.⁴ In a decision dated June 20, 2016, the hearing officer determined that the agency had presented sufficient evidence to show the grievant was excessively tardy and that she engaged in abuse and neglect of clients, and upheld the issuance of both Written Notices.⁵ The grievant now appeals the hearing decision to EDR.

² Agency Exhibit 1.

³ Agency Exhibit 2.

⁴ See Hearing Decision at 1.

⁵ See *id.* at 4-5.

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

Fairly read, the grievant asserts in her request for administrative review that the hearing officer’s findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. 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.

In the hearing decision, the hearing officer assessed the evidence and concluded that the “Grievant engaged in client neglect by refusing to render assistance to two patients” and, further, she engaged in client abuse “by making untruthful statements to patients about staff withholding medication from them and being unable to render proper treatment to patients.”¹² Based on the evidence presented at the hearing, he determined that the “Grievant’s behavior [rose] to the level of a Group III offense” for abuse and neglect of the agency’s clients.¹³ In her request for administrative review, the grievant broadly disputes the hearing officer’s decision and appears to claim that she did not make statements to Patient T about her treatment or refuse to monitor Patient P.¹⁴

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.

¹² Hearing Decision at 4.

¹³ *Id.*

¹⁴ The grievant has also offered evidence that is not part of the hearing record in an apparent attempt to explain her actions as charged in the Group III Written Notice. The grievant was not present at the hearing, see Hearing Recording at 00:25-00:30, and the evidence offered in her request for administrative review does not satisfy the necessary elements to be considered “newly discovered evidence.” Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly

There is evidence in the record to support the hearing officer's conclusion that the grievant engaged the behavior described in the Group III Written Notice such that the issuance of disciplinary action was justified. For example, the agency presented evidence to show that abuse and neglect of clients are prohibited,¹⁵ that the grievant refused to provide care to Patient P,¹⁶ and that she made untruthful statements to Patient T about her treatment that contributed to Patient T's violent behavior toward other staff members.¹⁷ While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the grievant's actions was in any way unreasonable or not based on the actual evidence in the record.

Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.¹⁸ Because the hearing officer's findings in this case 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.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹



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discovered evidence standard in the context of the grievance procedure). Accordingly, EDR will not consider the evidence offered in the grievant's request for administrative review.

¹⁵ Agency Exhibit 4 at 34-35.

¹⁶ *E.g.*, Agency Exhibit 6 at 6-7, 11-14.

¹⁷ *E.g.*, *id.* at 8-12, 21, 24.

¹⁸ *See, e.g.*, EDR Ruling No. 2012-3186.

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).