

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11143; Ruling
Date: April 19, 2018; Ruling No. 2018-4694; Agency: Department of Behavioral
Health and Developmental Services; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2018-4694
April 19, 2018

The Department of Behavioral Health and Developmental Services (the “agency”) has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 11143. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11143, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Psych Tech III at one of its facilities. She had been employed by the Agency since 2005. Grievant had prior active disciplinary action. On July 10, 2017, Grievant received a Group II Written Notice for failure to follow instructions.

Patient S was a patient at the Facility. He was sometimes aggressive and difficult to manage so the Agency placed him in a dayroom adjacent to the Unit where staff worked.

Grievant reported to the Charge Nurse. The Charge Nurse reported to the Unit Manager who reported to the RNC.

Grievant began working at the Unit in June 2017. She had a good relationship with Patient S when she first started providing services to him. At some point, the relationship worsened. Patient S would sometimes scratch, kick, and punch Grievant. Grievant did not like working with Patient S.

On October 17, 2017 at approximately 7:40 a.m., the Charge Nurse assigned Grievant to work with Patient S beginning at 11:30 a.m. Grievant did not want to work with Patient S that day. Grievant told the Charge Nurse that she was not going to work with Patient S because she had been assigned responsibility for Patient S more frequently than other staff. Grievant told the Charge Nurse she had

¹ Decision of Hearing Officer, Case No. 11143 (“Hearing Decision”), March 1, 2018, at 2-3 (citations omitted).

been assigned to Patient S for three days and this day would make the fourth. The Charge Nurse said the assignment sheet was completed and if Grievant “refused to go, we would deal with that when the time came.”

Several minutes after speaking with the Charge Nurse, Grievant contacted the Unit Manager. Grievant told the Unit Manager she believed it was unfair to have Grievant sit with Patient S every evening back to back. The Unit Manager told Grievant another employee made the same complaint. The Unit Manager told Grievant that she would look into the matter and get back with Grievant.

Grievant left the Unit at 11 a.m. to take her lunch break. When she returned at approximately 11:25 a.m., she spoke with the Unit Manager. The Unit Manager told Grievant, “I already put someone else over there, so you do not have to sit [with Patient S].” At 11:30 a.m., Grievant performed other duties on the Unit. Grievant testified that if the Unit Manager had told her she had to sit with Patient S, she would have done so when her shift began at 11:30 a.m.

Each party was asked to submit a list of possible witnesses four work days before the hearing. The Unit Manager was employed by the Agency at the time of the hearing. Neither party listed the Unit Manager as a possible witness. The Unit Manager did not testify during the hearing.

On November 3, 2017 the grievant was issued a Group II Written Notice for failure to follow instructions and terminated from employment based on her accumulation of disciplinary action.² The grievant timely grieved the disciplinary action and a hearing was held on February 28, 2018.³ In a decision dated March 1, 2018, the hearing officer found that the agency had not presented sufficient evidence to show that the grievant failed to follow instructions.⁴ As a result, the hearing officer rescinded the Group II Written Notice, ordered the grievant reinstated to her former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.⁵ The agency now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁷

² See *id.* at 1; DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

³ See Hearing Decision at 1.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Findings of Fact

In its request for administrative review, the agency alleges that the hearing officer erred in rescinding the Written Notice for several reasons. In part, the agency contends that the hearing officer's findings of fact as set forth in the decision, based on the weight and credibility that he accorded to the testimony presented at the hearing, are not supported by the evidence. More specifically, the agency argues that the evidence in the record demonstrates that the grievant told the Charge Nurse she would not work with Patient S, which constituted a "refusal to perform assigned work" and supported the issuance of a Group II Written Notice for failure to follow instructions. The agency asserts that the Unit Manager "had no choice but to pull another staff member to provide proper coverage" for Patient S and did not willingly reassign the grievant to perform another task.

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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer found that the "Grievant told the Charge Nurse she was not going to work with Patient S"¹² The hearing officer further stated that, after initially receiving her assignment from the Charge Nurse, the grievant then "expressed to the Unit Manager her objection to the assignment. The Unit Manager changed Grievant's assignment. The Unit Manager had the authority to change employee assignments. At 11:30 a.m., Grievant was no longer assigned responsibility for Patient S."¹³ As a result, the hearing officer concluded that the grievant "did not act contrary to a supervisor's instructions when she failed to work with the Patient S beginning at 11:30 a.m. on October 17, 2017," and, as a result, there was "no basis for disciplinary action."¹⁴

Having thoroughly reviewed the hearing record, EEDR is unable to determine whether there is a factual basis for the hearing officer's conclusion that the disciplinary action was not warranted under the circumstances in this case. The fact that the responsibility for working with Patient S was reassigned to another employee does not, by itself, indicate that the grievant's

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 2.

¹³ *Id.* at 3.

¹⁴ *Id.*

actions cannot be considered a failure to follow instructions. As the agency notes in its request for administrative review, it was obligated to ensure proper coverage of Patient S for safety reasons, and thus either the grievant or another employee was required to work with Patient S. Thus, the crux of the case is what the record evidence shows the grievant expressed to the Charge Nurse when given the assignment. If the record evidence indicates that the grievant was requesting a reassignment, the hearing officer's conclusion that the grievant's behavior did not constitute a failure to follow instructions may be an appropriate exercise of discretion in determining issues of disputed fact. If, however, the record evidence shows that the grievant communicated a refusal to work with Patient S and management was required to reassign other staff to perform the task, such conduct would properly be considered a failure to follow instructions justifying the issuance of a Group II Written Notice.

The parties presented conflicting evidence about the grievant's response when she was assigned to work with Patient S. The Charge Nurse testified that the grievant said she would not work with Patient S as assigned.¹⁵ The Charge Nurse further stated that the Unit Manager later told him to send someone else to Patient S instead of the grievant, but he did not know the reason for the Unit Manager's decision.¹⁶ The grievant testified that she did not refuse to work with Patient S, and that she would have worked with Patient S if the Unit Manager had ordered her to do so.¹⁷

It is unclear how the hearing officer determined that the grievant both "told the Charge Nurse she was not going to work with Patient S," which appears to be a refusal to perform the assignment, and also "expressed to the Unit Manager her objection to the assignment" as a request to work elsewhere without refusing to perform the task.¹⁸ In other words, EEDR cannot determine from a review of the decision whether the hearing officer fully considered all of the evidence about the nature and manner of the grievant's objection to the assignment in concluding that the discipline should be rescinded. Accordingly, the decision must be remanded to the hearing officer for further consideration of the evidence on this issue.

Agency's Request to Present Additional Evidence

In addition, the agency argues that the grievant's testimony about her conversation with the Unit Manager was false and seeks to admit additional evidence from the Unit Manager so the hearing officer may "assess [the] credibility" of the witnesses "based on a complete record." The agency has provided EEDR with a signed affidavit, authored by the Unit Manager, which describes her recollection of the incident. The agency requests that the hearing record be reopened to admit the affidavit and/or witness testimony from the Unit Manager about the incident to show that the grievant's work assignment was not changed, but rather that another employee was assigned to work with Patient S because the grievant refused to do so. In support of its position that the Unit Manager's affidavit and/or testimony should be admitted into the hearing record, the agency argues that it "could not have reasonably foreseen that the Grievant would present false testimony" at the hearing about her conversation with the Unit Manager.

¹⁵ Hearing Recording at 36:14-36:28 (testimony of Charge Nurse).

¹⁶ *Id.* at 42:24-43:34 (testimony of Charge Nurse).

¹⁷ *Id.* at 1:07:27-1:07:37, 1:10:58-1:11:33 (testimony of grievant).

¹⁸ Hearing Decision at 2-3.

It appears the agency did not discover the significance of the Unit Manager's testimony until the grievant testified at the hearing, as the Unit Manager was not listed as a potential witness by either the grievant or the agency. Furthermore, the grievant's dismissal grievance does not refer to her conversation with the Unit Manager,¹⁹ nor do any of the other documents furnished to the agency by the grievant in advance of the hearing.²⁰ At the hearing, the hearing officer asked the agency to locate the Unit Manager so she could testify.²¹ The Unit Manager was not at work and the agency was unable to reach the Unit Manager by phone.²² Under these circumstances, EEDR cannot conclude that the agency failed to exercise due diligence in preparing its case by not calling the Unit Manager as a witness.

At the same time, it is not clear that the Unit Manager's affidavit and/or testimony would have a material impact on the outcome of the case. A statement written by the Unit Manager that generally describes the incident was admitted into the hearing record with the agency's exhibits.²³ While this statement does not discuss the details of the interaction between the Unit Manager and the grievant, it does assert that the grievant refused to work with Patient S and that another employee was assigned to perform the task due to the grievant's refusal.²⁴ The grievant's testimony is the only direct account in the record of the conversation between the grievant and the Unit Manager, and the hearing officer's conclusion that the grievant "did not act contrary to a supervisor's action when she failed to work with Patient S" appears to be based entirely on the grievant's testimony that "[t]he Unit Manager changed [her] assignment."²⁵ While the Unit Manager's affidavit and/or testimony would be potentially relevant to contradict or disprove the grievant's account of the incident, it is unclear whether it would necessarily result in a different outcome, though it is possible.

Evidence not presented at hearing typically cannot be considered upon administrative review unless it is "newly discovered evidence."²⁶ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.²⁷ In this case, it is not clear that the Unit Manager's affidavit and/or testimony could be considered newly discovered evidence under this standard. However, as the hearing decision must be remanded for further consideration of the evidence in the record

¹⁹ Agency Exhibit 2.

²⁰ See Agency Exhibit 1 at 2-3; Grievant's Exhibits.

²¹ Hearing Recording at 48:53-49:11, 50:39-50:57.

²² *Id.* at 56:45-50:48, 1:00:52-1:00:56.

²³ Agency Exhibit 1 at 5.

²⁴ *Id.*

²⁵ Hearing Decision at 3.

²⁶ *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 discovered evidence standard in the context of the grievance procedure).

²⁷ See Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted). The fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Id. at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

as discussed above, EEDR also finds it appropriate for the hearing officer, in his discretion, to consider on remand whether a reopening of the hearing record for admission of the Unit Manager's affidavit and/or testimony may be warranted to provide the parties with a full and fair hearing.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent described above. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).²⁸ Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁹

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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²



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²⁸ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²⁹ See *Grievance Procedure Manual* § 7.2.

³⁰ *Id.* § 7.2(d).

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).