

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11155; Ruling  
Date: April 17, 2018; Ruling No. 2018-4696; Agency: Department of Behavioral  
Health and Developmental Services; Outcome: AHO's decision affirmed.



**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 2018-4696  
April 17, 2018

The grievant 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 11155. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11155, as found by the hearing officer, are as follows:<sup>1</sup>

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

The Patient resided in one of at least four patient rooms opening into a living room. The Patient had the lights off her room but left her room door open. The living room was lighted and some of the light shown into the Patient’s room. Grievant could see inside the room as she walked past the Patient’s door.

On September 23, 2017 at approximately 5:33 a.m., the Patient got out of her bed, walked out of her room, and fell onto the floor of the living room. She was injured because of the fall. The Agency reviewed a video tape of the incident and times before the Patient fell.

Grievant was responsible for performing patient checks every 15 minutes. She was expected to look into the rooms of approximately four patients and observe that they were breathing and not in distress.

Grievant was supposed to complete patient checks at 3:45 a.m., 4 a.m., 4:15 a.m., 4:30 a.m., 4:45 a.m., 5 a.m., 5:15 a.m. and 5:30 a.m. Grievant looked into the Patient’s room to check on the Patient at approximately 3:44 a.m., 4:01 a.m., and 5:18 a.m. At 5:31 a.m., Grievant passed the Patient’s room, but did not look inside.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11155 (“Hearing Decision”), March 19, 2018, at 2-3 (citations omitted).

On November 22, 2017, the grievant was issued a Group III Written Notice for client neglect and terminated from employment with the agency.<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on February 26, 2018.<sup>3</sup> In a decision dated March 19, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show the grievant's actions constituted neglect of the Patient and upheld the issuance of the Written Notice and the grievant's termination.<sup>4</sup> The grievant 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.”<sup>5</sup> 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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup>

In her request for administrative review, the grievant essentially argues 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. More specifically, the grievant argues that she conducted 15-minute checks of the Patient as required. She further contends that “the investigator tampered with the recording” because she alleges that it did not continuously record the entire time period during which she allegedly failed to perform checks on the Patient.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>8</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>9</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>10</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 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.

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<sup>2</sup> Agency Exhibit A. The hearing decision appears to contain an inadvertent mistake in listing the date of issuance as “November 22, 2018.” See Hearing Decision at 1.

<sup>3</sup> See Hearing Decision at 1.

<sup>4</sup> *Id.* at 3-4.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8.

In the hearing decision, the hearing officer concluded that the “Grievant was responsible for checking on the Patient every 15 minutes in order to ensure the Patient’s safety,” that she “should have checked on the Patient eight times from 3:45 a.m. to 5:30 a.m.,” and that she “only checked on the Patient three times” during that period.<sup>11</sup> The hearing officer further assessed the evidence and the grievant’s arguments relating to the video recording and found that

[t]he Agency showed that the video was motion activated. The video only recorded when someone was in the living room and the camera detected motion. Since Grievant did not conduct checks every fifteen minutes there were times when the video did not record. This conclusion is confirmed by the video recording from approximately 4:28 a.m. to 4:43 a.m. During this time period, another patient entered the living room and remained there. The video recorded her in the living room, but Grievant did not enter the living room during that fifteen minute time period. Grievant should have conducted at least one check at approximately 4:30 a.m. but she did not enter the living room.<sup>12</sup>

As a result of this analysis, the hearing officer determined the grievant’s actions constituted neglect of the Patient, thereby warranting the issuance of the Group III Written Notice and the grievant’s termination.<sup>13</sup>

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer’s determination that the grievant was required to conduct checks of the Patient every 15 minutes and that she failed to do so.<sup>14</sup> One of the agency’s witnesses testified that failing to check on the Patient every 15 minutes was properly considered to be client neglect.<sup>15</sup> State policy provides that client neglect is a Group III offense.<sup>16</sup> Furthermore, two agency witnesses testified that the camera positioned to capture the area of the Patient’s room was activated by motion, and that the camera did not record anything when the grievant did not enter the area to check on the Patient.<sup>17</sup> In other words, witness testimony supports the hearing officer’s conclusion that the lack of video footage demonstrates the grievant did not enter the area to perform checks of the Patient every 15 minutes as required.

Though the grievant may disagree with the hearing officer’s assessment of the evidence, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer’s authority, and EEDR 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.<sup>18</sup> Because the hearing officer’s

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<sup>11</sup> Hearing Decision at 3.

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> *Id.*

<sup>14</sup> *E.g.*, Hearing Recording at 9:53-13:04 (testimony of Witness P).

<sup>15</sup> *Id.* at 38:35-39:12 (testimony of Witness H).

<sup>16</sup> Agency Exhibit F at 21-22.


<sup>17</sup> Hearing Recording at 51:04-51:23, 1:03:18-1:03:47 (testimony of Witness H), 1:20:32-1:21:25 (testimony of Witness M).

<sup>18</sup> *See, e.g.*, EDR Ruling No. 2014-3884.

findings of facts with regard to these issues are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>19</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>20</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>21</sup>



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<sup>19</sup> *Grievance Procedure Manual* § 7.2(d).

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

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