

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11004; Ruling Date: July 14, 2017; Ruling No. 2018-4579; 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 Resolution¹

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2018-4579
July 14, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11004. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11004, as found by the hearing officer, are as follows:²

The Department of Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its facilities. She had been employed by the Agency for over 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

When transporting patients from one location to another using the Agency’s bus, an employee was to sit in the front of the bus and another employee was to sit in the back of the bus. The employee sitting in the back of the bus was required by Agency practice and Agency Policy P-11 to conduct a “sweep” of the bus after patients had left the bus. The sweep served to ensure that all patients had been removed from the bus.

At approximately 8 p.m. on February 3, 2017, patients were being transported on a bus from the Treatment Mall to the Building. An employee, Ms. P, sat at the front of the bus. Grievant sat at the back of the bus. She sat in the back of the bus to ensure that no patients sat in the back near the emergency door.

When the bus arrived at the Building, Ms. P exited the bus and went inside the Building to begin counting the patients as they entered the Building. Nine patients left the bus, but one remained on the bus. The Patient remained on the bus. Grievant exited the bus without successfully completing a sweep to ensure

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. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

² Decision of Hearing Officer, Case No. 11004 (“Hearing Decision”), June 19, 2017, at 2-3.

that no patients remained on the bus. The Driver did not realize that the Patient remained on the bus. He closed the door and began driving from the Building to the Motor Pool. Grievant and the Ms. P realized that the Patient was missing. They exited the Building and attempted to notify the Driver. They called the Driver using their radios, but the Driver did not respond because he had turned off his radio.

The Driver continued to drive the bus to the Motor Pool approximately seven blocks away from the Building. He parked the bus, locked the gate to the motor pool, clocked out, and went home. The Driver did not look in the back of the bus as he exited. He was not required to do so prior to locking the bus.

Grievant “handed off” her patients to the Nurse and obtained permission to drive to the Motor Pool. Grievant got into her personal vehicle and drove to the Motor Pool. Other employees also went to the Motor Pool in an Agency van. Grievant and the other employees did not have keys to the gate. They notified the Campus Security staff who quickly arrived at the Motor Pool. Security Staff did not have keys to open the Motor Pool gate. A security employee was able to pass through a gap in the fence as the other employees helped create the gap. He went to the bus and told the Patient how to open the door. The Patient exited the bus. When Grievant asked the Patient why he remained on the bus, the Patient said he had fallen asleep and was enjoying the ride.

Approximately five minutes passed from the time the bus left the Building with the Patient and the Patient was able to exit the bus.

On or about March 24, 2017, the grievant was issued a Group III Written Notice for client neglect and terminated from employment with the agency.³ The grievant filed a grievance to challenge the disciplinary action⁴ and a hearing was held on June 16, 2017.⁵ In a decision dated June 19, 2017, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant’s actions constituted neglect of a client and upheld the issuance of the Written Notice and the grievant’s termination.⁶ 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.”⁷ 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.⁸

³ Agency Exhibit 1.

⁴ Agency Exhibit 3.

⁵ See Hearing Decision at 1.

⁶ *Id.* at 1-3.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and/or Agency Policy

In her request for administrative review, the grievant appears to assert that the hearing officer's decision is inconsistent with state and/or agency policy. Specifically, she argues that the agency did not follow "policy and procedure" because it "failed to provide . . . proper staffing, proper equipment, adequate paperwork or a contingency plan when those policies fail." The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ However, upon review of the grievant's submission, EEDR is unable to find any argument, not otherwise addressed herein, that raises any way in which state and/or agency policy was not followed by the hearing officer. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁰ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹¹ 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.¹² 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.¹³ 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 assessed the evidence and determined that the "Grievant was responsible for performing a 'sweep' of the bus to ensure no patients were left on the bus," that she "exited the bus without ensuring that the Patient had left the bus," and that "[t]he Patient remained on the bus without being supervised."¹⁴ As a result, the hearing officer concluded that the agency had demonstrated the "Grievant failed to provide care to the Patient while he remained unsupervised" and that her actions constituted client neglect justifying the issuance of a Group III Written Notice and termination.¹⁵ In support of her position, the grievant argues that the agency did not prove that the Patient was endangered by her actions, that the patient "was not left alone" because "the bus driver was still present with the patient," and that the Driver was also responsible for the Patient.

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

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ Hearing Decision at 3.

¹⁵ *Id.*

There is evidence in the record to support the hearing officer's conclusion that the grievant engaged in the behavior described in the Group III Written Notice such that the issuance of the disciplinary action was justified. For example, the agency presented evidence to show that neglect of clients is prohibited and that the grievant was required to conduct a security sweep of the bus before she exited.¹⁶ An agency witness explained that a security sweep of the bus entails walking through each row of the bus, checking each seat, and making sure no patients are left behind.¹⁷ At the hearing, the grievant testified that she visually checked the bus before exiting and did not see the Patient, but acknowledged that she must have walked past the Patient as she exited the bus because she sat at the back of the bus and the Patient was not seated behind her.¹⁸ The agency presented evidence that the Patient was left unsupervised for approximately five minutes and that the grievant's failure to ensure the Patient was supervised during that time period constituted neglect.¹⁹ Two agency witnesses further stated that the Driver was not responsible for providing care to the Patient.²⁰ 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.²¹ Because the hearing officer's findings in this case 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. 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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴



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¹⁶ Agency Exhibit 6 at 2-3, 7; Agency Exhibit 8 at 6; Hearing Recording at 9:48-10:10 (testimony of Witness W).

¹⁷ Hearing Recording at 39:40-40:05 (testimony of Witness F).

¹⁸ *Id.* at 1:22:42-1:23:07, 1:29:01-1:29:35, 1:31:28-1:32:09 (testimony of grievant).

¹⁹ *E.g., id.* at 12:19-13:02, 17:59-18:10 (testimony of Witness W), 1:05:33-1:05:50 (testimony of Witness S); Agency Exhibit 2 at 5.

²⁰ Hearing Recording at 36:25-36:54 (testimony of Witness F), 53:07-53:45 (testimony of Witness S).

²¹ *See, e.g.*, EDR Ruling No. 2012-3186.

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).