

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11045; Ruling Date: September 28, 2017; Ruling No. 2018-4616; 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 2018-4616
September 28, 2017

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 (“DHRM”) administratively review the hearing officer’s decision in Case Number 11045. For the reasons set forth below, the hearing decision is remanded to the hearing officer for reconsideration.

FACTS

The grievant was employed as a Security Officer III at one of the agency’s facilities.¹ On May 11, 2017, the grievant was issued a Group II Written Notice for failure to follow instructions because she did not meet with an agency investigator as directed by her supervisor.² On May 22, 2017, the grievant was issued a second Group II Written Notice for failure to follow policy based on her failure to document conversations with a client as required by FI 709,³ as well as a Group III Written Notice for client abuse, and terminated from employment with the agency.⁴ The grievant filed a grievance to challenge the disciplinary actions and a hearing was held on August 17, 2017.⁵ In a decision dated August 28, 2017, the hearing officer concluded that the agency had not presented sufficient evidence to show the grievant failed to follow FI 709 or engaged in client abuse, and rescinded the Written Notices issued on May 22.⁶ The hearing officer further determined that the evidence demonstrated the grievant had failed to follow her supervisor’s instructions and upheld the May 11 Group II Written Notice.⁷ As the May 11 Group II Written Notice was not sufficient, by itself, to support the termination, the hearing officer ordered the grievant reinstated with back pay and benefits.⁸ The agency now appeals the hearing decision to EEDR.

¹ Agency Exhibit L at 1.

² Agency Exhibit B.

³ Agency Exhibit C.

⁴ Agency Exhibit A.

⁵ See Decision of Hearing Officer, Case No. 11045 (“Hearing Decision”), August 28, 2017, at 1.

⁶ *Id.* at 7-9.

⁷ *Id.*

⁸ *Id.* at 9.

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.”⁹ 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.¹⁰

Admission of Polygraph Results

While the agency has not raised this issue in its request for administrative review, EEDR must address the hearing officer’s admission of and reliance on the results of a polygraph test administered to the grievant. The Code of Virginia provides that “[t]he analysis of any polygraph test charts produced during any polygraph examination administered to a party of witness shall not be admissible in any proceeding” under the grievance procedure,¹¹ nor may such information relating to polygraph tests be otherwise “submitted, referenced, referred to, offered or presented in any manner in any proceeding” under the grievance procedure.¹² These statutory prohibitions are incorporated into EEDR’s *Rules for Conducting Grievance Hearings*, which states that “the results of polygraph tests are not admissible as evidence in a grievance hearing over the objection of any party except as to disciplinary or other actions taken against a polygrapher,” and “[e]vidence related to such inadmissible polygraph tests shall not be submitted, referenced, referred to, offered or presented in any manner at hearing.”¹³

At the hearing, the hearing officer admitted the results of a polygraph test administered to the grievant into evidence as Grievant’s Exhibit 24. In the hearing decision, the hearing officer discussed the polygraph results and noted that “the Grievant provided the Polygraph Report which concluded that ‘no deception indicated’” in support of his conclusion that the evidence was insufficient to show the grievant had engaged in client abuse.¹⁴ By admitting, discussing, and relying on the results of the grievant’s polygraph test in reaching his decision, the hearing officer has not complied with the grievance procedure. Accordingly, the hearing decision must be remanded to the hearing officer for the removal of any discussion of the results of the polygraph test, and Grievant’s Exhibit 24 must be stricken from the hearing record. The hearing officer must reassess the evidence in the record, excluding Grievant’s Exhibit 24 and any witness testimony or other evidence relating to the polygraph results, and issue a reconsidered decision.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code § 8.01-418.2.

¹² *Id.* § 40.1-51.4:4(D).

¹³ *Rules for Conducting Grievance Hearings* § IV(D).

¹⁴ Hearing Decision at 6, 8.

Additional Group II Written Notice

In its request for administrative review, the agency asserts that an additional Group II Written Notice was issued to the grievant on May 22, 2017, which was not challenged in a grievance or considered by the hearing officer.¹⁵ The agency argues that the grievant should not be reinstated as directed in the hearing decision because, if this additional Group II Written Notice is combined with the Group II Written Notice upheld by the hearing officer, the grievant has accumulated sufficient disciplinary action to support termination.¹⁶ Having conducted a thorough review of the hearing record, EEDR is unable to identify any conclusive evidence, whether in the form of witness testimony or exhibits, that establishes the existence of the alleged additional Written Notice. Although two of the Written Notices issued to the grievant make reference to “a Group II Written Notice already on file,” there is nothing that indicates the date of issuance, describes the nature of the offense, or provides any other details that would be necessary for a hearing officer to consider in determining whether a grievant has accumulated sufficient disciplinary action to warrant termination.¹⁷

As the hearing decision must be remanded for further consideration based on the admission of the grievant’s polygraph test results as discussed above, the hearing officer should also consider and address the evidence in the record relating to the existence of an additional Group II Written Notice and the effect such an additional Written Notice would have on the outcome of this case. 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 for additional evidence from the parties about any additional disciplinary action that may have been issued to the grievant.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration as set forth 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).¹⁸ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.¹⁹

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

¹⁵ Although the agency asserts that the hearing decision does not comply with both the grievance procedure and state policy, its arguments are most appropriately addressed as matters of the grievance procedure and will be addressed as such in this ruling.

¹⁶ See 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”).

¹⁷ Agency Exhibit A; see Agency Exhibit C. The grievant has reportedly stated that she never received such a Written Notice.

¹⁸ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹⁹ See *Grievance Procedure Manual* § 7.2.

review have been decided.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).