

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9997; Ruling Date: March 29, 2013; Ruling No. 2013-3551; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health
And Developmental Services
Ruling Number 2013-3551
March 29, 2013

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 9997. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 9997, as found by the Hearing Officer, are as follows:¹

1. The Grievant was formerly employed as a Direct Support Professional II by the Agency at a facility (the "Facility") which serves patients with severe intellectual disabilities. The patient at issue in this proceeding was assigned to the care of the Grievant during the first shift from 7:00 a.m. to 3:30 p.m.
2. The subject patient is a 65 year old, long-term resident of the Facility. The patient is essentially nonverbal and suffers from various ailments and disorders, including Bipolar I Disorder.
3. The patient's cognitive skills fall within the profound range of mental retardation/intellectual disabilities.
4. The patient enjoys his personal space and has a Behavior Support Plan which stresses the need for staff to be respectful of his personal space:

"4. When staff is making a request of [patient], be respectful of his personal space. Staff should not approach [patient] directly from the front but should remain off to his side. [Patient] does have hearing loss so staff should use caution when approaching him from behind to avoid startling him

¹ Decision of Hearing Officer, Case No. 9997 ("Hearing Decision"), February 14, 2013, at 2-4, (citations omitted).

5. When making a request of him, staff should extend a hand to [patient]. It has been noted that if he reaches for the hand, he is likely to be cooperative. If he does not accept the hand, staff should move away and try again in approximately 10-15 minutes."
5. Policy requires each Direct Support Professional II to be familiar with the Functional Behavior Assessment and Behavior Support Plan (the "Plan") for each patient under their direct care. Services are supposed to be delivered in a way that helps the person served to be as independent as possible and in a manner that reflects the individual's personal choice and preferences to the fullest extent possible. Accordingly, "[t]he direct care support professional should remember to 'do with' not 'for' the individual to the fullest extent possible."
6. Staff receives ongoing training concerning their job responsibilities and the appropriate methodologies for implementing their direct care duties.
7. During the hearing, the Grievant admitted that she was not familiar with the patient's Plan.
8. During the early afternoon on Monday, June 25, 2012, the patient was sitting on the arm of a chair in the day hall of a particular suite and building in the Facility. The patient was sitting next to A, another DSP II and was playing with her keys. The Grievant, F (also a DSP II) and A were all on the day hall at the relevant time.
9. The Grievant walked over to the patient, grabbed his t-shirt and told him to come with her to the bathroom. The patient resisted and lowered himself to the ground.
10. The Grievant then grabbed the back of the collar of the patient's t-shirt and dragged him approximately 21 feet across the day hall to just outside the entrance into the day hall in the hallway. At this time, the patient tried to bite the Grievant and she let go.
11. A came over to the patient, put her hands out and the patient responded by getting up, allowing the Grievant then to escort him to the bathroom.
12. Both A and F were troubled by the incident and reported the incident to their appropriate supervisors, as required by policy.
13. The Facility conducted a thorough investigation and the assigned trained Investigator, after assessing the credibility of the witnesses, reasonably found the allegation of abuse substantiated.
14. The Facility issued a Group III Written Notice on July 19, 2012:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse and Neglect of Clients, as defined in

Section 201-3 for a Substantiated Allegation of Abuse. An investigation substantiated that you "dragged" an individual [] across the day hall by the back of his t-shirt while he was seated on the floor. This is also a violation of the *Standards of Conduct*.

15. The Facility mitigated the discipline in view of the Grievant's 32 years of service and work record and the Grievant was not terminated, demoted, suspended, etc.:

Departmental Instruction 201 requires termination for a substantiated finding of abuse/neglect unless there are circumstances that would warrant mitigation. In view of your years of service and your work record, termination is being mitigated. Your response to the due process letter was also taken into consideration.

16. The Grievant was transferred to another Building within the Facility because of the incident.
17. The Grievant received considerable training concerning her direct care duties.
18. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

In the February 14, 2013 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written Notice.² The grievant now seeks administrative review from EDR.

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."³ 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 a party; the sole remedy is that the hearing officer correct the noncompliance.⁴

Newly Discovered Evidence

In her request for administrative review, the grievant alleges that there is newly-discovered evidence that would call into question the credibility of her co-workers A and F. Specifically, the grievant asserts that there is additional evidence regarding one co-worker's suspension for testing positive for drugs and the other co-worker's termination.

² Hearing Decision at 8.

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

⁴ See *Grievance Procedure Manual* § 6.4.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”⁵ 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.⁶ However, 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.⁷

Here, the grievant has not provided information to support her contention that the additional information regarding her co-workers should be considered newly discovered evidence under this standard. First, the grievant has failed to provide any information about whether the evidence was in existence at the time of hearing. Moreover, to the extent the evidence did, in fact, exist at the time of hearing, she has not met her burden of showing that the evidence was discovered since the hearing decision, that she exercised due diligence to discover the evidence, that the evidence is not merely cumulative or impeaching, that the evidence is material, and that the evidence is likely to produce a new outcome or an amended judgment. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

Lack of Knowledge of Behavioral Plan

The grievant’s second basis for administrative review is that she had not read the patient’s behavioral plan and therefore should not be held responsible for applying its requirements. As the hearing decision noted that the grievant “admitted that she was not familiar with the patient’s Plan,” this argument apparently challenges the hearing officer’s findings that the patient was under the grievant’s care at the time the misconduct occurred and that agency policy required her “to be familiar with the Functional Behavior Assessment and Behavior Support Plan [] for each patient under their direct care.”

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

⁵ 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 also* EDR Ruling No. 2007-1490 (explaining newly discovered evidence standard in context of grievance procedure).

⁶ *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989).

⁷ *Id.* at 771(emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

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 this instance, the grievant and the hearing officer apparently agree that she was not familiar with the patient's behavioral plan. Further, the grievant has not presented any argument or evidence challenging the hearing officer's finding that she was required to be familiar with the plan. To the contrary, a review of the record evidence indicates that there was sufficient evidence to support the hearing officer's conclusion. Because 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. Accordingly, we decline to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

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.¹² 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.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴



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¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² *Grievance Procedure Manual* § 7.2(d).

¹³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).