

Issue: Second Administrative Review of Hearing Officer's Decision and Reconsideration Decision in Case No. 10012; Ruling Date: June 17, 2013; Ruling No. 2013-3623; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2013-3623
June 17, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review for a second time the hearing officer's decision and remand decision in Case Number 10012. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

FACTS

The hearing officer's findings in his February 22, 2013 decision in Case Number 10012,¹ as recounted in EDR's first administrative review in this case (EDR Ruling Number 2013-3554), are hereby incorporated by reference. In EDR Ruling Number 2013-3554, the hearing officer was directed to provide further explanation of his factual findings with respect to the charges for which the grievant was on notice and the charges considered in rendering his determination.

The hearing officer issued a reconsideration decision on May 10, 2013. This decision held, in relevant part, that:²

The Agency alleged that Grievant failed to provide a safe environment for the Client because he failed to have another person with him when he showered the Client. This allegation is no different than the allegation that Grievant failed to comply with the Agency's policy requiring two employees to shower a client. In other words, the environment was unsafe because Grievant failed to comply with the Agency's policy requiring two staff to shower clients. The Agency established that Grievant failed to comply with the Agency's policy thereby justifying the issuance of a Group II Written Notice.

The grievant asserts in his renewed request for administrative review that the hearing officer's findings as outlined in the reconsidered decision are not supported by the record evidence, as he claims that the discipline was upheld based on grounds not originally cited in the Written Notice. As such, the grievant maintains that his due process rights have been violated.

¹ Decision of Hearing Officer, Case No. 10012, February 22, 2013.

² Reconsideration Decision, Case No. 10012-R, May 10, 2013, at 1-2.

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 action be correctly taken.⁴

The grievant argues that the hearing officer erred by upholding the discipline based on an offense, failure to follow a supervisor’s instructions, not specifically included on the Written Notice. As such, the grievant alleges that his due process rights have been violated. Post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and an opportunity for the presence of counsel.⁵ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.⁶

In this case, the description of the offense in the Written Notice stated:

Violation of Departmental Instruction #201, Reporting and Investigating Abuse of Clients. A facility investigation substantiated that on 11/16/12, you failed to provide a safe environment for an individual [resident’s initials], which resulted in a fracture of his left arm.

Upon remand, EDR directed the hearing officer to provide further explanation of his factual findings with respect to the charges for which the grievant was on notice and the charges fairly considered by the hearing officer in making his determination. The hearing officer has done so, concluding that failing to comply with agency policy is substantially related to the allegation on the Written Notice, namely, failure to provide a safe environment for the resident.⁷ Thus, the inclusion of this language can be considered part of the original charge and no due process violation has occurred as a matter of the grievance procedure.

To the extent that the grievant challenges this finding based upon the weight and credibility that the hearing officer accorded to evidence presented and testimony given at the hearing, EDR cannot substitute its judgment for that of the hearing officer. Hearing officers are

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-561 (4th Cir. 1983) (holding that due process requirements were met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee’s behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, and (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

⁶ See Va. Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. See Va. Code §§ 2.2-3005 and 3006; see also *Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

⁷ Reconsideration Decision at 1-2.

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 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. In this instance, the hearing officer’s factual finding is squarely within the hearing officer’s authority and it is not within our purview to interfere with his consideration of the evidence in this regard. EDR’s review in this case is, therefore, concluded.

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



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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 *Id.* § 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).