

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10206; Ruling Date: January 14, 2014; Ruling No. 2014-3788; 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 2014-3788
January 14, 2014

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10206. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The grievant was employed by the Department of Behavioral Health and Developmental Services (“agency”).¹ On September 11, 2013, the grievant was issued a Group III Written Notice of disciplinary action with removal for violation of Departmental Instruction 201 by engaging in “physical abuse” of a patient.² The grievant timely grieved the disciplinary action and a hearing was held on December 11, 2013.³ On December 17, 2013, the hearing officer issued a decision upholding the disciplinary action with removal.⁴ The grievant has now requested administrative review of the hearing decision.

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.”⁵ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁶

¹ See Decision of Hearing Officer, Case No. 10206 (“Hearing Decision”), December 17, 2013, at 1.

² *Id.*

³ *Id.*

⁴ *Id.* at 1, 5.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

Due Process

The grievant argues that the hearing officer erred by upholding the discipline based on a finding that her conduct constituted an assault or battery, as this specific term had not been used by the agency in its allegations. Constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”⁷ is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.⁸ However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure’s *Rules for Conducting Grievance Hearings* (“Rules”). Further, as discussed below, we note that the grievant may request administrative review from the DHRM Director. The DHRM Standards of Conduct contain a section expressly entitled “Due Process”.⁹ If requested by the grievant, the DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.¹⁰ Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct her behavior. Rather, it need only serve as an “initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”¹¹

On the other hand, 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.¹² The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹³

⁷ E.g., *Davis v. Pak*, 856 F.2d 648, 651 (4th Cir. 1988); *see also* *Huntley v. N.C. State Bd. Of Educ.*, 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that notice prior to a hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency and held as an actual revocation hearing).

⁸ *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

⁹ *See* DHRM Policy 1.60, *Standards of Conduct*, §E.

¹⁰ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). State policy requires:

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency’s evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, §E. Significantly, the Commonwealth’s Written Notice form instructs the individual completing the form to “[b]riefly describe the offense and give an explanation of the evidence.”

¹¹ *Loudermill*, 470 U.S. at 545-46.

¹² *Detweiler v. Commonwealth of Virginia*, 705 F.2d 557, 559-561 (4th Cir. 1983).

¹³ *See* Va. Code § 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

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

Violation D.I.201: Reporting and Investigating Abuse and Neglect of Clients:
The results of the investigation substantiated the allegation of “physical abuse.”
Corroborating evidence disclosed that you used excessive force by grabbing a
patient by the camisole and forcing her to the ground.¹⁴

The grievant argues in her request for administrative review that the hearing officer upheld the discipline issued to her on a basis other than that asserted by the agency. Section VI(B) of the *Rules* provides that in every instance, an “employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.”¹⁵ Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.¹⁶ In addition, the *Rules* provide that “[a]ny challenged management action or omission not qualified cannot be remedied through a hearing.”¹⁷ Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, EDR finds that the grievant did have adequate notice of the charge against her and that the charge was sufficiently set forth on the Written Notice. While the Written Notice did not contain the term “assault or battery,” it charges the grievant with “physical abuse” in violation of Departmental Instruction 201.¹⁸ That policy in turn defines “abuse” to include “assault or battery.”¹⁹ Further, the grievant has not identified any basis on which she was precluded from mounting a defense to the agency’s allegations. Therefore, we decline to disturb the decision of the hearing officer on this basis.

Inconsistency with State and Agency Policy

Fairly read, the arguments set forth by the grievant in her request for administrative review challenge the hearing officer’s finding that the grievant’s conduct constitutes a basis for a Group III Written Notice under the applicable policies defining patient abuse. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.²⁰ Accordingly, if she has not already done so, the grievant may, within **15**

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, 2.2-3006; see also *Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

¹⁴ Hearing Decision at 1; Agency Exhibit 1, Tab 2 at 1.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B) (citing *O’Keefe v. United States Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that “[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.”)).

¹⁶ See, e.g., EDR Ruling No. 2011-2704; EDR Ruling No. 2007-1409.

¹⁷ *Rules for Conducting Grievance Hearings* § I.

¹⁸ Agency Exhibit 1, Tab 2 at 1.

¹⁹ *Id.*

²⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

calendar days of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also appears to challenge the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing and the facts he chose to include in the decision. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²¹ and to determine the grievance based "on the material issues and grounds in the record for those findings."²² 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.²³ 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.²⁴ 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.

Based on a review of the record, there is sufficient evidence to support the hearing officer's finding that the grievant used inappropriate physical force towards the patient.²⁵ Camera footage introduced by the agency clearly supports the hearing officer's factual findings regarding the grievant's conduct.²⁶ In reaching his holding, the hearing officer also apparently relied upon witness testimony and the investigator's report.²⁷ 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.

CONCLUSION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.²⁸ Within 30 calendar days of a final hearing decision, either party

²¹ Va. Code § 2.2-3005.1(C).

²² *Grievance Procedure Manual* § 5.9.

²³ *Rules for Conducting Grievance Hearings* § VI(B).

²⁴ *Grievance Procedure Manual* § 5.8.

²⁵ Hearing Decision at 3-5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Grievance Procedure Manual* § 7.2(d).

may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).