

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10222; Ruling Date: March 10, 2014; Ruling No. 2014-3811; 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 2014-3811  
March 10, 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 10222. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On September 30, 2013, the grievant was issued a Group III Written Notice for neglect of a patient in violation of Departmental Instruction 201.<sup>1</sup> He initiated a grievance challenging the disciplinary action, and on February 3, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.<sup>2</sup> The grievant has now requested administrative review by 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.”<sup>3</sup> 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.<sup>4</sup>

*Alleged Bias of Hearing Officer*

In his request for administrative review by EDR, the grievant asserts that the representative for the agency “was engaging the [hearing officer] in too much chit chat” and questions whether the agency had an unfair advantage on this basis. The EDR *Rules for Conducting Grievance Hearings* (the “*Rules*”) address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for

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<sup>1</sup> Decision of Hearing Officer, Case No. 10222, (“Hearing Decision”), February 3, 2014, at 3.

<sup>2</sup> *Id* at 7.

<sup>3</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>4</sup> *See Grievance Procedure Manual* § 6.4(3).

[v]oluntarily recusing himself or herself and withdrawing from any case (i) as required in “Recusal,” § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.<sup>5</sup>

Similarly, EDR Policy 2.01 states that a “hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia.”<sup>6</sup>

The EDR requirement of recusal when the hearing officer “cannot guarantee a fair and impartial hearing” is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.<sup>7</sup> The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”<sup>8</sup> EDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.<sup>9</sup> The party moving for recusal of a judge has the burden of proving the judge’s bias or prejudice.<sup>10</sup>

The grievant’s assertion that the agency representative engaged in too much conversation with the hearing officer is insufficient to establish bias. It is not inappropriate for a hearing officer to engage in general conversation with parties or their representatives at the time of the hearing. Indeed, refusal to speak with parties about matters unrelated to the hearing either prior to the hearing or during hearing breaks would unnecessarily chill the hearing environment. Our review of the hearing recording also does not support the grievant’s assertion that the hearing officer conducted the hearing in a manner that evidences bias or prejudice against the grievant. Accordingly, the hearing officer’s decision will not be remanded on this basis.

#### *Witnesses*

The grievant further asserts that he was unable to question three witnesses due to those witnesses having “called in sick.” Two of these witnesses were co-workers who had participated in the internal investigation of the grievant’s conduct. In addition, the grievant states that he asked that someone from Human Resources be present for the hearing, but that this individual

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<sup>5</sup> *Rules for Conducting Grievance Hearings* § II.

<sup>6</sup> EDR Policy 2.01, *Hearing Officer Program Administration*, at 3.

<sup>7</sup> While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

<sup>8</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992); *see Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

<sup>9</sup> EDR Ruling No. 2012-3176.

<sup>10</sup> *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

was also absent. The grievant argues that because the two co-workers were unavailable to be questioned, the hearing officer could not have reached a “fair decision by policy.”<sup>11</sup>

Although it is possible that the failure of witnesses to appear could in limited circumstances be a basis for remand, such circumstances do not exist here. It appears that the grievant did not seek orders from the hearing officer to have any of these three witnesses appear. The two co-workers had been identified by the agency as potential witnesses, but the grievant did not separately request their appearance. In addition, while it is possible the grievant made a verbal request for a member of Human Resources to appear at the hearing, he did not formally request an order from the hearing officer.<sup>12</sup> Hearing officers are authorized to draw adverse inferences in the event agencies fail to make available relevant witnesses employed by the agency who have been ordered to appear.<sup>13</sup> Had the grievant sought orders for these witnesses, the hearing officer would have been able to draw adverse inferences from their absences, if he concluded the agency had failed to make those witnesses available. Because there were no orders for these witnesses, however, EDR will not remand the decision for the purpose of allowing the hearing officer to consider whether any adverse inferences should be drawn. Further, as the grievant failed to request orders for these witnesses to appear at hearing, their presence cannot now be found to have been so critical as to necessitate reopening the hearing record.<sup>14</sup> Accordingly, the hearing officer’s decision will not be disturbed on this ground.

#### *Production of Personnel File*

The grievant also challenges the agency’s apparent attempt to charge his representative \$125 for a copy of his personnel file. While the grievant’s concern regarding this charge is understandable, the grievant does not appear to have been prejudiced at hearing by the agency’s actions. The grievant’s representative was apparently given the opportunity to review the file and select documents for copying.<sup>15</sup> Although the grievant could have challenged the agency’s actions through the non-compliance procedures set forth in Sections 6.3 and 6.4 of the *Grievance Procedure Manual*, the grievant apparently elected to pay the charge imposed by the agency for the documents selected. There is no evidence that if the agency had not imposed a cost for copying, the grievant and his representative would have selected other, additional documents for use at hearing, that any additional documentation contained in the personnel file would have been relevant to the qualified hearing issues, or that the charges imposed in any way limited the grievant’s ability to present his case. As the grievant has not shown that the agency’s conduct in

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<sup>11</sup> It is unclear what the relevance, if any, the testimony by the member of Human Resources would have been.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § III(E) (explaining the hearing officer’s authority to issue orders for witnesses to appear at a hearing). The only witnesses for whom the grievant appears to have requested orders were the grievant’s direct supervisor and the grievant’s representative. Grievant’s Exhibit Binder, Tab 4 at 1.

<sup>13</sup> *See id.* § V(B).

<sup>14</sup> Remand for the purpose of reopening the record might nevertheless be appropriate, even in the absence of witness orders, if evidence suggested that these individuals were not in fact ill or that the agency was in some manner responsible for their absences. However, there is no evidence in this case that the absence of these witnesses was motivated by any improper purpose or in bad faith.

<sup>15</sup> Grievant’s Exhibit Binder, Tab 4 at 5-8. The agency apparently provided four pages at no cost to the grievant and another 19 pages at 50 cents a page, for a total of \$9.50. *Id.* at 7-8.

charging for copies of these documents prejudiced him in the hearing process, the hearing decision will not be disturbed on this basis.<sup>16</sup>

### *Findings of Fact*

The grievant also challenges the hearing officer's findings of fact in regard to his conduct. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>17</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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 had engaged in conduct constituting abuse/neglect.<sup>21</sup> In reaching his decision, the hearing officer considered the testimony of several agency witnesses, as well as materials from the agency's internal investigation.<sup>22</sup> Although the grievant argues that the evidence was contradictory and circumstantial, the determination of witness credibility lies within the sole authority of the hearing officer, and the grievant has not shown that the hearing officer abused his discretion in reaching his determinations. That reasonable minds could disagree regarding the evidence does not in itself constitute a basis for overturning the hearing officer's decision. The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, 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.<sup>23</sup>

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<sup>16</sup> The grievant also alleges that there was an issue with the agency's delivery of the requested documents. As it appears the grievant ultimately received the documents prior to the hearing, we will not address this issue further.

<sup>17</sup> Va. Code § 2.2-3005.1(C).

<sup>18</sup> *Grievance Procedure Manual* § 5.9.

<sup>19</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>20</sup> *Grievance Procedure Manual* § 5.8.

<sup>21</sup> Hearing Decision at 7.

<sup>22</sup> *Id.* at 4-7; *see also* Agency Exhibit 12.

<sup>23</sup> The grievant's representative notes in the request for administrative review that the only relief sought by the grievant was to be allowed to resign. While a hearing officer may order reinstatement and reverse or modify a disciplinary action, a hearing officer's authority does not include directing an agency to allow an employee the opportunity to resign in lieu of termination. *See Rules for Conducting Grievance Hearings* § VI.

*Inconsistency with State and Agency Policy*

The grievant's request for administrative review further asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>24</sup> The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

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.<sup>25</sup> 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.<sup>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup>



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<sup>24</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>25</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>26</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>27</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).