

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10294; Ruling Date: April 29, 2014; Ruling No. 2014-3872; 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 Department of Behavioral Health and  
Developmental Services  
Ruling Number 2014-3872  
April 28, 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 10294. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On January 10, 2014, the grievant was issued a Group III Written Notice with removal for placing a patient in seclusion without an order.<sup>1</sup> She timely initiated a grievance challenging the disciplinary action.<sup>2</sup> On April 7, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.<sup>3</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>4</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>5</sup>

*Inconsistency with State and Agency Policy*

Fairly read, the grievant’s request for administrative review 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

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<sup>1</sup> Decision of Hearing Officer, Case No. 10294, (“Hearing Decision”), April 7, 2014, at 1.

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

<sup>3</sup> *Id.* at 1, 5.

<sup>4</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>5</sup> *See Grievance Procedure Manual* § 6.4(3).

policy.<sup>6</sup> The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

### *Findings of Fact*

The grievant's request for review also challenges a number of the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>7</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>8</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>9</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>10</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 evidence, there is sufficient evidence to support the hearing officer's finding that the grievant improperly placed a client in seclusion, thereby putting the client at risk of psychological harm.<sup>11</sup> In reaching his decision, the hearing officer appears to have considered witness testimony and documentary evidence, as well as the agency's policies.<sup>12</sup> While the grievant apparently disagrees with the hearing officer's factual determinations, that disagreement does not in itself constitute a basis for overturning the hearing officer's decision. 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.<sup>13</sup> Within 30 calendar days of a final hearing decision, either party

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<sup>6</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

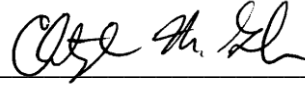
<sup>10</sup> *Grievance Procedure Manual* § 5.8.

<sup>11</sup> Hearing Decision at 4.

<sup>12</sup> *See, e.g.*, Agency Exhibit 7 (summary of investigation); Agency Exhibit 8 (agency policy on seclusion or restraints); Agency Exhibit 14 (addendum to investigation summary).

<sup>13</sup> *Grievance Procedure Manual* § 7.2(d).

may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>



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<sup>14</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).