

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10731; Ruling Date: March 18, 2016; Ruling No. 2016-4306; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.



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 2016-4306
March 18, 2016

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 10731. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10731, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Licensed Practical Nurse at one of its facilities. She had been employed by the Agency for approximately six years. Grievant had prior active disciplinary action. On May 14, 2015, she received a Group I Written Notice for disruptive behavior and use of obscene language in the workplace during work hours.

Grievant received training regarding the Agency’s client abuse policy. She knew or should have known to report allegations of client neglect to the Facility Director as required by policy DI 201.

On July 29, 2015, two Agency employees were providing services to the Patient who resided at the Facility. The Patient was being combative. Ms. D walked into the area and observed the employees. She saw the Patient being sprayed with water and being struck in the forehead.

Grievant usually worked on a different floor from where Ms. D worked. Grievant was not working on July 29, 2015. She did not observe how the Patient was treated by the two employees.

On August 4, 2015, Grievant and Ms. D met for dinner. Ms. D was reluctant to discuss the incident. Ms. D said she was working when she heard a commotion on the other side of the floor. Ms. D walked to the other area and observed two staff and the Patient. Ms. D then told Grievant that a patient had

¹ Decision of Hearing Officer, Case No. 10731 (“Hearing Decision”), February 2, 2016, at 2-3.

been “tortured” in the whirlpool by two employees. Ms. D would not give Grievant details of the incident. Ms. D said she needed to “get it off of her chest” as she was crying. Grievant also began crying and told Ms. D she needed to report the incident. Ms. D said she was concerned of being threatened by the two other staff and said she did not know to whom she should report. Grievant also said she did not know to whom to report the matter. They discussed an option of placing an anonymous note under the Director’s office door. Grievant believed Ms. D would report the incident.

Grievant worked at the Facility on August 5, 2015. Grievant did not work on August 6, 2015. She spoke with Ms. D that evening and learned that Ms. D had not reported the incident. When Grievant returned to work on August 7, 2015, Grievant asked to meet with the Unit Manager. Grievant asked the Unit Manager if there was a way to report abuse anonymously. The Unit Manager said she did not know. Grievant said she did not know as well and speculated the Patient Advocate should be notified.

The Unit Manger reported Grievant’s conversation through her chain of command. Grievant was summonsed to speak with the Facility Investigator. At approximately noon on August 7, 2015, she answered the Investigator’s questions. Grievant wrote a statement saying “I was not working when any of this happened and I was not told the details. I was told the patient’s name . . . and that he was tortured one evening during a whirlpool. Down the road, I was told the patient was sent out and died.”

The Patient died at the Hospital on August 5, 2015 at 2:44 a.m. Because of his death, the Agency investigator was unable to determine whether the Patient had been abused physically.

On October 5, 2015, the grievant was issued a Group III Written Notice with termination for neglect of a client due to her “failure to immediately report [an] allegation of abuse to [the] facility director.”² The grievant timely grieved the disciplinary action and a hearing was held on January 13, 2016.³ In a decision dated February 2, 2016, the hearing officer determined the agency had presented sufficient evidence to show that the grievant’s failure to report an allegation of abuse constituted client neglect and upheld the Group III Written Notice and the grievant’s termination.⁴ The grievant now appeals the hearing decision to 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.”⁵ If the hearing

² Agency Exhibit A at 1.

³ See Hearing Decision at 1.

⁴ *Id.* at 3-5.

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

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

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with agency policy. Specifically, the grievant claims the agency "was obligated to specify some treatment, care or service denied to the patient" by the grievant, rather than the failure to report potential abuse or neglect, in order to demonstrate that the grievant's actions constituted neglect. She further asserts that the agency "did not have a policy basis to issue a Group III Notice" because the agency did not make a "supported finding of neglect" after investigating the incident. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

Burden of Proof

The grievant also asserts that the hearing officer failed to apply the correct burden of proof in rendering his decision. As the grievant correctly notes, the agency was required to show by a preponderance of the evidence that the disciplinary action issued to her was warranted and appropriate under the circumstances.⁸ It appears that the grievant's position is based upon the hearing officer's finding that the grievant's failure to follow the reporting requirements of the agency's Departmental Instruction 201 ("DI 201") constituted neglect.⁹ While the grievant couches this finding in terms of an "absolute liability" standard, we disagree with this characterization. The hearing decision sets forth in no uncertain terms that "[t]he burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not."¹⁰ The hearing officer concluded that the agency met this burden on the basis of the evidence presented at the hearing.¹¹ There is no indication that the hearing officer imposed a different burden of proof in this matter. Thus, we cannot conclude that the hearing officer failed to comply with the grievance procedure and we decline to disturb the decision on that basis.

Hearing Officer's Findings of Fact

Fairly read, the grievant's request for administrative review argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹² and to determine the grievance

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

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ *Grievance Procedure Manual* § 5.8.

⁹ Hearing Decision at 4.

¹⁰ *Id.* at 2 (citations omitted).

¹¹ *Id.* at 4-5.

¹² Va. Code § 2.2-3005.1(C).

based “on the material issues and the grounds in the record for those findings.”¹³ 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.¹⁴ 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.¹⁵ 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 case, the hearing officer assessed the evidence and determined that the grievant “was responsible for ensuring the safety and welfare of every patient at the Facility even if she was not assigned specific responsibilities with each patient” and that her “failure to immediately report information to the Facility Director undermined the Patient’s safety and welfare because the Agency was unable to timely investigate the abuse allegations.”¹⁶ Thus, he found that the agency presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect.¹⁷ In her request for administrative review, the grievant disputes the hearing officer’s decision to uphold the discipline and argues that the hearing decision included factual findings that were not supported by the evidence in the record. Specifically, she argues that an earlier report of the allegation would not have enabled the agency to conduct a more timely investigation of the incident, and she further argues that the investigator’s statement, as referenced in the hearing decision, that she was “unable to determine whether the Patient had been abused physically”¹⁸ is inaccurate.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer’s findings of fact. During questioning by grievant’s counsel, the agency’s investigator testified that the grievant’s failure to report the allegation of abuse constitutes neglect under the agency’s policy, DI 201, as reporting suspected abuse or neglect is a service necessary to the welfare of the patients.¹⁹ She further explained that because the patient died prior to any report having been made, the possibility exists that there may have been some evidence of abuse which would have been found if the alleged abuse had been reported on the day of its occurrence.²⁰ However, in this instance, the investigator testified that by the time the grievant provided the agency with information about the reported abuse, the patient was already deceased and thus unavailable for her to perform a medical assessment or to answer questions about the incident.²¹ In response, the grievant points out that the agency’s

¹³ *Grievance Procedure Manual* § 5.9.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *Grievance Procedure Manual* § 5.8.

¹⁶ Hearing Decision at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ See Hearing Recording at 54:20-55:52 (testimony of agency investigator).

²⁰ *Id.*


²¹ See Hearing Recording at 58:51-59:42 (testimony of agency investigator).

report determined that the allegation of abuse was not substantiated and contends that a suggestion that evidence to the contrary may have existed is merely speculative.

Determinations of credibility and weight as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where, as here, 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 his hearing decision, the hearing officer found the testimony of the agency's investigator credible and held that as soon as the grievant "learned . . . that the Patient may have been 'tortured,' [she] was obligated to report immediately this information to the Facility Director or his designee. . . . Grievant failed to immediately report the information she learned . . . thereby acting contrary to DI 201."²² Therefore, the hearing officer found that the agency presented sufficient evidence to support the issuance of a Group III offense under agency policy DI 201.²³ 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

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶



Christopher M. Grab
Director
Office of Employment Dispute Resolution

²² Hearing Decision at 4.

²³ *Id.*

²⁴ *Grievance Procedure Manual* § 7.2(d).

²⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).