

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10708; Ruling Date: March 22, 2016; Ruling No. 2016-4316; 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 2016-4316
March 22, 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 10708. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as a direct service associate by the Department of Behavioral Health and Developmental Services (“agency”).¹ On July 7, 2015, the grievant was issued a Group III Written Notice with a five workday suspension for client abuse.² The grievant timely grieved the disciplinary action.³ A hearing was subsequently held on January 28, 2016.⁴ On February 17, 2016, the hearing officer issued a decision upholding the disciplinary action.⁵ The grievant has now requested administrative review of the hearing officer’s decision.⁶

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”⁷ 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.⁸

¹ See Decision of Hearing Officer, Case No. 10708 (“Hearing Decision”), February 17, 2016, at 2; *see also* Grievant’s Exhibit 1 at 1.

² Agency Exhibit A.

³ Grievant’s Exhibit 1; *see* Hearing Decision at 1.

⁴ *See* Hearing Decision at 1.

⁵ *Id.* at 1, 5.

⁶ The grievant indicated in her request for administrative review, dated March 2, 2016, that she had requested a copy of the hearing recording from EDR but had not yet received it. EDR mailed the grievant a copy of the hearing recording on March 1, 2016. As the grievant has not engaged in any further communication with EDR regarding the recording, EDR assumes that the grievant has now received the recording and has chosen not to make any additional submissions to EDR based on her review of that recording.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with Agency Policy

The grievant argues that the hearing officer's decision is inconsistent with state and agency policy. In particular, she appears to argue that the hearing officer erred in finding that her conduct violated either state or agency policy against client neglect or abuse, particularly as the client may not have suffered any injury. The Director of DHRM has the sole authority to interpret all policies affecting state employees and to make a final determination on whether the hearing decision comports with policy.⁹ The grievant has requested such a review. Accordingly, EDR will not address these claims further.

Hearing Officer's Consideration of the Evidence

The grievant also challenges the hearing officer's finding that the grievant's conduct constituted misconduct or a violation of policy. In particular, the grievant appears to assert that the hearing officer erred in finding that she engaged in a loud dispute with a co-worker in front of a client.¹⁰ Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹¹ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹² Further, in cases involving discipline, the hearing officer reviews the evidence *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.¹³ 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.¹⁴ 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 grievant appears to dispute the hearing officer's determinations regarding weight of evidence and witness credibility. While the grievant may disagree with the hearing officer's decision, determinations of this type are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, such as this case, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. Because the hearing officer's findings in this case 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.¹⁵ While the grievant may be correct that some evidence supports her view of the facts of the case, EDR

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ See Hearing Decision at 4.

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ See, e.g., Agency Exhibit C.

cannot find that the hearing officer abused his discretion in reaching the factual conclusions made in deciding this case. Accordingly, we decline to disturb the decision.

Failure to Mitigate

The grievant also appears to challenge the hearing officer's decision not to mitigate the Written Notice. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or in aggravation of any offense charged by an agency in accordance with rules established by [EDR]."¹⁶ The *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."¹⁷ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁸

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.¹⁹ EDR will review a hearing officer's mitigation determination for abuse of discretion,²⁰ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

¹⁶ Va. Code § 2.2-3005(C)(6).

¹⁷ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁸ *Id.* § VI(B)(1).

¹⁹ The Merit Systems Protection Board's approach to mitigation, while not binding on this Office, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).

²⁰ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts." *Id.*

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that mitigation was not warranted.²¹ Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.²²

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



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²¹ Hearing Decision at 4-5.

²² The grievant also argues that the disciplinary action was taken against her in retaliation for her previous protected activity. Although the hearing officer does not address the grievant's concerns regarding retaliation specifically, EDR's review of the record does not support either a conclusion that the hearing officer erred in finding a sufficient factual basis to uphold the discipline or that the hearing officer improperly determined that mitigation was not warranted.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).