

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10805; Ruling
Date: June 22, 2016; Ruling No. 2016-4368; 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 2016-4368
June 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 10805. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10805 are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a DSP II at one of its facilities. She had been employed for nearly 13 years prior to her removal. Grievant had prior active disciplinary action. On October 10, 2014, Grievant received a Group I Written Notice for unsatisfactory attendance.

The Individual resides at the Facility. She is a 41 year old female who has a severe intellectual disability. She is unable to speak, sign, gesture, or otherwise communicate.

On March 12, 2016, Grievant was working on the Unit providing services to individuals living on the Unit. Ms. R was responsible for providing services to several individuals including the Individual. The Individual wanted a snack prior to the customary time individuals living on the Unit received their snacks. At approximately 7:15 p.m., Ms. R complied with the Individual's request and gave the Individual a snack of peanut butter on graham crackers and several saltine crackers. The Individual received this snack prior to the regular time she otherwise would have received her snack.

At approximately 7:35 p.m., Ms. R was working with an individual in the bathroom. Grievant was in the dining room approximately 53 feet away from the bathroom. Four individuals and the Individual were in the dining room with

¹ Decision of Hearing Officer, Case No. 10805 ("Hearing Decision"), May 25, 2016, at 2-3.

Grievant. Grievant observed the Individual open the refrigerator in order to obtain a snack. Grievant stepped out of the dining room and asked Ms. R if Grievant had already had a snack that day. Ms. R said, "I already fed her". Grievant re-entered the dining room. A few seconds later, Grievant used her right hand with an open palm to smack the Individual across the left side of her face. The hit left an imprint of Grievant's hand on the left side of the Individual's face across her left cheek and neck. The Individual screamed and left the dining room. The Individual was upset and crying as she moved towards Ms. R. The Individual held her hands up and extended away from her chest as she approached Ms. R. Ms. R stopped the Individual and looked at her hands but observed nothing of concern. Ms. R looked at the Individual's face and observed a red hand print on the left side of the Individual's face. The print was from someone's right hand. Ms. R took the Individual to two other employees who also observed the hand print.

On March 31, 2016, Grievant was issued a Group III Written Notice of disciplinary action with termination for violation of Departmental Instruction 201, *Reporting and Investigating Abuse and Neglect of Clients*.² In a May 25, 2016 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written notice and the grievant's termination.³ The grievant now seeks administrative review from 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 . . ."⁴ 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.⁵

The grievant's request for administrative review essentially challenges 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁶ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁷ 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.⁸ Thus, in disciplinary actions the hearing officer has the authority to determine whether

² Agency Exhibit 1.

³ Hearing Decision at 5.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

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.⁹ 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 instance, the grievant contests the evidence presented by the agency that she engaged in abuse of the individual in question. The grievant suggests that the agency's main witness in this case, Ms. R, was not credible, and thus she essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted. She further states that Ms. R herself engaged in abuse and/or neglect of certain individuals in the care of the agency at some indeterminate time and had resigned from the agency prior to the hearing in this case.¹⁰

The hearing officer found that the agency did present sufficient evidence to support the issuance of a Group III Written Notice for violation of Departmental Instruction 201.¹¹ Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this case. The grievant's coworker, Ms. R., testified that while the grievant was in the dining room with the Individual, she heard a loud slap, then the Individual screamed and ran out of the dining room, crying, towards Ms. R.¹² Ms. R. observed a red hand print on the left side of the Individual's face.¹³ Ms. R further testified that while she and the grievant were not close friends and had experienced a conflict several months prior to the incident, her judgment of the situation was not affected by her relationship with the grievant.¹⁴ The hearing officer assessed the testimony of Ms. R. and determined that "Ms. R's testimony was credible and does not appear to have been motivated by a desire to remove Grievant from employment."¹⁵ He thus concluded that the grievant had "used her right hand with an open palm to smack the Individual across the left side of her face,"¹⁶ and that this action constitutes abuse under the agency's policy.¹⁷

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ In response, the agency indicates that it has no knowledge of any abuse/neglect of individuals allegedly committed by Ms. R during her employment. It does not appear that any evidence regarding the allegations of abuse/neglect allegedly committed by Ms. R was offered into the record at hearing. To the extent the grievant is arguing this information is newly discovered evidence, there has been nothing presented by the grievant to support EDR finding that this information satisfies the elements of newly discovered evidence. *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989). Accordingly, because the grievant has not satisfied this standard, EDR will not consider this additional evidence of alleged conduct by Ms. R or remand the decision for further consideration by the hearing officer.

¹¹ Hearing Decision at 4-5.

¹² *See* Hearing Record at 7:05-8:57 (testimony of Ms. R).

¹³ *Id.*

¹⁴ *See* Hearing Record at 30:43-31:59 (testimony of Ms. R).

¹⁵ Hearing Decision at 4.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

Determinations of credibility 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 witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group III Written Notice for violation of Departmental Instruction 201.¹⁸ 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, EDR declines 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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹



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¹⁸ Hearing Decision at 4-5.

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).