

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11115; Ruling Date: February 21, 2018; Ruling No. 2018-4668; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2018-4668
February 21, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11115. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11115 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 more than 13 years.

The Resident was a 65 year old man with a history of psychotic depression, poor functioning with impaired independent living due to cognitive impairment, post traumatic anxiety associated with dysfunctional obsessive and compulsive symptomology. Sometimes he would run and fall intentionally.

On July 29, 2017, Grievant was conducting rounds by visiting resident rooms. The rooms were connected by a hallway. Grievant was inside one of the rooms. The Resident began running down the hallway. Grievant stepped to the threshold of the room. She observed the Resident running from her left to her right down the hallway. As he passed her, he fell to the floor in front of her but to the right of the door threshold. Grievant knew the Resident had fallen to the floor. She walked out of the doorway, turned to her left and walked down the hallway away from the Resident. She did not provide any assistance to the Resident as he remained “lifeless” on the floor. She continued her rounds without asking anyone else to assist the Resident. A short time later, another employee who had observed the Resident fall walked down the hallway to speak with the Resident and assist him.

¹ Decision of Hearing Officer, Case No. 11115 (“Hearing Decision”), December 29, 2017 at 2.

On September 21, 2017, the grievant was issued a Group III Written Notice, with termination, for client neglect, which constitutes a violation of the agency's Departmental Policy 201.² The grievant timely grieved her termination from employment and a hearing was held on December 11, 2017.³ On December 29, 2017, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.⁴ The grievant has now requested administrative review of the hearing officer's decision.

DISCUSSION

By statute, EEDR 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 officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially argues that the agency did not meet its burden of proof to show that she violated Departmental Policy 201, challenging the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. She disputes the testimony provided by Witness S, alleging that he provided different information in his testimony at the hearing than he provided to the agency during the investigation. Further, she points to the agency's Nursing Clinical Procedure No. 04-F, arguing that she complied with its provisions that state the nurse should "have another staff member help . . . the patient into a wheelchair or into bed. Do not help the patient on [one's] own."⁷

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁹ 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.¹⁰ 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.¹¹ Where the evidence conflicts or is subject to varying

² *Id.* at 1; Agency Exhibit B.

³ Hearing Decision at 1.

⁴ *Id.* at 3-4.

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

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

⁷ Grievant's Exhibits at 13.

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

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. Even accepting as true the grievant's arguments regarding the testimony of Witness S, the hearing officer appears to have based his decision primarily upon the video of the incident in question and the testimony from the grievant's supervisor regarding the incident.¹² EEDR has thoroughly reviewed the testimony at hearing and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the September 21, 2017 Written Notice and that the behavior constituted misconduct.¹³ The grievant's supervisor testified that she reviewed the video of the incident in question, and, instead of walking away from the patient, the grievant should have assessed him, taken his vital signs, and contacted a physician.¹⁴ She expressed her concern that looking at the patient does not constitute a proper assessment of the patient, and, furthermore, that the grievant failed to request assistance from any other employee in the hallway at the time.¹⁵ While the grievant may dispute her supervisor's assessment of whether she followed the provisions of the agency's Nursing Clinical Procedure No. 04-F, the hearing officer found the testimony of the grievant's supervisor credible and held that the resident "could have been injured and in need of medical assistance . . . [b]y failing to provide assistance to the Resident, Grievant neglected the Resident."¹⁶ Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

Finally, the grievant argues that the hearing officer erred in finding that she "asserted she did not see the Resident fall,"¹⁷ pointing out that the statement she made to the investigator admits that she "observed [the resident] throw himself to the floor."¹⁸ Even assuming that the grievant's assertion is correct, based upon EEDR's review of the record, it appears that the her admission of this fact was not a material issue in this case such that the outcome would change if the case were remanded to the hearing officer for further consideration of the facts on this point. As discussed above, the disciplinary action taken by the agency was based upon its determination that the grievant did see the resident fall, and yet, she failed to act in accordance with her duty to do so.¹⁹ Accordingly, EEDR will not disturb the hearing decision on this basis.

¹² See Hearing Decision at 3.

¹³ *Id.* at 3-4.

¹⁴ Hearing Recording at 17:21-18:21.

¹⁵ *Id.* at 22:55-25:18.

¹⁶ Hearing Decision at 3.

¹⁷ Hearing Decision at 3.

¹⁸ Agency Exhibit C at 5.

¹⁹ See Agency Exhibits B, C.

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



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²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).