

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10056, 10085;
Ruling Date: September 19, 2013; Ruling No. 2014-3702; Agency: Department of
Social 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 the Department of Social Services
Ruling Number 2014-3702
September 19, 2013

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 10056/10085. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10056/10085 are as follows:¹

The Department of Social Services employed Grievant as a Senior Program Manager. The purpose of her position was to:

Direct and manage the children’s permanency programs, including all foster care and adoptive services, focused on positive outcome for at risk children and families in the Commonwealth. Assures effective and efficient administration in accordance with VDSS overall mission, vision, especially strengthening families and expanding the children’s services transformation while adhering to the guiding principles of permanency programs and services.

Grievant had been employed by the Agency for approximately 11 years prior to her removal effective February 19, 2013. Grievant reported to the Supervisor. Except for the facts giving rise to these disciplinary actions, Grievant’s work performance was satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

On March 26, 2013, the Supervisor provided Grievant with a written counseling stating, in part:

¹ Decision of Hearing Officer, Case No. 10056/10085 (“Hearing Decision”), August 13, 2013, at 2-4.

The manner in which you perform your duties is a reflection of the leadership of this agency. That is why follow up, follow through, respect for others' time, and responsiveness are so important. I recognize that [your] workload is significant; you must juggle competing priorities on a daily basis; and you must rely on staff to whom you delegate responsibilities. Even so you are accountable for fulfilling commitments and following up to make sure that delegated responsibilities have been accomplished.

In July 2012, the Supervisor asked Grievant to contact a Foster Parent. The Supervisor provided Grievant with the Foster Parent's telephone number and asked Grievant to discuss with the Foster Parent a planned foster parent survey. The Supervisor wanted Grievant to build a relationship with the Foster Parent in order to turn the Foster Parent from being an opponent into being an advocate for the Agency. Grievant did not contact the Foster Parent. In October and November 2012, the Supervisor again told Grievant to contact the Foster Parent. Grievant failed to contact the Foster Parent. On January 9, 2013, the Supervisor learned that Grievant had not contacted the Foster Parent. Grievant finally called the Foster Parent. The Foster Parent reacted negatively towards the Agency because she was not called on a timely basis.

On January 23, 2013 at approximately 10:15 a.m., Grievant attended a meeting with the Agency Head, Chief Financial Officer, Supervisor, Budget Director and several other Agency managers. They were seated at a table. They were discussing how to respond to a question posed by a staff member of the House Appropriations Committee. The question involved how the Agency intended to defend its request for \$1.35 million in the budget even though the Agency had received \$800,000 from another source. The Budget Director told Grievant to write a justification for the funding and provide that response to the Budget Director by 3 p.m. that day. Grievant told the group that she would take care of the task right away. The meeting ended at approximately 11 a.m. or 11:15 a.m. Grievant returned to her desk. At approximately 12:30 p.m., the Supervisor asked Grievant to meet him at the General Assembly building to assist with addressing a pending bill.

At approximately 2:50 p.m., the Supervisor received a call from an agency manager asking for the information Grievant was to provide. The Supervisor located Grievant and told her to return to the office to complete the assignment. Grievant returned to the office. She drafted the language and submitted it to the Budget Director by 3:21 p.m. The Agency ultimately received the requested funding.

The Supreme Court's Director of Court Improvement asked the Agency to post on its website a document explaining the rights of foster parents. On January 29, 2013, the Supervisor instructed Grievant to post the brochure on the Agency's

public and internal websites by February 8, 2013. Grievant delegated responsibility for the task to her subordinates, Ms. B and Ms. M. On January 29, 2013, Grievant forwarded a copy of the email from the Supreme Court's Director of Court improvement to Ms. W. Grievant and Ms. B and Ms. M decided it made better sense to include the brochure's link in the pending foster care and adoption manuals. This decision was based on the lack of a good location for the brochure on the Agency's website and the need to connect the brochure with guidance put forth by the Agency in both manuals regarding foster parents and pre-adoptive parents' rights as it related to court hearings. This process could not be completed by February 8, 2013. Grievant did not notify the Supervisor that she had concluded to delay the posting of the brochure.

Changes to the foster care and adoption manuals were posted to the Agency's website in April 2013.

On January 30, 2013, the grievant was issued a Group II Written Notice for failure to follow instructions.² On February 19, 2013, the grievant was issued a second Group II Written Notice for failure to follow instructions and her employment was terminated.³ She initiated timely grievances challenging the disciplinary actions, and on August 13, 2013, following a consolidated hearing, the hearing officer issued a decision upholding the disciplinary actions.⁴ 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."⁵ 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.⁶

Inconsistency with State 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 policy.⁷ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 5.

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

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).

Findings of Fact

The grievant also asserts that the hearing officer erred in finding that she had been given repeated specific instructions regarding the call to the Foster Parent. 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 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.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 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, there is sufficient evidence to support the hearing officer’s finding that the grievant failed to comply with her supervisor’s repeated instructions to call the Foster Parent.¹² Although there was conflicting testimony and documentation regarding the instructions, record evidence supports the hearing officer’s conclusion that the grievant was asked repeatedly by her supervisor to call the Foster Parent and that she failed to comply with these instructions.¹³ That reasonable minds could disagree regarding the evidence does not in itself constitute a basis for overturning the hearing officer’s decision. The test is not whether a hearing officer could reasonably have found for the grievant, but instead whether the hearing officer’s findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, 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.

Failure to Mitigate

The grievant also argues that the hearing officer erred by failing to mitigate the disciplinary action on the basis that the disciplinary actions taken against her were inconsistent with those taken against similarly situated employees. The grievant’s counsel failed either to

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.

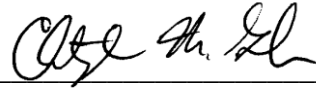
¹² Hearing Decision at 3-4, 5.

¹³ *See, e.g.*, Hearing Recording at 16:00 through 16:48.

raise this argument or to present evidence regarding inconsistent treatment during the grievance hearing, and as such, the grievant may not now raise this objection on administrative review.¹⁴

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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷



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¹⁴ To the extent the grievant asserts that her claims regarding mitigation are based on newly-discovered evidence, she has not met her burden of establishing that: (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended. *See, e.g.*, EDR Ruling No. 2013-3551.

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).