

Issue: Compliance-Hearing Decision; Ruling Date: November 27, 2001; Ruling #2001-162; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: In compliance-hearing officer



## *COMMONWEALTH of VIRGINIA*

### *Department of Employment Dispute Resolution*

#### COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse  
Services/ No. 2001-162

November 27, 2001

The grievant has requested a compliance ruling in the June 8, 2001 grievance (hearing case #5248) that he initiated with the agency. The grievant claims the hearing officer's written decision does not comply with the grievance procedure.

#### FACTS

The grievant was employed as a Mental Health Physician at one of the agency's hospitals. He was issued a Group II Written Notice and terminated from employment on May 15, 2001, for "failure to follow supervisors instructions."<sup>1</sup> The grievant initiated a grievance contesting the disciplinary action on June 8, 2001, an administrative hearing was held on August 13-14, 2001, and the hearing officer's written decision was then issued on August 20, 2001 upholding the Group II Written Notice and termination. The grievant timely requested this Department to administratively review the hearing officer's August 20 decision; he concurrently requested reconsideration from the hearing officer. The hearing officer granted the reconsideration request and issued a comprehensive response on August 31, 2001, concluding that there was no basis to amend or reverse the original decision. The grievant also submitted a request to the EDR Director on September 6, 2001 for review of the hearing officer's reconsideration decision. We now respond to the grievant's request for administrative review.<sup>2</sup>

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<sup>1</sup> The grievant's medical director instructed him in a February 23, 2001 email that he must arrange for his own coverage when he would be absent from work. The Group II Written Notice charges the grievant with being absent on March 1, 8 & 15, 2001 without arranging for coverage.

<sup>2</sup> See *Grievance Procedure Manual* § 7.2(c)(providing that a hearing officer's decision on reconsideration should be issued before the DHRM or EDR Directors issue their decisions).

The grievant claims that the hearing officer issued a noncompliant written decision by: (1) basing the decision on “material factual errors, misconstrued facts, and contradictory conclusions;” (2) excluding “crucial exculpatory evidence and testimony;” (3) violating state and agency policy; and (4) violating state law, specifically Va. Code Ann. §2.1-116.05.<sup>3</sup> The grievant’s request for review of the hearing officer’s August 31, 2001 reconsideration decision incorporates the four claims above and adds that: (5) the hearing officer’s reconsideration contradicts his own “precedent decision” regarding the required prompt issuance of disciplinary action; and (6) the hearing officer unfairly denied the grievant’s attorney’s request for postponement of the hearing (agreed to by the other party).

### DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions in all matters related to procedural compliance with the grievance procedure.”<sup>4</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>5</sup>

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>6</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>7</sup> Further, “[i]n 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. If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline.”<sup>8</sup> Mitigating factors include, but are not limited to, “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity” and “an employee’s long service or otherwise satisfactory work performance.”<sup>9</sup> 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.<sup>10</sup>

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<sup>3</sup> Recent changes in the Code have relocated this cited section to Va. Code § 2.2-3002(D).

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3), page 18.

<sup>6</sup> Va. Code § 2.2-3005(D)(ii).

<sup>7</sup> *Grievance Procedure Manual* § 5.9, page 15.

<sup>8</sup> *Rules for Conducting Grievance Hearings*, page 7; DHRM Policy No. 1.60(IX)(B)(effective 9/16/93).

<sup>9</sup> DHRM Policy No. 1.60 VII(C)(1).

<sup>10</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.<sup>11</sup> Accordingly, the technical rules of evidence do not apply.<sup>12</sup> By statute, hearing officers have the duty to “[r]eceive probative evidence” and to “exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.”<sup>13</sup> 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

### Alleged Errors

The grievant claims that the hearing officer mischaracterized his response to questions at the hearing regarding whether he found the *language* in the medical director’s above-cited February 23, 2001 email to be unclear. The grievant has stated that he found the instructions contained in the email to be confusing for reasons other than the *language* –i.e., the instructions were inconsistent with prior procedure and they were bad, and even improper, policy.

It is undisputed that the grievant answered affirmatively when asked at the hearing whether he found portions of the relevant email confusing. The hearing officer appears to have taken the plain meaning of this answer as a claim by the grievant that he was confused about the language of the email –a claim which the hearing officer found not to be credible in light of the grievant’s position and education. This is a determination well within his authority to hear and decide the evidence.

The grievant claims the hearing decision does not recognize the limits of his medical director’s authority to give him instructions. Specifically, the grievant was instructed to use a staff psychiatrist to cover for him when he would be absent. He did not believe that a psychiatrist could provide adequate medical care for patients. In considering this claim, the hearing officer acknowledged that the grievant might well have justification for not following a policy that had “a demonstrated adverse effect on patient care.” The hearing officer considered evidence that psychiatrists routinely provide medical care in place of doctors on nights and weekends. Moreover, when skills above the level of the psychiatrist arise, the hospital’s policy is to call an ambulance and have the patient taken to a medical hospital for treatment. Based on this evidence, the hearing officer concluded that the grievant did not demonstrate a legitimate basis for refusing to

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<sup>11</sup> *Rules for Conducting Grievance Hearings*, page 4.

<sup>12</sup> *Id.*

<sup>13</sup> Va. Code § 2.2-3005(C)(5).

comply with the medical director's instructions. This determination is consistent with the hearing officer's authority.

The grievant also claims that the hearing officer erred in finding that he was "cavalier" and that he had "displayed an obvious disrespect for authority towards his director" in this matter. He asserts that his very civil demeanor during the hearing contradicts these determinations. The hearing officer has responded that he observed the grievant's admittedly "courteous, punctual, and patient [behavior] during the hearing." However, he believed other evidence presented was far more relevant in deciding this issue –e.g., "[the grievant's] refusal to respect authority was exemplified in the e-mail to his supervisor in which he stated, 'I did not request or obtain coverage ... despite warnings that failure to do so constituted failure to follow a supervisor's direction.'<sup>14</sup>" Also, the hearing officer noted that, "[e]ven after all that has transpired, Grievant resolutely contends that it 'is not [his] responsibility,'<sup>15</sup> to assure coverage during his absence."<sup>16</sup> Although the grievant disagrees with this characterization of his behavior, he has not shown that the hearing officer made an error of fact or that his determination of this issue was not based on the record evidence.

The grievant claims the hearing officer erred in finding that the disciplinary action was taken in a timely manner. Also, the grievant asserts that this finding is inconsistent with the hearing officer's decision in an earlier case (Docket #5247). The hearing decision at issue now, however, shows that the hearing officer assessed the reasonableness of such time frames based on the circumstances of each case. In this case, he found that the elapsed time from the charged conduct to issuance of the discipline (March to May) was reasonable under the circumstances and consistent with the time frames in similar cases. In the earlier case cited by the grievant, the time between the charged conduct and issuance of the discipline in that instance was nearly six months,<sup>17</sup> which the hearing officer found to be an unreasonable delay. The determination by the hearing officer that the discipline in this case was issued in a timely manner is well within his authority.

#### Alleged Exclusion of Evidence

The grievant alleges that the hearing officer failed to consider important exculpatory evidence, which resulted in "a legally incorrect conclusion." The grievant's reconsideration request does not, however, state what conclusion he considers to be legally incorrect. The grievant testified at the hearing that he did not receive the February

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<sup>14</sup> Agency Exhibit 20. E-mail from grievant to his supervisor, March 23, 2001.

<sup>15</sup> Page 5, Request for Reconsideration, August 30, 2001.

<sup>16</sup> Reconsideration Decision, August 31, 2001, p. 3.

<sup>17</sup> The quote cited by the grievant in which the hearing officer refers to an unacceptable one month delay refers to the commencement of an investigation into the matter, not the issuance of a disciplinary action. Grievance No. 5247, August 20, 2001 Hearing Decision.

23, 2001 memorandum; the agency presented no evidence to rebut grievant's assertion. Therefore, the hearing officer accepted grievant's assertion as true. There is no indication from this that the hearing officer acted outside his authority.

#### Alleged Policy Violations

The grievant also claims that the hearing officer has misconstrued agency policy by selectively quoting portions of it and failing to acknowledge that the grievant had prior approval for his absences on the relevant dates as required by the policy. The hearing officer has responded that, "[t]here is no dispute that grievant had been preapproved to have every Thursday off from work. The issue in this case was not preapproval but whether grievant took action to assure coverage for this preapproved absence."<sup>18</sup> The determination is consistent with the hearing officer's authority to identify the issues and apply the relevant policies in deciding the case.

Similarly, the grievant alleges that Hospital Instruction 3110 was misapplied when issuing his disciplinary action, because the supervisor issuing the disciplinary action did not discuss details of the offense with grievant prior to issuing discipline. However, the hearing officer responded that the grievant did not point to any portion of the policy that would require such a discussion with him prior to issuance of discipline, which only requires that the supervisor carefully review the facts before issuing discipline. He further found that the grievant provided no evidence to rebut the agency's contention that this matter was carefully reviewed before the discipline was issued. These determinations were within the hearing officer's authority.

#### Alleged Violation of Va. Code § 2.1-116.05

The grievant argues that the hearing decision does not recognize the first step respondent's authority to provide relief in this case as provided by the grievance procedure statute. This is the third time this Department has ruled on this issue. In our compliance rulings issued on March 23, 2001 and July 20, 2001 we held that "management did not violate a substantial procedural requirement of the grievant procedure by failing to accept the recommendation of the first step respondent."<sup>19</sup> In his decision, the hearing officer correctly noted that he [like the grievant] is bound by the original March 23, 2001 ruling on procedural compliance, which is final and nonappealable.<sup>20</sup> Accordingly, his decision on this issue is in compliance with the grievance procedure.

#### Postponement Request

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<sup>18</sup> Reconsideration Decision, August 31, 2001, p. 4.

<sup>19</sup> See EDR Rulings #2001-QQ (March 23, 2001), and 2001-120 (July 20, 2001).

<sup>20</sup> Grievance No. 5247, issued August 20, 2001, p. 7.

Finally, the grievant asserts that the hearing officer exceeded or abused his authority by refusing to grant a delay in the hearing agreed to by both parties. The hearing officer has responded that the delay would have resulted in issuance of a decision well beyond the 30 days required by the grievance procedure, which can only be granted upon a showing of just cause.<sup>21</sup> The hearing officer considered several factors in determining there was no just cause for delay, including the length of the requested delay, the availability of the witness by telephone, the time available to provide the witness with documents he needed to refer to in testifying, and the fact that the witness's testimony was unchallenged and his demeanor not central to evaluating his testimony. The hearing officer also pointed out that the witness did testify at the hearing and the grievant was given ample opportunity to elicit all the testimony he wanted from the witness. The decision to deny postponement due to a lack of just cause was within the hearing officer's discretion.

#### DECISION

In sum, the grievant's challenges to the hearing officer's decision, when examined, simply contests his exercise of discretion in the weight and credibility that he accorded the hearing exhibits and witnesses testimony, the resulting inferences that he drew, and the characterizations that he made. Such determinations were entirely within the hearing officer's authority, and this Department cannot conclude that the hearing officer's findings were without some basis in the record and the material issues in this case.

For the reasons discussed above, this Department finds that the hearing officer neither abused his discretion in his conduct of the hearing nor exceeded his authority in deciding this case. This Department's rulings on matters of compliance are final and nonappealable.<sup>22</sup>

#### APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, and for the reasons discussed in this ruling and in the hearing officer's August 31, 2001 reconsideration decision, the August 20, 2001 hearing decision in this case is now a final hearing decision. The August 20, 2001 hearing decision may be appealed to the circuit court in the jurisdiction in which the grievance arose within 30 calendar days from the date of this ruling.

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<sup>21</sup> Reconsideration Decision, August 31, 2001, p. 5. See also, *Grievance Procedure Manual*, § 5.1, effective July 1, 2001, which addresses the 30 calendar day requirement for the hearing officer's issuance of the decision.

<sup>22</sup> Va. Code § 2.2-1001(5).

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