Issue: Compliance/Hearing Decision; Ruling Date: January 4, 2002; Ruling #2001-169; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance

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. 2001-169

January 4, 2002

The grievant has requested a compliance ruling in the June 8, 2001 grievance (case #5249) that he initiated with the agency. The grievant claims the hearing officer's written decision does not comply with the grievance procedure. The grievant submitted two requests for review to this Department, which we received on August 29, 2001 and September 6, 2001, respectively.[1]

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 violating state policy on personnel records disclosure and management.[2] 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

[1] Through counsel, the grievant has recently asserted that the hearing decision at issue in this review was "constructively denied" by this Department "on or about December 7, 2001." We disagree. There is no basis for a constructive denial. This Department has made every effort to fully address the multiple issues raised by the grievant's two requests for review of the hearing decision in Case Number 5249, and to provide the grievant with information about the status of his requests in this and a second related grievance.

[2] The grievant sent the medical director an email on February 27, 2001, in which he stated his concerns about the patient care-related performance problems of a physician's assistant at the hospital. The grievant included ten attachments to the email as examples of earlier problems he had noted by the same assistant. The email and attachments were copied to the Inspector General of the agency. The Group II Written Notice charges the grievant with disclosing "confidential performance related information about an employee to several individuals, including at least one outside of [the agency] [i.e., the Inspector General], without justification, consent or demonstrated necessity. Moreover, the information was considered part of the supervisory record and employee's personnel record and [the grievant] failed to discuss this disclosure with the employee." See Written Notice Form, dated May 15, 2001.

hearing officer's August 20 decision; he concurrently requested reconsideration from the hearing officer, and from the Department of Human Resource Management (DHRM). 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.[3]

The grievant claims that the hearing officer issued a noncompliant decision that violated: (1) agency policy on reporting patient neglect and abuse[4]; (2) state personnel records policy[5]; (3) policies on the timeliness and procedure for issuing discipline[6]; and (4) state law regarding the authority of resolution step respondents within the grievance procedure.[7] 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 creates (procedural) policy; (6) the hearing officer misconstrues and disregards the material facts; (7) the decision contradicts the hearing officer's own "precedent decision"[8] regarding the required prompt issuance of disciplinary action; and (8) the hearing officer unfairly denied the grievant's attorney's request for postponement of the hearing, which had been 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."[9] 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.[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

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[3] 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).
[4] Departmental Instruction 201 (RTS) 00, Reporting and Investigating Abuse and Neglect of Clients.
[5] DHRM Policy Nos. 6.05, Personnel Records Disclosure, and 6.10, Personnel Records Management.
[6] DHRM Policy No. 1.60 §VI.A., *Standards of Conduct*, and Hospital Instruction Number 3110, *Processing Disciplinary Actions*, June 23, 2000, respectively.
[7] The statute cited in the appeal is Va. Code Ann. §2.1-116.05. Recent changes in the Code have relocated this section to Va. Code § 2.2-3002(D).
[8] Hearing Decision, Docket No. 5247, August 20, 2001.
[9] Va. Code § 2.2-1001(2), (3), and (5).
[10] See *Grievance Procedure Manual* § 6.4(3), page 18.
[11] Va. Code § 2.2-3005(D)(ii).

the record for those findings."[12] 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."[13] 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."[14] 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.[15]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[16] Accordingly, the technical rules of evidence do not apply.[17] By statute, hearing officers have the duty to "[r]eceive probative evidence" and to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs."[18] 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.

Whether the Decision is Inconsistent with Law and Policy (Claims 1-4)

In accordance with the above, whether the hearing decision is consistent with state and agency policy is a matter for DHRM, not this Department, to determine. The grievant has requested an administrative review of these issues by DHRM, which has notified the parties that its decision will be issued after this ruling. Thus, the grievant's policy claims (claims 1, 2 and 3 above) are issues properly within DHRM's purview. Accordingly, this ruling will not address those claims, except to direct the hearing officer to reconsider his decision in light of the forthcoming ruling from DHRM, should it be found that the decision is inconsistent with state or agency policy.

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[12] *Grievance Procedure Manual* § 5.9, page 15.
[13] *Rules for Conducting Grievance Hearings*, page 7; DHRM Policy No. 1.60(IX)(B)(effective 9/16/93).
[14] DHRM Policy No. 1.60 VII(C)(1).
[15] *Grievance Procedure Manual* § 5.8(2), page 14.
[16] *Rules for Conducting Grievance Hearings*, page 4.
[17] *Id.*
[18] Va. Code § 2.2-3005(C)(5).

Questions regarding the decision's conformity with law are to be reviewed by the circuit court in the jurisdiction in which the grievance arose, not this Department. The grievant argues that the decision violates state law by failing to accept the first management step respondent's grant of relief (claim 4) notwithstanding the fact that the agency head ultimately concluded, at the qualification stage, that relief should not be granted. In our compliance rulings issued on March 23, 2001 and July 20, 2001[19] 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."[20] In his decision, the hearing officer concluded that he is bound by our March 23, 2001 compliance ruling on this issue. In this case, we find that the original and reconsidered decisions on this issue are in compliance with the grievance procedure. As stated, our rulings on matters of compliance with the grievance procedure are final and nonappealable. [21] Whether this presents an appealable issue of state law is within the purview of the circuit court to decide, subject to appeal to the higher courts.

Other Alleged Errors (Claims 5-8)

The grievant's fifth claim is that the hearing officer erred in stating that "the grievant failed to comply with the requirement to send a copy of his reconsideration request to the agency," and that the hearing officer "created policy" by implying that he should have provided a copy of his request to the agency at the same time as to the hearing officer (a requirement he asserts is not found in the grievance procedure). This argument is without merit. Even assuming without deciding that the statement was erroneous, it involves procedural matters that occurred after the hearing and decision. There is no showing that the alleged error is relevant or material to the substantive issues qualified for the hearing or that it prejudiced the grievant in any way.

The grievant claims that the hearing officer erred in stating that he had "readily acknowledged during the hearing that he disagrees with some of the policies of the [director] and, that grievant believes he could better manage the facility than the current director does" (claim 6). The grievant claims that he never made the statement. The hearing officer has responded that "[i]n fact, the grievant did make a statement to this effect in response to a question posed by the hearing officer. However, even if the grievant had not made such a representation, the outcome of the hearing would be unchanged" as explained further in his original and reconsideration decisions.[22] These are determinations well within the hearing officer's authority to weigh the evidence and decide the case.

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[19] Our third ruling on this issue, EDR Ruling 2001-162, was issued on November 27, 2001, after this ruling was requested.
[20] See EDR Rulings #2001-QQ (March 23, 2001), and 200-120 (July 20, 2001).
[21] Va. Code § 2.2-1001(2), (3), and (5).
[22] Decision, August 20, 2001; Reconsideration Decision, August 31, 2001.

The grievant also claims that the hearing officer's decision mischaracterizes his February 27, 2001 email as "a serious criticism of the facility director and the medical director" (claim 6). The grievant asserts that this conclusion contradicts the content of the document. The hearing officer has responded that "an objective reading of the memorandum reflects that, in fact, a dual message was communicated."[23] In this case, the hearing officer appears to have taken the plain meaning of the email's language as a thinly veiled criticism of the management of the hospital. The hearing officer assumed that the criticisms were "meritorious, well intentioned, and motivated by [the grievant's] genuine concern for patient welfare."[24] Nevertheless, for the same reasons cited above, the hearing officer concluded that the grievant's email was critical of management. This is similarly a determination within his authority to hear and decide the evidence.

The grievant alleges that the hearing officer failed to consider important exculpatory evidence (claim 6) –specifically, that he had previously reported other employees, by name, to the Inspector General, without repercussion. The hearing officer responded that this issue was not thoroughly covered at the hearing, "thus, there is no conclusive evidence that the agency was aware of such instances. However, even if the agency was aware of such instances, the failure to discipline an offense does not preclude taking disciplinary action for a subsequent repeat offense."[25] There is no indication from this that the hearing officer abused his authority to receive and consider the evidence.

The grievant claims the hearing officer erroneously concluded that the disciplinary action was issued in a timely manner –a finding allegedly inconsistent with the hearing officer's decision[26] in an earlier case (claim 7). The hearing decision at issue here, 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 (February to May) was reasonable under the circumstances (such as the grievant's intervening sick leave taken from March 23 to May 7, 2001) and consistent with the time frames in similar cases.[27] 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,[28] 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.

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[23] Reconsideration Decision, August 31, 2001, p. 2.
[24] Reconsideration Decision, August 31, 2001, p. 2.
[25] Reconsideration Decision, August 31, 2001, p. 4.
[26] Grievance No. 5247, August 20, 2001 Hearing Decision, p. 6.
[27] Decision, August 20, 2001, p. 6.
[28] 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, pp. 6&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 (claim 8). The hearing officer has responded that the delay would have resulted in the 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.[29] 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 contest his exercise of discretion, 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.[30]

APPEAL RIGHTS

Only final hearing decisions are reviewed by the circuit court. The hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by this Department or DHRM, the hearing officer has issued a revised decision.[31] As stated above, the grievant has also requested an administrative review of this case from DHRM, and a decision from that Department will be forthcoming. The hearing officer is ordered to issue a revised opinion,

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[29] Reconsideration Decision, August 31, 2001, pp. 6-7. 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.

[30] Va. Code § 2.2-1001(5).

[31] See *Grievance Procedure Manual* § 7.2(d), page 20. See also *Grievance Procedure Manual* § 7.3, page 20, for discussion on circuit court appeal.

if needed, no later than 10 days after receiving DHRM's decision, in a manner consistent with DHRM's policy determinations. Following that, the hearing officer's revised opinion will be a final hearing decision. In the event no changes are ordered by DHRM, the hearing officer's August 31, 2001 reconsidered decision will be final upon receipt of the DHRM determination. The final hearing decision may be appealed to the circuit court in the jurisdiction in which the grievance arose within 30 calendar days from the date upon which it becomes final.

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Neil A.G. McPhie, Esquire
Director

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Jeffrey L. Payne
Employment Relations Consultant