Issue: Compliance/administrative review of hearing decision; Ruling Date: November 5, 2004; Ruling #2004-895; 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
Ruling Number 2004-895
November 5, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7875. The grievant claims that the hearing officer erred by (1) failing to make a finding of fact that the toilet seatbelt was a "restraint;" (2) failing to make a factual finding of misconduct or wrongdoing; and (3) implicitly finding that a safety seatbelt is a "restraint." For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

Prior to her termination, the grievant was employed as a medication assistant with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). On July 6, 2004, the grievant received a Group III Written Notice with termination for abuse and neglect of a client by "unauthorized use of restraint."[1] The grievant challenged the disciplinary action by initiating an expedited grievance on July 7, 2004. The grievance proceeded to hearing on October 8, 2004. In an October 12th decision, the hearing officer affirmed the disciplinary action.

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…on all matters related to procedural compliance with the grievance procedure."[2] If the hearing officer's exercise of authority is not in compliance with the

[1] The Written Notice additionally charged the grievant with violating the client's rights to reasonable privacy and dignity. This second charge was removed by the second step-respondent during the management resolution steps of the grievance process.
[2] Va. Code § 2.2-1001(2), (3), and (5).

grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[3]

Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and grounds in the record for those findings."[5] 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.[6] 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.[7] Further, the grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision that "contain[s] findings of fact on the material issues and the grounds in the record for those findings."[8]

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, the grievant was charged with abuse for using unauthorized restraint. In his hearing decision, the hearing officer found the following:

> The agency has shown, by a preponderance of the evidence, that grievant did seat belt to a toilet a client whose physical management plan does not include use of such a restrictive device. She left the client belted to the toilet for nearly an hour and, during that time took a half-hour break out of the area……Grievant *knew* that restrictive seat belting had not been approved for this client. She also knew that the client is subject to seizures and is prone to head-banging. Grievant's seat belting of the client to a toilet for nearly an hour, and leaving her alone for a half hour, were actions that the grievant knew might have resulted in harm to the client.[10]

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[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3005(D)(ii).
[5] *Grievance Procedure Manual* § 5.9.
[6] *See Rules for Conducting Grievance Hearings*, § VI (B).
[7] *Grievance Procedure Manual* § 5.8(2).
[8] *Grievance Procedure Manual* § 5.9; *see also Rules for Conducting Grievance Hearings* § V(C).
[9] Va. Code § 2.2-3005(C)(5).
[10] Decision of Hearing Officer, Case No 7875, issued October 12, 2004 (emphasis in original).

Although the hearing officer did not specifically discuss whether the toilet safety seatbelt constitutes a "restraint," the hearing decision contains the required "findings of fact on the material issues and the grounds in the record for those findings."[11] Similarly, although not expressly stated as a finding of fact in the hearing decision, by upholding the disciplinary action, the hearing officer clearly finds that there was misconduct or wrongdoing. As such, this Department concludes that the hearing officer has not violated the grievance procedure by failing to discuss in detail the definition of "restraint" or to include an express statement that the grievant's behavior constitutes misconduct or wrongdoing.

Erroneous Conclusions

Additionally, the grievant maintains that the hearing officer's implicit finding that the toilet safety seatbelt constitutes a "restraint" is erroneous. In support of this contention, the grievant argues that the seatbelt was not a "restraint" if the client was able to release the belt and that there was no evidence at hearing that the client was prevented from releasing herself from the safety belt. In addition, the grievant appears to equate the use of a toilet safety belt to an automobile safety belt and contends that failure to include the use of an automobile safety belt in the client's treatment plan does not mean that such use is abuse and therefore the same holds true for the toilet seat safety belt.

The grievant's claims are largely based on the hearing officer's interpretation of DMHMRSAS Departmental Instruction (DI) 201(RTS)03, Section 201-3.[12] In essence, the grievant claims that the hearing officer violated the grievance procedure in the way in which he interpreted the meaning of the word "restraint." The crux of the grievant's argument presents a policy interpretation question, which is not for this Department to determine. Rather, the Director of the Department of Human Resource Management (DHRM) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state policy.[13] Only a determination by the DHRM Director could establish whether the act described in the

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[11] *Grievance Procedure Manual* § 5.9; *see also Rules for Conducting Grievance Hearings* § V(C).

[12] The Written Notice form states the nature of the offense as "Abuse & neglect of a client as evidenced by the following: 1) unauthorized use of restraint." To support its charge, the agency produced at hearing Section 201-3 of DMHMRSAS Departmental Instruction (DI) 201(RTS)03, *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities*, issued October 31, 2003 which cites the "[u]se of physical or mechanical restraints on a person that is not in compliance….with the person's individualized service plan" as an example of abuse. It should be noted that the hearing decision incorrectly cites to DMHMRSAS Departmental Instruction (DI) 201(RTS)00, *Reporting and Investigating Abuse and Neglect of Clients*, revised April 17, 2000 as Exhibit 6 and the supporting policy for the agency's disciplinary action in this case. Exhibit 6, however, is actually DMHMRSAS Departmental Instruction (DI) 201(RTS)03, *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities*, issued October 31, 2003. Upon review of Exhibit 6 and the hearing officer's reference to the earlier Departmental Instruction 201(RTS)00, this Department concludes that the hearing officer's error is harmless as the text of the two documents is identical in all respects material to this grievance.

[13] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2).

Written Notice constitutes misconduct under the *Standards of Conduct*, or whether the hearing officer erred in his interpretation of state and agency policy.[14] In contrast, this Department has the authority to determine whether the hearing officer's findings of misconduct or inappropriate behavior are based upon the material issues and grounds in the record.[15]

On the Written Notice, DMHMRSAS charged the grievant with an offense specifically listed in its abuse and neglect policy.[16] Moreover, the hearing officer found that the acts described in the Written Notice occurred and were improper and it appears that the hearing officer's findings are based upon evidence in the record and the material issues of the case. As such, this Department will not substitute its judgment for that of the hearing officer.

Requests for administrative review must be made and *received* by the reviewer within 15 calendar days of the date of the hearing decision.[17] In this case, the grievant did not request a ruling from DHRM. However, the grievant timely requested an administrative review by this Department. This Department has previously held that timely claims made to the wrong party may proceed.[18] Therefore, if the grievant wishes to request DHRM to administratively review the hearing officer's application of agency policy, she must do so within 15 calendar days from the date of this ruling. If DHRM finds that the hearing officer's interpretation of policy was incorrect, the DHRM Director's authority is limited to directing the hearing officer to reconsider his decision in accordance with her interpretation of policy.[19]

APPEAL RIGHTS AND OTHER INFORMATION

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

[14] *See Rules for Conducting Grievance Hearings*, § VII(A)(2).
[15] Hearing officers are authorized to make "findings of fact as to the material issues in the case" and to determine the grievance based "on the material issues and grounds in the record for those findings." *See* Va. Code § 2.2-3005(D)(ii) and *Grievance Procedure Manual* § 5.9.
[16] *See* MHMRSAS Departmental Instruction 201(RTS)03, *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities*, Section 201-3, issued October 31, 2003.
[17] *See* Grievance *Procedure Manual* § 7.2(a).
[18] *See* EDR Rulings 2000-008 (grievance initiated timely with the wrong party) and 2003-124, 2000-131 (request for administrative review sent to wrong agency).
[19] *Grievance Procedure Manual* § 7.2(a)(2).
[20] *Grievance Procedure Manual*, § 7.2(d).
[21] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

final hearing decision is contradictory to law.[22] This Department's rulings on matters of procedural compliance are final and nonappealable.[23]

Claudia T. Farr
Director

[22] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2nd 319 (2002).
[23] Va. Code § 2.2-1001 (5).