

Issue: Administrative Review of Case #8165; Ruling Date: October 21, 2005; Ruling #2006-1168; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: hearing officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Mental Health,  
Mental Retardation and Substance Abuse Services  
Ruling Number 2006-1168  
October 21, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8165. The grievant challenges the hearing officer's determination that the discipline taken against him was appropriate under the Standards of Conduct.

FACTS

The grievant was employed as a Human Service Care Worker by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency).<sup>1</sup> On June 21, 2005, the agency issued the grievant a Group III Written Notice of disciplinary action with removal for a violation of the departmental instruction on reporting and investigating abuse and neglect.<sup>2</sup> The grievant timely initiated a grievance challenging the disciplinary action, and after the parties failed to resolve the grievance during the management resolution steps, the grievance proceeded to hearing on September 14, 2005.<sup>3</sup> The hearing officer issued a decision upholding the challenged disciplinary action on October 3, 2005.<sup>4</sup>

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."<sup>5</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>6</sup>

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<sup>1</sup> Hearing Decision at 2.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1, 4.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>8</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.

In this case, the grievant asserts that the hearing officer improperly failed to mitigate the discipline taken against him, as others involved in the incident giving rise to the grievant’s termination were disciplined less harshly. Under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was “warranted and appropriate under the circumstances.”<sup>9</sup> Where the hearing officer finds that mitigating circumstances justifying a reduction or removal of the grieved disciplinary action exist, he must then consider whether there are also aggravating circumstances which would “overcome the mitigating circumstances.”<sup>10</sup> A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness.<sup>11</sup> Moreover, this Department will find that a hearing officer failed to comply with the grievance procedure with respect to mitigation of disciplinary action only where the hearing officer’s action constituted an abuse of discretion.

Under the facts presented by this case, we cannot find that the hearing officer abused his discretion in finding that the discipline imposed on the grievant did not exceed the limits of reasonableness. The hearing officer acknowledged in his decision that other involved employees were not removed from employment, and that the inconsistent application of disciplinary action is a basis to mitigate discipline.<sup>12</sup> He further determined, however, that aggravating circumstances justified the grievant’s termination, notwithstanding the inconsistent discipline.<sup>13</sup> The aggravating circumstances identified by the hearing officer were the grievant’s untruthfulness during the step process and the grievant’s work performance.<sup>14</sup> Thus, we cannot conclude that the hearing officer’s determination, that the apparent inconsistency in discipline was outweighed by aggravating circumstances, constituted an abuse of discretion.

The grievant also questions whether the hearing officer considered other evidence presented at hearing in reaching his decision. The grievant’s objections, however, are merely challenges to the hearing officer’s findings of disputed fact, the weight and credibility that the

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<sup>7</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> See *Rules for Conducting Grievance Hearings*, § VI.B.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Hearing Decision at 4.

<sup>13</sup> Hearing Decision at 4.

<sup>14</sup> *Id.* at 4-5.

hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. As stated above, such determinations are entirely within the hearing officer's authority.

#### 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.<sup>15</sup> 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.<sup>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>15</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>17</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>18</sup> Va. Code § 2.2-1001 (5).