

Issue: Administrative Review of Case #8185; Ruling Date: November 28, 2005; Ruling #2006-1186; 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 2006-1186
November 28, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8185. The grievant claims that the hearing officer did not issue a fair decision, and she asks that her case be reviewed by a "different individual." For the reasons discussed below, this Department concludes that the hearing officer's decision and actions did not violate the grievance procedure.

FACTS

The grievant was employed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) as a direct care aide.¹ On August 9, 2005, the grievant received a Group III Written Notice and was removed from employment.² The grievant timely initiated a grievance, and after the parties failed to resolve the grievance during the management resolution steps, the agency head qualified the grievance for hearing.³ Subsequently, a hearing was held on October 18, 2005.⁴ On October 21, 2005, the hearing officer issued a decision upholding the disciplinary action against the grievant.⁵

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."⁶ 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.⁷

¹ Hearing Decision at 2.

² *Id.* at 1.

³ *Id.* at 1-2.

⁴ *Id.* at 1.

⁵ *Id.* at 1, 5.

⁶ Va. Code § 2.2-1001(2), (3), and (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

The grievant asserts that the hearing officer's decision was unfair, as "[h]e seemed to be more concerned with the discrimination issue than the issue of restoring [the grievant's] position."⁸ She requests that her case be reviewed again by a "different individual."

The *Rules for Conducting Grievance Hearings* require the hearing officer to conduct the hearing in an "orderly, fair and equitable fashion"⁹ and to "maintain order, decorum and civility."¹⁰ Additionally, the hearing officer must establish and maintain a tone of impartiality throughout the hearing process¹¹ and avoid the appearance of bias.¹² The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.¹³ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹⁴

In this case, the grievant has not identified or submitted any evidence to support her claim of unfairness or bias, nor has she claimed that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of this grievance. Accordingly, we find no actionable bias on the part of the hearing officer, and must deny the grievant's request for a retrial of her grievance.

CONCLUSION

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 This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁸

Claudia T. Farr
Director

⁸ The grievant is apparently referring to the hearing officer's discussion of her allegation of racial discrimination, in which he concluded that she had not presented "any circumstantial evidence or shown any disparate impact that would suggest a racial component to the discipline." Hearing Decision at 5.

⁹ See *Rules for Conducting Grievance Hearings*, § IV(C).

¹⁰ See *Rules for Conducting Grievance Hearings*, § IV(A).

¹¹ See *Rules for Conducting Grievance Hearings*, § III(D).

¹² See *Rules for Conducting Grievance Hearings*, § II.

¹³ *Welsh v. Commonwealth of Va.*, 14 Va. App. 300, 315 (1992), (brackets in original).

¹⁴ See, e.g., Ruling Nos. 2003-113 and 2004-758.

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

¹⁶ See *Grievance Procedure Manual* §7.3(a).

¹⁷ *Id.*

¹⁸ Va. Code § 2.2-1001(5).