Issue: Administrative Review of Hearing Officer's Decision in Case No. 8613; Ruling Date: August 29, 2007; Ruling #2008-1730; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing Office and Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling Number 2008-1730
August 29, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8613. The grievant appears to claim that the hearing officer erred by failing to appropriately consider certain e-mails and by concluding that she did not return to her worksite when so instructed by her supervisor. In addition, the grievant asserts that the hearing decision contains an incorrect legal conclusion, which she does not identify. For the reasons set forth below, this Department finds no reason to disturb the hearing decision.

FACTS

The facts as set forth in the June 19, 2007 hearing decision issued in Case Number 8613 are as follows:[1]

> The Department of Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Social Worker at one of its facilities . . . . Grievant and Social Worker H were responsible for providing services to clients in a particular unit. The Supervisor wanted Grievant to provide services to these clients when Social Worker H was away and for Social Worker H to cover for Grievant when Grievant was away. The Supervisor sent emails to her staff explaining this procedure. However, some of the staff, including Grievant, did not understand the Supervisor's wishes.
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> On January 25, 2007, Social Worker H went to a building where training was to take place. This building was away from the unit where the clients resided. Grievant also wished to attend the training. At 8:03 a.m.

[1] For the sake of brevity and clarity, small portions of text from the original decision have been omitted.

> Grievant called the Supervisor as a courtesy and told the Supervisor that Grievant and Social Worker H would be attending the training that day. The Supervisor told Grievant that Grievant and the Social Worker H could not attend training on the same day. The conversation ended.
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> At approximately 8:35 a.m., the Supervisor called the training Instructor and asked him to tell Grievant to return to the unit. The Instructor assumed the Supervisor had called because an emergency existed at the unit. The Instructor told Grievant to return to the unit because there was an emergency there. Grievant left the training building and returned to the unit. She spoke with other staff to determine if an emergency existed. She concluded no emergency existed so she returned to the training building. The Supervisor learned that Grievant had returned to the training building. The Supervisor called the Instructor a second time at approximately 8:50 a.m. She asked the Instructor to hand the telephone to Grievant. The Instructor took Grievant the telephone so that Grievant could speak with the Supervisor. The Supervisor told Grievant to return and stay at the unit. Grievant said that she did not need to do so. Grievant remained at the training until the training was completed.[2]

The hearing officer held that the agency established, by a preponderance of evidence, that the grievant failed to follow supervisory instructions by failing to return to the unit when so instructed by her supervisor.[3] In his decision, the hearing officer addressed several points raised by the grievant, including the alleged confusion caused by e-mails which the grievant now asks this Department to consider. The hearing officer explains:

> Grievant argues that it was not necessary for her to leave training and return to Unit 3 because two other social workers remained at Unit 3 and could cover for Grievant and Social Worker H who were in training. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is correct, it merely shows that the Supervisor's judgment was wrong. Employees are expected to carry out the instructions of their supervisors even if those instructions reflect poor decision-making by supervisors. Grievant was instructed to return to Unit 3 and should have done so even if returning to Unit 3 was unnecessary. Any confusion resulting from prior emails was resolved by the Supervisor's instruction to return to Unit 3.[4]

The hearing officer also addressed a point repeatedly raised by the grievant in her appeal to this Department—that she returned to Unit 3, twice in fact, when ordered by her supervisor. The hearing officer states in his decision that: "Grievant testified that she

[2] June 19, 2007, Decision of the Hearing Officer in Case 8613, pp. 2-3.
[3] *Id.* at 3-4.
[4] *Id.* at 4.

returned to the unit a second time. After determining for a second time that an emergency did not exist, Grievant returned to the training and completed it. In any event, Grievant did not remain at the unit as instructed by the Supervisor."[5]

In sum, the hearing officer found that the agency presented sufficient evidence to support its issuance of a Group I Written Notice and that no mitigating circumstances existed sufficient to warrant a reduction of the disciplinary action.[6]

The grievant asked the hearing officer to reconsider his decision based on what the hearing officer appears to have correctly described as "numerous facts that are either irrelevant or unproven."[7] In his Reconsideration Decision, the hearing officer reiterated that:

> Grievant was disciplined for failing to return to her unit when instructed to do so by the Supervisor. Many of the facts Grievant cites are not related to the instruction she received from her Supervisor. For example, Grievant points out that no emergency existed at the unit when she returned there. The Supervisor's instruction did not depend on the existence of an emergency at the unit. Grievant should have complied with the Supervisor's instruction regardless of whether an emergency existed at the time of the Supervisor's instruction.[8]

Accordingly, the hearing officer affirmed his earlier decision.[9]

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."[10] 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.[11]

Findings of Fact

The grievant appears to argue that the hearing officer failed to fully or appropriately consider e-mails that were potentially ambiguous and confusing. The

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[5] *Id.* at 3, note 2, (emphasis added).
[6] *Id*. at 4.
[7] July 11, 2007, Reconsideration Decision of the Hearing Officer in Case 8613, p. 1.
[8] *Id.*
[9] *Id.* at 2.
[10] Va. Code § 2.2-1001(2), (3), and (5).
[11] *See Grievance Procedure Manual* § 6.4(3).

grievant also takes issue with the hearing officer's conclusion that she did not return to Unit 3. The grievant asserts that she did.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[14] 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.

The grievant's challenge here contests the weight and credibility that the 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. Such determinations are entirely within the hearing officer's authority.

Here, the hearing officer's findings are based upon evidence in the record and the material issues of the case. The hearing officer points out that "[a]ny confusion resulting from prior emails was resolved by the Supervisor's instruction to return to Unit 3."[15] There is ample evidence in the record that the grievant was indeed instructed to return to Unit 3.[16] Moreover, the second point raised by the grievant—that she *temporarily* returned to Unit 3—does not appear to be in dispute. However, as the hearing officer points out in his decision, the instruction from the grievant's supervisor was not only to return to Unit 3, but to remain there. This finding too is supported by record evidence, most notably, the grievant's own January 26, 2007 Response to Due Process Memo (Grievant Exhibit 1) in which she indicates that she was instructed to "leave the TOVA training immediately and <u>not to attend the TOVA training</u>."[17]

Supplemental Arguments

The grievant supplemented her original Request for Administrative Appeal (Supplement 1) on July 10, 2007, asking this Department to consider additional information and arguments. For example, the grievant asks this Department to consider

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[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual,* § 5.9.
[14] Va. Code § 2.2-3005(C)(5).
[15] June 19, 2007, Decision of the Hearing Officer in Case 8613, p. 4.
[16] January 26, 2007 Due Process Memo to grievant from her supervisor (Agency Exhibit 1), January 25, 2007 Incident Summary (Agency Exhibit 1); January 26, 2007 Grievant's Response to January 26th Due Process Memo (Agency Exhibit 1; Grievant Exhibit 1), and testimony of supervisor beginning at hearing tape 1, side 1,counter 380.
[17] Emphasis added.

minutes from a February 27, 2007 staff meeting. The minutes, which were part of Grievant's Exhibit 2, state that training is very important and that the agency's goal is that all staff members receive adequate training.[18] On July 18, 2007, the grievant again supplemented her Request for Administrative Appeal (Supplement 2) in which she takes issue with other decision findings and conclusions, and in which she raises an allegation of hearing officer bias.

As the hearing officer explained in his original decision when discussing the e-mails, the arguments and additional information presented in Supplement 1 and 2 do nothing to change the finding that the grievant was instructed to return to Unit 3 and remain. As discussed above, the finding that the grievant was instructed to return and stay is supported by record evidence. In addition, there does not appear to be any evidence of hearing officer bias in this case. 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, pecuniary interest" in the outcome of a case.[19] 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.[20] In this case, the grievant has not claimed nor presented evidence that the hearing officer had a direct, personal, substantial, pecuniary interest in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer's alleged actions, even if true, demonstrated bias in this case.

Decision Inconsistent with Law

The grievant contends that the hearing decision is inconsistent with law. Such appeals are directed to the circuit court in the jurisdiction in which the grievance arose rather than this Department.[21]

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department has no reason to remand or otherwise disturb the decision.

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.[22] 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.[23] Any such appeal must be based on the assertion that the

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[18] The minutes also stress that proper notification that employees are adding/requesting training is required and notification an hour before training is to begin is **inappropriate**. (Emphasis in original.)
[19] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E. 2d 451, 459 (1992).
[20] *See, e.g.,* EDR Ruling No. 2007-1523; EDR Ruling No. 2004-640 and EDR Ruling No. 2003-113.
[21] See *Grievance Procedure Manual* §7.3(a).
[22] *Grievance Procedure Manual,* § 7.2(d).
[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).

final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable.[25]

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Claudia T. Farr
Director

[24] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).
[25] Va. Code § 2.2-1001 (5).