

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8665; Ruling Date: October 15, 2007; Ruling #2008-1810; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: 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 2008-1810  
October 15, 2007

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8665. For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

This case concerns two disciplinary actions issued to the grievant: 1) a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy, and 2) a Group III Written Notice for sleeping during work hours and taking unauthorized possession of the key to the administrative wing for personal use.<sup>1</sup> As a result of these Written Notices, the grievant was terminated.<sup>2</sup> The hearing officer upheld the disciplinary actions in a decision dated August 30, 2007.<sup>3</sup> The grievant now requests administrative review from this Department.

The grievant argues that the hearing decision does not comply with section three of the Grievance Procedure Manual, which concerns the Management Resolution Steps, because, in short, the grievance file materials did not accurately describe the grievant's prior disciplinary record. The agency stated on the Written Notice forms themselves that the grievant had two active Group II Written Notices and one active Group III Written Notice.<sup>4</sup> However, the grievant had only one active Group I Written Notice and one active Group III Written Notice.<sup>5</sup> The grievant argues that these errors tainted the pre-hearing grievance process because the agency relied on an incorrect disciplinary record.

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<sup>1</sup> Decision of Hearing Officer, Case No. 8665, Aug. 30, 2007 ("Hearing Decision"), at 1.

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

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

## 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>6</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>7</sup>

The grievant argues that the agency’s “typographical error”<sup>8</sup> on the Written Notices regarding the grievant’s disciplinary record tainted the process. However, the evidence does not reflect any violation of section three of the Grievance Procedure Manual that would warrant remand of the hearing decision in this case.<sup>9</sup> Additionally, the grievant’s assertion that the errors on the forms tainted the process appears misplaced. The hearing officer found that a profile detailing the correct version of the grievant’s disciplinary record was sent to the agency manager who made the decision to terminate the grievant.<sup>10</sup> Though the grievant may disagree with the characterization of this evidence, the manner in which the hearing officer handled the agency’s apparent errors was not inconsistent with the grievance procedure in this case.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>11</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>12</sup> Further, in 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, or aggravating circumstances to justify the disciplinary action.<sup>13</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, after considering an accurate version of the grievant’s disciplinary record, the hearing officer found that the Written Notices issued and the decision to terminate were appropriate.<sup>14</sup> Based on a review of the testimony at hearing and the record evidence,<sup>15</sup> there is

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<sup>6</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> Hearing Decision at 3.

<sup>9</sup> Moreover, if indeed the agency failed to follow the grievance procedure during the management resolution steps, this issue should have been raised at that time. *Grievance Procedure Manual* § 6.3 (“All claims of noncompliance should be raised immediately.”). By proceeding with the grievance after becoming aware of a procedural violation, a party will generally forfeit the right to challenge the noncompliance at a later time. *See id.*

<sup>10</sup> Hearing Decision at 3-4.

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> Hearing Decision at 3-4.

<sup>15</sup> *See, e.g.,* Agency Ex. 1, at Tabs 1 – 2, 8.

substantial evidence to support the hearing officer's decision. As such, this Department has no basis to remand this case to the hearing officer.

#### 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>16</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>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).