

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8780;
Ruling Date: May 29, 2008; Ruling #2008-2025; Agency: Department of
Mental Health, Mental Retardation and Substance Abuse Services; Outcome:
No Ruling – Untimely.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2008-2025
May 29, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8780. Because the grievant's request for administrative review was untimely, this Department will not review the hearing officer's actions or decisions.

FACTS

This case involves a grievant who received a Group III Written Notice with termination for alleged resident abuse.¹ The hearing decision was issued on February 19, 2008.² The hearing officer upheld the disciplinary action and termination.³ On March 5, 2008, the grievant timely requested that the hearing officer reconsider his decision. In a March 13, 2008 reconsideration decision, the hearing officer upheld his earlier decision.⁴ The grievant also appears to have requested an administrative review from the Department of Human Resource Management, to which she received a reply on or about April 30, 2008. On May 20, 2008 the grievant requested an administrative review by this Department. The grievant asserts that the hearing officer was biased and reached incorrect factual conclusions.

DISCUSSION

The Grievance Procedure Manual provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of

¹ Decision of Hearing Officer, Case No. 8780, February 19, 2008 ("Hearing Decision"), at 1.

² *Id.*

³ *Id.* at 4-5.

⁴ *See* Reconsideration Decision of Hearing Officer, Case No. 8780-R, March 13, 2008 ("Reconsideration Decision").

the date of the original hearing decision.”⁵ Further, the February 19, 2008 hearing decision clearly advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must be received by the reviewer within 15 calendar days of the date the decision was issued.⁶ Here, however, this Department received the grievant’s request for administrative review on May 20, 2008, well beyond the 15 calendar days following the February 19, 2008 decision.⁷ Furthermore, the grievant has offered no just cause explanation for the delay. Accordingly, the grievant’s request for administrative review by this Department is untimely.⁸

We are also compelled to note that even if the grievant’s request for administrative review were timely, 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.⁹ 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.¹⁰ 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.

Likewise, as to the assertion that the hearing officer reached incorrect factual conclusions, even if the request had been timely, this Department would not be able to reverse the hearing decision. Where the evidence conflicts or is subject to varying

⁵ *Grievance Procedure Manual* § 7.2(a).

⁶ Hearing Decision at 5.

⁷ It should be noted that had the grievant’s May 20th request for administrative review to this Department challenged new findings and/or conclusions in the hearing officer’s reconsideration decision that were not part of the original February 19, 2008 hearing decision, the request may have been considered timely because (1) she timely challenged the original February 19th decision to the hearing officer; and (2) she could not have anticipated any such new findings and/or conclusions until the reconsideration decision was issued on March 13, 2008. However, the grievant’s May 20th request for administrative review does not challenge new findings and/or conclusions in the reconsideration decision, but rather challenges the hearing officer’s findings and/or conclusions in the original February 19th decision. Any requests for administrative review of the original decision had to be made within 15 calendar days of the date of issuance, or by March 5, 2008.

⁸ This Department would like to note that although the grievant’s request for administrative review is untimely, she may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

⁹ *Welsh v. Commonwealth*, 14 Va. App. 300, 314, 416 S.E.2d 451, 459 (1992).

¹⁰ *See, e.g.*, EDR Ruling No. 2007-1523; EDR Ruling No. 2004-640 and EDR Ruling No. 2003-113.

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.

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision when the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request or once all timely requests for review have been decided.¹¹ Because the grievant's administrative review request to this Department was untimely, the hearing decision became a final hearing decision on April 30, 2008, the day the DHRM Director's designee issued his Decision. The grievant has 30 calendar days from that date, or by **May 30, 2008**, to appeal the hearing decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must have been that the final decision is contradictory to law.¹²

Claudia T. Farr
Director

¹¹ See *Grievance Procedure Manual* § 7.2(d).

¹² See Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).