

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8847, 8849;
Ruling Date: July 29, 2008; Ruling #2009-2058; Agency: Department of Mental
Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing
Decision Affirmed.



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 2009-2058
July 29, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8847/8849.¹ For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

This case concerns a Group III Written Notice with removal issued to the grievant for client abuse.² The hearing officer upheld the disciplinary action in a decision dated June 17, 2008,³ which was also affirmed in a reconsideration decision of July 2, 2008.⁴ The grievant now requests administrative review from this Department.

The grievant raises a number of issues in her reconsideration request. The grievant primarily questions the credibility of a witness and the content of her testimony. Further, the grievant asserts that there was insufficient evidence that she engaged in client abuse. The grievant also raises a concern related to the nonappearance of a witness for the hearing, as well as other matters.

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."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

¹ Case Number 8847/8849 was a consolidated hearing involving two different grievants. Only the request for administrative review of one of the grievants, identified in the hearing decision as Grievant J, is addressed in this ruling.

² Decision of Hearing Officer, Case No. 8847/8849, June 17, 2008 ("Hearing Decision"), at 1.

³ *Id.* at 5.

⁴ Reconsideration Decision of Hearing Officer, Case No. 8847/8849-R, July 2, 2008 ("Reconsideration Decision").

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

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Credibility/Sufficiency of the Evidence

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁸ 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.⁹ 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 argues that the agency did not present sufficient evidence that she engaged in abuse.¹⁰ The grievant appears to suggest that because the agency did not have an eyewitness that saw her engage in abusive behavior, the disciplinary action should have been reversed. However, based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer’s decision. Though there was conflicting testimony, there is evidence in the record reflecting that the grievant engaged in an act described by the hearing officer as “poking at” the client.¹¹ It was not necessary to show that the grievant actually touched the client to have engaged in abuse.¹² Combined with the evidence of the client’s negative reaction to the grievant’s act, the hearing officer determined that the act of “poking at” the client might cause psychological harm, which the hearing officer held meets the definition of abuse.¹³ This Department cannot find that the hearing officer exceeded or abused his authority in these determinations.

In challenging the specific witness’s credibility, the grievant also appears to contest the hearing officer’s findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of other witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer’s authority. As long as the hearing officer’s findings are based upon evidence in the record and the material issues of the case, this

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ To the extent the grievant is arguing that the hearing officer misapplied policy in finding that abuse occurred, this ruling does not address that question. Whether a hearing decision is consistent with state or agency policy is an issue for the Department of Human Resource Management. See *Grievance Procedure Manual* § 7.2(a).

¹¹ Hearing Decision at 4.

¹² Hearing Decision at 3-4; Reconsideration Decision at 2 n.1; see also Hearing Record at 1:41:00 – 1:41:50.

¹³ Hearing Decision at 3-4; see also Hearing Record at 1:40:07 – 1:41:50.

Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Based upon a review of the hearing record, this Department has no basis to disturb the hearing officer's credibility determinations and subsequent findings of fact in weighing the, at times, conflicting evidence.

Witness Issue & Adverse Inference

The grievant claims that an agency employee, a supervisor, did not attend the hearing even though ordered to appear by the hearing officer as a witness. Pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.¹⁴ To that end, consistent with the *Rules for Conducting Grievance Hearings*,¹⁵ the hearing officer's witness order was sent to both the agency's representative and the grievant, in addition to the witness. When a hearing officer orders an agency employee to attend a hearing, the agency must ensure that the witness appears for the hearing.

In this case, the hearing officer ordered the supervisor to attend the hearing. She did not attend because she was on vacation.¹⁶ As the agency has presented no evidence to the contrary, this Department can make no conclusion other than that the agency failed to require the supervisor to appear for the hearing. Discussion by the agency's representative at the hearing indicates that the agency did not understand its duty in this regard.¹⁷ Moreover, there is no other evidence in the record of other extenuating circumstances about why the supervisor did not attend. Therefore, because it was the agency's responsibility to have the supervisor appear for the hearing as a witness, the hearing officer had the authority to draw an adverse inference against the agency.¹⁸

It appears the hearing officer did not draw such an adverse inference, as there is no discussion about it in the hearing decision. During the hearing, the hearing officer properly questioned the grievant about the nature of the supervisor's intended testimony.¹⁹ Though the grievant acknowledged she did not know the full content of the supervisor's testimony, the grievant agreed that she could testify as to the supervisor's statements that she wanted to present.²⁰ It is unclear from the hearing decision what weight the hearing officer gave to this

¹⁴ *Rules for Conducting Grievance Hearings* § III.E ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").

¹⁵ *Id.* ("Orders should be issued in the name of the hearing officer and mailed by the hearing officer to the appropriate individual(s), with a copy to each party.").

¹⁶ Hearing Record at 1:57:30 – 1:57:35.

¹⁷ Hearing Record at 1:57:30 – 1:58:40.

¹⁸ *Rules for Conducting Grievance Hearings* § V.B ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered.").

¹⁹ Hearing Record at 1:58:40 – 1:59:40.

²⁰ *Id.* This supervisor was not an eyewitness to the incident giving rise to the disciplinary action at issue in this case. It appears the grievant sought to present the supervisor as a witness because of statements the supervisor had made to the grievant after the incident. *Id.* The grievant testified that her supervisor told her not to worry about the situation and that "it goes no further, ... but it still could be viewed as abuse." Hearing Record at 2:15:50 – 2:16:20.

testimony.²¹ Nevertheless, because the supervisor failed to appear for the hearing as a witness, the hearing officer could have, or perhaps should have, taken this testimony as true based on the drawing of an adverse inference against the agency. In this case, however, the grievant's testimony as to her supervisor's statements, even if found to be true, would not appear to affect the outcome of the decision. Accordingly, there is no basis to remand the case to the hearing officer regarding this witness issue. Because the testimony does not appear to be material, any potential abuse of discretion by not drawing an adverse inference was harmless.

Other Issues

The grievant also briefly asserts issues regarding witness deals, the falsification of documents, and retaliation. The grievant has presented insufficient evidence in her request for administrative review to support these claims. Further, the grievant asserts that the hearing decision did not address the allegation that she engaged in verbal abuse. The hearing officer has since addressed this matter in the Reconsideration Decision by stating that the agency "failed to show that [the grievant] verbally abused the Client."²² As such, there is no basis to disturb the hearing decision on any of these other grounds.

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵

Claudia T. Farr
Director

This testimony is unclear regarding what conduct the grievant's supervisor stated could be viewed as abuse: the grievant's physical act or the other employee's verbal statements at the time.

²¹ The grievant's testimony about the supervisor's statements is hearsay, which, though admissible, could be given less weight.

²² Reconsideration Decision at 1.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).