Issue: Administrative Review of Hearing Officer's Decision in Case No. 8886; Ruling Date: October 9, 2008; Ruling #2009-2110; 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 Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2009-2110
October 9, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8886 concerning his grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). For the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

In this case, the grievant received a Group III Written Notice with termination for neglect of a client.[1] The issue arose because the grievant left the facility, for a short time, to obtain lunch for himself and a co-worker without requesting appropriate coverage to care for the client.[2] The hearing officer, in a decision dated August 5, 2008, upheld this disciplinary action.[3] The hearing officer addressed the grievant's further arguments in a Reconsideration Decision, which again upheld the Written Notice.[4] The grievant now seeks administrative review of the hearing decision.

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 does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6] The grievant has presented various arguments in his request for administrative review, which are addressed below.[7]

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[1] Decision of Hearing Officer, Case No. 8886, Aug. 5, 2008 ("Hearing Decision"), at 1.
[2] *Id.* at 3-4.
[3] *Id.* at 6.
[4] Reconsideration Decision of Hearing Officer, Case No. 8886, Sept. 9, 2008 ("Reconsideration Decision"), at 4.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] The grievant also appears to assert that his termination "represents discriminatory treatment and retaliation for … exercising his First Amendment Rights and other protected activity." This Department has not found any evidence

Factual Conclusions

The grievant challenges the hearing officer's conclusions based on the "totality of evidence" and argues that the agency did not meet its burden of proof. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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.[10] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[11] 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 making his arguments, the grievant appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various 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 the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[12] Based upon a review of the hearing record, sufficient evidence supports the hearing officer's decision. The evidence reflects that the grievant left a client he was supposed to be caring for in either a "1 to 1" or "close observation" status without obtaining the necessary coverage.[13] The individual he did ask to watch the client while he was gone for a brief time was unable to do so because she was with a "1 to 1" client.[14] Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no basis to disturb the hearing officer's decision based on any of the grievant's factual disputes.[15]

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or argument in the hearing record to support the grievant's claims. Consequently, this issue is not supported by the record and is not a ground for disturbing the hearing officer's decision. *See* Reconsideration Decision at 3.

[8] Va. Code § 2.2-3005.1(C).

[9] *Grievance Procedure Manual* § 5.9.

[10] *Rules for Conducting Grievance Hearings* § VI(B).

[11] *Grievance Procedure Manual* § 5.8.

[12] *Rules for Conducting Grievance Hearings* § VI(B).

[13] Hearing Decision at 3-4; Reconsideration Decision at 3.

[14] *Id.*

[15] One of the specific issues the grievant raises is that he was prevented from taking a lunch break, which he asserts is mandated by certain laws. The hearing officer's determination that there was no evidence to support that the grievant was prevented from taking a lunch break is well supported by the record evidence. *See* Reconsideration Decision at 3. The evidence does not appear to indicate that the grievant was disallowed from taking a lunch break, just that he failed to request the coverage so that he could do so properly. *Id.*

Exclusion of Evidence

The grievant asserts that the hearing officer "shut down" questioning regarding alleged issues of favoritism toward the client. However, a review of the hearing record indicates that the hearing officer did not "shut down" the grievant's examination of witnesses on this issue. Although the agency's advocate repeatedly objected to the line of questioning, this Department has not found evidence in the record that the hearing officer excluded or limited any of the grievant's evidence.[16] Even if it is assumed that the hearing officer improperly excluded evidence, the matter must only be remanded if the evidence would affect the outcome of the hearing.[17] In this case, the evidence regarding alleged favoritism, even if it was excluded, would not affect the outcome of the hearing.[18] The record does not reflect any improper conduct by the hearing officer with regard to the grievant's examination of witnesses about issues of alleged favoritism.

New Evidence

The grievant has submitted for consideration on administrative review certain additional documents. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[19] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[20] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[21]

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[16] *See* Hearing Recording, Tape 1, Side B, at Counter Nos. 169-211.

[17] *See* EDR Ruling No. 2004-727; *see also, e.g.*, Pace v. Richmond, 231 Va. 216, 226, 343 S.E.2d 59, 65 (1986) ("We will not reverse a judgment for error in excluding evidence 'where it appears from the record that the error … could not and did not affect the verdict.'" (quoting Davidson v. Watts, 111 Va. 394, 398, 69 S.E. 328, 330 (1910)) (alteration in original)).

[18] The grievant appeared to be presenting evidence about alleged favorable treatment by his supervisor toward the client, not an allegation of inconsistent discipline of employees, which is addressed in the Mitigation section of this ruling. The questioning at issue here, and that addressed by the grievant's request for review, concerning whether other clients had refrigerators in their rooms does not appear to be an inquiry that would have led to testimony that would have affected the outcome of the hearing.

[19] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[20] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

[21] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the grievant has provided no information to support a contention that the document should be considered newly discovered evidence under this standard. Specifically, there is no evidence that the grievant diligently attempted to discover this evidence prior to the hearing. Consequently, consistent with the hearing officer's determination on reconsideration,[22] there is no basis to re-open the hearing for consideration of this evidence and it cannot be considered in this administrative review as it is not part of the hearing record.

Mitigation

The grievant argues that certain issues, including alleged staffing deficiencies and differences in discipline among employees, warranted mitigation of the disciplinary action. The grievant also asserts that he did not have notice that he was to treat the client "as a 1 to 1." Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[23] EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.[24]

Therefore, for a hearing officer to mitigate a disciplinary action, the rules require a finding that the agency's discipline exceeded the limits of reasonableness upon consideration of the record evidence. This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[25] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

This Department cannot find that the hearing officer in this case exceeded or abused his authority in determining that the evidence did not warrant further reduction of the disciplinary action.[26] The evidence concerning allegedly different treatment of employees did not appear to be definite or specific, much less compelling a determination that termination exceeded the limits

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[22] Reconsideration Decision at 2-3.
[23] Va. Code § 2.2-3005(C)(6).
[24] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[25] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[26] *See* Hearing Decision at 5-6; Reconsideration Decision at 3-4.

of reasonableness in this case.[27] Further, the hearing officer's analysis of the alleged staffing deficiencies was logical. If the grievant was unable to obtain coverage to take a lunch break due to reduced staffing, that may have been a relevant consideration. However, it does not appear that the grievant ever attempted to obtain coverage. As such, there is no indication that the alleged staffing deficiencies affected the grievant's ability to go to lunch.[28] The grievant's lack of notice argument also fails. Though the grievant may argue that he did not know he needed to care for the client "as a 1 to 1," the hearing officer still found that the grievant had violated the relevant policy even if the client was on "close observation," which the grievant argued was his assignment.[29] Based on these considerations, the hearing officer's mitigation determination was not unreasonable, but rather based on sound analysis of the evidence presented and proper application of the mitigation standard provided in the *Rules for Conducting Grievance Hearings*. This Department will not disturb the hearing officer's decision.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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Claudia T. Farr
Director

[27] *See* Hearing Decision at 5.
[28] *See* Hearing Decision at 4; Reconsideration Decision at 3.
[29] *See* Hearing Decision at 4; Reconsideration Decision at 3.
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).