

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8931; Ruling Date: October 15, 2008; Ruling #2009-2131; 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 2009-2131
October 15, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8931. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

This case concerns two Written Notices given to the grievant on April 8, 2008: 1) a Group I Written Notice primarily for "Unprofessional behavior/conduct that undermines the effectiveness of the Agency;" and 2) a Group II Written Notice concerning certain hiring practices.¹ The hearing officer found that the agency had sustained its burden of proof and upheld the Written Notices.² The grievant, through her attorney, now requests administrative review of the hearing decision. The same grounds raised to this Department were also raised on reconsideration with the hearing officer. The hearing officer addressed the grievant's arguments in a Reconsideration Decision on September 17, 2008, which upheld the original decision.³

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."⁴ 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.⁵

Factual Arguments

¹ Decision of Hearing Officer, Case No. 8931, Aug. 28, 2008 ("Hearing Decision"), at 1.

² *Id.* at 6.

³ Reconsideration Decision of Hearing Officer, Case No. 8931, Sept. 17, 2008 ("Reconsideration Decision"), at 2-4.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4.

The grievant argues that the hearing officer “failed to address how the facts which were proven by the Agency establish a violation of the Standards of Conduct, and if so, what level of violation occurred.” The grievant also asserts that the evidence did not support the hearing officer’s findings. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ 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.⁸ 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.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.

Here, the grievant’s arguments 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.¹⁰ In this case, it appears that substantial evidence supports the hearing officer’s decision. Indeed, the hearing officer properly answered the grievant’s arguments in the Reconsideration Decision, which explains the bases for the decision and correctly points out the grievant’s misstatements about the hearing officer’s findings.¹¹ In reviewing these decisions, the established violations of the Standards of Conduct are apparent and properly articulated. Further, the hearing officer acknowledged the witnesses’ differing perceptions of the relevant facts.¹² The hearing officer was guided by the findings of an outside expert who investigated the allegations against the grievant.¹³ Making such determinations of disputed facts is precisely the type of question on which this Department cannot substitute its judgment for that of the hearing officer. There is no indication that the hearing officer abused his discretion in making these

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

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

¹¹ Reconsideration Decision at 2-3. The grievant inaccurately stated that the hearing officer “found the Agency had proven only that three statements which [the grievant] allegedly made were made.” The grievant later states that the hearing officer “impliedly” made these findings. Although the hearing officer only determined that three of the alleged instances of misconduct occurred, which were more than sufficient to support the Group I Written Notice, the hearing officer specifically stated that he did “not have to reach a decision regarding the other allegations of unprofessional conduct.” Hearing Decision at 4; Reconsideration Decision at 2. The hearing officer made no findings regarding the other allegations, contrary to the grievant’s assertions.

¹² See Hearing Decision at 3.

¹³ See Hearing Decision at 4-5.

findings or that the facts were not supported by the hearing record. Consequently, this Department has no reason to disturb the hearing decision.

Mitigation

The grievant also asserts an argument that the hearing officer “failed to address the reasonableness of the Agency’s mitigation, given the factual findings.” However, in reviewing an agency action regarding mitigation of a disciplinary action, a hearing officer must give deference to “the agency’s consideration and assessment of any mitigating and aggravating circumstances,”¹⁴ and “may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.”¹⁵ Further, this Department will review a hearing officer’s mitigation determinations only for abuse of discretion.¹⁶ Therefore, EDR will remand the hearing officer’s mitigation determination only upon clear evidence that the hearing officer failed to follow the “exceeds the limits of reasonableness” standard.

To the extent the grievant is arguing that the hearing officer should have mitigated the disciplinary actions, this Department cannot find that the hearing officer in this case exceeded or abused his authority in determining that no mitigating circumstances exist to further reduce the Written Notices.¹⁷ The grievant’s arguments do not indicate that the hearing officer’s mitigation determination was in any way unreasonable. This Department will not disturb the hearing officer’s decision.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer’s 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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

Claudia T. Farr
Director

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *Id.*

¹⁶ “‘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.*

¹⁷ Hearing Decision at 6.

¹⁸ *Grievance Procedure Manual* § 7.2(d).

¹⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).