

Issue: Administrative Review of Hearing Officer's Decision in Case No. 2009-2256;  
Ruling Date: April 14, 2009; Ruling #2009-2256; 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 2009-2256  
April 14, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8930. 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 a Group 1 Written Notice given to the grievant on April 2, 2008 for unsatisfactory job performance, specifically, not timely completing documentation on clients under his care.<sup>1</sup> The hearing officer found that the grievant had not timely completed his paperwork.<sup>2</sup> The hearing officer found that although the grievant was absent from work for a significant number of days during the pertinent time period, the grievant nevertheless had sufficient time to complete his paperwork.<sup>3</sup> Accordingly, the hearing officer sustained the Written Notice.<sup>4</sup>

The grievant asked the hearing officer to reconsider his decision on the basis that (1) he is a dedicated employee, (2) he does not agree with the outcome of the original Hearing Decision, (3) he and his family were in crisis since December 2007, (4) he believes the Agency's witnesses gave conflicting testimony as to how much time was required to complete the paperwork in question, (5) he was not behind in his work until the tragedy with his family in January 2008, and (6) he did not have adequate time to complete assignments.

The hearing officer declined to alter his decision, holding that none of the points raised were newly discovered evidence and that the grievant either could have or did raise these

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<sup>1</sup> Decision of Hearing Officer, Case No. 8930, February 23, 2009 ("Hearing Decision"), pp. 1-3.

<sup>2</sup> *Id.* at 3.

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

<sup>4</sup> *Id.* at 5.

concerns at hearing.<sup>5</sup> The grievant now requests administrative review of the hearing decision from this Department.

### 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 has raised the same objections with this Department that he raised with the hearing officer, which largely consist of challenges to particular findings of fact and conclusions based on those facts. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>8</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>9</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>10</sup> 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.<sup>11</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.

Again, the grievant largely contests issues such as 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.<sup>12</sup> For example, the grievant asserts that agency witnesses gave

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<sup>5</sup> Reconsideration Decision of Hearing Officer, Case No. 8930-R2, April 1, 2009 (“Second Reconsideration Decision”), at 1-2. The hearing officer had issued an earlier Reconsideration Decision of Hearing Officer, Case No. 8930-R, Mar. 17, 2009 (“First Reconsideration Decision”) in which the hearing officer concluded that the grievant’s request for administrative appeal was untimely. For the reasons set forth in EDR Ruling No. 2009-2255, this Department ruled that the request was timely and ordered the hearing officer to rule on the merits of the grievant’s appeal.

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

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

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>11</sup> See *Grievance Procedure Manual* § 5.8.

<sup>12</sup> See *Rules for Conducting Grievance Hearings* § VI(B).

conflicting testimony as to how much time was required to complete client documentation and that he did not have time to complete his work. The inconsistency between versions of testimony regarding how long it takes to complete required documentation appears to have come from the grievant, not agency witnesses. More importantly, resolving inconsistencies between the testimonies of any witnesses, regardless of which party calls them, is precisely the sort of the function reserved exclusively to hearing officers. This Department cannot substitute its judgment for that of a hearing officer regarding determinations over inconsistencies.

In this case, based upon a review of the record, it appears that sufficient evidence supports the hearing officer's decision.<sup>13</sup> There is no indication that the hearing officer abused his discretion in making these findings. Consequently, this Department has no reason to disturb the hearing 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.<sup>14</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>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> At approximately 52-55 minutes into the hearing, the grievant's supervisor's supervisor, the Program Manager, testified that the average client inter-disciplinary notes could be completed in 10 to 15 minutes, and that monthly progress notes could be completed in less than five minutes per client. He also testified that the grievant had six clients for whom reports were due each month and thus he could have completed his documentation duties in approximately two hours per month. The Program Manager testified at approximately 58-61 minutes into the hearing that based on the number of days that the grievant was present at work during the pertinent timeframe, he could have completed the required documentation. Notably, the grievant did not cross examine the Program Manager on any of his testimony. We further note that it does not appear that grievant's dedication to his job and clients was at question here. Moreover, his immediate supervisor testified at approximately 8-9 minutes into the hearing that the grievant's performance was "generally acceptable except for the area of documentation," and that his timeliness in completing documentation has improved since the issuance of the Group I Written Notice (testimony approximately 38 and 40-41 minutes into hearing). As to the grievant's contention that he and his family have been in crisis since 2007, the agency did not contest that point. It merely asserts that notwithstanding the crisis, the grievant had sufficient time to complete his paperwork during the time when he was present at work.

<sup>14</sup> *Grievance Procedure Manual* § 7.2(d). We note that for the reasons set forth in Ruling No. 2009-2255, the grievant's appeal to the Department of Human Resource Management shall also be deemed timely.

<sup>15</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>16</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).