

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9121/9161;
Ruling Date: December 4, 2009; Ruling #2010-2422; Agency: Department of
Behavioral Health and Developmental Services; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2010-2422
December 4, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9121/9161. Grievant was issued a Group II Written Notice of disciplinary action with suspension for leaving the workplace without permission and a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions and written policy. The grievant filed grievances to challenge the agency's actions and in a September 4, 2009 hearing decision, the discipline was upheld. The grievant has appealed on several bases, which are addressed below. For the following reasons, this decision is remanded for further consideration and/or clarification.

FACTS

The facts of this case as set forth in the September 4, 2009 Hearing Decision in Case No. 9121/ 9161 are as follows:

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Support Supervisor at one of its Facilities. He began working for the Agency on August 10, 2007. The purpose of his position was:

The Direct Support Supervisor is responsible for job development and job coaching services to individuals; must be able to perform site reviews and supervise job coaching staff in a community setting. Must be able to provide active treatment and person centered planning services.

Grievant worked in N Building. He had a badge which he was supposed to swipe on a time clock to show his arrival at work. N Building was where his home clock was located.

On February 25, 2009, Grievant received a written counseling for failing to use the time clock properly. Grievant was counseled, in part, as follows:

Failure to swipe in at home clock: [Grievant] counseled on the necessity of swiping in at home clock. [Grievant] must [notify] Area APM or Support Center Chief when leaving building.

On March 6, 2009, Grievant received a written counseling from the Supervisor for failing to use the time clock properly. The counseling states, in part:

Failure to swipe in a home clock: [Grievant] has twenty occurrences of failing to either clock in or out at home clock. ***

Failure to swipe in at home clock: [Grievant] counseled on the necessity of swiping in at home clock. He was informed that it is unacceptable to swipe in and leave building without supervisor's approval. [Grievant] must notify Area APM or Support Center Chief when leaving building.

On March 17, 2009 Grievant was working at Building N in the morning. At 9:45 a.m., Grievant signed out in the sign in/ sign out log but did not list where he was going as he had been instructed by the Supervisor to do. Grievant left the Facility to attend a previously scheduled court date. While he was away from the Facility, the Manager came to Building N and could not find Grievant. The Manager asked the Supervisor where Grievant was and the Supervisor responded that Grievant did not tell the Supervisor that he was leaving and where he was going. Grievant returned approximately two hours later.

On April 20, 2009, Grievant began work by swiping his badge at cottage 24. On April 22, 2009 and May 11, 2009, Grievant began his work day by swiping his badge at building 124.¹

Based on these findings, the hearing officer reached the following conclusions:

“[L]eaving work without permission” is a Group II offense. On March 17, 2009, Grievant left the Facility to attend court. He did so without the permission or knowledge of the Supervisor. Grievant's absence was not due to an emergency or some other unexpected circumstance. Grievant was absent from the Facility for approximately one hour longer than his set lunch period and, thus, his absence was not excused as part of his lunch period. Grievant had been counseled regarding leaving Building N without notifying a supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written

¹ Decision of Hearing Officer in Case 9121/9161 issued September 4, 2009 (“Hearing Decision”) at 2-3.

Notice. Upon the issuance of the first Group II Written Notice, the Agency may suspend an employee for up to ten workdays. Accordingly, Grievant's suspension of three workdays must be upheld.

Grievant argues that the Supervisor was not present at Building N when he was leaving and, thus, Grievant could not have notified the Supervisor. This argument fails. Grievant could have notified the Supervisor of the court date many days prior to March 17, 2009.

Failure to follow a supervisor's instructions is a Group II offense. Grievant was instructed by the Supervisor to begin his workday by swiping his badge at the home clock located in Building N. On April 20, 2009, April 22, 2009, and May 11, 2009, Grievant began his day by swiping his badge at a location other than the home clock. He failed to comply with the Supervisor's instructions thereby justifying the Agency's issuance of a Group II Written Notice. Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment. Because Grievant has accumulated two active Group II Written Notices, the Agency's decision to remove him from employment must be upheld.

Grievant argued that he did not receive adequate training regarding the requirements of clocking in and out of Building N. No credible evidence was presented suggesting Grievant required training regarding how to swipe his badge. He regularly swiped his badge using the Agency's time clock system and had been instructed to first swipe his badge at Building N.²

Having decided that the agency had met its burden of establishing that misconduct occurred and that the discipline was consistent with law and policy, the hearing officer turned to the issue of mitigation. He declined to reduce the discipline based on the following:

Grievant contends the disciplinary action should be mitigated because other employees also began their day by swiping their badges at locations other than their home clocks. The evidence showed that other employees, who swiped their badges at locations other than their home clock, were authorized to do so by the Supervisor because they had duties at those locations. Grievant was not authorized to report to locations other than Building N. The Agency did not single out Grievant for disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.³

² *Id.* at 3-4.

³ *Id.* at 4-5.

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

Findings of Fact/Consideration of Evidence/Burden of Proof

The grievant’s request to this Department for administrative review, in part, challenges the hearing officer’s findings of fact and related conclusions. 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.

The grievant asserts that he was not absent from the facility for more than an hour and the sign-in roster confirms this contention. The hearing officer addressed this point in his Reconsideration Decision and explained that even if the grievant has not been absent for more than an hour on March 17th, he did not write where he was going when he left.¹⁰ Record evidence supports this finding.¹¹ Thus, this Department will not disturb this finding.

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

⁵ *Grievance Procedure Manual* § 6.4.

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

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

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ Reconsideration Decision in Case 9121/9161 issued September 10, 2009 (“Reconsideration Decision”) at 1.

¹¹ See Agency Exhibit 1, (Marked Attachment 1), Sign In/Out Sheet containing March 17, 2009 a.m. entries with the “Activities” line beside the grievant’s name blank. (We note that the grievant provided a copy of the same sheet, apparently photocopied at a later date, which contains additional entries throughout March 17th as well as March 18th and 19th. This version of the Sign In/Out Sheet indicates that the grievant left for court. (Grievant Exhibit 1.)) See also testimony beginning at 8:30 into the hearing by the Assistant HR Director that grievant logged out but did not indicate where he was going. Furthermore, the grievant’s supervisor testified that when the grievant was leaving for lunch break he was supposed to sign out “lunch” in the log book. Testimony beginning at 45:20.

The grievant also asserts that “I also stated that I was going to use that time for my lunch/break therefore there was no need for me to notify my supervisor.” Yet, a review of the recording of the hearing reveals that the grievant never testified in this case. Accordingly, this Department will not disturb the decision on the basis of any findings regarding the failure to sign out (leaving the workplace without permission), except as discussed in the “Mitigation” section below.

Mitigation

The grievant contends that he was singled out for discipline. As to the Written Notice issued for failing to follow supervisor’s instruction (swipe-in/clock-in at the home worksite), the hearing officer directly asked the grievant’s supervisor, an Assistant Program Manager (“APM”), if the grievant had been singled out for not swiping his badge while others were allowed to with impunity.¹² The supervisor answered “no.”¹³ Thus, there is record evidence to support the finding that he was not singled out for failing to swipe in/clock in at his home worksite.

As to the second Written Notice (issued for not signing out on March 17th), the hearing officer seems to address the issue of being singled out only in a very general manner. He simply states that “[n]o credible evidence was presented to suggest Grievant was singled out for disciplinary action.”¹⁴ Yet, testimony at hearing appeared to reveal that another employee, a peer of the grievant’s supervisor (also an APM) who was on duty on March 17th, left the building and did not sign out.¹⁵ The hearing officer asked the grievant’s supervisor if the other APM should have signed out when he left.¹⁶ The grievant’s supervisor replied “yes.”¹⁷ Under further questioning by the hearing officer, the grievant’s supervisor explained that he did not supervise the peer APM.

The hearing officer did not address in his decision the apparent failure of the peer APM to sign out. While the fact that the peer APM was not supervised by the grievant’s supervisor may be relevant, it is not necessarily dispositive. In cases involving a claim of inconsistent treatment of employees, we have held that treatment of employees in the grievant’s reporting line, division/department, and/or at the same facility are all potentially relevant.¹⁸ Moreover, in

Record evidence also supports the second Written Notice regarding the failure to swipe-in/clock-in. *See* Agency Exhibit 7. *See also* testimony beginning at 14:45 by Assistant HR Director that grievant clocked in at a worksite other than his home worksite and had been counseled about this in the past.

¹² Questioning beginning at 1:03:06.

¹³ Testimony at 1:03:16.

¹⁴ Reconsideration Decision at 2.

¹⁵ Testimony beginning at 40:30.

¹⁶ *Id.* at 41:55.

¹⁷ *Id.* at 42:28.

¹⁸ *See* EDR Ruling No. 2009-2087 (“In most cases involving a claim of inconsistent treatment of employees, a grievant can obtain related documents addressing the treatment of employees in the grievant’s reporting line, division/department, and/or at the same facility.”). We note that under the Merit Systems Protection Board (MSPB) rules, which this agency often views as persuasive authority, where an employee seeks to raise the affirmative defense of disparate discipline for similar misconduct, an employee must establish that the comparator employee

addition to the testimony by the grievant's supervisor that the other APM did not sign out (and apparently was not disciplined¹⁹), there was also testimony by another witness who appeared to indicate that others may have routinely left without signing out.²⁰ Thus, it is unclear how the hearing officer reached his determination that no credible evidence was presented to suggest grievant was singled out for disciplinary action. Accordingly, this decision is remanded for further consideration and/or clarification consistent with this decision.

By remanding this decision, we do not express any opinion as to whether the discipline should have been mitigated or should be now. (The hearing officer is not precluded from doing so if he finds mitigation appropriate under the *Rules*.) Rather, it is unclear as to whether the hearing officer considered the evidence cited above, and, if so, why he viewed it as not credible.

Policy Question

Finally, the grievant objects to the decision on the basis that his supervisor was not at the facility when he failed to sign out, and was not therefore permitted to issue discipline against the grievant. First, as a matter of compliance with the grievance procedure, there is no requirement that a supervisor be present at the facility when misconduct occurs in order to have authority to issue discipline. We are aware of no such requirement under state policy either. Thus, while we find no reason to disturb the decision on this basis, we recognize that the Department of Human Resource Management is the sole agency charged with the promulgation and interpretation of state policy. Thus, to the extent that the grievant is asserting that the hearing decision is inconsistent with state policy, that is a question of policy and more properly an issue for DHRM.²¹ Accordingly, if the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling.**

was in the same work unit, had the same supervisors, and engaged in substantially similar misconduct. *McLeod v. Dep't of the Treasury*, 332 Fed. Appx. 631, 634 (Fed Cir. 2009)(unpublished decision). However, this Department recognizes that whether an employee reports directly to the same supervisor as the grievant is not always an absolute requirement. For instance, if an agency routinely fails to enforce a rule, employees could be led to believe the rule is inconsequential, rescinded, or otherwise invalid. We are not expressing any opinion as to whether that may have been the case here.

¹⁹ Grievant's Exhibit 2, item 4, which seems to indicate that the grievant is the only employee who has been disciplined for failing to sign out. Grievant had apparently asked for "Disciplinary actions given to individuals (17 March, 2009) that were not present in the building when Ms. [], Director Case Management, arrived to the building to include Acting Director for that day and/or Disciplinary action given to employees in the past for a situation of this matter." The grievant was apparently provided only a copy of his Group II Written Notice.

²⁰ The agency's representative asked the witness "With regard to leaving campus without telling anyone, not putting it down on any log, just being gone for more than an hour [unintelligible] an hour and 15 minutes or more, is that permissible?" The witness responded: "Sometimes in our building, to be honest with you, depending on who you are, yes it is." The agency representative replied: "Well I'm talking about someone in your position." Witness response: "Someone in my position? We have people in our building that do it constantly, everyday. Agency representative: "Is that permissible?" Witness: "Yes it is. It depends on who you are. It depends. Because they do it every day and they are steadily doing it. It is not just one person or two people, you can go pull that book today." The witness went on to testify that for employees under her supervision, she simply asks for a leave slip and that such conduct "is really no big deal." Testimony at 1:15:44-1:17:07.

²¹ See, *Grievance Procedure Manual* § 7.2(a).

Since the initial request for review to this Department was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the decision is remanded for further consideration and/or clarification. 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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴

Claudia T. Farr
Director

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).