

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9164; Ruling  
Date: January 27, 2010; Ruling #2010-2451; Agency: Department of Behavioral  
Health and Developmental Services; Outcome: Remanded to Hearing Officer.



*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 2010-2451  
January 27, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case No. 9164. For the reasons set forth below, the decision is remanded to the hearing officer.

FACTS

The facts, as set forth in the September 25, 2009 hearing decision in Case No. 9164, are as follows:<sup>1</sup>

The Department of Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its Facilities. The purpose of her position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.

No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Other than the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

On March 19, 2009, at approximately 3:40 a.m., Grievant was sitting in a chair in a hallway at one of the Facility's housing units. Patients were asleep on the hallway. Several chairs were located near the bathroom on the hallway. The chair Grievant was sitting in had a view of the bathroom and the hallway. Grievant was not feeling well. She had her head down resting on her hand as she

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<sup>1</sup> Footnotes from the hearing decision have been omitted.

sat in the chair. Ms. R approached Grievant and demanded Grievant get out of her chair so that Ms. R could sit there. Ms. R wanted to assume the post on the hallway. Grievant said she was on break and indicated she would not get out of the chair. Ms. R could have sat in one of the other chairs and successfully assumed her post, however, she insisted on taking Grievant's chair. Mr. J was also present. He began kicking Grievant's chair and demanding that she get out of the chair. Mr. J indicated he believed Grievant was pretending to be sick and Grievant responded she was not pretending. Ms. R began talking about an incident that occurred several weeks ago where someone had said something disparaging about her mother. Grievant said, "I ain't say nothing about your momma and I ain't thinking about your momma." Ms. R stood up and pushed Grievant while Grievant was still sitting. Grievant tried to stand up and Ms. R pushed Grievant again. At approximately 3:44 a.m., Grievant and Ms. R began pushing and pulling and fighting one another. Mr. J attempted to intervene. He placed himself between Grievant and Ms. R. He was facing Ms. R and trying to keep Ms. R away from Grievant. Ms. R was attempting to get around Mr. J and hit Grievant. Grievant was attempting to hit Ms. R by going overtop of and around Mr. J. After Mr. J was between Ms. R and Grievant, another male employee, Mr. H, attempted to separate the two women by grabbing Grievant. Mr. J was able to separate Ms. R and moved her into another room. A video of part of the fight shows Grievant attempting to hit Ms. R at least four times while Mr. J is intervening with at least two of those hits being while Mr. H also is attempting to pull her away. Once patient was awake at that time and observed some of the fighting.<sup>2</sup>

Based on the above facts, the hearing officer determined that the grievant violated the Commonwealth's workplace violence policy. Specifically, the hearing officer held that:

Grievant contends she was engaging in self-defense after Ms. R had started the fight. Grievant is correct with respect to the beginning of the fight. Initially, Grievant was hitting Ms. R in order to stop Ms. R from hitting Grievant. The Agency did not discipline Grievant for engaging in self-defense.<sup>3</sup>

The hearing officer further considered possible mitigation holding that:

Grievant did not start the fight. Her desire to end the fight by beating Ms. R is understandable. The question is whether this a mitigating circumstance. Although the Hearing Officer may have reached a different conclusion, the Hearing Officer is not a super-personnel officer who can substitute his opinion regarding the appropriate discipline once the Agency has met its burden of proof. In this case, the Agency's discipline does not exceed the limits of reasonableness because it is authorized by the DHRM Standards of Conduct. In light of the

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<sup>2</sup> Decision of the Hearing Officer in Case Number 9164, dated September 25, 2009 ("Hearing Decision"), 2-3.

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

standard set for the [sic] in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>4</sup>

### 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>5</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>6</sup>

The grievant seeks administrative review for a variety of reasons. The grievant asserts that as a full time permanent employee, having filed a timely grievance, she has:

- a right to access and right to be afforded time to review all relevant evidence;
- a right to have all relevant evidence be made available to be accepted on record as part of a grievance hearing;
- a right to have all such evidence accepted on record at a hearing to be accurate and not falsified or tampered with;
- a right to a fair and impartial investigation;
- a right to have credible unrefuted eyewitness testimony considered and given proper weight in a final decision;
- a right to work in a work environment free from harassment (agency policy 2.30);
- a right to work in a safe environment and related;
- a right to self defense and right to take action to protect herself from bodily injury.

The grievant also states that there were serious evidentiary issues relevant to this case, apparently related to documents purportedly not provided to the grievant.

Under the grievance procedure an employee may request administrative review from the EDR Director on the basis that the decision does not comply with the grievance procedure. Several of the objections raised above have nothing to do with the grievance procedure, therefore, will not be addressed. Instead, these objections appear to be potentially based in policy or law.

The Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that

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

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

<sup>6</sup> *Grievance Procedure Manual* § 6.4.

hearing decisions are consistent with state and agency policy.<sup>7</sup> If the grievant has not previously made a request for administrative review of the hearing officer's decision to DHRM regarding policy issues but wishes to do so, she must make a written request to the DHRM Director, **which must be received within 15 calendar days of the date of this ruling.** The DHRM Director's address is 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well. Any such appeal, however, must be confined to those policy objections raised in the administrative review request presented to this Department.

As to any objection based on the decision being contradictory to law, 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>8</sup>

#### *The Right to Have All Relevant Evidence Accepted As Part of the Grievance Hearing*

The grievant asserts that she has "a right to have all relevant evidence be made available to be accepted on record as part of a grievance hearing." To the extent that the grievant is asserting that all relevant evidence must be admitted, this is generally true. "Hearing officers *must* admit relevant evidence, as long as it is not also immaterial, insubstantial, privileged, or repetitive."<sup>9</sup> From a review of the hearing record there is nothing to suggest that the hearing officer failed to admit any evidence proffered by the grievant other than a record relating to the grievant's unemployment hearing and a document relating to a court action arising from the altercation that led to the grievant's dismissal. At hearing, the hearing officer correctly stated that, under Virginia law, determinations or decisions of the Virginia Employment Commission are not admissible in grievance hearings.<sup>10</sup>

In addition, the hearing officer correctly noted at hearing that the burdens of proof are different in criminal matters and grievance hearings.<sup>11</sup> The fact that the grievant was allegedly cleared of any criminal conduct relative to the incident that led to her dismissal is of little, if any, significance in this case. Under the grievance procedure, the agency must establish its case by a "preponderance of the evidence" standard. But in a criminal matter, the prosecution must establish its case by a higher "beyond a reasonable doubt" standard. Thus, a court's dismissal of charges of a related criminal matter does not preclude an agency from prevailing at a grievance hearing under the lower "preponderance of the evidence" standard. For these reasons, under the particular facts of this case, we find no evidence that the hearing officer failed to admit any proffered evidence.

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<sup>7</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>8</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>9</sup> EDR Ruling No. 2006-1290 at 5, (emphasis in original).

<sup>10</sup> See *Rules for Conducting Grievance Hearings* § IV (D) citing to Va. Code § 60.2-623.

<sup>11</sup> Hearing recording beginning at 1:13:30.

*Findings of Fact*

The grievant asserts that she has a right to have credible unrefuted eyewitness testimony considered and given proper weight in a final decision. This too is largely correct. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>13</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>14</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>15</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. Thus, to the extent the grievant is challenging the hearing officer’s findings of fact and his weighing of the evidence, such determinations are entirely within the hearing officer’s authority.

In this case, the hearing officer relied upon video evidence in concluding that the grievant continued to fight even as others attempted to intervene to end the altercation. Record evidence (the video recording of the incident and the hearing testimony) supports the hearing officer’s finding.<sup>16</sup> The grievant has not identified sufficient evidence to call into question this finding. Accordingly, this Department must uphold the hearing officer’s finding of fact with respect to this issue.

*Right to True and Unadulterated Evidence*

The grievant asserts that she has a right to have all evidence accepted on record at a hearing to be accurate and not falsified or tampered with. This is not correct. There is simply no guarantee that all evidence presented at hearing will be accurate, true, or free from tampering. One of the central purposes of the grievance hearing is to ferret out any falsity or inaccuracies and the grievant had opportunity to do so at hearing. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.<sup>17</sup> In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently

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<sup>12</sup> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>15</sup> *Grievance Procedure Manual* § 5.8.

<sup>16</sup> Hearing recording beginning at 18:30; and resuming at 30:40.

<sup>17</sup> See e.g., EDR Ruling #2006-1383.

denied rehearing requests arising after a final judgment.<sup>18</sup> Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The same principles described above generally apply to other forms of allegedly false evidence. Accordingly, we decline to disturb the decision on this basis.

### *The Right to Have a Timely Opportunity to Review Evidence*

The final objection that relates to the grievance procedure is the statement that the grievant has a right to access to all relevant evidence and a right to be afforded time to review it. This too is generally correct. Under the grievance procedure, a party to a grievance may request documents that relate to the grievance.<sup>19</sup> In addition, documents that will be potentially introduced as exhibits at the grievance hearing must be exchanged prior to the grievance hearing, a process governed by an order issued by the hearing officer.<sup>20</sup>

At hearing, the grievant asserted that she was not provided complete video recordings of the altercation and the investigators report of the incident.<sup>21</sup> Under the grievance procedure, if prior to the assignment of a hearing officer a party does not receive requested documents, that party may request a ruling from the EDR Director that orders the other party to provide the requested documents.<sup>22</sup>

This Department has no record of receiving, prior to the grievant's administrative review request that is the subject of this ruling, any ruling request regarding the agency's failure to produce documents. The grievant asserts that this investigator's report was requested during the management steps. Had the noncompliance process been implemented and a ruling request been made to this Department during the management steps, the documents issue could have been addressed well prior to the hearing.

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<sup>18</sup> See, e.g., Peet v. Peet, 16 Va. App. 323 (1993); Jones v. Willard, 224 Va. 602 (1983).

<sup>19</sup> Absent just cause, all documents relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party. Upon receipt of such a request, a party shall have a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided within 5 workdays of receipt of the request. If it is not possible to provide the requested documents within the 5 workday period, the party must, within 5 workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the withholding party must provide the requesting party with a written explanation of each claim, no later than 10 workdays from the receipt of the document request. *Grievance Procedure Manual* § 8.2.

<sup>20</sup> See *Rules for Conducting Grievance Hearings* § III (D) and (E).

<sup>21</sup> Hearing recording at approximately 58:00.

<sup>22</sup> The grievance procedure requires both parties to address procedural noncompliance through a specific process. *Grievance Procedure Manual* § 6.3. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. *Id.* If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. *Id.*

The grievant's failure to request intervention by the EDR Director during the management steps, however, is not outcome determinative because the grievance procedure further provides that:

Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer's decision or order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing and **received by EDR** within 15 calendar days of the date of the hearing decision.<sup>23</sup>

In her witness list submission to the agency and hearing officer, the grievant essentially asserted that the agency continued to withhold from her the video recordings and investigator's report:

Also, at this time, we remind the parties that during the Prehearing Conference Call that grievant [sic] representative stipulated to evidentiary issues with regard to Case No. 9164. Specifically, to the refusal of the [facility] Administration to provide requested copies of all appropriate Tapes of the incident and a copy of the Investigator's Report. This relevant and crucially important evidence still has not been provided to the grievant [] and to her representative, [].

Therefore, it appears that the grievant timely raised her claim to the hearing officer about the undisclosed documents, though granted, not as an express request for an order of production. We now turn to the agency's purported failure to provide the documents and the hearing officer's apparent failure to address the grievant's concern regarding those documents.

#### Video Recording of the Incident

After the grievant asserted at the grievance hearing that the tape was incomplete, the hearing officer questioned her as to how the purportedly missing portions of the recording were relevant to her case.<sup>24</sup> The grievant asserted that it would have shown that she did not initiate the altercation and that Ms. R approached the grievant and physically attacked her first. The hearing officer appears to have accepted that the grievant did not start the fight.<sup>25</sup> The hearing officer's conclusion that the grievant violated policy is based on his finding that the grievant continued to fight with Ms. R after others had intervened. Accordingly, the absence of the portion of the tape showing who started the fight was not prejudicial. Therefore, we see no need for further action on this matter.

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<sup>23</sup> *Grievance Procedure Manual* § 6.3 (emphasis in original).

<sup>24</sup> Hearing recording beginning at 1:02:00

<sup>25</sup> Hearing Decision at 3.



### Investigator's Report

Regarding the undisclosed investigator's report, the hearing decision did not address the agency's failure to provide the report nor did it appear that the report was addressed at the hearing. However, in fairness to the hearing officer, objections to the agency's failure to provide the report were veiled and ambiguous, at best. Apparently, the only written record of the grievant's concern regarding the investigator's report was raised in a footnote to a Witness List. Furthermore, at hearing, when the issue of the agency's purported failure to provide the report was raised during the grievant's testimony, it was not clear that it was being raised as matter of noncompliance for which the grievant was seeking intervention by the hearing officer. It was also mentioned in closing argument but not clearly in the form of an objection.<sup>26</sup> It is clear now, however, that the grievant considers this to be a still pending matter of the agency's failure to produce the requested document, and the hearing officer's failure to address it. Accordingly, the hearing officer is instructed to rule on the issue of the agency's purported non-compliance in its alleged failure to provide the grievant with a copy of the investigation report.

It may be that the hearing officer will find that the agency's failure is tantamount to harmless error because other record evidence (e.g., the video recording) supports the finding that:

Once Mr. J had positioned himself between Grievant and Ms. R, Grievant could have ended the fight simply by stopping her forward movement. Instead, Grievant continued to push against Mr. J in an attempt to reach and hit Ms. R. Mr. H attempted to intervene by grabbing Grievant and pulling her away. If Grievant had stopped moving towards Ms. R, the fight would have ended as Mr. H was attempting to hold Grievant. Instead, Grievant kept moving towards Ms. R and attempting to hit her. Some of Grievant's blows may have hit Mr. J instead of Ms. R. Although Grievant engaged in self-defense, she also engaged in fighting that could have resulted in injury to Mr. J and Mr. H as well as herself.

We, however, are reluctant to make such a determination given the potential significance of an official investigation report of the incident the led to the grievant's termination.<sup>27</sup> If the hearing officer finds that the report could have potentially affected the outcome of his decision, he is not limited to ordering the production of the report. He would also have the authority to re-open the hearing if he deemed it appropriate.

### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the decision is remanded to the hearing officer in accordance with this ruling. 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

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<sup>26</sup> Hearing recording at 1:33:00. The grievant also asserts that the documents issue was discussed at the prehearing conference.

<sup>27</sup> The investigation report would appear relevant to the grievance. That determination, however, is typically ultimately left to the discretion of the hearing officer.

has issued a revised decision.<sup>28</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>29</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>30</sup>

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Claudia T. Farr  
Director

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<sup>28</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>29</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>30</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).