Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 9121, 9161; Ruling Date: February 25, 2010; Ruling #2010-2514; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision In Compliance.

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 2010-2514
February 25, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's Second Reconsideration Decision in Case Number 9121/9161. For the reasons set forth below, this Department will not disturb the hearing decision as modified by the two subsequent reconsideration decisions.

FACTS

The 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 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:
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> > 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.
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> 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.
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> 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. ***
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> 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 Notice. Upon the issuance of the first Group II Written Notice, the Agency may

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

> suspend an employee for up to ten workdays. Accordingly, Grievant's suspension of three workdays must be upheld.
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> 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.
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> 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.
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> 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]

The grievant asked the hearing officer to reconsider his decision, and in a September 10, 2009 Reconsideration Decision the hearing officer upheld his previous decision.

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[2] *Id.* at 3-4.
[3] *Id.* at 4-5.

The grievant had also appealed to this Department. In EDR Ruling No. 2010-2422 this Department held in pertinent part that:

> 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." 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. The hearing officer asked the grievant's supervisor if the other APM should have signed out when he left. The grievant's supervisor replied "yes." Under further questioning by the hearing officer, the grievant's supervisor explained that he did not supervise the peer APM.
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> 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. Moreover, in addition to the testimony by the grievant's supervisor that the other APM did not sign out (and apparently was not disciplined), there was also testimony by another witness who appeared to indicate that others may have routinely left without signing out. 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.
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> 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.[4]

The hearing officer provided the following response in his Second Reconsideration Decision:

> The Agency's Facility has numerous supervisors who may have different management styles. Management styles may include different expectations for employees working in different areas of the Facility. If a supervisor concludes that attendance is not a problem among his or her employees, that supervisor may create different expectations for employees than would a supervisor who considers attendance to be a problem for his or her employees. Grievant

[4] EDR Ruling No. 2010-2422 at 6-7 (footnotes omitted).

> demonstrated attendance problems and the APM set his expectations for Grievant and the other employees he supervised. The APM issued the written notice based on his expectations for employees within his control and not based on the expectations of other supervisors at the Facility. The fact that other supervisors may have had different standards or failed to tightly enforce their standards does not show that the Supervisor who issued the written notice to Grievant singled out Grievant for discipline. At best, this would show that the other supervisors had different standards for their subordinates or that they were poor managers in the enforcement of standards. Grievant knew what was expected of him by the Supervisor, yet he disregarded that expectation. There is no credible evidence to show that the Supervisor singled out Grievant for disciplinary action. There is no basis to mitigate the disciplinary action against Grievant.[5]

It is this decision that the grievant has asked this Department to review.

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."[6] 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.[7]

The hearing officer was instructed to provide further consideration and/or clarification of how he reached his determination that no credible evidence was presented to suggest grievant was singled out for disciplinary action. He has complied with that order by stating the rational for his conclusion that the grievant had not been inconsistently disciplined, based on the record evidence. Therefore, this Department has no basis to further consider this matter.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the decision will not be disturbed. 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.[8] The decision is

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[5] Second Reconsideration Decision in Case 9121/9161-R2 issued December 30, 2009 at 2.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *Grievance Procedure Manual* § 6.4.
[8] *Grievance Procedure Manual* § 7.2(d). The grievant's request for an administrative review of hearing officer's Second Reconsideration Decision was received by this office on January 19, 2010. The Second Reconsideration Decision was issued on December 30, 2009. While the 15 calendar day appeal deadline is still in effect with subsequent challenges to reconsidered decisions, neither the *Grievance Procedure*

now a final hearing decision. Within 30 calendar days of the date of this decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[9] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[10]

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Claudia T. Farr
Director

Manual, Reconsideration Decisions, nor EDR Ruling No. 2010-2422 expressly set forth the filing requirements for subsequent challenges to Reconsideration decisions. In addition, the period between the issuance of the Second Reconsideration Decision and the 15th calendar day following the issuance of that decision included two days when state government was closed for the holidays. In addition, state government was closed on January 15 and 18, 2010 due to state holidays. The request was received on the first business day following the January 18th holiday. Under the unique circumstances of this case, the request will be considered timely.

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

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