Issue: Administrative Review of Hearing Officer's Decision in Case No. 9314; Ruling Date: June 30, 2010; Ruling #2010-2665; 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 2010-2665
June 30, 2010

The grievant (through her representative) has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9314 with the Virginia Department of Behavioral Health and Developmental Services ("agency"). For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

## FACTS

The facts of this case, as set forth in the Hearing Decision in Case Number 9314, are as follows:

> The Department of Behavioral Health and Developmental Services employs Grievant as a Forensic Mental Health Technician at one of its Facilities. She has been employed by the Agency for approximately 10 years. The purpose of Grievant's position is:
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> > to provide complete 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.
>
> Grievant had prior active disciplinary action consisting of a Group I Written Notice of disciplinary action for unsatisfactory attendance.
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> On March 12, 2009, the Agency posted a sign stating:
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> > Cell Phones are prohibited in the clinical areas.
> > According to policy number A-05b.
> > Use of personal communication devices is strictly prohibited in any patient area/setting while on duty.
> > Camera phones are banned in all [Facility] buildings for security and HIPAA reasons.
>
> The sign was placed above the time clock, on the door of the employee's lounge, and in each nurse's station.

On or about March 25, 2009, a Client's Husband complained to a charge nurse, Ms. V, that a nurse on another ward was rude to him and screamed at him. Ms. V did not know which employee the Husband was complaining about but knew that she was supposed to notify the charge nurse on the other ward. Ms. V notified the other supervisor. Sometime later, possibly the next day, Grievant left her ward and walked to Ms. V's ward. Grievant begin to explain to Ms. V that the Husband was out of line and that she only told the Husband he should be in the visitor's room. Ms. V told Grievant that she had referred the incident to the other charge nurse. Grievant became angry and walked down the hall saying, "I should have known I wouldn't get anywhere with you". Grievant threw up her hands and began walking away saying "damn bitch". Ms. V reported the interaction to her supervisor, Ms. T, and indicated that Ms. C had heard Grievant.

Ms. C was sitting in an office next to hallway where the interaction between Grievant and Ms. V took place and overheard the conversation. Ms. T asked Ms. C to write a statement about the incident between Grievant and Ms. V. Sometime later, Grievant walked into Ms. C's office and stood behind and to the right of Ms. C. Grievant had a camera phone and took a picture of Ms. C. Ms. C saw the flash and heard a shutter sound from the camera phone. Ms. C asked Grievant why she was taking Ms. C's picture. Grievant did not respond. Grievant turned and walked out of the room. Ms. C called Ms. T to report Grievant's behavior.

Ms. T called Grievant and asked Grievant to come to Ms. T's office. When Grievant met with Ms. T, Grievant said that she took a picture with her cell phone. When asked why she did so, Grievant responded that, "I do not like people smiling in my face and talking about me behind my back." Grievant also said "It will not happen again, I need my job."[1]

Based on the foregoing Findings of Fact, the hearing officer reached the following Conclusions of Policy:

Failure to comply with written policy is a Group II offense. Facility Policy Number A-05b states, "Camera phones are banned on all [Facility] buildings for security and HIPAA reasons." Grievant brought a camera phone into the secured Facility building nearby acting contrary to Facility written policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's three work day suspension must be upheld.

Grievant denies that she brought a camera phone into the workplace and took a picture of Ms. C. There are several reasons why the Agency has established by a preponderance of the evidence that Grievant brought a camera phone into the Facility and took a picture of Ms. C. First, Ms. C's testimony was

[1] Decision of the Hearing Office in Case 9314, issued May 14, 2010 ("Hearing Decision") at 2-3. The footnotes from the Hearing Decision have been omitted here.

credible. She had only known Grievant for approximately two months prior to the incident. There was no history of conflict between Grievant and Ms. C. No credible motive was presented that would explain why Ms. C would falsely accuse Grievant. Second, Grievant admitted to Ms. T that she brought a camera phone into the workplace and took a picture of Ms. C. Grievant's denial during the hearing is not consistent with her admission to Ms. T. Third, Grievant asserted that she intentionally lied to Ms. T about having a camera phone in order to bring attention to the poor working circumstances at the Facility. Grievant's testimony about this claim was not credible.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant contends that the Agency engaged in workplace harassment contrary to DHRM Policy 2.30. This policy defines workplace harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant presented evidence of circumstances she believes support workplace harassment. For example, she presented evidence that on February 26, 2009 she confronted a man she had never seen before in the ward. Grievant confronted him because he was not wearing a badge required of all employees working at the Facility. The man was a supervisor but had nothing on him to identify his status. Grievant was later reprimanded for her confrontation with the man even though she was merely performing her duties. Grievant also presented evidence of a meeting called by staff to discuss asbestos removal at the Facility. Some Facility managers were unaware of the meeting and did not believe the meeting was appropriate. Grievant and all of the other employees who attended the meeting were instructed to sign a document saying that the meeting was

unauthorized. Several staff including Grievant refused to sign the document. Grievant presented evidence that she and other staff had made numerous complaints with Facility managers but managers were ineffective at resolving those complaints. Grievant testified that the inability of Facility managers to resolve numerous problems had resulted in her and many others employees experiencing unnecessary stress.

Grievant's evidence does not support the conclusion that the Agency engaged in workplace harassment. Grievant did not show that any of the Agency's actions were taken "on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability." For example, Facility managers asked all of the employees who attended the meeting to sign a document saying the meeting was unauthorized. Facility managers did not differentiate among those employees based on their race, sex, color etc. The Agency did not engage in workplace harassment as it is defined under DHRM Policy 2.30 in effect during the relevant time period.

The essence of Grievant's claim regarding workplace harassment is that she objects to how the Agency is managing the Agency's affairs. The Hearing Officer is not a "super personnel officer" who can impose his management style on the Agency. To the extent an agency engages in poor management practices, the Hearing Officer only has the authority to correct those practices if they are contrary to State policy. In this case, Grievant has not established that the Agency acted contrary to DHRM policy.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence shows by a preponderance of the evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.

Grievant engaged in protected activity because she complained to Facility managers regarding her safety and the Agency's operations. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protected activity and the materially adverse action she suffered. It is clear that the Agency issued disciplinary action against Grievant because it believed she engaged in inappropriate behavior. The Agency did not take action against Grievant as a pretext for retaliation.

## 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."[2] 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.[3]

*Burden of Proof and Findings of Fact*

The grievant asserts that the agency failed to meet its burden of proof. For the reasons below we disagree.

The *Rules for Conducting Grievance Hearings "Rules"* state that:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[4]

Thus, in a case such as this, the hearing officer must determine whether the agency has proven by a preponderance of evidence that the grievant failed to follow policy. The hearing officer makes no assumptions regarding alleged facts; the agency must present evidence in support of the charge. The *Rules* require that he examine the "facts de novo (afresh and independently, as if no determinations had yet been made)." The hearing officer is authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and grounds in the record for those findings."[6] Where the evidence conflicts or is subject to varying interpretations, the hearing officer has 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.

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[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *Grievance Procedure Manual* § 6.4.
[4] *Rules for Conducting Grievance Hearings* ("Rules") at VI(B).
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.

In this case, the agency has met its burden of establishing the charge against the grievant. The agency presented evidence in the form of testimony to support the charge that the grievant photographed another employee at work.[7] (In addition, the grievant previously admitted that she had she had taken a photo, although she recanted at hearing asserting that she made the false statement, essentially, to get management's attention. The hearing officer found the grievant's explanation of her earlier false statement not credible.) The grievant asserted that the discipline issued against her was retaliatory but the primary focus of her retaliation argument seemed to be on an event that took place *after* the Written Notice was issued.[8] Based on the foregoing, there appears to be evidence supporting key findings such as (1) the grievant took a photograph at the workplace; and (2) the actions taken by the agency were not based on retaliation. Accordingly, this Department has no basis for substituting its judgment for that of the hearing officer with respect to those findings.

## APPEAL RIGHTS AND OTHER INFORMATION

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.[9] 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.[10] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[11]

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Claudia T. Farr
Director

[7] *See* Hearing testimony beginning at 5:30 and 45:00.
[8] See Hearing testimony beginning at 1:29:00.
[9] *Grievance Procedure Manual* § 7.2(d).
[10] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[11] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).