

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9517; Ruling
Date: June 7, 2011; Ruling No. 2011-2972; Agency: Department of Corrections;
Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2972
June 7, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9517. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

On September 23, 2010, the grievant filed a grievance challenging the agency's Group I, Group II, and Group III Written Notices. On February 9, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2011, a hearing was held at the agency's office.¹

The relevant facts as set forth in Case Number 9517 are as follows:²

1. Grievant was employed by the Department of Corrections as a Registered Nurse since December 3, 2007.
2. The Grievant was a Registered Nurse at the Department's facility for criminally impaired. She received a departmental written notice and is grieving a Group I written notice for abuse of State's time, coupled with a Group II written notice for failure to follow instructions and/or policy; and a Group III written notice for falsifying records.
3. There was no supervisor present after 10:45 p.m., on February 21, 2010. From the record on February 21, 2010, Grievant's shift was from 4:00 p.m. until 12:30 a.m. She left at 12:00 a.m. without clearing with her Supervisor, having worked through her mandatory 30 minute lunch break. Grievant turned her keys in at 10:45 p.m. and her black box at 11:45 p.m.

¹ Decision of Hearing Officer, Case No. 9517, issued April 13, 2011 ("Hearing Decision") at 1.

² *Id.* at 1-2.

4. Neither the key watch system which provided the time of Grievant's keys turn in nor the TSI system which provided one "black box" for locating employees is designed to be a personnel timing system, but they provide corroboration for acts prior to a nurse's departure from the facility.
5. Grievant admitted to her nursing supervisor that contrary to policy she did not count controlled substances, pills and sharps and syringes with another nurse because he was out of the building. Grievant signed the count log leaving the second signature block open.
6. The issue of counting controlled substances as set by policy was particularly sensitive because a nurse was found to have taken narcotics. He was dealt with through the court system.
7. Grievant did not report, as she was instructed, that she was leaving early on her shift to the director of nurses by calling her at home and by placing paperwork in the system.
8. Grievant maintained all of her actions were of the type regularly done by other nurses and overlooked.
9. From the Grievant's testimony, sharps, syringes and controlled substances would not be counted simultaneously by on-coming/off-going nurses. The controlled substances would be counted by the departing nurse and signed for and the oncoming nurse would count the controlled substances and sign off.
10. On February 21, 2010, official policy was published requiring counting controlled substances by two nurses present at the same time. Grievant admitted to having violated the policy.

In the April 13, 2011 hearing decision, the hearing officer denied the grievant's request for relief.³ The hearing officer denied the grievant's request for reconsideration on May 16, 2011.⁴ The grievant now seeks administrative review 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."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

³ *Id.* at 3.

⁴ *See* Reconsideration Decision Letter of Hearing Officer, Case No. 9517 ("Reconsideration Decision") issued May 16, 2011.

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

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Findings of Fact

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and the grounds in the record for those findings."⁸ 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.⁹ 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 actions taken were both warranted and appropriate under all the facts and circumstances.¹⁰ 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.

Here, the grievant contends that, pursuant to agency operating procedures, she counted the controlled medications with the charge nurse on February 21, 2010. Furthermore, the grievant states that she had permission from the charge nurse to leave work early on February 21, 2010. Determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the management action was appropriate.¹¹ This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Specifically, the grievant's supervisor testified that the grievant personally disclosed to her that she did not count the medications with the second charge nurse on February 21, 2010.¹² Furthermore, the grievant admitted in an August 23, 2010 formal statement to the agency that she counted the medications by herself while the other nurse was outside the building taking his lunch break.¹³ The grievant's supervisor also testified that the grievant was scheduled to work until 12:30 a.m. on February 22, 2010, but instead the grievant departed work early on February 21, 2010, without seeking prior approval to do so.¹⁴ According to the grievant's supervisor, the grievant in fact admitted that she left early on February 21, 2010, in her August 23, 2010 formal statement.¹⁵ In addition, the facility warden testified that the

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² See Hearing Recording, Tape 1, Side A, Tape Counter at 400 through 450 (testimony of grievant's supervisor).

¹³ See Hearing Recording, Tape 1, Side A, Tape Counter at 590 through 601 (testimony of grievant's supervisor).

¹⁴ See Hearing Recording, Tape 1, Side B, Tape Counter at 78 through 105 (testimony of grievant's supervisor).

¹⁵ See Hearing Recording, Tape 1, Side A, Tape Counter at 475 through 560 (testimony of grievant's supervisor).

grievant did not submit a leave slip nor receive prior authorization to leave work early on February 21, 2010.¹⁶ Moreover, the facility warden testified that even though the agency's TSI alarm system indicated the grievant left at 11:45 p.m. on February 21, 2010, not only did the agency's key watch system indicate her keys were turned in at 10:45 p.m., but the grievant also admitted in prior statements to the agency that she left work early on February 21, 2010.¹⁷ Accordingly, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to remand the decision.

Inconsistency with Policy

The grievant's request for administrative review challenges whether the agency's Operating Procedure 720.5 states that two nurses must simultaneously count controlled substances. DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁸ Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Hearing Officer Closing His Eyes

The grievant asserts that she observed the hearing officer close his eyes during the hearing which purportedly gave the appearance he was falling asleep during her testimony. The grievant's stated observations, however, do not indicate that the hearing officer fell asleep during the proceedings. To the contrary, the agency's advocate indicates that she did not observe the hearing officer sleeping or being inattentive. Moreover, the agency party, as well as three agency employees who operated the recording equipment during the hearing, also indicated they did not observe the hearing officer sleeping or being inattentive. Indeed, during this Department's review of the hearing record it is clear that the hearing officer's attentiveness and knowledge of the testimony is apparent in his questioning of the witnesses as well. Therefore, there is no basis to find any misconduct on the part of the hearing officer in this regard.

Email Evidence

The grievant asserts that she was unable to obtain an email from her supervisor which purportedly explained that the nurses could go home thirty minutes early if they worked through their lunch. Assuming without deciding that the grievant actually requested the email from the agency, the grievant has provided no evidence that she used the non-compliance provisions of the *Grievance Procedure Manual* or that she requested an order from the hearing officer requiring the agency to provide the e-mail.¹⁹ Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly

¹⁶ See Hearing Recording, Tape 2, Side A, Tape Counter at 980 through 1141 (testimony of facility warden).

¹⁷ See Hearing Recording, Tape 2, Side B, Tape Counter at 260 through 450 (testimony of facility warden).

¹⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

¹⁹ See Hearing Recording, Tape 3, Side A, Tape Counter at 830 through 879 (testimony of grievant). See also Hearing Recording, Tape 4, Side A, Tape Counter at 36 through 50 (testimony of grievant).

discovered evidence.”²⁰ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.²¹ However, the fact that a party discovered the evidence after the trial does not necessarily make it “newly discovered.” Rather, the party must show that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.²²

Here, the grievant has provided no information to support a contention that the email should be considered newly discovered evidence under this standard. Specifically, the grievant was apparently aware of the email prior to the hearing and did not submit this evidence at hearing or present any evidence at hearing that she had taken measures to ensure that she would have the e-mail available at hearing. Consequently, there is no basis to reopen the hearing for consideration of this additional email.

Mitigating Factors

The grievant contends the agency’s disciplinary action should have been mitigated. The hearing officer has the sole authority to weigh all of the evidence and to consider whether the facts of the case constitute misconduct and whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”²³ EDR’s *Rules for Conducting Grievance Hearings* (“Rules”) provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are “mitigating circumstances,” such as “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee’s long service, or otherwise satisfactory work performance.” A hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances.

²⁰ Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d on reh’g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining “newly discovered evidence” rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining “newly discovered evidence” standard in context of grievance procedure).

²¹ *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

²² *Id.* (emphasis added) (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

²³ Va. Code § 2.2-3005(C)(6).

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.²⁴

The *Rules* further state that:

Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²⁵

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.²⁶ Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

The grievant contends that the hearing officer failed to consider mitigating factors such as the inconsistent treatment by the supervisor in disciplining nurses for the allegedly common practice of leaving one's shift early. Upon review of the record, the grievant relied upon the agency's TSI alarm reports to show the hours each nurse worked during a certain time frame; some of these reports showed certain nurses did not work a full shift.²⁷ However, on cross examination, the grievant admitted that she did not know whether these nurses had been approved or pre-authorized to work a shorter shift.²⁸ Additionally, the hearing officer found that the grievant actually admitted leaving her shift early without permission, not simultaneously counting the controlled substances with the other nurse, and falsifying the medication control sheet.²⁹ Hence, the hearing officer found the agency's discipline was consistent with law and policy and did not exceed the limits of reasonableness.³⁰ Although the hearing officer did not expressly use the term "mitigating circumstances" in his hearing decision, it appears as though he did consider the mitigating circumstances the grievant raised in her administrative review in the discussion of the facts and associated conclusions of this case. Therefore, this Department

²⁴ *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

²⁵ *Id.*

²⁶ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts." *Id.* See also *Bynum v. Cigna Healthcare of NC, Inc.*, 287 F.3d 305, 315 (4th Cir. 2002) quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; *United States v. General*, 278 F.3d 389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).

²⁷ See Hearing Recording, Tape 3, Side B, Tape Counter at 990 through 1005 (testimony of grievant).

²⁸ *Id.*

²⁹ Hearing Decision at 3.

³⁰ *Id.*

cannot find that the hearing officer abused his discretion in determining there were no mitigating circumstances in this case.

CONCLUSION AND APPEAL RIGHTS

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.³¹ 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.³² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³³

Claudia T. Farr
Director

³¹ *Grievance Procedure Manual* § 7.2(d).

³² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).