

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9566; Ruling Date: June 10, 2011; Ruling No. 2011-2980; Agency: University of Virginia Health System; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia Health System
Ruling No. 2011-2980
June 10, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9566. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 9566 are as follows:¹

The facts in this matter are very straightforward. On December 16, 2010, the Grievant was issued a Formal Performance Counseling Form for insubordination. Pursuant to that Formal Performance Counseling Form, the Grievant was suspended for eight (8) hours on December 21, 2010 and was placed on a performance warning for the time period of December 16, 2010 through March 16, 2011. That document contained the following language:

All performance expectations for the job must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.

Accordingly, as of December 16, 2010, the Grievant was on notice that any performance failure on his part, prior to March 16, 2011, would result in his termination.

The Hearing Officer heard testimony from the manager of the department in which the Grievant works. The Grievant's title is that of a Sterile Processing Technician. A part of his job is to decontaminate instruments, assemble them pursuant to a particular physician's recipe and then sterilize them. On January 19, 2011, pursuant to the recipe of one (1) of the physicians who works at the Agency location, the Grievant prepared a set or pan of instruments. The recipe itself

¹ See Decision of Hearing Officer, Case No. 9566, issued May 6, 2011 ("Hearing Decision") at 3-4. Footnotes from the Hearing Decision have been omitted here.

indicates that it was prepared by the Grievant based on his initials and, on Page 2 of the Exhibit, the Grievant signed his name. On January 24, 2011, this pan of instruments was being used during a surgical procedure. During that procedure, it was discovered that one (1) of the instruments in the pan (a Rongeur Bone Double Action Left Leksell 3mm) contained bone fragments from a prior usage. One (1) of the nurses who was assisting in this procedure notified the Sterile Processing Coordinator of this problem and turned over a bag containing this soiled instrument, as well as the recipe for that set of instruments containing the Grievant's signature, to this Coordinator. The Coordinator turned the instrument and documentation over to the Manager and the Grievant was subsequently terminated for failing to meet performance expectations during the time frame of December 16, 2010 through March 16, 2011.

* * * * *

The Grievant was issued a Formal Performance Counseling Form on February 1, 2011 for:

Failure to follow procedure for assembly of surgical instrumentation; soiled instrumentation in a prepared instrument set which violates infection control and patient safety practices, repetitive infraction subsequent to step 2 PIC on 9/8/2010. Soiled instrument reported and confirmed on 1/24/11 for set assembled on 1/19/2011. [Grievant] was given a Step 3 PIC with 90 day performance warning period on 12/16/10 for insubordinate behavior. This incident results in a failure to meet performance expectations during performance warning period. A predetermination meeting was held.

Pursuant to the Formal Performance Counseling Form, the Grievant was terminated. On February 16, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. On April 5, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 3, 2011, a hearing was held at the Agency's location.

In a May 6, 2011 hearing decision, the hearing officer upheld the grievant's termination.² The hearing officer denied the grievant's request for reconsideration on May 19, 2011.³ 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 ...

² *Id.* at 4.

³ *See* Decision of Hearing Officer, Case No. 9566 ("Reconsideration Decision") issued May 19, 2011 at 2.

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

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”⁶ and to determine the grievance based “on the material issues and the 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 contends that he did not have adequate notice when his performance warning period began and ended. Upon this Department’s review of the hearing record, we cannot find that the hearing officer exceeded or abused his authority under the grievance procedure where, as here, his findings (that the performance warning period was from December 16, 2010 through March 16, 2011) were supported by the record evidence and pertain to a material issue in the case. Specifically, the grievant’s supervisor’s supervisor testified that the grievant received a step three performance counseling form on December 16, 2010, which indicated that the performance warning period was from December 16, 2010 through March 16, 2011.¹⁰ Similarly, she testified that it was common disciplinary practice for all employees to receive a 90 day performance warning period when an employee reaches a step three performance counseling.¹¹ This record evidence pertains to the material issue of whether the grievant had adequate notice of his performance warning period as found by the hearing officer. 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 for this reason.

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

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

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

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ See Hearing Recording at 24:18 through 26:20 (testimony of grievant’s supervisor’s supervisor).

¹¹ See Hearing Recording at 28:19 through 29:43 (testimony of grievant’s supervisor’s supervisor).

Inconsistency with Policy

In his request for administrative review, the grievant also disagrees that the agency's policy specifically states that failing to follow assembly procedures for surgical instruments is grounds for termination. The content of agency policy is a matter of policy for the Department of Human Resource Management (DHRM) to address on administrative review. Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue 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.

Documents Allegedly Requested

In his administrative review request, the grievant contends that he was denied access to documents pertaining to him. However, upon this Department's review of the hearing record, it appears this issue was not raised by the grievant at hearing and, therefore, the hearing record does not support the contention that the agency failed to comply with the document discovery provisions of the grievance procedure. Furthermore, the significance of these documents is additionally unclear in that the grievant provided no discussion of what documents he sought or how these documents would have affected the outcome of the hearing decision. As such, there is no basis to order any form of relief because of the agency's alleged failure to produce documents.

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."¹² 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. 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.¹³

¹² Va. Code § 2.2-3005(C)(6).

¹³ *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

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.¹⁴

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.¹⁵ 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 in disciplining employees for dirty surgical instruments and the alleged discrimination by the grievant's supervisor. The grievant introduced three witnesses at hearing. The first witness testified that she saw their supervisor yell at the grievant about time and attendance issues, but she did not say she had witnessed any discrimination.¹⁶ The second witness testified about whether it was the grievant's signature on the recipe sheet for the surgical instruments; however, he did not testify about inconsistent treatment or discrimination.¹⁷ The third witness testified that she had witnessed their supervisor discriminate against the grievant when their supervisor would yell at the grievant about being away from his work station for extended breaks.¹⁸ However, upon cross examination, the grievant's third witness admitted that she never reported this to management and that the supervisor may have had other reasons for his anger apart from discriminatory or retaliatory purposes.¹⁹ The hearing officer concluded that the grievant did not introduce any other reasons to justify mitigation in this case.²⁰ Hence, the hearing officer found the agency's discipline was consistent with law and policy and did not exceed the limits of reasonableness.²¹ In light of the above, this Department cannot find that the hearing officer abused his discretion in determining there were no mitigating circumstances in this case.

¹⁴ *Id.*

¹⁵ "'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).

¹⁶ See Hearing Recording at 1:31:14 through 1:31:54 (testimony of Technician #1).

¹⁷ See Hearing Recording at 1:46:00 through 1:50:57 (testimony of Technician #2).

¹⁸ See Hearing Recording at 1:53:26 through 1:55:07 (testimony of Technician #3).

¹⁹ See Hearing Recording at 1:55:43 through 1:55:55 (testimony of Technician #3) and Hearing Recording at 1:59:36 through 2:00:29 (testimony of Technician #3).

²⁰ Hearing Decision at 4.

²¹ *Id.*

Finally, the grievant asserts that the hearing officer allegedly failed to follow proper hearing procedures because he “stopped” the grievant from introducing an additional mitigating factor during his closing statement. The general conduct of the hearing is within the sound discretion of the hearing officer.²² Thus, noncompliance with the grievance procedure and *Rules for Conducting Grievance Hearings* on such grounds will only be found if the hearing officer has abused that discretion. In this case, it appears the grievant tried to raise his mental illness as a potential mitigating factor during his closing statement. After the grievant raised this potential mitigating factor, the hearing officer questioned the grievant whether he had any evidence to submit regarding his mental illness.²³ Although the hearing recording is in part inaudible, it appears the grievant did not have such evidence. The hearing officer invited the grievant to “go ahead” and the grievant replied “I’m done.”²⁴ Here, the grievant did not offer any evidence of mental illness to support mitigation of the offense after the hearing officer gave the grievant an opportunity to present his evidence during his closing statement. Therefore, based upon this Department’s review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. Both parties were able to present their cases adequately and neither was materially prejudiced.

CONCLUSION

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.²⁵ 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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷

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Director

²² E.g., EDR Ruling No. 2009-2091.

²³ See Hearing Recording at 2:02:17 through 2:02:23 (hearing officer’s question).

²⁴ See Hearing Recording at 2:02:30 through 2:02:37 (statements of hearing officer and grievant).

²⁵ *Grievance Procedure Manual* § 7.2(d).

²⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).