

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9531, 9583;
Ruling Date: September 23, 2011; Ruling No. 2012-3042; Agency: Department of
Behavioral Health and Developmental Services; Outcome: Hearing Decision In
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2012-3042
September 23, 2011

The grievant has requested that this Department administratively review the decision in Case No. 9531/9583. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case No. 9531/9583 are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its Facilities.

Grievant had prior active disciplinary action. On March 13, 2009, Grievant received a Group I Written Notice for unsatisfactory work performance. On March 13, 2009, Grievant received another Group I Written Notice for unsatisfactory work performance. On March 16, 2010, Grievant received a Group I Written Notice for being tardy. On June 14, 2010, Grievant received a Group I Written Notice for unsatisfactory work performance. On June 14, 2010, Grievant also received a Group II Written Notice for failure to follow instructions.

The Client preferred to eat by himself. One of his behavior plans permitted him to eat his meals alone in the dining room without any individuals or staff in close proximity to him.

On June 18, 2010, Mr. H was working as the Acting Charge Aide. He was responsible for directing the activities of staff and individuals in the absence of a Shift Supervisor. Mr. H asked Grievant to get the Client for breakfast. Grievant asked the Client to come for breakfast. The Client began walking down the hallway toward the dining room but observed another individual going into the dining room. The Client turned around and went back to the day hall and said he wanted to wait. The Client later came into the dining room. Grievant followed the Client into the dining room and remained there. Mr. H entered the dining room and observed Grievant near the Client. He asked Grievant to leave so that the Client could eat. Grievant replied "I ain't got to go no damn where; I get just

¹ Decision of Hearing Officer, Case No. 9531/9583 ("Hearing Decision"), issued July 5, 2011 at 1-3.

as much right to be here as anybody else!” Mr. H said, “No! You need to go right now so [the Client] can eat.” Grievant remained in the room. Mr. H. became angry that Grievant was refusing his instructions so he left and called a supervisor, Mr. T.

On January 6, 2011, Grievant was pushing an individual in his wheelchair from one end of a hallway. As Grievant passed near another employee, Ms. R, Grievant looked at Ms. R and said “f—king bitch”.

On August 27, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor’s instructions. On January 25, 2011, Grievant was issued a Group I Written Notice for use of abusive language in the workplace. Grievant was removed from employment based upon the accumulation of disciplinary action.

On August 28, 2010, Grievant timely filed a grievance to challenge the Agency’s issuance of a Group II Written Notice. On January 25, 2011, Grievant timely filed a grievance to challenge the Agency’s issuance of a Group I Written Notice with removal. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 18, 2011, the EDR Director issued Ruling No. 2911-2939 consolidating the two grievances for a single hearing. On April 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2011, a hearing was held at the Agency’s office.

In a July 5, 2011 hearing decision, the hearing officer upheld the August 27, 2010 Group II Written Notice for failure to follow a supervisor’s instructions and the January 25, 2011 Group I Written Notice for use of abusive language in the workplace.² Furthermore, the hearing officer upheld the grievant’s removal based upon the accumulation of disciplinary action.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...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

² *Id.* at 5.

³ *Id.*

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

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

*Findings of Fact*⁶

The grievant contends that the hearing officer erred by basing his decision upon a January 25, 2011 Group I Written Notice, which stated that as of January 25, 2011, the grievant had seven cumulative active Written Notices. The grievant alleges that seven active Written Notices did not exist as of that date. As such, the grievant asserts that the hearing officer was not allowed “to consider the actual posture of the Grievant’s challenge” by making this alleged factual error.

Two issues were qualified for the grievant’s May 23, 2011 hearing: (1) a Group II Written Notice that was issued to the grievant on August 27, 2010; and (2) a Group I Written Notice that was issued to the grievant on January 25, 2011.⁷ In addition, the hearing officer also considered the following five prior active disciplinary actions: (1) a Group I Written Notice for unsatisfactory work performance issued to the grievant on March 13, 2009; (2) a Group I Written Notice for unsatisfactory work performance issued to the grievant on March 16, 2009;⁸ (3) a Group I Written Notice for being tardy issued to the grievant on March 16, 2010; (4) a Group I Written Notice for unsatisfactory work performance issued to the grievant on June 14, 2010; and (5) a Group II Written Notice for failure to follow instructions issued to the grievant on June 14, 2010.⁹ These five prior active Written Notices were only considered by the hearing officer for accumulation purposes pursuant to the Commonwealth’s *Standards of Conduct*.¹⁰

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹² 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.

In this case, the hearing record clearly supports the hearing officer’s findings that seven active disciplinary actions existed as of January 25, 2011. Specifically, the record exhibits reflect

⁶ The grievant also requested the Director of the Department of Human Resource Management (DHRM) to administratively review the same fact finding issues addressed in this Ruling. (See items 1, 2, and 3 in Grievant’s July 19, 2011 Request for Administrative Review to DHRM.) We note, however, that under the grievance procedure, the DHRM Director’s review is limited to determining whether the hearing decision is consistent with policy. Va. Code § 2.2-3006(A). A hearing officer’s fact-finding is governed by the grievance procedure. Accordingly, EDR has addressed these objections by the grievant herein.

⁷ Hearing Decision at 1.

⁸ The grievant also contends the hearing decision erroneously states that two Group I Written Notices were issued on March 13, 2009. One active Group I Written Notice for unsatisfactory work performance was indeed issued on March 13, 2009, but a second active Group I Written Notice for unsatisfactory work performance was actually issued on March 16, 2009, not March 13, 2009. Although the hearing decision reflects the second Group I Written Notice for unsatisfactory work performance was issued on March 13, 2009, this Department finds such error in the hearing decision as harmless.

⁹ Hearing Decision at 2.

¹⁰ See Department of Human Resource Management, Standards of Conduct, Policy No. 1.60, effective April 16, 2008.

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

that the six prior Written Notices remained active as of January 25, 2011,¹³ and the seventh disciplinary action was taken by the agency on January 25, 2011 when it issued the Group I Written Notice to the grievant. As such, this Department finds no error with the hearing officer's finding that all seven active Written Notices existed as of January 25, 2011.

*Mitigating Circumstances of Prior Disciplinary Actions*¹⁴

The grievant also argues that the hearing officer failed to consider the “[m]itigating circumstances of any prior Group I offenses.” Under the *Rules for Conducting Grievance Hearings*, only issues that have been qualified for hearing are before the hearing officer for a decision on the merits.¹⁵ In this particular case, the August 27, 2010 Group II Written Notice and the January 25, 2011 Group I Written Notice were the only two issues qualified for hearing and a decision on the merits.¹⁶ Therefore, the hearing officer had the authority to consider mitigating circumstances only with respect to the two qualified disciplinary actions. The other five Written Notices were not qualified for hearing and were not before the hearing officer for a decision on their merits. Rather, they were considered only to determine their cumulative effect along with the two Written Notices that were qualified. Accordingly, we cannot conclude that the hearing officer failed to comply with the grievance procedure on this issue.

*Grievant's Request to File Administrative Review Request on Additional Grounds*¹⁷

In her July 19, 2011 requests for administrative review, the grievant seeks “leave to file on additional grounds upon receipt of the transcript of hearing in this matter.” However, the *Grievance Procedure Manual* provides that “all requests for review must be made in writing, and **received** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.”¹⁸ Moreover, requests for review to EDR must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance; likewise, requests for review to DHRM must refer to a particular mandate in state or agency policy with

¹³ Due to a technical error, the hearing was not recorded and, therefore, this Department could not review the hearing testimony evidence. However, because of the nature of the appeal, this Department was able to review the hearing decision and the record exhibits to resolve the issues in this review.

¹⁴ The grievant requested the DHRM Director to administratively review her contention that the hearing officer improperly failed to consider or address in his decision mitigating circumstances related to any prior disciplinary offenses. (See item 5 in Grievant's July 19, 2011 Request for Administrative Review to DHRM.) We note, however, that under the grievance procedure, the DHRM Director's review is limited to determining whether the hearing decision is consistent with policy. Va. Code § 2.2-3006(A). The issue of mitigation by a hearing officer is governed by the grievance procedure and reviewable by the EDR Director. Accordingly, EDR has addressed this objection by the grievant herein.

¹⁵ See *Rules for Conducting Grievance Hearings*, § V(C).

¹⁶ Hearing Decision at 1.

¹⁷ The grievant requested the DHRM Director to grant her request for leave to file on additional grounds upon receipt of the transcript of hearing. (See item 6 in Grievant's July 19, 2011 Request for Administrative Review to DHRM.) We note, however, that under the grievance procedure, the DHRM Director's review is limited to determining whether the hearing decision is consistent with policy. Va. Code § 2.2-3006(A). The time requirements established by the grievance procedure is a compliance issue reviewable by the EDR Director. Accordingly, EDR has addressed this objection by the grievant herein.

¹⁸ *Grievance Procedure Manual* § 7.2(a).

which the hearing decision does not conform.¹⁹ We note as well that the July 5, 2011 hearing decision clearly advised both parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must be received by the reviewer within fifteen calendar days of the date the decision was issued.²⁰

Grievant's July 19, 2011 requests for administrative review to EDR and DHRM appear to be timely; in EDR's case and presumably DHRM's as well, the July 19th request was received on the fourteenth day in the fifteen calendar day period. Thus all grounds for review described in the July 19 requests are reviewable. However, there is no provision in the grievance procedure for extending the fifteen calendar-day period to allow either party to develop "additional grounds" for administrative review. All grounds for administrative review must be received by the reviewer within the fifteen calendar day period, thus grievant's request for leave to file additional grounds beyond the fifteen calendar day period must be denied.

Grievant's Request for a Rehearing

In her July 26, 2011 letter to this Department, the grievant requests leave to incorporate additional grounds into her July 19, 2011 request for administrative review, in this instance, grounds for a rehearing. Specifically, the grievant asserts that the recording equipment used at hearing did not in fact record the proceeding, a fact that is not in dispute. In her July 26 letter, the grievant states that the lack of a recording does not allow her to "fully and adequately grieve the hearing decision."

The grievant's July 26th letter does not explain, however, why the lack of a recording has prevented her from timely submitting all her objections to this Department or to DHRM for administrative review; nor does it explain why the lack of a recording would prevent this Department or DHRM from reviewing and ruling on her timely objections. As explained above, the grievant had fifteen calendar days to present all objections to administrative reviewers. One of her timely objections contested the hearing officer's fact findings discussed above in the *Findings of Fact* section of this ruling. Other record evidence—exhibits—allowed this Department to reach a determination regarding these disputed facts. Had there not been documentary record evidence that resolved the questions surrounding the disputed factual findings, this Department would have little choice but to reopen the hearing. However, because all questions regarding factual findings could be resolved through an examination of other record evidence, there is no need to reopen the hearing.²¹ Thus, the grievant's request must be denied.

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.²² Within 30 calendar days of a final hearing decision, either party

¹⁹ *Id.*

²⁰ Hearing Decision at 5.

²¹ Nor does it appear that a recording of the hearing would be required for DHRM to rule on the grievant's remaining objection to that agency (see item 4 in Grievant's July 19, 2011 Request for Administrative Review to DHRM). Whether state or agency policy required the agency to afford the grievant a referral to the Employee Assistance Program appears to be simply a matter of policy interpretation.

²² *Grievance Procedure Manual*, § 7.2(d).

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may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴

Claudia T. Farr
Director

²³ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁴ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).