

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9701; Ruling Date: January 31, 2012; Ruling No. 2012-3213; 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 Department of Behavioral Health and Developmental Services
Ruling Number 2012-3213
January 31, 2012

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9701. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

The findings of fact, as set forth in the hearing decision in Case Number 9701, are as follows:¹

In early 2011 issues arose with one of Grievant's subordinates. The person was dealt with by Grievant's superiors. Grievant was upset about being passed by and not included in the discipline of her employee. Soon thereafter, statements were made that caused Agency to question some of Grievant's actions and behaviors. An investigation of Grievant commenced. Grievant took exception with the methods of investigations and the exclusion of her Attorney at meetings of herself and Agency. At the conclusion of the investigation, rather than being issued a Written Notice, Grievant was made subject to a Performance Improvement Plan (PIP). Grievant was of the belief that she could not grieve the disciplinary action because it was not a Written Notice, nor could she grieve what she considered work place harassment. However, it appears she might have been able to qualify under GPM§4.1(b) 1 or the last paragraph of that section.

Nonetheless, Grievant did not file a grievance and, unknown to Agency, contacted her State Representative. It is clear Grievant had an absolute right to contact her State Representative. It is also clear that this did not put Agency on noticed [sic] of any claim of Grievant.

After Grievant was made aware of the discipline (PIP) from the first investigation, additional information came to light about Grievant having falsified her employment application. It was investigated as a new matter. It appeared that

¹ Decision of Hearing Officer, Case No. 9701 ("Hearing Decision"), issued December 8, 2011 at 3-5. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant had not been forthcoming regarding her previous employment with State Facilities as well as claiming educational degrees that she did not possess. During the time the second investigation was ongoing, a State Official who had received information from Grievant's State Representative, made Agency aware of Grievant's complaints regarding her first investigation. After obtaining what Agency believed was sufficiency [sic] evidence of Grievant's falsification of records/employment application, Agency issued a Group III Written Notice with termination to the Grievant. Grievant complains that this Written Notice was retaliatory in nature.

The specific timeline of events is listed below all occurring in 2011.

- 03/05/11: Investigation #1 commenced.
- 05/16/11: Conclusion of #1 Investigation.
- 05/23/11: Grievant receives Notice of Discipline. (PIP) regarding investigation #1.
- 05/23/11: Agency Human Resource person reports to Grievant's Superior possible inconsistencies in Grievant's employment application.
- 05/23/11: Second Investigation starts.
- 06/06/11: Grievant sends complaints to her State Representative regarding Investigation #1.
- 06/13/11: Grievant's supervisor talked to other Agency that had employed Grievant about Grievant's past employment regarding investigation #2.
- 06/15/11: Grievant's complaint regarding Investigation #1 sent to Governor's Office.
- 06/17/11: Human Resources request personnel file of Grievant from sister Agency regarding Investigation #2.
- 06/21/11: Grievant's information regarding Investigation #1 sent to additional Agencies in Richmond.
- 06/23/11: PIP issued to Grievant regarding Investigation #1.
- 06/28/11: Email from State Agency in Richmond informing Agency of Grievant's complaint.

- 06/29/11: Grievant's 76 page complaints regarding Investigation #1 sent to Agency.
- 07/25/11: Letter of Intent to issue a Written Notice regarding Investigation #2 given to Grievant.
- 07/26/11: Grievant's Notice of Group III discipline with termination given to Grievant.

* * * * *

On July 25, 2011, Grievant was issued a letter of intent by Agency to issue a Group III disciplinary with termination for falsifying records, that is, falsifying her employment application. The Grievant responded on July 26, 2011 and on the same date a Written Notice was issued. On August 19, 2011, the Grievant filed an expedited grievance. The second step resolution response was issued on September 1, 2011. On September 22, 2011, the Commissioner qualified the matter for Hearing. A Hearing Officer was appointed on October 11, 2011. A Pre-Hearing Conference commenced October 19, 2011. At Counsels' requests there were two hearing dates, the matter of disciplinary action was heard on November 9, 2011 and the Retaliation Claim was heard November 21, 2011.²

In a December 8, 2011 hearing decision, the hearing officer upheld the Group III disciplinary action with termination and denied the grievant's retaliation claim.³ The grievant sought reconsideration by the hearing officer, and in a January 18, 2012 decision, the hearing officer upheld the December 8th hearing decision.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 does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

² *Id.* at 1.

³ *Id.* at 9.

⁴ See Reconsideration Decision of Hearing Officer, Case No. 9701 ("Reconsideration Decision"), issued January 18, 2012 at 2.

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

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

The grievant raises three issues in her December 23, 2011 request for administrative review, specifically alleging: 1) the hearing officer improperly admitted evidence and allowed agency testimony of the grievant's personnel records; 2) the hearing decision is inconsistent with Department of Human Resources Management (DHRM) Policy 6.05; and 3) the agency's November 23, 2011 correspondence, which was addressed to the hearing officer, improperly influenced the hearing officer and affected the outcome of the hearing decision.

Evidentiary Issues

The grievant alleges, pursuant to DHRM Policy 6.05, that the hearing officer improperly admitted into evidence the grievant's personnel records and allowed testimony by agency personnel regarding the information contained therein. Specifically, the grievant asserts that she did not give consent to Facility A to disclose these records to Facility B, and hence, the agency "unlawfully obtained" her personnel records which "constituted the basis for [Facility B's] wrongful discharge of the grievant and undoubtedly influenced the hearing officer's decision."

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 grounds in the record for those findings."⁸ Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁹ Accordingly, the technical rules of evidence do not apply.¹⁰ By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.¹¹ 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.

At issue in this case is whether the grievant falsified her employment application. As such, the hearing officer had the duty to receive all probative evidence regarding this issue. In her hearing decision, the hearing officer stated "[w]hether or not the Agency should have received Grievant's employment records is not pertinent to this hearing as it was clearly allowable for the Agency to report employment dates, which then established that Grievant had not be [sic] truthful on her previous employment application."¹² In her reconsideration decision, the hearing officer held that the issue of whether the agency had inappropriately shared information was "not an issue or even a consideration" in her hearing decision because the pertinent information was "whether or not Grievant was employed by a sister agency during the time that Grievant did not reveal on her employment application."¹³ Furthermore, the hearing

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings*, § IV(D).

¹⁰ *Id.*

¹¹ Va. Code § 2.2-3005(C)(5).

¹² Hearing Decision at 9.

¹³ Reconsideration Decision at 1.

officer notably points out that those dates are public information.¹⁴ As a matter of compliance with the grievance procedure, we find no error with the hearing officer's conclusions. The grievant's dates of employment are clearly relevant to this case and appear to be public records.¹⁵ Therefore, the hearing officer's actions here can hardly be viewed as an abuse of discretion, clearly erroneous, or in any other way a violation of the grievance procedure. Accordingly, we decline to disturb the decision on this basis.

Inconsistency with Agency Policy

The grievant alleges that the hearing decision is inconsistent with DHRM Policy 6.05 because personnel records should not "be disclosed to third parties without the written consent of the subject employee" and the grievant "was not allowed [an] opportunity to correct any alleged misinformation." To support her allegation, she asserts that Facility A should not have provided the grievant's personnel records to Facility B because Facility B is a third party and a separate agency. In its rebuttal, the agency asserts that Facility A and Facility B are not separate agencies, but separate facilities operated under the Department of Behavioral Health and Developmental Services (DBHDS) and under the supervision and control of one agency head, the Commissioner of DBHDS.

This Department has no authority to assess whether the hearing officer correctly interpreted DHRM Policy 6.05 in rendering her decision. The Department of Human Resources Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy. The DHRM Director has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. 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.

Agency's November 23, 2011 Correspondence to the Hearing Officer

The grievant alleges that the agency's November 23, 2011 correspondence to the hearing officer was "highly improper" and improperly influenced the hearing officer's decision. In her Reconsideration Decision, the hearing officer held that the November 23rd correspondence "had no impact whatsoever on the Hearing Officer's decision."¹⁶ The decision does not appear to rely upon the information provided in the November 23rd correspondence, therefore this Department has no reason to disturb the hearing officer's findings or second guess her decision with respect to this issue.¹⁷

¹⁴ *Id.*

¹⁵ See DHRM Policy 6.05.

¹⁶ Reconsideration Decision at 2.

¹⁷ We are compelled to note that the time to submit evidence and make arguments is at hearing, not after it has concluded.

Grievant's January 13, 2012 Request for Administrative Review

In a January 13, 2012 email, the grievant requested administrative review of two additional issues, specifically alleging: 1) the hearing officer improperly excluded certain evidence at hearing; and 2) the agency's January 2, 2012 email to this Department was highly improper and a deliberate attempt to mislead and improperly influence the outcome of the grievance.

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 This Department has allowed parties to raise beyond the 15 day timeframe only those issues that could not have been raised previously.¹⁹ Here, the issue of the hearing officer's alleged failure to exclude certain evidence at hearing was an issue that could have been raised within the 15 day period following the original hearing. The hearing officer issued her original decision on December 8, 2011.²⁰ The grievant first raised this particular issue on January 13, 2012, which was 36 calendar days after the issuance of the hearing decision. Therefore, the request for administrative review for this particular issue is untimely.

Although the grievant's second issue pertaining to the agency's January 2, 2012 email could not have been raised previously, we note that the January 2nd email received by this Department was the agency's rebuttal to the grievant's December 23, 2011 request for administrative review. The grievant and agency advocates were copied on this email. The Grievance Procedure Manual provides that an "opposing party may submit a written challenge (rebuttal) to any appeal to the appropriate administrative reviewer. A copy of any such rebuttal must also be provided to the appealing party and the EDR Director."²¹ The agency's rebuttal was drafted by the agency's employee relations manager, and not the agency's advocate. However, for purposes of compliance with the grievance procedure, the agency is allowed an opportunity to rebut the grievant's allegations, and the agency rebuttal may be drafted by any agency advocate, not solely by the agency advocate that was present at hearing. Therefore, we decline to disturb the hearing decision for this reason.

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 and any reconsidered hearing decisions following such review have been decided.²² 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.²³ Any such appeal must be

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

¹⁹ See EDR Ruling no. 2007-1563, 2007-1637, 2007-1691, note 26.

²⁰ Hearing Decision at 1.

²¹ *Grievance Procedure Manual* § 7.2(a).

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

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

based on the assertion that the final hearing decision is contradictory to law.²⁴ This
Department's rulings on matters of procedural compliance are final and nonappealable.²⁵

Claudia T. Farr
Director

²⁴ *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319, 322 (2002).

²⁵ *See* Va. Code §§ 2.2-1001 (5), 2.2-3003(G).