Issue: Administrative Review of Hearing Officer's Decision in Case No. 9793; Ruling Date: August 13, 2012; Ruling No. 2012-3350; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Department of Behavioral Health and Developmental Services
Ruling Number 2012-3350
July 13, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9793. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts as set forth in Case Number 9793 are as follows:[1]

1. The Grievant began working at the agency in 2002 as a Direct Support Professional. In 2005, she was trained to give medication and became an Medication Aide. She was promoted to Med Tech in 2009. She continued as a Med Tech until she was removed from the Med Tech Program in September, 2011, and she has worked since then as a Direct Support Professional.

2. Personnel at the agency authorized to administer medication to the residents include: Med Tech Staff, Medication Eligible Staff (this includes Medication Aides), Licensed Practical Nurses, Registered Nurses, Physicians, and Dentists.

3. The Virginia Board of Nursing defines a Med Tech as "an unlicensed person who has successfully completed an education program approved by the Board of Nursing to administer drugs in accordance with a physician's instructions pertaining to dosage, frequency and manner of administration, and in accordance with regulations promulgated by the Board of Pharmacy

[1] Decision of Hearing Officer, Case No. 9793 ("Hearing Decision"), April 29, 2012 at 2-6. (Some references to exhibits from the Hearing Decision have been omitted here.)

related to security and record keeping, when drugs would normally self-administered."

4. Staff at the agency is taught to administer medication through an initial training, and periodic refresher courses. In addition, a written Medication Administration Policy, which is periodically updated, is kept on site at the agency in each building's medication room in a binder along with other policies and instructions regarding medication administration.

5. The Grievant completed the initial training in 2005, and signed a document that acknowledge that her medication administering privileges could be "revoked for violation of procedure and /or accruing six (6) medication errors in a six (6) month period."

6. In addition, the Grievant attended periodic refresher courses, including training sessions on August 8, 2007, September 25, 2009, March 24, 2010, and August 3, 2011, at which she signed attendance sheets. In her testimony, the Grievant admitted going to some refresher courses, but did not recall when those occurred.

7. The Medication Administration Policy outlines the policies and procedures to ensure the accurate administration and documentation of medications.

8. The agency maintains a medication variance system to report problems with medication administration. When a variance is discovered, a Medication Variance Report Form is filled out by agency personnel. The form is given to a member of the nursing staff who logs in the information to a computer database and assigns a number to the variance.

9. The agency has a Clinical Review Team that meets to review the medication variances. The members of the team in September, 2011 were the Chief Nurse Executive, Health Care Coordinator, Program Compliance Director and the Residential Services Director. (A fifth position, Medication Program Nurse Coordinator, was not filled at the time). According to the Agency Instruction 6430, dated June 7, 2011, a majority of the members of the team are required for decision making. On page 3 of this document, it states: "The members of the Clinical Review Team have the authority to revoke the (Agency Personnel's) Medication Technician qualification for unsatisfactory medication administration performance."

10. The nursing department uses the variance to teach personnel correct procedure and to counsel employees.

11. On January 11, 2011, the Grievant was given a verbal counseling by the Health Care Coordinator after a medication variance by the Grievant. At that

time, the Education Tracking Form filled and signed by both the Health Care Coordinator and the Grievant, indicates that the Health Care Coordinator reviewed the Medication Administration Policy (Revised 8/25/10) with the Grievant.

12. The Grievant testified that her signatures were on the Education Tracking Form dated 1/11/11, but denies that the medication policy was reviewed with her. In the Grievance Form A, Attachment D, the Grievant denies seeing the Medication Administration Policy prior to her demotion in September, 2011. It is the finding of this hearing officer that the Grievant had been made aware of the current Medication Administration Policy on several occasions prior to her demotion including during the verbal counseling in January, 2011.

13. In addition to the verbal counseling in January, 2011, the Grievant received variances as noted on the following forms:

    a. 3/1/11 Education Tracking Form: Not following procedure when medication not available
    b. 4/1/11 Medication Variance Report Form: followed a discontinued order
    c. 7/9/11 Corrective Action Protocol: administering medication to individuals in the dining room
    d. 7/18/11 Extra Dose Accountability Form: failure to reorder medication
    e. 8/10/11 Education Tracking Form: Check med cart after passing meds. Compare MAR and label before administering
    f. 8/10/11 Education Tracking Form: Reorder bulk meds when 1/3 empty
    g. 9/8/11 Corrective Action Protocol: pre-pouring medication
    h. 9/16/11 Corrective Action Protocol: pre-pouring medication

14. On September 16, 2011, the Team Leader, after observing the Grievant pre-pouring meds and giving meds to more than one individual at a time, suspended the Grievant from administering medication until she met with the Health Care Coordinator. On September 28, 2011, the Health Care Coordinator suspended the Grievant from administering medication and gave the Grievant one day to present any mitigating circumstances that would warrant the continuation in the Medication Administration Program.

15. On September 29, the Grievant responded in a memo. In the memo, she admitted violating policies and procedures by pre-pouring meds and giving

meds to more than one person at a time. She stated it was a common practice among med techs.

16. The testimony of two other med techs, the night shift supervisor, the registered nurse, and the team leader was that pre-pouring medication and giving meds to more than one person at a time was against the agency's policies, and was not a common practice among med techs and other medication eligible personnel.

17. The Registered Nurse testified that he recalls discuss variances with the Grievant on August 10, 2011 when there was a problem with the proper charting of meds, a missing dose of meds, and a failure to reorder meds as stated in policy. He also recalled counseling the Grievant in March, 2011 regarding her failure to notify a nurse when a medication was not available.

18. The Health Care Coordinator consulted with the Director of Residential Services and the Chief Nurse Executive and all three agreed with the decision to revoke the Grievant's med tech qualification because of unsatisfactory medication administration performance. Since the decision was made by three of the four members of the Clinical Review Team, it was a majority opinion of the Clinical Review Team.

19. Note: The fourth member of the Clinical Review Team, the Director of Program Compliance, testified that she had been part of the Clinical Review Team for two and a half years, but she did not participate in the discussion regarding the removal of the Grievant's med tech privileges. She also did not correctly name the members of the team (she included the pharmacist and the doctor who are not on the team). Incredibly, she testified that she was unaware that the Clinical Review Team had the authority to revoke a med tech's qualification.

20. On September 29, 2011, the Health Care Coordinator revoked the Grievant's medication administration privileges. On the same day, the Director of Residential Services informed the Grievant that she was demoted to a Direct Support Professional (DSP). Since there was no opening for a DSP at her present job location, she was assigned as a DSP at another location on the same campus.

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The Grievant was employed as a Medical Technician ("Med Tech") at the agency. On September 29, 2011, the agency removed the Grievant from the Med Tech program, demoted her to Direct Support Professional (DSP), and transferred her to another home on the same agency campus. The Grievant initiated the Employee Grievance Procedure on October 27, 2011 to dispute

> the removal from the Med Tech program, the demotion and the transfer. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on February 7, 2012. On March 26, 2012, the hearing officer was assigned to hear the case.[2]
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> Telephonic pre-hearing conferences were held on March 28, and April 18, 2012. The hearing was on April 20, 2012. Nine witnesses, including the grievant, testified. Two potential witnesses for the Grievant were unavailable on the date of the hearing. The proffer by the attorney for the Grievant that the testimony would be redundant was accepted by the hearing officer. The agency's and grievant's exhibits were entered into evidence without objection. The Agency's exhibits are identified as Exhibits Agency A-V. The Grievant's exhibits are identified as Exhibits Grievant 1-5. The nine hour hearing was recorded on a digital recorder and stored on seven compact disks ("CD 1-7").[3]

In an April 29, 2012 hearing decision, the hearing officer upheld the agency's revocation of the grievant's medication administration privileges, her removal from the Med Tech Program, her demotion to a Direct Support Professional, and her subsequent transfer to a new location.[4] The grievant now seeks administrative review from this Department.

DISCUSSION

By statute, the Department of Human Resource Management's Office of Employment Dispute Resolution 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, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Findings of Fact

In her request for administrative review, the grievant asserts that the hearing officer "failed to make specific findings of fact relative to whether or not Grievant was guilty of the accusation contained in the 9/16/2011 Corrective Action Protocol form" which directly led to the grievant's removal from the Med Tech Program, her demotion, and her subsequent transfer. In addition, the grievant alleges that the hearing officer "failed to make specific findings of fact in the Hearing Decision as to the Grievant's guilt or non-guilt" of the agency's alleged number of medication variances. As such, according to the grievant, there was no evidence of her

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[2] *Id*. at 1.
[3] *Id*.
[4] *Id*. at 7.
[5] Va. Code § 2.2-1202-2(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

committing six actual medication variances, which she alleges was "required by Agency policy before she could lose her privileges to administer medication."

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] As with disciplinary actions, the hearing officer must review the evidence *de novo* and all remedies for non-disciplinary actions must conform to law, policy, and the grievance procedure.[9] 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.[10] 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.[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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

We cannot find that the hearing officer failed to make a finding about the September 16, 2011 incident, nor did she fail to address the number of medication variances issued to the grievant within a six month period within her hearing decision. For example, the hearing decision reflects within the 'Findings of Fact' section that the hearing officer found "[o]n September 16, 2011, the Team Leader, after observing the Grievant pre-pouring meds and giving meds to more than one individual at a time, suspended the Grievant from administering medication until she met with the Health Care Coordinator."[12] In that same section of the hearing decision, the hearing officer held the grievant had received eight variances between March 1, 2011 and September 16, 2011.[13] Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[14] Accordingly, EDR cannot find that the hearing officer exceeded or abused her authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, EDR has no basis to disturb the hearing officer's decision for this reason.

To the extent the grievant believes the hearing officer's fact findings are inconsistent with agency policy, the EDR has no authority to assess whether the hearing officer correctly interpreted agency policy in rendering her decision. The Department of Human Resources

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[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(C).
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 5.
[13] Hearing Decision at 4-5.
[14] *Rules for Conducting Grievance Hearings* § VI(B).

Management (DHRM) Director 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.

Failure to Properly Review the Management Actions as Disciplinary, Classify the Level of Discipline, and Consider Mitigating Circumstances

The grievant asserts that the hearing officer incorrectly held that the agency's actions of revoking the grievant's medication administration privileges, removing her from the Med Tech Program, demoting her to the DSP position, and transferring her to a new location were not a disciplinary action. Hence, the grievant alleges "this error improperly affected the way in which the Hearing Officer viewed this entire case." Moreover, the grievant asserts that had the hearing officer properly viewed this case as a disciplinary action, then the hearing officer should have identified within the hearing decision "if the proper level of punishment or discipline was imposed upon the Grievant" and whether mitigating circumstances existed.

In her decision, the hearing officer held that the agency's revocation of the grievant's med tech qualification was not a disciplinary action.[15] However, the hearing decision is silent as to whether the grievant's subsequent removal from the Med Tech Program, demotion to the DSP position, and transfer to a new location were taken primarily for disciplinary reasons because of the grievant's revoked medication administration privileges. Clearly both the demotion issue and the transfer issue were fairly raised on the Grievance Form A and qualified by the agency as issues for hearing. *The Rules for Conducting Grievance Hearings ("Rules")* state that:

> If the grievance is qualified, the grievant will have the burden of proving at hearing that the contested adverse employment action, though unaccompanied by a formal Written Notice, was nevertheless taken for disciplinary reasons. If the hearing officer finds that the contested action was disciplinary, the agency will have the burden of proving that the action, though disciplinary, was warranted. As with formal disciplinary actions, the hearing officer shall consider mitigating and aggravating circumstances, giving appropriate deference to the agency's right to manage its affairs.[16]

In this case, it appears the hearing officer only addressed one piece of the entire management action taken by the agency – the revocation of the grievant's medication administration privileges – as a non-disciplinary matter, and hence, reviewed this case from a non-disciplinary action framework. However, the grievant fairly raised the demotion and transfer issues in her grievance, and the hearing decision did not address whether the subsequent management actions

[15] Hearing Decision at 7.
[16] *Rules for Conducting Grievance Hearings* § VI(B).

(i.e. the removal from Med Tech Program, demotion, and transfer) were considered in their totality as a disciplinary or non-disciplinary action by the agency. Therefore, EDR remands the decision for further consideration by the hearing officer to consider the totality of the management actions and determine whether the action was taken primarily for disciplinary reasons against the grievant. If the hearing officer finds the agency's actions as disciplinary, then the hearing officer must apply the framework for determining whether the discipline was warranted and appropriate.[17]

The grievant alleges that if the hearing officer had found the agency's actions as disciplinary, then the hearing officer also had an obligation to identify the level of discipline imposed upon the grievant and should have considered whether mitigating circumstances existed in the hearing decision. We agree that if the hearing officer, upon remand, finds that the agency's actions were primarily disciplinary, then the hearing officer also has an independent duty to assess the severity of the discipline and whether mitigating circumstances do indeed exist consistent with the framework established in the *Rules*:

> 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.[18]

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.[19] Accordingly, EDR remands the decision for further consideration by the hearing officer to determine whether the agency's actions were taken primarily for disciplinary reasons, and if so, if the actions were consistent with law and policy and if mitigating and/or aggravating circumstances existed.

Due Process

The grievant alleges that the hearing officer "erroneously failed to make any specific findings of fact in the Hearing Decision as to whether or not this Due Process memo provided adequate and sufficient notification to Grievant of the charge(s) against her." Specifically, she asserts the agency's due process notification "did not contain an adequate or sufficient explanation or the evidence the Agency was using against her," nor did it contain "specific

[17] *See Id.*
[18] *Rules* at VI(B) (emphasis added).
[19] *Grievance Procedure Manual* § 5.8.

details of the wrongdoing," "any dates of the alleged wrong doing," or identifiable violated policies.

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[20] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[21] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules*. Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[22] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[23] In addition, the *Rules* provide that "any challenged management action or omission not qualified cannot be remedied through a hearing."[24] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, the grievant did not receive a Written Notice, but she did receive three informal discipline and/or verbal counseling memos which she alleges were primarily issued for disciplinary reasons. As such, the grievant asserts the memos were inadequate notice of agency's alleged charges against her. On September 16, 2011, the grievant received a "Verbal Counseling" Corrective Action Protocol form which described the grievant's medication administration issue as:[25]

> On 9/16/2011 you were observed around 1pm coming in the A-side day room with a hand basket and administer medication to two individuals (JW and CR). Pre-pouring of mediation is not allowed, you were reminded of this on 9/8/11

[20] Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Matthews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (alteration in original)); Bowens v. N.C. Dep't of Human Res., 710 F.2d 1015, 1019 (4th Cir. 1983) ("At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them."). *See also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that the notice prior to the hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing). *See also* Garraghty v. Jordan, 830 F.2d 1295, 1299 (4th Cir. 1987) ("It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge.")(citing Cleveland Bd. of Education v. Loudermill, 470 U.S.532, 546 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71, *reh'g denied*, 417 U.S. 977 (1974).

[21] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[22] *Rules for Conducting Grievance Hearings* § VI(B) citing to O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002), which holds that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply."

[23] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[24] *Rules for Conducting Grievance Hearings* § I.

[25] Agency Exhibit R.

> again this is against [named facility] medication administration program standards.
>
> You must stay within [named facility] medication administration program standards. Your failure to do so has warrant further disciplinary action, as defined by the Employee Standards of Conduct. Effective today you will no longer administer meds until you meet with the Health Care Coordinator.

On September 28, 2011, the agency issued the grievant a Suspension/Due Process memo which stated:[26]

> I regret to inform you that as a result of multiple medication variances your medication administration privileges are suspended effective today 9/28/11.
>
> The reason for this decision as follows:
> Failure to follow medication administration policies and procedures
>
> You are now being afforded the opportunity to present any mitigating circumstances you believe would warrant the continuation in the Medication Administration Program. Please provide your written response to me by 9/29/11. If a decision is made to discontinue your Medication Administration privileges you may be subject to demotion or termination.

On September 29, 2011, the agency issued the grievant an Administrative Transfer memo which stated:[27]

> As a result of the loss of your med eligibility status on September 28, 2011, you are being demoted to a Direct Support Professional (DSP) at [named facility]. Your new DSP assignment, to be effective on Friday, September 30, 2011, is [named home]. You are assigned to work on A.M. shift.

Based upon this Office's review of the memos, it appears at first blush that the grievant may not have been fully informed of the specific date, time period, or surrounding circumstances for which she was charged with the multiple medication variances. Furthermore, the hearing decision did not squarely address whether the grievant received adequate notice of her charges. Accordingly, this Office remands this decision for further clarification of whether the grievant had adequate notice of the charges set forth by the agency when it revoked her medication administration eligibility status, demoted the grievant to a lower position, and transferred her to a different location.

Finally, as noted above, due process is a legal concept. Thus, once the hearing decision becomes final, the grievant is free to raise any due process claims with the circuit court in the jurisdiction where the grievance arose.

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[26] Agency Exhibit T.
[27] Agency Exhibit U.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further clarification and consideration in Case Number 9793 as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[28] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[29]

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[28] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[29] *See Grievance Procedure Manual* § 7.2(a).
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).