

Issue: Administrative Review of Hearing Officer's decision in Case No. 9793; Ruling Date: September 26, 2012; Ruling No. 2013-3410; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision Affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2013-3410
September 26, 2012

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's August 6, 2012 Reconsideration Decision in Case Number 9793. For the reasons set forth below, we will not disturb the decision of the hearing officer.

PROCEDURAL FACTS

The original decision in Case Number 9793 was issued on April 29, 2012.¹ EDR has already addressed the grievant's previous request for administrative review in EDR Ruling Number 2012-3350. Following that review, the matter was remanded to the hearing officer for further consideration. In response, the hearing officer issued a Reconsideration Decision on August 6, 2012.² The grievant now seeks review of that decision.

DISCUSSION

By statute, EDR 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."³ 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.⁴

Findings of Fact and Conclusions of Law

In the recent ruling request, the grievant once again disputes the factual basis for the hearing officer's conclusion that the management action grieved was a non-disciplinary action, a question addressed in EDR Ruling Number 2012-3350. The grievant also requests EDR "to make its own direct finding on this issue, especially where the factual record can only support

¹ Decision of Hearing Officer, Case No. 9793 ("Hearing Decision"), Apr. 29, 2012.

² Reconsideration Decision of Hearing Officer, Case No. 9793 ("Reconsideration Decision"), Aug. 6, 2012.

³ Va. Code § 2.2-1202.1(2), (3), and (5).

⁴ See *Grievance Procedure Manual* § 6.4(3).

one reasonable conclusion on the issue,” and further alleges this is a “special kind of Grievance Procedure compliance issue.”

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁵ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁶ 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.

Based on her analysis and interpretation of the facts of this case, the hearing officer explained in her Reconsideration Decision how she concluded that the agency’s revocation of the grievant’s med tech qualification was not a disciplinary action.⁷ As similarly addressed in EDR Ruling Number 2012-3350, EDR has no basis to dispute the hearing officer’s conclusion when her findings are based upon evidence in the record. While EDR may have come to a different conclusion, this is not a case where the facts compel only one reasonable result. Consequently, there is no basis for EDR to remand for any further consideration of this issue.

Finally, because the grievant believes the hearing officer’s conclusion is erroneous, she also alleges the hearing officer failed to carry out “other obligations” that she would have had if she had concluded this was a disciplinary case such as: 1) whether the agency carried its burden of proof; 2) whether the proper level of discipline was imposed upon the grievant; and 3) whether any mitigating circumstances existed. Since the hearing officer concluded the agency’s action was non-disciplinary in nature, we do not find the hearing officer abused her discretion by not addressing the three claims the grievant raises.

Due Process

In her second administrative review request, the grievant once again raises a due process challenge, alleging that the hearing officer’s Reconsideration Decision “is not adequate or sufficient in terms of Grievant’s due process protections,” nor did it address the grievant’s due process challenge “with the degree of specificity that should have been required for a disciplinary case, such as Grievant’s within case surely is.” Specifically, she alleges that the hearing officer’s Reconsideration Decision “is based on the false conclusion that Grievant had admitted...‘violating policies by pre-pouring meds.’” Moreover, the grievant alleges that because the hearing officer failed “to make a specific finding supported by stated reasons as to whether or not the pre-pouring medication policy was actually provided to Grievant by the Agency ahead of her alleged violation of said policy,” the hearing officer erroneously concluded the grievant’s due process rights were not violated.

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ Reconsideration Decision at 1-2.

In EDR Ruling Number 2012-3350, EDR held that constitutional due process, the essence of which is “notice of the charges and an opportunity to be heard,”⁸ is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.⁹ 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.”¹⁰

In her Reconsideration Decision, the hearing officer specifically addressed the grievant’s due process challenge and once again held that the grievant acknowledged her medication administration privileges could be revoked when she violated an agency procedure.¹¹ She elaborated that “[t]he violation of procedure occurred on September 16, 2011 when the grievant was observed pre-pouring medications,” and because of the violation, the grievant was notified that day by the agency that her medication administration privileges were suspended.¹² Moreover, the hearing officer found that “[o]n September 28, the Health Care Coordinator gave the grievant written notice of the specific problem of pre-pouring meds,” and “[t]he grievant responded in writing that day. In her response, she admitting [sic] violating policies by pre-pouring meds.”¹³ As such, the hearing officer upheld her decision that “[t]he grievant’s due process rights were not violated in this case.”¹⁴

While admittedly the Reconsideration Decision does not address whether the grievant received the agency’s pre-pouring medication policy prior to her alleged policy violation, EDR concludes that the hearing officer’s succinct description of the facts in the Reconsideration Decision further clarifies how the grievant was fully informed of the agency’s charges against her as well as how the agency provided the grievant an opportunity to respond to those charges.¹⁵ Accordingly, we cannot conclude, for purposes of compliance with the grievance procedure only, that the grievant’s due process rights were violated simply because the hearing officer did not address at length in her Reconsideration Decision how the grievant’s due process rights were protected. EDR cannot substitute its judgment for that of the hearing officer with respect to those findings of fact.

⁸ *E.g.*, EDR Ruling No. 2013-3350 (and authorities cited therein).

⁹ *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B) (citing *O’Keefe v. United States Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding 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”).

¹¹ Reconsideration Decision at 2.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Further, the hearing officer had previously found that he grievant was made aware of the policy on several occasions prior to the grieved action. Hearing Decision at 4 (factual finding No. 12).

Finally, as noted above, due process is a legal concept. Thus, once the Hearing Decision becomes final, the grievant is free to raise any legal claims with the circuit court in the jurisdiction where the grievance arose.¹⁶

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 have been decided and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹



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¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).