

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9868; Ruling Date: October 18, 2012; Ruling No. 2013-3451; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2013-3451
October 18, 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 9868. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

In Case Number 9868, the disciplinary action at issue was a Group II Written Notice for client abuse.¹ In short, the grievant was disciplined for saying to a client, whom had been attacked previously by another client, "if she comes out of that room there is nothing I can do to keep you safe except hit the panic alarm and wait for assistance. I cannot get between the two of you fighting."² In the September 28, 2012 hearing decision, the hearing officer upheld the disciplinary action for client abuse.³ The grievant now seeks administrative review from EDR.⁴

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."⁵ If the hearing officer's

¹ Decision of Hearing Officer, Case No. 9868 ("Hearing Decision"), Sept. 28, 2012 at 1, 4.

² *Id.* at 3.

³ *Id.* at 5.

⁴ In conjunction with her request for administrative review to EDR, the grievant has submitted additional statements from other agency employees. First, these documents were received after the conclusion of the 15 calendar-day appeal period. *See Grievance Procedure Manual* § 7.2. Further, even if submitted timely, these documents were not part of the hearing record and do not appear to be "newly discovered evidence" and, therefore, will not be considered in this review. *See, e.g.*, EDR Ruling No. 2010-2467.

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

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

The grievant disputes the hearing officer's consideration of the evidence and whether the agency presented sufficient evidence to establish by a preponderance that the disciplinary action was proper.⁷ Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and grounds in the record for those findings."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.

In this case, the grievant's written request for review provides no indication where the evidence may have been insufficient to support the hearing officer's factual findings and ultimate conclusions. Further, based on our review of the record, there exists evidence to support the hearing officer's findings. While the grievant may disagree with the findings, the hearing officer has the sole authority to weigh the evidence and determine questions of disputed facts based upon the record. Therefore, because EDR cannot find that the hearing officer's findings and determinations are not 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. Consequently, we have no basis to disturb the hearing officer's decision on these grounds.

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.¹² Within 30 calendar days of a final hearing decision, either party

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

⁷ The grievant also alleged that the hearing officer had a conflict of interest in this case because the agency has an alleged history of taking hearing officers lunch on the day of the hearing. EDR has reviewed the grievant's submission, investigated the allegation, and finds that there is nothing to support it in this case. The hearing officer ate lunch on his own. Because the grievant has presented no other allegation to support a conflict of interest, we will not address this claim further. EDR finds no conflict of interest in this case.

⁸ Va. Code § 2.2-3005.1(C).

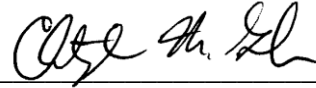
⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² *Grievance Procedure Manual* § 7.2(d).

may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴



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¹³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).