

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9885, 10001;  
Ruling Date: June 11, 2013; Ruling No. 2013-3615; Agency: Department of  
Conservation and Recreation; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Conservation and Recreation  
Ruling Number 2013-3615  
June 11, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) administratively review the hearing officer's May 7, 2013 Reconsideration Decision in Case Number 9885/10001. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

PROCEDURAL FACTS

The original decision in Case Number 9885/10001 was issued on February 28, 2013. EDR has already addressed the grievant's previous request for administrative review in EDR Ruling Number 2013-3557. Following that review, EDR remanded the matter to the hearing officer for further consideration. In response, the hearing officer issued a Reconsideration Decision on May 7, 2013.<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup>

In his Reconsideration Decision, the hearing officer concluded that "[e]ven with the additional allegations made by the Grievant, there does not exist a basis to mitigate the disciplinary action."<sup>4</sup> Although the Reconsideration Decision does not give a thorough explanation of why the hearing officer concluded that each of the mitigating factors when considered in their totality and in combination with the grievant's work record did not serve as a basis to mitigate the Group II Written Notice for failure to follow a supervisor's instruction, EDR

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<sup>1</sup> Reconsideration Decision of Hearing Officer, Case No. 9885/10001-R ("Reconsideration Decision"), May 7, 2013.

<sup>2</sup> Va. Code § 2.2-1202.1(2), (3), (5).


<sup>3</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>4</sup> Reconsideration Decision at 2.

does not find that the hearing officer abused his discretion in this case. The *Rules for Conducting Grievance Hearings* (“Rules”) specifically state that in disciplinary grievances, if the hearing officer finds that the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup> In his Reconsideration Decision, the hearing officer further explained that the grievant did not meet the standard to show that the discipline imposed by the agency was “unconscionably disproportionate, abusive, or totally unwarranted based on any individual factor or when considered as a group.”<sup>6</sup> As such, the hearing officer did not find mitigation appropriate in this case. While EDR may not necessarily agree with the conclusion reached by the hearing officer, nevertheless, weighing this evidence and rendering a factual finding is squarely within the hearing officer’s authority and it is not within our purview to interfere with his consideration of the evidence in this regard. EDR’s review in this case is, therefore, concluded.

#### 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.<sup>7</sup> 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.<sup>8</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>9</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>5</sup> *Rules* § VI(B). The Merit Systems Protection Board’s approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>6</sup> Reconsideration Decision at 2.

<sup>7</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>8</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>9</sup> *Id.*; *see also* Virginia Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).