

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10228; Ruling Date: March 14, 2014; Ruling No. 2014-3827; Agency: Department of State Police; Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of Virginia State Police
Ruling Number 2014-3827
March 14, 2014

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 10228. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On September 9, 2013, the grievant was issued a Group III Written Notice of disciplinary action for shirking official duty.¹ He timely initiated a grievance challenging the disciplinary action.² On February 11, 2014, following a hearing, the hearing officer issued a decision reducing the Group III Written Notice to a Group II Written Notice for failure to perform assigned work.³ The grievant has now requested administrative review by EDR.

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."⁴ 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.⁵

Grievance Procedure Violations

The grievant asserts that under agency General Order ADM 12.00, Section 17(c), the agency was required to include an extension letter in the administrative investigative case file.⁶

¹ Decision of Hearing Officer, Case No. 10228, ("Hearing Decision"), February 11, 2014, at 1.

² *Id.*

³ *Id.* at 5-6.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Grievant Exhibit 15 at 7 (stating that where an extension is required to conduct an administrative investigation, the appropriate supervisor "will forward a letter to the Division Commander, requesting an extension of 10 work days

The grievant appears to argue that the agency's conduct in failing to produce the extension letter at hearing constitutes a violation of the grievance procedure, and that this failure precluded him from "moving for dismissal of the entire case on procedural grounds." Although the grievant is correct that failure to produce existing documents can constitute noncompliance with the grievance procedure, the grievant has been aware that the complete investigatory file does not contain the alleged extension letter since at least October 7, 2013, when he initiated his grievance.⁷ Notwithstanding this knowledge, he did not address the non-production of this document through the compliance process set forth in Section 6.3 of the *Grievance Procedure Manual*. He also did not request an order for the production of the extension letter from the hearing officer. In light of the grievant's failure to timely raise his objection or seek an order for the production of the extension letter during the hearing process, EDR will not remand the hearing decision on these grounds.

Further, the agency's failure to produce this document in no way impeded the grievant's ability to make his arguments regarding the agency's compliance with General Order ADM 12.00 at hearing. The grievant was free to argue to the hearing officer that the agency's non-production of the document, as well as the document's possible non-existence, constituted a basis for overturning the disciplinary action against him. That the grievant and his counsel apparently chose not to make these arguments at hearing is not a basis for remand.

Inconsistency with State and Agency Policy

The grievant's request for administrative review may fairly be read to assert a claim that the disciplinary action against him was not consistent with General Order ADM 12.00. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.⁹

and setting forth the reason(s) for the delay. This letter will be made a part of the administrative investigation case file.")

⁷ Grievant's Exhibit 16 at 1,4.

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989). Although the grievant did not raise this argument at hearing, his claim regarding the alleged lack of an extension letter in his administrative investigation file was set forth in his grievance. Agency Exhibit 2 at 2, 5. While EDR does not find the hearing officer erred by not addressing the extension letter in his decision, the grievant has sufficiently raised his argument to preserve his appeal on this basis to DHRM. However, any determinations regarding such an appeal are within DHRM's sole discretion.

⁹ The grievant appears to assert a claim that the agency's failure to produce the extension letter at hearing constitutes "newly-discovered evidence." Having thoroughly reviewed the grievant's claim and the record, EDR finds no basis to reopen the hearing under the standard applied by EDR for newly-discovered evidence. See EDR Ruling 2012-3364.

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.¹⁰ 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.¹¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹²



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¹⁰ *Grievance Procedure Manual* § 7.2(d).

¹¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).