

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10765; Ruling
Date: May 16, 2016; Ruling No. 2016-4353; Agency: Department of Corrections;
Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2016-4353
May 16, 2016

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 decision in Case Number 10765. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed at one of the agency’s facilities as a Utility Plant Specialist II.¹ On or about December 31, 2015 he was issued a Group III Written Notice with termination for failing to report to work without notice, failure to follow instructions and/or policy, and insubordination.² The grievant timely grieved the disciplinary action³ and a hearing was held on March 18, 2016.⁴ In a decision dated April 7, 2016, the hearing officer determined that the types of misconduct charged on the Written Notice were classified as Group II offenses by DHRM Policy 1.60, *Standards of Conduct*, and that the agency had not presented sufficient evidence to justify elevating the disciplinary action to a Group III Written Notice.⁵ The hearing officer reduced the discipline to a Group II Written Notice and upheld the grievant’s termination based on his accumulation of disciplinary action.⁶

EDR received a five-page fax transmission from the grievant on April 13, 2016, which appears to consist of four documents that were admitted into the hearing record and one unidentified document.⁷ The documents appear to have several annotations, but the grievant provided no explanation of the meaning of those annotations to EDR. On one of the documents, the grievant indicated that he was “requesting a copy of recording of hearing on 3-18-15 [sic],” but he included no additional attachments indicating that he intended to appeal the hearing

¹ See Agency Exhibit 2.

² Agency Exhibit 1.

³ Agency Exhibit 2.

⁴ See Decision of Hearing Officer, Case No. 10765 (“Hearing Decision”), April 7, 2016, at 1.

⁵ *Id.* at 1, 3 & n.6.

⁶ *Id.* at 3-4; see Agency Exhibit 10; DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

⁷ See Agency Exhibit 2; Grievant’s Exhibit 1 at 16, 34, 38.

officer's decision. Because the grievant did not indicate that he wished to appeal the hearing officer's decision, EDR did not consider the April 13 submission to be a request for administrative review. On May 6, 2016, the grievant contacted EDR to inquire about the status of his appeal. The grievant faxed a second submission to EDR on the same date, consisting of a copy of his original April 13 submission as well as additional documents.⁸ Upon receiving notice from the grievant that his April 13 submission was intended as an appeal of the hearing decision, EDR opened an administrative review ruling.

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.”⁹ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.¹⁰

The grievance procedure further provides that a request for administrative review submitted to EDR “must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance.”¹¹ While EDR does not generally strictly construe this requirement, a grievant must, at the very least, identify the basis on which he believes the decision is not in compliance with the grievance procedure. Without that information, EDR cannot conduct a review of a hearing decision or the hearing record to determine whether the decision complies with the grievance procedure. Here, the grievant submitted copies of documents to EDR and requested a copy of the hearing recording. He has not provided any explanation as to why he disputes the decision or presented any arguments regarding how the decision allegedly does not comply with the grievance procedure. In the absence of such information or, indeed, any indication as to the basis of the grievant's appeal of the decision to EDR, and having reviewed the hearing decision and the record in this case, EDR finds no basis to disturb the hearing officer's decision.

CONCLUSION AND APPEAL RIGHTS

⁸ The additional documents in the May 6 submission appear to consist of documents from the hearing record and copies of the grievant's correspondence with the agency after the hearing decision was issued. See Agency Exhibit 3 at 3-4, 9. As on the April 13 submission, the grievant made some annotations to the documents but did not include anything to explain the meaning of those annotations. The grievance procedure requires that all “[r]equests for administrative review must be . . . *received by* the reviewer within 15 calendar days of the date of the original hearing decision.” *Rules for Conducting Grievance Hearings* § VII(A); *Grievance Procedure Manual* 7.2. To the extent any of the documents submitted by the grievant on May 6 can be construed as additional theories or arguments regarding whether the hearing decision complies with the grievance procedure, such claims were untimely and will not be considered by EDR.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ *Rules for Conducting Grievance Hearings* § VII(A); see also *Grievance Procedure Manual* 7.2(a).

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing 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 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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¹² *Grievance Procedure Manual* § 7.2(d).

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

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