Issue: Compliance-Hearing Decision; Ruling Date: February 6, 2002; Ruling #2001-218; Agency: Department of Transportation; Outcome: Hearing officer in compliance, policy issues not to be addressed by this agency.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2001-218
February 6, 2002

The Virginia Department of Transportation (VDOT), through its representative, has appealed the hearing officer's November 7, 2001 decision in Case No. 5319. The agency objects to the decision on four grounds: (1) the hearing officer incorrectly determined that the grievant was not discharged from an Employee Assistance Program, when no evidence was presented on the matter; (2) the hearing officer incorrectly interpreted VDOT's policy concerning safety-sensitive duties and "Fitness for Duty Program Compliance Agreements;" (3) the determination that violations of compliance agreements are not chargeable offenses is incorrect because the *Standards of Conduct* provide that listed offenses are not all-inclusive; and (4) the hearing officer did not address the grievant's challenge to the validity of breathalyzers. As discussed further below, the hearing officer acted in accordance with the grievance procedure and neither abused his discretion or exceeded his authority. Moreover, a number of VDOT's claims are policy-oriented, and it would not be appropriate for this Department to address those issues.

FACTS

The grievant was employed as an Environmental Safety Specialist II with VDOT. VDOT's drug and alcohol policy provides for "Reasonable Suspicion Testing" for any employee who displays characteristics of individuals under the influence of drugs or alcohol.[1] On June 18, 2001, the grievant was tested under this policy, and both tests indicated that her blood alcohol content was above the legal limit. As a result, the grievant received a Group III Written Notice under the *Standards of Conduct* and was enrolled in an Employee Assistance Program (EAP). Under VDOT policy, the grievant signed a "Fitness for Duty Compliance Agreement," which stated that failure to comply with the Program would result in termination of her employment.[2]

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[1] VDOT Drug and Alcohol Testing Policy, page 4.
[2] *See* Fitness for Duty Program Compliance Agreement, signed June 20, 2001.

In July, the agency determined that the grievant had twice violated the Compliance Agreement.[3] As a result, on July 20, 2001, VDOT issued a second Group III Written Notice and terminated her employment. On August 17, 2001, the grievant initiated a grievance challenging her discharge, claiming that the results of the breathalyzer tests were not accurate, the Fitness for Duty Coordinator provided false information, and that her supervisor did not comply with state and agency policies concerning drug and alcohol use. The hearing officer issued a decision on November 7, 2001, finding that because noncompliance with a Fitness for Duty Compliance Agreement is not listed specifically as a chargeable offense in state or agency alcohol and drug policies, the grievant's removal was inappropriate. The agency appealed the decision on November 19, 2001.

DISCUSSION

According to the *Grievance Procedure Manual*, "[a]ll requests for review [of a hearing decision] must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision."[4] By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "render all decisions related to procedural compliance, and such decisions shall contain the reasons for such decision and shall be final."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6] The Department of Human Resource Management (DHRM) has the authority to determine whether the hearing decision is consistent with policy.[7] Further, a circuit court has appellate jurisdiction to determine whether the final hearing decision is consistent with law.[8] Only final hearing decisions are reviewed by the circuit court. The hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by this Department or DHRM, the hearing officer has issued a revised decision.[9]

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[3] Breathalyzer tests on July 9 and July 18 revealed that the grievant's blood alcohol content was above the legal limit.

[4] *Grievance Procedure Manual* § 7.2(a), page 18. If the tenth calendar day falls on a weekend or state holiday, this Department extends the deadline to the next business day. In this case, the deadline (November 17) fell on a Saturday. Therefore, the deadline was extended to the following Monday, November 19.

[5] Va. Code § 2.2-3003 (A) and (G).

[6] *Grievance Procedure Manual* § 6.4(3), page 18.

[7] Va. Code § 2.2-3006 (A).

[8] Va. Code § 2.2-3006 (B).

[9] *Grievance Procedure Manual* § 7.2(d), page 20; *see also Grievance Procedure Manual* § 7.3, page 20, for discussion on circuit court appeal.

VDOT asserts that the hearing officer incorrectly found that "at no point before her removal from employment on July 20, 2001 was the grievant discharged from the Turning Point treatment program to which the Department had referred her."[10] The agency further noted that it has evidence that the grievant was, in fact, discharged from the program, but that it did not product the evidence at the hearing because it did not think it was an issue in the grievance. It is unclear from the record whether or not the grievant was forced to leave the EAP. However, even if the hearing officer reached an incorrect conclusion, such conclusion does not affect his ultimate finding that the grievant'' discharge from employment was improper, based on his interpretation of state and agency policies.[11] Thus, even if the hearing officer made an error in the above factual statement, the error was harmless, and need not be corrected at this point for purposes of this ruling.

VDOT claims that the hearing officer violated the grievance procedure because he failed to address an issue that the grievant raised - the validity of the breathalyzers. Moreover, the agency asserts that the grievant never disputed the validity of the state and agency policies, the EAP, or the Fitness for Duty Compliance Agreement. However, in cases involving terminations, the agency has the burden of proving, by a preponderance of the evidence, that the action was justified under the circumstances.[12] Thus, the hearing officer has the authority to determine whether the discipline and termination were warranted and appropriate under all the facts and circumstances, as long as his decision is based upon the evidence and the material issues in the case.[13] His written decision must "contain a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified."[14]

Here, it appears that the hearing officer's decision was consistent with the process established by the grievance procedure. The substance of the grievance challenged the validity of the Group III Written Notice that resulted in the

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[10] Decision of Hearing Officer, November 7, 2001, page 3.
[11] Along with its Request for Reconsideration to the hearing officer, the agency provided documentation that purportedly showed that grievant had been discharged from the EAP prior to her termination from work. Based on his November 21st Reconsideration Decision, this information apparently did not affect the hearing officer's decision. Furthermore, assuming without deciding that this documentation was relevant, the agency should have introduced it during the hearing rather than after its conclusion.
[12] *Rules for Conducting Grievance Hearings*, "Conducting the Hearing," page 7.
[13] *Grievance Procedure Manual* § 5.9, page 15.
[14] *Rules for Conducting Grievance Hearings*, "Written Decision," pages 9-10.

grievant's termination from VDOT.[15] The hearing officer, after examining the evidence and hearing testimony, had the task of determining whether her termination was warranted and appropriate under the circumstances. The hearing officer has the authority to consider all evidence admitted at the hearing, including state and agency policies. In this case, the hearing officer considered the evidence before him and the circumstances surrounding the grievant's termination, and then determined that the agency failed to meet its burden of proof in this matter. Therefore, we cannot find that the hearing officer violated the grievance procedure, regardless of the substantive merits of his decision.

The nature of the remainder of the agency's claims is largely based on the hearing officer's interpretation of the state's drug and alcohol policy,[16] the *Standards of Conduct*,[17] and VDOT's Fitness for Duty Program. In essence, the agency claims that the hearing officer violated the grievance procedure through his interpretation of the term "safety-sensitive duties" and his application of the Fitness for Duty Program provisions. Thus, the crux of VDOT's argument is policy interpretation, which is not an issue for this Department to address. Rather, the Director of DHRM (or her designee) has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[18] In addition to its appeal to this Department on procedural grounds, VDOT has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.[19]

CONCLUSION

For the reasons discussed above, this Department cannot find that the hearing officer either abused his discretion or exceeded his authority under the grievance procedure in deciding this case. Furthermore, it is not for this Department to determine whether the hearing officer's November 7, 2001 decision is inconsistent with state or agency policy.

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.[20] Within 30 calendar days

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[15] In support of her grievance, the grievant specifically challenged the validity of the breathalyzer tests that were administered to her, the credibility of the EAP Fitness for Duty Coordinator, and claimed that "supervisors, managers, and coordinators failed to follow VDOT values and are in violation of the VDOT Drug and Alcohol Policies." *See* Grievance Form A and Attachments.
[16] DHRM Policy No. 1.05.
[17] DHRM Policy No. 1.60.
[18] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[19] *Grievance Procedure Manual* § 7.2 (a)(2).
[20] *Grievance Procedure Manual,* § 7.2(d).

of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22] In noting the right of appeal to the circuit court, this Department expresses no opinion as to whether the final hearing decision conforms to law. This Department's rulings on matters of *procedural compliance* are final and nonappealable. [23]

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[21] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).
[22] *Id.*
[23] Va. Code § 2.2-3003 (G).