

Issue: Compliance/Hearing Officer Decision; Ruling Date: March 1, 2002; Ruling #2002-008;
Agency: Department of Agriculture and Consumer Services; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Agriculture and Consumer Services/ No. 2002-008
March 1, 2002

Pursuant to § 7.2(a)(3) of the *Grievance Procedure Manual*, the agency has requested the Director of the Department of Employment Dispute Resolution (EDR) to administratively review the hearing officer's decision in the above captioned grievance. The agency claims that the hearing officer exceeded his authority or abused his discretion under the grievance procedure. For the reasons discussed below, this Department disagrees, and holds that the hearing decision is consistent with the procedural requirements of the grievance process.

DISCUSSION

Hearing decisions must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the EDR Director.¹ A party requesting the EDR Director to administratively review a hearing decision on the basis of noncompliance with the grievance procedure "must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance."² If noncompliance is found, the EDR Director's "authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure."³ This Department is not authorized to review hearing decisions on the basis of personnel policy or law.⁴

In this case, the hearing officer found that although the agency had established by a preponderance of the evidence that the grievant had committed a Group III offense, mitigating circumstances (the grievant's tenure and work performance) outweighed aggravating factors (such as an uncontested, active Group II Written Notice offered into evidence by the agency).

¹ *Grievance Procedure Manual* § 6.4, page 18.

² *Grievance Procedure Manual* § 7.2(a)(3), page 19.

³ *Grievance Procedure Manual* § 7.2(a)(3), page 19.

⁴ Va. Code § 2.2-3006 (providing that a party may request the Director of the Department of Human Resource Management for an administrative review of a hearing decision on the basis of inconsistency with personnel policy and may appeal to the circuit court on the basis that the hearing decision is contradictory to law). *See also* *Grievance Procedure Manual* § 7.2(a)(2) and § 7.3(a), pages 19 –20.

For those reasons, the hearing officer upheld the Group III Written Notice but reversed the grievant's termination. The agency claims that the hearing decision's consideration of the uncontested, active Group II Written Notice violated the grievance procedure, asserting that the Group II Written Notice had not been qualified and thus was not before the hearing officer for a determination of the facts underlying its issuance.

To be sure, issues that are "not qualified by the agency head, the EDR Director, or the Circuit Court" -- such as the Group II Written Notice in this case -- "cannot be remedied through a hearing."⁵ But the hearing decision in this case did not attempt to provide a remedy for the Group II Written Notice. On the contrary, the Group II Written Notice was considered as background evidence only -- the agency itself had introduced it at hearing as evidence in support of its case. The hearing officer duly considered that Notice in his decision, not as a qualified issue to be determined on the merits and for which relief may be ordered, but as background evidence to weigh in determining whether and to what extent mitigation was warranted.

Although the hearing officer gave the active Group II Written Notice less weight than the agency may have, he was entirely within his authority under the grievance procedure to do so in determining whether to uphold or reverse the grievant's termination. As expressly provided in the *Rules for Conducting Grievance Hearings*, the hearing officer "may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct",⁶ and "may order that the employee be reinstated while upholding the level of the Written Notice" before him.⁷ That is what the hearing officer did in this case. The agency's request for administrative review to this Department, when examined, simply contests the weight that the hearing officer accorded to the evidence, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision.

CONCLUSION

For the reasons discussed above, this Department cannot find that the hearing officer abused his discretion or exceeded his authority under the grievance procedure in considering the Group II Written Notice offered into evidence by the agency. This Department's rulings on matters of compliance with the grievance procedure are final and nonappealable.⁸ In addition, the parties should note that after the Department of Human Resource Management issues its written decision and the hearing officer's decision becomes final, it may be appealed to the Circuit Court on the grounds that it is contradictory to law.⁹

⁵ *Rules for Conducting Grievance Hearings*, page 1.

⁶ *Rules for Conducting Grievance Hearings*, page 12.

⁷ *Rules for Conducting Grievance Hearings*, page 13.

⁸ Va. Code § 2.2-1001(5).

⁹ Va. Code § 2.2-3006 (B); *see also Grievance Procedure Manual*, § 7.3 (a), page 20.

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