

Issue: Compliance-Hearing Decision; Ruling Date: September 6, 2002; Ruling #2002-140; Agency: Department of Transportation; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling Number 2002-140
September 6, 2002

On June 24, 2002, the grievant requested that this Department administratively review the June 12, 2002 hearing decision in his March 29, 2002 grievance with the Virginia Department of Transportation (VDOT or the agency) challenging formal disciplinary action. The grievant claims that: (1) his witnesses were not present at the grievance hearing; (2) prior disciplinary actions should not have been considered by the hearing officer; and (3) the hearing officer did not give consideration to the reasons set forth by the grievant for his actions.

FACTS

On March 11, 2002, the grievant was issued a Group I Written Notice with a five day suspension for disruptive behavior.¹ The hearing officer in this March 29, 2002 grievance ultimately affirmed the agency's action in a June 12, 2002 hearing decision. For the reasons set forth below, this Department will not disturb the hearing officer's decision.

DISCUSSION

By statute, this Department 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."² 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.³

¹ Grievant had two active disciplinary actions on the date the March 11th Group I Written Notice was issued. A Group I Written Notice was issued to grievant for disruptive behavior on March 28, 2000. An earlier Group I Written Notice had been issued on September 18, 2000, for a conviction of improper driving.

² Va. Code § 2.2-1001(2), (3), and (5).

³ See *Grievance Procedure Manual* § 6.4(3), page 18.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁵ Further, “[i]n cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline.”⁶ Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.⁷

Timeliness of the Ruling Request

Under the grievance procedure, a party may challenge a hearing decision based on the decision’s non-compliance with the grievance procedure by directing a ruling request to the Director of the Department of Employment Dispute Resolution (EDR) within 10 calendar days of the issuance of the decision.⁸ In this case, the decision was issued on June 12, 2000. The 10th day landed on a Saturday, therefore the appeal deadline was extended until the next business day, Monday the 24th. Accordingly, the ruling request was timely.

Witness Issues

The grievant alleges that his witnesses did not appear at hearing because they had not been notified of the hearing. The hearing officer notified the parties at the prehearing conference that it was the responsibility of the parties to notify their witnesses of the time and place of the hearing. The grievant was also informed that if he required the hearing officer to issue an order for the appearance of any witnesses, the hearing officer would do so if the grievant provided the hearing officer with the names and addresses of the witnesses. Neither the grievant nor his representative requested any orders prior to the hearing. Neither requested a continuance of the hearing because of the absence of witnesses. Accordingly, this Department finds no error as to this issue.

Prior Disciplinary Action

⁴ Va. Code § 2.2-3005(D)(ii).

⁵ *Grievance Procedure Manual* § 5.9, page 15.

⁶ *Rules for Conducting Grievance Hearings*, page 11; DHRM Policy No. 1.60(IX)(B).

⁷ *Grievance Procedure Manual* § 5.8(2), page 14.

⁸ *Grievance Procedure Manual* § 7.2 (a), page 18.

The grievant objects to the hearing officer's admission of evidence of prior disciplinary actions. The Commonwealth's Standards of Conduct recognize that *active* prior disciplinary actions are properly considered when determining the appropriate level of discipline. For instance, the Standards of Conduct state that upon the accumulation of three active Group Notices, the grievant should normally be suspended for not more than five days.⁹ Accordingly, the hearing officer did not err by accepting into evidence and considering the effect of the two prior active Group Notices on the agency's decision to suspend the grievant for five days.

Failure to Consider Mitigating Factors

The grievant claims that the hearing officer erred by not considering all the reasons that the grievant behaved as he did. Based on the record evidence there appears to have been sufficient support for the hearing officer's determination to uphold the disciplinary action against the grievant: acts of insubordination (failure to follow a supervisor's instructions, normally, a Group II offense) and threatening behavior (typically, a Group III offense that warrants immediate termination of employment). Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings have some basis in the record evidence and the material issues in the case.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department concludes that the hearing officer neither abused his discretion nor exceeded his authority under the grievance procedure in deciding this case.

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 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.¹³

⁹ The Department of Human Resources Management (DHRM) Policy 1.60 VII (D)(1)(b)(1).

¹⁰ *Grievance Procedure Manual*, § 7.2(d), page 20.

¹¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

¹² *Id.*

¹³ Va. Code § 2.2-1001(5).

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