

Issue: Appeal Review Ruling of Director; Ruling Date: February 12, 2003; Ruling #2003-019; Agency: Department of Corrections; Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2003-019
February 12, 2003

Pursuant to Va. Code 2.2-3006(B), the Department of Corrections (DOC) seeks approval from the Director of this Department to appeal the final hearing decision in Case No. 5572 on the basis that it is contradictory to law. Because there is no evidence that DOC's appeal is based on any improper purpose such as to harass or cause delay, its request is granted. DOC may file a notice of appeal with the Circuit Court in the jurisdiction in which the grievance arose once the hearing decision becomes a final decision. In this case, that will be when the Department of Human Resources Management (DHRM) issues its decision on a policy issue raised by the grievant and, if ordered by DHRM, the hearing officer issues a revised opinion.¹ Approval to proceed with a circuit court appeal in no way addresses the jurisdiction of the circuit court or the substantive merits of the appeal.

This Department also deems it appropriate to comment generally on its established rules and precedent regarding the mitigation authority of a hearing officer, an issue that is presented by this appeal. A hearing officer's mitigation authority is derived from the Commonwealth's grievance statutes, the *Grievance Procedure Manual*, and the *Rules for Conducting Grievance Hearings*. Virginia Code § 2.2-3005 confers upon hearing officers the authority to "order appropriate remedies" and to "[t]ake other actions as necessary or specified in the grievance procedure."² In accordance with Va. Code § 2.2-1001, this Department has promulgated (1) a grievance procedure, which is embodied in the *Grievance Procedure Manual*, and (2) rules governing grievance hearings, which are set forth in the *Rules for Conducting Grievance Hearings*.³ Importantly, the *Grievance Procedure Manual* explicitly incorporates the *Rules for Conducting Grievance Hearings* as a source of hearing officer authority under the grievance procedure.⁴

The *Rules for Conducting Grievance Hearings (Rules)* expressly states that in cases involving disciplinary action, a "hearing officer may consider mitigating or

¹ *The Grievance Procedure Manual* § 7.2(d), page 20 ("[a] hearing officer's original decision becomes a final hearing decision, with no further possibility of administrative review when: . . . all timely requests for administrative review have been decided and, if ordered by EDR [this Department] or DHRM, the hearing officer has issued a revised decision").

² Va. Code §§ 2.2-3005 (C)(6) & (7).

³ See Va. Code §§ 2.2-1001(2) & (3).

⁴ *Grievance Procedure Manual*, § 5.1, page 13.

aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct,” and that “[s]hould the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so.”⁵ The *Rules*, however, further explain that “[i]n considering mitigating circumstances, the hearing officer must also consider management’s right to exercise its good faith business judgment in employee matters,” and that “[t]he agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.”⁶ Furthermore, the *Rules* recognize that the hearing officer “is not a ‘super-personnel officer’” and “management is reserved the exclusive right to manage the affairs and operations of state government.”⁷

Thus, while this Department's *Rules* and precedent have long recognized that hearing officers assuredly have the authority to mitigate, these *Rules* and precedent have also recognized that such authority is not boundless. Accordingly, if the level of an agency's discipline is consistent with law and policy, a hearing officer should reduce the level of discipline only where compelling circumstances exist.⁸ In addition, a hearing decision must state the specific facts and analysis as to why mitigation of discipline is appropriate under the above *Rules* in an individual case.⁹

Claudia T. Farr
Director

⁵ *Rules for Conducting Grievance Hearings* § VI (B)(1), page 12.

⁶ *Rules for Conducting Grievance Hearings* § VI (B)(1), page 12.

⁷ *Rules for Conducting Grievance Hearings* § VI (A), page 10.

⁸ Examples of compelling circumstances could include, but are not limited to, factors such as arbitrary or capricious agency action; inconsistencies in disciplining similarly situated employees; failure to provide reasonable notice of the rule or standard at issue; and/or discipline that is plainly disproportionate to the sustained charges. See also Decision of Hearing Officer, Case No. 5588 (December 18, 2002).

⁹ *Rules for Conducting Grievance Hearings* § V (C) pages 9-10. See also EDR Ruling 2001-146.