

Issue: Administrative Review/Case #5797; Ruling Date: November 19, 2003; Ruling #2003-435; Agency: Department of State Police; Outcome: hearing officer in compliance. (keyword = mitigating circumstances)



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of State Police/ No. 2003-435
November 19, 2003

The grievant has requested a compliance ruling regarding an October 9, 2003 grievance hearing decision (case #5797). The grievant alleges that the decision violates state policy. The grievant further alleges that the hearing officer failed to consider mitigating circumstances. For the reasons set forth below, this Department finds that that the hearing decision did not violate the grievance procedure.

FACTS

On July 9, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violating safety rules when there is a threat of bodily harm in violation of General Order 19, paragraph 14.b.(10) of the State Police Manual.

On July 9, 2003, Grievant was issued another Group III Written Notice of disciplinary action with removal for:

Making any false official statement, a violation of General Order 19, paragraph 14.b.(5) of the State Police Manual.

On July 21, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 18, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. This matter was originally scheduled to be heard on September 12, 2003. At the request of a party, the Hearing

Officer found just cause to grant a continuance. On October 1, 2003, a hearing was held at the Agency's regional office. Following an October 1, 2003 hearing, the hearing officer upheld the agency's actions in an October 9, 2003 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."¹ 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.²

Inconsistency with Policy

The grievant objects to the decision on the basis that it is inconsistent with state policy. The Department of Human Resources Management (DHRM), not this Department, has the sole authority to interpret all policies affecting state employees and to ensure that hearing decisions are consistent with state policy.³ Accordingly, requests for administrative review based on policy conformance must be directed to the DHRM Director.

Mitigating Circumstances

The grievant claims that the hearing officer did not consider mitigating circumstances, even though mitigating factors were presented at hearing. Under the grievance procedure, "the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct."⁴ Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee's length of service.⁵ The grievance procedure, however, does not require hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation. In any event, it appears from the hearing officer's October 9th decision that mitigating circumstances were considered. For example, the hearing officer wrote that he could not mitigate based on the grievant's purported depression because he could not find any direct connection between the grievant's alleged depression and the actions for which he was disciplined.

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3), page 18.

³ Va. Code § 2.2-3006; *Grievance Procedure Manual* § 7.2 (a)(2), page 19.

⁴ *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

⁵ *Id.*

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APPEAL RIGHTS:

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, and for the reasons discussed in this ruling, the July 22, 2002 hearing decision in this case is now a final hearing decision. Pursuant to Section 7.3(a) of the *Grievance Procedure Manual* and Section 2.2-3006(B) of the Code of Virginia, this final hearing decision may be appealed to the circuit court in the jurisdiction in which the grievance arose within 30 calendar days from the date of this ruling.

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.