

Issue: Administrative Review of Case #8268; agency asserts hearing officer improperly interpreted agency policy; Ruling Date: March 24, 2006; Ruling #2006-1308; Agency: Department of Taxation; Outcome: hearing decision in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of Department of Taxation  
Ruling Number 2006-1308  
March 24, 2006

The Department of Taxation (the agency) has requested administrative review of the hearing officer's decision in Case Number 8268. The agency asserts that the hearing officer "improperly interpreted agency policy in rendering his decision."

FACTS

The grievant was employed as a collector with the agency.<sup>1</sup> On November 18, 2005, the grievant received two Group III Written Notices.<sup>2</sup> One of these written notices was "based on the allegation that the grievant violated the agency's Outside Employment policy by assisting or preparing income tax returns for compensation."<sup>3</sup> The other written notice was for the grievant's alleged unauthorized access of taxpayer accounts.<sup>4</sup> The grievant was terminated from employment effective November 18, 2005.<sup>5</sup>

On December 1, 2005, the grievant initiated a grievance challenging the disciplinary actions.<sup>6</sup> After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.<sup>7</sup> The hearing was conducted on February 21, 2006.<sup>8</sup>

On February 24, 2006, the hearing officer issued a decision reversing the group III Written Notice for outside employment, reducing the other Group III Written Notice to a Group II, and ordering the agency to reinstate the grievant.<sup>9</sup> The agency requested that the hearing officer reconsider his decision. On March 22, 2006, the hearing officer issued a reconsideration decision affirming his previous decision. The agency has

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<sup>1</sup> Hearing Decision at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6.

requested an administrative review of the hearing officer's decision, which the grievant opposes.

### DISCUSSION

In its request for administrative review, the agency asserts that the hearing officer improperly interpreted agency policy in reducing the Group III Written Notice for unauthorized access of taxpayer records to a Group II. However, the hearing officer's interpretation of state and/or agency policy 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.<sup>10</sup> Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.<sup>11</sup>

Under the grievance procedure, a request for an administrative review based on inconsistency with policy must be made to the Department of Human Resources Management (DHRM) Director, with a copy also going to the agency.<sup>12</sup> If the agency has not previously made a request for administrative review of the hearing officer's decision to DHRM but wishes to do so, it must make a written request to the DHRM Director, which must be **received within 15 calendar days of the date of this ruling**. The DHRM Director's address is 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219. The fax number for an appeal is (804) 371-7401. Because the initial request for review was timely, a request for administrative review to DHRM within this 15-day period will be deemed timely as well.<sup>13</sup>

### APPEAL RIGHTS

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.<sup>14</sup> If the agency does not elect to appeal to DHRM, the decision will become final within 15 days of the date of this decision. If the

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<sup>10</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2(a)(2).

<sup>11</sup> The agency argues in its request for administrative review that this Department should uphold the Group III Written Notice without mitigation. This Department has no authority to mitigate or to withhold mitigation. Rather, the Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure (*Grievance Procedure Manual*, § 7.2(a)) including its mitigation provisions (*Rules for Conducting Grievance Hearings*, § VI(B)(1)). In any event, in this case it does not appear that the hearing officer reduced the discipline on the basis of mitigation. Rather, it appears his decision is based on fact-findings and conclusions of policy.

<sup>12</sup> *Grievance Procedure Manual*, § 7.2(a).

<sup>13</sup> The grievant asserts that the agency's request for administrative review was untimely as it was not submitted within 10 calendar days of the hearing officer's decision. This contention is without merit, as the *Grievance Procedure Manual* provides that a request for administrative review is timely if it is received within 15 calendar days of the decision. *Id.* at § 7.2(c)

<sup>14</sup> *Id.* at § 7.2(d).

agency appeals to DHRM, the decision becomes final when the DHRM Director issues her decision, *and* the hearing officer issues any revised decision ordered by the DHRM Director. The date of the last of these decisions shall be considered the date upon which the hearing decision becomes final. 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.<sup>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>15</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a). The agency should note, however, that it “must request and receive approval from the Director of EDR before filing a notice of appeal.” *Grievance Procedure Manual* § 7.3(a).

<sup>16</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).