

Issue: Administrative Review/hearing decision; Ruling Date: June 27, 2006; Ruling #2006-1375; Agency: Department of Corrections; Outcome: hearing officer ordered to modify decision



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1375
June 27, 2006

The Department of Transportation (VDOT or the agency) has requested that this Department administratively review the hearing officer's decision in Case Number 8298.

FACTS

On June 16, 2005, the grievant submitted his resignation to VDOT with an effective date of June 30, 2005.¹ On June 30, 2005, VDOT issued the grievant a Group III Written Notice with termination for improper use of a state vehicle and preferential treatment of his spouse.² In the due process discussions leading up to the termination of employment, the agency told the grievant that his resignation would state 'resignation in lieu of termination'.³

The grievant challenged the disciplinary action by initiating a grievance on October 26, 2005.⁴ After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.⁵ The grievance proceeded to hearing on March 29, 2006.⁶ In an April 5, 2006 hearing decision, the hearing officer reduced the Group III Written Notice with termination to a Group II Written Notice with ten days suspension and ordered the agency to change the grievant's personnel record to reflect "resignation" as the reason for separation.⁷ Additionally, the hearing officer awarded the grievant attorney fees.⁸

¹ See Decision of Hearing Officer Case No. 8298, issued April 5, 2006.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

On April 19, 2006, the agency sought a reconsideration decision from the hearing officer as well as an administrative review from this Department.⁹ In both requests, the agency asserts that it is unable to implement the ten day suspension as the grievant is no longer employed with VDOT. In his May 2, 2006 reconsideration decision, the hearing officer acknowledges the agency's inability to implement the suspension, but opines that the appropriate discipline in this case is a Group II Written Notice with ten day suspension and "[i]t would be inappropriate for the hearing officer to reduce the level of discipline merely because the agency is unable to effectuate a portion of the discipline for technical reasons."¹⁰

DISCUSSION

As an initial point, this Department has no authority to order the agency to implement the hearing officer's decision. That authority is vested solely in the circuit court.¹¹ However, by statute, this Department has been given the exclusive 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."¹² 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.¹³

Under the grievance procedure, the hearing officer has the authority to award appropriate remedies and may not grant relief that is inconsistent with law or policy.¹⁴ Although not expressly stated, in determining the appropriate remedy in disciplinary cases, the hearing officer should take into consideration not only the appropriate level of discipline under policy for the cited behavior but any other compelling facts and circumstances specific to the case. Moreover, once the hearing decision is final, either party to the grievance "may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation" of that decision.¹⁵ When read in conjunction, these grievance procedure provisions indicate that any relief awarded must be (1) appropriate under the circumstances of the particular case; and (2) capable of implementation.

In this case, we have no reason to question, nor has the agency challenged, the hearing officer's finding that the grievant's behavior warrants a Group II Written Notice with ten day suspension under the Standards of Conduct. However, immediately following his June 30th separation from VDOT, the grievant was hired by another state

⁹ This Department received the agency's request for administrative review on April 20, 2006; however due to an inadvertent miscommunication, the agency's request was not processed until June 12, 2006.

¹⁰ See Reconsideration Decision of Hearing Officer Case No. 8298, issued May 2, 2006.

¹¹ Va. Code § 2.2-3006(D).

¹² Va. Code § 2.2-1001(2), (3), and (5).

¹³ See *Grievance Procedure Manual* § 6.4(3).

¹⁴ See Va. Code § 2.2-3005.1; *Grievance Procedure Manual* §§ 5.7 and 5.9 (emphasis added).

¹⁵ Va. Code § 2.2-3006(D).

agency and therefore, VDOT has no authority to impose a suspension upon the grievant. Accordingly, while the reduction of the Group III Written Notice with termination to a Group II Written Notice with ten day suspension may otherwise be just relief under the provisions of the Standards of Conduct, it does not appear to be an appropriate remedy in this particular case as it is impossible for VDOT to implement the suspension portion of that remedy. Consequently, this Department finds that the hearing officer erred by issuing an order that was incapable of being implemented by VDOT under the facts and circumstances unique to this particular case. As such, the hearing officer is ordered to modify his decision in accordance with the provisions set forth above.

APPEAL RIGHTS AND OTHER INFORMATION

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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁹

Claudia T. Farr
Director

¹⁶ *Grievance Procedure Manual*, § 7.2(d).

¹⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual*, § 7.3(a).

¹⁸ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

¹⁹ Va. Code § 2.2-1001(5).