

Issue: Administrative review of Case #8432; Hearing Decision; Ruling Date: November 20, 2006; Ruling #2007-1475; Agency: Virginia Department of Transportation; Outcome: this agency will not disturb the decision of the hearing officer.



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

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Department of Transportation  
Ruling Number 2007-1475  
November 20, 2006

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8432. For the reasons discussed below, this Department will not disturb the decisions of the hearing officer.

FACTS

The facts of case number 8432, as set forth in the hearing decision issued on October 18, 2006, are as follows:

The Virginia Department of Transportation employed Grievant as an Engineering Technician III until he was demoted to an Engineering Technician II on June 15, 2006. The purpose of his position was:

The Engineering Technician III provides a method to monitor contractors and provides a way to track the progress of construction projects. The Engineering Tech III is the liaison between the contractor, the property owner, and the ... Residency Office. This position insures that construction projects are constructed according to plans, specifications and contracts.

Grievant reported to the Engineering Technician IV who reported to the Area Construction Engineer.

In June 2001, Grievant's Employee Work Profile was amended to include a requirement that he obtain an Erosion and Sediment Control Inspector Certification. To obtain this certification, one must attend a two or three day class and pass a test. The training and test is administered two times each year by the Department of Conservation and Recreation.

As part of Grievant's November 2005 evaluation, he was rated as Below Contributor for one of his Core Responsibilities because he "is not certified as an Erosion and Sediment Control Inspector as required ...."

On April 20, 2006, Grievant met with the Area Construction Engineer to discuss the requirements of Grievant's position as an Engineering Technician III. The Area Construction Engineer told Grievant that his position required him to have an Erosion and Sediment certification from the Department of Conservation and Recreation. He told Grievant that the Agency was considering disciplinary action if he failed to take and pass the DCR exam. The Area Construction Engineer presented Grievant with a memorandum documenting their meeting.

In May 2006, Grievant attended the several day course offered by the Department of Conservation and Recreation. He took the final examination and failed to pass the test. This was the second time he had failed to pass the test. Because Grievant failed to pass the DCR test, the Agency issued Grievant a Group III Written Notice with demotion. Grievant had no prior active disciplinary action.<sup>1</sup>

The hearing officer reduced the Group III Notice to a Group II and reversed the demotion, concluding in his October 18<sup>th</sup> decision that:

“Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. On April 20, 2006, Grievant was instructed by a supervisor, the Area Construction Engineer, to take and pass the Erosion and Sediment Control Inspector's class administered by the Department of Conservation and Recreation. Grievant took the test but did not pass. Grievant's [sic] did not comply with a supervisor's instruction because he did not pass the test and obtain his certificate from DCR. Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.<sup>2</sup>

The hearing officer further explained that: “Policy 1.60 does not authorize an Agency to demote an employee without prior active disciplinary action upon the issuance of a Group II Written Notice. Accordingly, the Agency's demotion of Grievant and salary reduction must be reversed.”<sup>3</sup>

### 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.”<sup>4</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this

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<sup>1</sup> Decision of Hearing Officer, Case Number 8432, issued October 18, 2006. (Footnotes omitted).

<sup>2</sup> Id at 3 (footnotes omitted).

<sup>3</sup> Id. at 4.

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>5</sup>

On October 31, 2006, the agency requested an administrative review from this Department on the basis that the hearing officer exceeded the scope of his authority by imposing his interpretation of the standards of conduct over that of the Department of Human Resource Management (DHRM). This argument, although couched as a challenge to the hearing officer's authority under the grievance procedure, is properly viewed as an objection that the hearing decision does not comport with state policy. Such challenges are appropriately directed to the DHRM Director. The agency has already requested administrative review by the DHRM Director on the basis that the decision is inconsistent with policy. Accordingly, because the question of whether the hearing decision comports with policy has been raised with the appropriate reviewer (DHRM), there is nothing further for this Department (EDR) to address relating to the October 31, 2006 appeal that the agency filed here.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this Department will not disturb the decision of the hearing officer.

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 and, if ordered by DHRM, the hearing officer has issued a revised decision.<sup>6</sup> However, an agency must request and receive approval from the EDR Director before filing a notice of appeal. 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>7</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>8</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>7</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>8</sup> *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).