Issue: Administrative Review of Hearing Officer's Decision in Case No. 9103; Ruling Date: January 11, 2010; Ruling #2010-2428; Agency: Virginia Department of Transportation; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Department of Transportation
Ruling Numbers 2010-2428
January 11, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decisions in Case Number 9103. Particularly, he challenges the hearing officer's decision to refrain from reopening the hearing. For the reasons set forth below, we find no error by the hearing officer.

FACTS

The condensed facts of this case as set forth in the July 16, 2009 Hearing Decision in Case Number 9103 (the "Hearing Decision") are as follows:

The Virginia Department of Transportation employed the grievant as a Transportation Contract Administrator. The purpose of his position was: "Support Residency Maintenance and Construction Programs by developing contracts and monitoring preliminary engineering activities." The grievant worked for the agency for over 16 years. He reported to the Assistant Resident Administrator who had been grievant's supervisor for approximately four years.

On February 1, 2008, the grievant received a Notice of Improvement Needed/Substandard Performance regarding the issues of: timeliness in meeting scheduled deadlines, and ensuring work is complete and accurate. On October 28, 2008, Grievant received an annual performance evaluation with an overall rating of "Below Contributor."

On November 12, 2008, the Supervisor presented Grievant with a memorandum and a Performance Improvement Plan. On January 30, 2009, Grievant received a re-evaluation with an overall rating of "Below Contributor." He was removed from employment effective January 30, 2009.

The grievant challenged his removal through the grievance process and in a July 16, 2009 hearing decision, the hearing officer held that: (1) the agency's re-evaluation plan is consistent with state policy; (2) the agency's evaluation of the grievant was not arbitrary or capricious; (3) the grievant was re-evaluated in accordance with state policy;[1] but (4) "the Agency failed to

[1] Hearing Decision at 5.

comply with State policy because it failed to consider alternatives to removal effective January 30, 2009."[2] Due to his finding that the agency failed to comply with policy in this respect, the hearing officer's only order for relief was that the agency consider such alternatives to removal as per policy and provide the grievant with a detailed explanation of its conclusions.[3]

Evidently, after the hearing officer ordered the agency to evaluate options other than removal, the agency submitted documents to him showing that it had complied with his order. The hearing officer apparently did not consider the agency's documents, as he seems to have concluded that he lacked jurisdiction to reopen the hearing to take any additional evidence, including the evidence proffered by the agency as to its compliance with his order. He did not modify his original decision.

In his request for reconsideration of the hearing decision, the grievant sought to reopen the hearing to present evidence relating to the agency's compliance (or lack thereof) with the hearing officer's order.

The hearing officer denied the grievant's request for reconsideration holding that:

> The documents submitted by the Agency following the hearing do not relate to the original hearing, they related to the Agency's compliance with the Hearing Officer's order. Grievant seeks to present evidence regarding whether the Agency has complied with the Hearing Officer's order. Whether the Agency has complied with the Hearing Officer's order is not an issue before the Hearing Officer. The Grievance Procedure Manual does not grant the Hearing Officer the authority to determine whether the Agency has complied with the Hearing Officer's order. It would be an issue addressed as part of the appeals process. Accordingly, there is no basis to grant Grievant's request to reopen the hearing.[4]

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[2] The hearing officer found that under policy, removal is appropriate *only if* "the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties." Hearing Decision at 7. The applicable policy, Department of Human Resource Management Policy 1.40, states the following:

> "If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period."
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> "An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period."
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> "As an alternative, the Agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%."
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> "If the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action.

[3] Hearing Decision at 7.

[4] Reconsideration Decision, Case No 9103-R, issued August 27, 2009 ("Reconsideration Decision") at 1-2.

The grievant has asked this Department to review the hearing officer's decision not to reopen the hearing. In addition, the grievant has appealed the hearing officer's alleged failure to mitigate the grievant's removal from employment.[5]

DISCUSSION

Timeliness of the Request for Administrative Review

The Grievance Procedure Manual provides that "all requests for review must be made in writing, and ***received*** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."[6] However, this Department has consistently allowed parties to raise beyond the 15 day timeframe an issue that could not have been raised previously.[7] Here, the issue of the hearing officer's failure to reopen the hearing was not an issue that could have been raised within the 15 day period following the original hearing. The hearing officer issued his original decision on July 16, 2009 and his Reconsideration Decision on August 27, 2009. It was only in the August 27th Reconsideration Decision that the hearing officer held that he would not be reopening the hearing. The grievant requested review of the Reconsideration Decision on September 11, 2009, which was within 15 calendar days of the issuance of the Reconsideration Decision. Therefore, the request is timely.

Mitigation

The grievant timely requested an administrative review request from the Department of Human Resources Management on the issue of "mitigation." Mitigation is expressly addressed in both the Standards of Conduct and the grievance procedure. We address here only mitigation as it pertains to the authority of a hearing officer to mitigate discipline under the grievance procedure.[8] The Department of Human Resource Management ("DHRM") Director will address "mitigation" from a policy perspective in her ruling.[9]

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[5] The request for administrative review was addressed and sent to the Department of Human Resources Management ("DHRM"). As explained further in this ruling, because mitigation is both a grievance procedure concept and a policy concept we are addressing mitigation as well. It should be noted that this Department has long held that a timely request for administrative review addressed to one reviewer is typically deemed timely initiated with the correct reviewer. *See* EDR Ruling No. 2006-1308.

[6] *Grievance Procedure Manual* § 7.2(a).

[7] *See* EDR Ruling no. 2007-1563, 2007-1637, 2007-1691, note 26.

[8] In cases involving *disciplinary actions*, the duty of an agency to consider (or not consider) potential mitigating circumstances is wholly independent from the duty of the hearing officer to consider mitigating circumstances. DHRM held under an earlier version of the *Standards of Conduct* that an agency has no duty to consider mitigating circumstances. DHRM Policy Ruling No. 8636. Hearing officers, however, must consider mitigating circumstance if the agency has established that misconduct occurred and the discipline issued is consistent with law and policy. *See Rules for Conducting Grievance Hearings* VI (B).

[9] As the hearing decision reflects, DHRM Policy 1.40, Performance Planning and Evaluation provides that "[i]f the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action." The hearing officer appears to have construed this language as creating a mandate that the agency consider demotion, reassignment, or a reduction in duties. Whether this policy creates an obligation to "mitigate" a termination to a demotion, reduction in duties, or reassignment remains a question for the DHRM Director to answer.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[10] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.[11]

As reflected above, the *Rules* address the consideration of mitigation as a requirement for discipline issued under the *Standards of Conduct.* Although the *Rules* recognize the duty of hearing officers to consider mitigating factors that relate to disciplinary actions (both formal and informal),[12] the *Rules* contain no requirement that a hearing officer consider "mitigation" under DHRM Policy 1.40, Performance Planning and Evaluation. Thus, the hearing officer's absence of mitigation analysis in the decision is consistent with the grievance procedure.[13]

Reopening of the Hearing

The hearing officer was correct when he stated in his decision that: "The Grievance Procedure Manual does not grant the Hearing Officer the authority to determine whether the Agency has complied with the Hearing Officer's order." Instead, the Grievance Procedure Manual expressly provides that:

> Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision. The petitioning party must provide the EDR Director a copy of the petition. The court shall award reasonable attorneys' fees and costs to the

[10] Va. Code § 2.2-3005(C)(6).
[11] *Rules* § VI(B) (alteration in original).
[12] *See Rules* § VI (B). ("Sometimes an employee may experience an 'adverse employment action' (e.g., discharge, transfer, demotion, etc.) that is not accompanied by a formal Written Notice as contemplated by the Standards of Conduct, but which may have been taken for essentially disciplinary reasons -- in other words, to correct or penalize behavior by enforcing applicable standards of conduct or performance. If the grievance is qualified, the grievant will have the burden of proving at hearing that the contested adverse employment action, though unaccompanied by a formal Written Notice, was nevertheless taken for disciplinary reasons. If the hearing officer finds that the contested action was disciplinary, the agency will have the burden of proving that the action, though disciplinary, was warranted. As with formal disciplinary actions, the hearing officer shall consider mitigating and aggravating circumstances, giving appropriate deference to the agency's right to manage its affairs.")
[13] This is not to say that a hearing officer is precluded from considering whether the agency's actions constitute a misapplication or unfair application of policy. To the contrary, the hearing officer should consider whether the agency's actions are consistent with policy.

> employee if the employee substantially prevails on the merits of the implementation.[14]

We have consistently held that where a party contests whether a hearing officer's order has been followed, the implementation process described above is the appropriate means through which to pursue such an argument.[15] Accordingly, the hearing officer did not err when he stated that "[w]hether the Agency has complied with the Hearing Officer's order is not an issue before the Hearing Officer." He had no authority to receive and consider potential evidence proffered by either the agency or grievant that related to his decision and order. Any concerns regarding compliance with the hearing officer's order should be raised with the Circuit Court in the jurisdiction in which the grievance arose.[16]

CONCLUSION AND 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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[17] 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.[18] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[19]

Finally, as described above, any remaining concerns regarding compliance with hearing officer's original decision and order are to be raised with the circuit court in the jurisdiction in which the grievance arose.[20]

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Claudia T. Farr
Director

[14] *Grievance Procedure Manual* § 7.3 (c); Va. Code § 2.2-3006(D).
[15] *C.f.* EDR Ruling No. 2009-2208. ("This Department has previously recognized that because there is an independent judicial procedure for the implementation of a hearing officer's order, a grievance may not be initiated for this purpose. To the extent an agency fails to comply with an order by a hearing officer or an implementation order by a district court, any remedy lies in the judicial system, not the grievance procedure.")
[16] *Grievance Procedure Manual* § 7.3(c).
[17] *Grievance Procedure Manual* § 7.2(d).
[18] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[19] *Id.; see also* Virginia Dept. of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).
[20] *Grievance Procedure Manual* § 7.3(c); Va. Code § 2.2-2006(D).