

Issue: Administrative Review of Hearing Officer's Reconsideration Decision in Case No. 9239; Ruling Date: September 17, 2010; Ruling #2011-2720; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2011-2720  
September 17, 2010

The grievant has requested administrative review of the hearing officer's second reconsideration decision in Case No. 9239.

FACTS

The facts of this case are set forth in detail in EDR Ruling No. 2010-2522.<sup>1</sup> In sum, the grievant was discharged for failing a drug test. The grievant, a Corrections Captain, was charged with testing positive for marijuana use. The hearing officer originally reversed the discipline and this Department affirmed the hearing officer's decision in EDR Ruling No. 2010-2522.

The agency had also appealed the original hearing decision to the Department of Human Resource Management ("DHRM"). On May 21, 2010, DHRM remanded the decision to the hearing officer. Based on the DHRM ruling, the hearing officer reversed his earlier decision and upheld the discipline, terminating the grievant's employment.<sup>2</sup>

DISCUSSION

In his request for review by this Department of the hearing officer's second reconsideration decision, the grievant raises a number of issues. However, virtually all relate solely to policy or law. This Department has no authority to rule on either. The Director of the Department of Human Resource Management ("DHRM") is the final authority regarding policy interpretation and her designee has ruled in this matter. The legal concerns raised in the most recent request for administrative review, as well as all

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<sup>1</sup> <http://www.edr.virginia.gov/searchedr/2010-2522.pdf>.

<sup>2</sup> <http://www.edr.virginia.gov/searchhearing/2010-9239%20Decision.pdf>.

other legal concerns not raised in the request, may be addressed to the circuit court in the jurisdiction in which the grievance arose.

We are nonetheless compelled to address two objections raised by the grievant that, though related to law and policy, merit a response from this Department. First, the grievant asserts that this Department “has initial and final say over DHRM in these Administrative Proceedings pertaining to law.” The grievant has also requested that EDR “Administratively Review this entire case and the 2<sup>nd</sup> Reconsideration Decision as it appears to be contrary to EDR’s vested scope of authority.” The scope of EDR’s authority is explained below.

In EDR Ruling No. 2010-2522, this Department held that: “interpreting state and agency policies, even where a policy is silent, is unquestionably a hearing officer responsibility.”<sup>3</sup> The ruling explained that “A hearing officer is bound to make an initial determination of whether an agency’s actions are consistent with law and policy,<sup>4</sup> with the DHRM Director having the final authority to interpret policy.”<sup>5</sup> While the *hearing officer* has authority to make *initial* determinations regarding policy, the DHRM Director, not the hearing officer or EDR, has the authority to make the final interpretation of policy. That being said, where a party asserts that a final hearing decision is contradictory to law due to the impact of a DHRM administrative review ruling on policy (or due to the impact of an EDR administrative review ruling on compliance with the grievance process), that party can appeal the final hearing decision to the circuit court on the basis that it contradicts law. The determination of whether the final hearing decision, as shaped by administrative rulings from the EDR and DHRM Directors, is contradictory to law, is one the court makes, not this Department. Thus, as explained below, because the hearing decision becomes a final decision with the issuance of this ruling, any legal concern regarding the final decision, as modified through administrative review rulings and reconsidered decisions, must be made to the circuit court within 30 days of the receipt of this ruling.

#### APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer,

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<sup>3</sup> See *Rules for Conducting Grievance Hearings* § II (“the hearing officer is responsible for . . . [w]riting a decision that contains . . . conclusions of policy and law”).

<sup>4</sup> *Rules for Conducting Grievance Hearings* § VI(B) (“the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances”)

<sup>5</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

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the hearing officer has issued his remanded decision.<sup>6</sup> The hearing officer has now issued his second reconsideration decision and this ruling responds to that decision. Thus, with the issuance of this ruling, the hearing decision is now final. Thus, within 30 calendar days of the date of this 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>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 v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).