

Issue: Administrative Review of Hearing Officer's decision in Case No. 9366; Ruling
Date: January 18, 2011; Ruling No. 2011-2861; Agency: Department of Corrections;
Outcome: Hearing Office in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2861
January 18, 2011

The agency has requested that this Department administratively review the December 9, 2010 Remand Decision in Case Number 9366 (“Remand Decision”). For the reasons set forth below, we find that the hearing officer did not err in this case.

FACTS OF THE CASE

In his grievance, the grievant challenged a Group III Written Notice and the termination of his employment.¹ The hearing officer reduced the Group III Notice to a Group I and reversed the termination in the original August 16, 2010 Hearing Decision in Case 9366 (“Hearing Decision”).² The agency appealed the decision to the EDR Director, challenging the hearing officer’s mitigation and reinstatement. In EDR Ruling No. 2011-2762, this Department remanded the Hearing Decision to the hearing officer for further clarification. In his Remand Decision he upheld his earlier Hearing Decision. The agency now appeals the Remand Decision, again asserting that the hearing officer erred in reinstating the grievant.

The full facts of Case Number 9366 are set forth in both that case and EDR Ruling No. 2011-2762. The essence of Case 9366, however, was that the grievant failed to inform the agency that he had been required to serve additional jail time for a driving while intoxicated (DWI) conviction, time that had previously been suspended. The grievant contended that, having informed the agency of the original DWI conviction, he was not aware that policy required him to report that, because of a probation violation, he had been required to serve the previously suspended jail time. The hearing officer found the grievant’s contention regarding his lack of knowledge of the applicable agency policy both plausible and credible. Accordingly, the hearing officer reduced the discipline on the basis that the grievant did not have adequate notice of the rule he violated.

DISCUSSION

In its latest request for administrative review, the agency argues that because the agency has previously mitigated other disciplinary actions, further mitigation in this case was

¹ Decision of the Hearing Officer in Case Number 9366 issued August 16, 2010 at 1.

² *Id.* at 6.

inappropriate. In EDR Ruling EDR Ruling No. 2011-2762, this Department held that a hearing officer must uphold agency imposed discipline if it is within the limits of reasonableness. EDR Ruling No. 2011-2762 further held that this Department will review a hearing officer's mitigation determination for abuse of discretion,³ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. In his Remand Decision, the hearing officer found that termination under the circumstances of this case met the "exceeds the limits of reasonableness" standard. The hearing officer reiterated his previous finding from the original Hearing Decision, explaining that "I find that the Grievant did not have sufficient notice of the Agency's procedure that was effective November 15, 2009."⁴ He further found that "I find the Grievant did not have sufficient notice of the Agency's interpretation of the policy to include this specific circumstance of the imposition of previously suspended sentence of which the Agency was aware."⁵ Based on these mitigation factors, the hearing officer held that the Group III Notice was excessive and therefore reduced it to a Group I.

Based on record evidence reviewed in EDR Ruling 2011-2762 and the reasoning set forth in the Hearing and Remand Decisions, this Department cannot conclude that the hearing officer abused his discretion when he mitigated the Group III to a Group I and reinstated the grievant. The basis upon which the hearing officer reduced the discipline here--lack of notice of the rule--is a basis which could potentially result in a complete reversal of discipline, under the proper facts. As a matter of fundamental fairness, if an agency has an unwritten rule which has not been adequately disclosed (and explained if potentially unclear), and the rule is not one that merely embodies a standard of misconduct a reasonable person would intuitively recognize as inappropriate, then the imposition of any level of discipline for a violation of such an unpublished rule could potentially exceed the bounds of reasonableness. It is not clear why the hearing officer upheld the discipline imposed in this case even as a Group I, given that the hearing officer found that the grievant was unaware that he had any duty to report the additional time served. However, given that a true lack of notice of a rule can potentially warrant a complete reversal of discipline, we cannot conclude that a mere reduction of the discipline constitutes an abuse of discretion. Accordingly, we decline to disturb the Hearing Decision or Remand Decision.

APPEAL RIGHTS

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, the hearing officer has

³ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts." *Id.*

⁴ Decision of the Hearing Officer on Remand in the Matter of Case No. 9366 issued December 9, 2010 ("Remand Decision") at 1.

⁵ *Id.*

issued his remanded decision.⁶ With the issuance of this decision, the original decision is now 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.⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁸

Claudia T. Farr
Director

⁶ *Grievance Procedure Manual* § 7.2(d).

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

⁸ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).