Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 9391; Ruling Date: October 12, 2011; Ruling No. 2011-3026; Agency: Department of Mines, Minerals and Energy; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mines, Minerals and Energy
Ruling Number 2011-3026
October 12, 2011

The agency has requested that this Department (EDR) administratively review the hearing officer's reconsidered decision(s) in Case Number 9391. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts and determinations as set forth in the original hearing decision in case Number 9391 are as follows:

> Grievant was issued a Group III Written Notice. Although the Notice was not dated, it was signed by Grievant on June 16, 2010. Grievant was disciplined for not following accident notification policy, willingly and recklessly damaging state property and violating safety rules. This Group III Written Notice included a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class. The incident in question occurred March 15, 2010. There was an investigation conducted on June 2, 2010 and a recommendation issued on June 12, 2010.
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> After reviewing the evidence presented and observing the demeanor or each witness, the Hearing Officer makes the following findings of fact:
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> Grievant is a gas and oil inspector for the Department of Mines, Minerals and Energy. He has held this particular position for approximately twenty (20) years. He estimated he has traveled over one-half (1/2) million miles in this capacity of inspecting gas and oil systems.
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> Gas wells in Virginia are rated for their urgency to be inspected according to State guidelines. After initial start-up is completed and monitored, it is not uncommon for an established well to be inspected once a year. Inspectors have schedules to follow to view the sites within their district. The locations are often

remote with only service road access. Fording streams where no bridge exists is not uncommon. The particular two (2) sites in question (March 15, 2020) [sic] were scheduled to be inspected within one year of December 18, 2008. Grievant made an attempt in both December 2009 and January 2010 to access the location of the wells but, due to weather, he was unable to reach them. No attempt was made in February. On March 15, 2010, Grievant again revisited the road to the well locations. There were three (3) locations on the service road where streams covered the road. Grievant stated he inspected the first stream, using his expertise of twenty (20) years and determined he could ford it. He stated he applied the same determination to the second and third crossings. Grievant misjudged the depth of the water near the exit point of the third stream and his state owned vehicle stalled and became entrapped in the stream. Water did wash into the vehicle and the lower parts of the engine. The water height was higher than the bottom of the door of the vehicle.

Grievant left the vehicle by climbing out the passenger side window and onto the bank. Grievant's cell phone had no service. Grievant determined to walk uphill hoping to get cell service. He did pass both wells sites on his journey uphill. When he was still unable to get service, he turned to travel back to the highway. He forded all three (3) streams on foot in mid-March to arrive back to "civilization". He convinced an occupant of a home to allow him to use her phone to call for help. The incident occurred approximately 1:30 pm and Grievant's call from the lady's home was at approximately 4:00 pm. The vehicle was not pulled from the water until after dark. By this time, there was considerable water damage. Agency estimated the loss of the vehicle at $9,050.00 and replacement cost at $26,800.00 or a total economic loss of approximately $36,000.00.

Agency conducted an investigation of the incident. Grievant was called upon to give factual information. At the conclusion of the investigation, it was determined to issue a Group III Disciplinary Notice to Grievant with a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class.

DISCUSSION

Agency presented evidence to show Grievant had not been truthful about the event by filing his inspection report twenty-four (24) hours later (March 16) and moving the inspection frequency up to six (6) months. Agency believed that Grievant had stated to the investigator that he had inspected the wells when he had passed them on his climb uphill seeking phone service. Grievant stated he did view the wells but did not inspect them and that since the December 2009 inspection date had not been accomplished, the well should be revisited no later than June of 2011.

Agency stated Grievant was to have reported the incident to the State Police for investigation. Office of Fleet Management Service Policies and Procedures Manual, Section IV(A) clearly states any accident is to be reported. Grievant stated he did not realize that there would be damage to the vehicle, such that a report would need to be filed and, further, Grievant checked with his superior and they both did not recognize a need to contact the police. The written policy was clear and Grievant was expected to have read it.

Agency also found that Grievant had violated safety rules by endangering himself and the vehicle. However, it was admitted by Agency's witnesses that there were no written safety rules. This would make it very difficult for Grievant to fail to follow a policy if there was not one.

Agency believed Grievant had willfully and recklessly driven the state owned vehicle into a dangerous stream. Grievant had a very long history of visual evaluation of streams and had proven himself not accident prone, having had very few incidences in his twenty (20) years of service. The Agency gave no evidence of a standard policy for evaluating streams. Surely, Grievant was not expected to walk through icy waters in bare feet to check the depth. Grievant stated he visually checked the route and he determined it was safe based on his twenty (20) years experience of fording streams. There is no preponderance of evidence to believe this is not true. Further, there is no reason to believe Grievant's survey of the stream was a reckless or willful intent to damage state property.

The Agency's case is motivated by the extraordinary cost of the accident and hindsight knowledge. Grievant would certainly not have crossed the stream if he had had "after the fact" knowledge "before the fact". If Agency cannot trust employee's judgment then to reduce the possibility of this sort of accident and to hold employees responsible, inspectors should be provided with waders and a yardstick and a safe water level established. All stream crossings should have a walk-through check. Holding Grievant responsible for the cause based solely on the evidence of the effect does not meet the Agency's burden of proof.

Grievant contends the Agency did not follow written policy or afford him his due process rights by not permitting him an opportunity to discuss a forthcoming discipline before it was issued. There is no lack of due process by not permitting a defense before being charged. Grievant's opportunity to defend himself would not be necessary until after he was aware that he needed to defend himself. Grievant had ample opportunity to do this in the grievance steps provided by law. However, as a breach of policy, Agency makes it clear Grievant was expected to follow the policies of DHRM Policy 1.60. There is no reason why Agency should not also follow the policies as clearly written.

OPINION

I find Agency has failed to prove Grievant's actions were willful and reckless. I find Grievant did not violate a non-existent safety policy. I do find Grievant failed to follow the accident reporting policy. I find a Group III Disciplinary Action excessive for a first offense of failure to report an accident.

Further, I find Grievant's due process rights were not violated as Grievant had ample opportunity to defend himself through the grievance process. DHRM Policy clearly states Grievant should have an opportunity to discuss a written notice (not just appear at the investigative stage) prior to its being issued.

DECISION

For the reasons stated above, I find that Agency's discipline of Grievant with a Group III discipline too harsh and would reduce it to a Group I for failure to follow an accident reporting policy.

However, I find that Agency did not follow policy in the manner in which Agency issued the Written Notice. Grievant's Motion is granted. The matter is **dismissed**. Grievant shall be awarded back pay and the Group III Disciplinary Action removed. Grievant did not make a request for attorney fees and they are not granted.[1]

The agency requested reconsideration by the hearing officer. The hearing officer upheld her earlier decision in a March 15, 2011 Reconsideration decision.[2] The agency had also sought administrative review by both the EDR and Department of Human Resource Management ("DHRM") Directors. In EDR Ruling No. 2011-2877, this Department addressed the agency's contention that: (1) the hearing decision mischaracterized the facts; (2) due process was provided; and (3) the hearing officer failed to give deference to agency actions. EDR Ruling No. 2011-2877 found no error with regard to the hearing officer's findings of fact or conclusions regarding due process, but the issue regarding deference to the agency's action, the level of discipline in particular, was remanded to the hearing officer for further clarification. EDR Ruling No. 2011-2877 explained:

Failure to follow written policy is normally a Group II offense. The hearing decision is not clear as to why the hearing officer found the sustained offense to be a Group I instead of a Group II . . . . Because it is not clear as to why the hearing officer concluded that the sustained misconduct was appropriately

[1] Decision of the Hearing Officer in Case No. 9391 issued December 30, 2010 ("Hearing Decision"), at 1-6. Footnotes from the Hearing Decision have been omitted here.
[2] Reconsideration Decision in Case No. 9391 issued March 15, 2011 ("Reconsideration Decision"), at 5.

designated as a Group I Written Notice instead of a Group II Written Notice, the decision is remanded for further clarification.[3]

In a May 27, 2011 ruling, DHRM issued a determination that essentially echoed EDR Ruling No. 2011-2877. On June 14, 2011, the hearing officer issued a second Reconsideration Decision. In that decision, the hearing officer reversed her original removal of the entire discipline and instead reduced it to a Group I Written Notice. The agency initiated a second request for reconsideration with the hearing officer and sought a second administrative review by this Department as well as DHRM. It is this second administrative review request that this subject of this ruling. The hearing officer upheld her second Reconsideration Decision in a third Reconsideration Decision issued on August 10, 2011.

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."[4] 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.[5]

The agency has again challenged the hearing officer's fact findings. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[8] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[9] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

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[3] EDR Ruling No. 2011-2877, issued April 29, 2011, at 11.
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.

The agency argues that the hearing officer has again mischaracterized the facts. The agency asserts that hearing officer erred by finding that (1) the grievant asked his superior if he should report the incident, and (2) he was told that there would be no need. The hearing officer clarified her statement in her third reconsideration decision where she explained:

> The Hearing Officer believes the totality of the testimony would indicate Grievant believed he did not need to make a police report based on the opinion of at least two (2) of the personnel superior to Grievant's position. The Hearing Officer believes this was an incorrect interpretation of the policy but takes into account that Grievant did not reach this conclusion by himself. In addition to the statements quoted by Agency in their request for reconsideration, Mr. [W] testified Mr. [C] did believe Grievant had followed policy but it was clear to Mr. [W] Grievant had not followed policy. Mr. [A] was also of the opinion there was no need to report a stalled vehicle to the police. It is a stretch of the imagination to believe there were so many comments and opinions about the police report without Grievant being included in any of the conversations.

Based on a review of the record, we cannot conclude that the hearing officer has mischaracterized the facts. First, there is record testimony by Mr. A that it was his opinion having a vehicle stall in a stream was not the sort of circumstance that required reporting to the state police.[10] He testified that his opinion did not change even after he realized that the vehicle "was gone".[11] In addition, at least twice during the hearing, reference was made to a memo authored by Mr. C. which indicated that Mr. C. thought that the grievant had complied with the reporting requirements.[12] Finally, the hearing officer concludes that it stretches the imagination to believe that the grievant was not privy to such opinions. But even if the grievant had not been privy to such opinions, the fact that these superiors held such views is sufficient by itself to constitute a mitigating circumstance. Under EDR's *Rules for Conducting Grievance Hearings* ("*Rules*"), lack of notice of a rule is potentially a mitigating factor. The *Rules* expressly allow the hearing officer to consider whether the employee "ha[d] notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it."[13] Here, the hearing officer has apparently accurately observed that at least two superiors viewed the matter as one that did not require reporting to the state police. Thus, it would appear that the grievant's interpretation of how the accident reporting policy should be interpreted was consistent with at least two superiors. Thus, mitigation would not have constituted an abuse of discretion in this case.

The agency has also advanced the argument that the hearing officer has attempted to act as a super-personnel officer because she did not give deference to the agency. This argument is

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[10] Hearing testimony beginning at 3:47:00.
[11] *Id.* The agency has included portions of Mr. A's testimony in its request for administrative review. Omitted from its request was the following exchange between the grievant's attorney and Mr. A--Question: "Well, once it came out of the water and it didn't—the vehicle was gone, did you change your opinion about that [the obligation to report]?" Answer: "No." Question: "You still felt that he didn't have to report it. Answer: "That's my opinion."
[12] Hearing testimony beginning at 1:17:00; hearing testimony beginning at 2:49:00.
[13] *Rules* at § VI (B)(1).

also without merit. The *Rules* expressly allow a hearing officer to reduce the discipline when mitigating circumstances exist, such as, lack of notice of how an agency interprets its rule. When a hearing officer reduces discipline where record evidence exists of an ambiguous interpretation of a rule, such an act can hardly be viewed as a violation of any *Rules* provision.

The agency also argues that because the grievant unquestionably damaged property, the level of the offense should be at least a Group II. The grievant was charged, in part, for "willfully and recklessly damaging state property." The original hearing decision addressed this charge and much of the discussion was included in EDR Ruling No. 2011-2877. That ruling explained:

> The hearing officer explained in the reconsideration decision that:
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> > Grievant stated his "survey of the stream" the day of the incident was the same criteria he consistently applied. It appears that over twenty years his "survey of streams" bode well for him. While there was no way available for Grievant at the time to definitely know that conditions were safe, there was also no way for him to know conditions were unsafe. He stated he applied the standard he was accustomed to applying. This standard had never been rejected or modified by the Agency.[14]
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> The agency asserts that the grievant was not disciplined for his survey of the stream but his "reckless decision to proceed into the water when there was no urgency or requirement that he do so and there was no possible way he could reasonably determine that the conditions were safe enough to proceed." The hearing officer held that:
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> > Grievant sufficiently described his job to convince the Hearing Officer that many of his travels were dangerous and that he exercised consistent caution.
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> > As stated earlier, Agency is using hindsight to bootstrap its case. There were no eye witnesses, no admissions from Grievant, no consistent bad behavior of Grievant brought to light, no grudges that Grievant had against the Agency or any other evidence that would cause the Hearing Officer to believe anything other than Grievant's statement that he exercised habitual caution. The Agency's best evidence was what other people thought, after the fact, that Grievant should have been thinking.[15]

[14] Reconsideration Decision at 3, footnote omitted.
[15] *Id*.

> Based on a review of the hearing record, we find no error with the hearing officer's characterization of the facts or her conclusions based on those facts. The hearing officer found that the grievant's actions were not reckless. Citing to testimony of the first agency witness, the hearing decision found that the agency had no written safety rules. The hearing officer found that the grievant did not violate a non-existent safety rule. Based on this Department's review of the hearing record, this Department cannot hold that the hearing officer erred in reaching these conclusions.
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> In terms of identifying a safety rule, the first agency witness offered only that employees are expected to operate vehicles safely.[16] The hearing officer further found that the agency offered no evidence of a standard policy for evaluating streams. The agency has not rebutted this finding but instead argues that it was not the evaluation of the stream that was negligent but the decision to try to cross in the absence of certainty that it was safe. The grievant testified that he has never been presented with any sort of safety policy (other than the Standards of Conduct ("SOC")) that would guide him in determining how to assess that with any degree of certainty that a given stream was safe to cross.[17] Other than the general directive to operate vehicles safely, the agency did not appear to offer any evidence of safety rules that pertain to off-road driving and stream crossings to guide those who are expected to cross steams. Based on the totality of the evidence presented, this Department cannot conclude that the hearing officer's findings regarding the charge of reckless destruction of property are unsupported by record evidence.

Based on the foregoing, the agency's objections to the charge of willfully and recklessly damaging state property was addressed fully in EDR Ruling No. 2011-2877 and will not be revisited here.

Finally, the agency has raised issues regarding the hearing decision's compliance with law and policy. We note, however, that both the policy and legal objections appear to turn on the agency's argument that the hearing officer mischaracterized the facts of this case. As we have explained above, we find no merit in this argument. The hearing officer is the sole fact-finder and neither this Department, DHRM, nor the circuit court serves as a fact finder in the grievance process.[18] Thus, arguments based on allegedly erroneous fact-finding are not properly raised with DHRM or the court. Rather, they may be raised with the hearing officer in a

[16] Testimony beginning at 1:15:00.
[17] Testimony beginning at 4:12:00
[18] *See* Barton vs. Va. Dept. of State Police, 39 Va. App. 439, 573 S.E. 2d 319 (2002)(the "circuit court lacks authority to consider the grievance *de novo*, to modify the hearing officer's decision, to substitute the court's view of the facts for those of the hearing officer, or to invoke the broad equitable powers to arrive at a decision that the court may think is fair"). Barton, 573 S.E. 2d at 322(citing to Department of Environmental Quality v. Wright, 256 Va. 236, 241, 504 S.E.2d 862, 864 (1998))(emphasis added). The grievance statutes "clearly provide the hearing officer is to act as fact finder and the Director of the Department of Human Resource Management is to determine whether the hearing officer's decision is consistent with policy." Barton, 573 S.E. 2d at 322.

reconsideration request or with this Department, but as long as the hearing officer's findings have record evidence support, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]

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Claudia T. Farr
Director

[19] *Grievance Procedure Manual* § 7.2(d).
[20] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[21] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).