

Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 9489;  
Ruling Date: October 25, 2011; Ruling No. 2012-3032; Agency: Virginia Department  
of Transportation; Outcome: Hearing Decision Upheld.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department of Transportation  
Ruling Numbers 2012-3032  
October 25, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's reconsidered decision in Case Number 9489. For the reasons set forth below, there is no reason to disturb the hearing officer's reconsidered decision.

FACTS

The facts of this case are involved and set forth in detail in the 24 page hearing decision in Case Number 9489. In sum, the grievant sought to be a substitute for another employee who was in a position designated for layoff. The agency declined to select the grievant as a substitute. The grievant grieved his non-selection and his grievance advanced to a grievance hearing, where the hearing officer ultimately denied the grievant relief in a March 30, 2011 hearing decision. The grievant requested that the hearing officer reconsider his decision and also requested administrative review from this Department and from the Department of Human Resource Management (DHRM). In a July 5, 2011, reconsidered decision the hearing officer upheld his earlier decision. On July 25, 2011, in EDR Ruling No. 2011-2957, this Department declined to disturb the hearing decision. A day later, the DHRM Director's designee issued a ruling also upholding the hearing decision. The grievant then sought review by this Department of the hearing officer's reconsideration decision.

DISCUSSION

*Administrative Review*

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>1</sup> 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.<sup>2</sup>

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<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>2</sup> See *Grievance Procedure Manual* § 6.4(3).

### Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the reconsideration decision was not issued within fifteen days of the request for reconsideration. According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are instructed to attempt to issue reconsideration decisions within 15 calendar days of the request.<sup>3</sup> Preferably, reconsideration decisions are issued within that timeframe but it is not always possible. The facts of this case are complex and resulted in a 24 page hearing decision. Moreover, the *Grievance Procedure Manual* instructs that reconsideration decisions “should” be issued within the 15 day timeframe. The 15 day target is a goal, not an absolute requirement that warrants relief when not achieved.<sup>4</sup> Based on the foregoing, this Department cannot find that the delay in the issuance of the reconsidered decision warrants any disturbance of the hearing decision.

### Remaining Arguments

The grievant’s remaining arguments appear to have been previously addressed by the hearing officer, by DHRM, and/or by this Department. Thus, they will not be addressed again here.

### APPEAL RIGHTS AND OTHER INFORMATION

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.<sup>5</sup> 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>6</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>7</sup> In this case, while the request for administrative review that is the subject of this ruling was pending, the grievant appealed to the circuit court. In a September 29, 2011 final order, the circuit court also declined to disturb the hearing officer’s hearing decision. Accordingly, no appeals remain with the possible exception of an appeal to the Court of Appeals pursuant to Virginia Code § 17.1-405.

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Claudia T. Farr  
Director

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<sup>3</sup> *Grievance Procedure Manual* § 7.2(c). (“The hearing officer *should* issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request.”) (Emphasis added).

<sup>4</sup> *Cf.* EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135. This Department views the 35-day language of the Rules as directive rather than mandatory. Standing alone, failure to issue a decision within the 35-day timeframe does not serve as grounds for a rehearing or favorable decision. *Cf.* Va. Dept. of Taxation vs. Brailey, 2008 Va. App. LEXIS 19 (2008) (unpublished decision).

<sup>5</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>6</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>7</sup> *Id.*; *see also* Virginia Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).