Issue: Administrative Review of Hearing Officer's Decision in Case No. 9682, 9683, 9684; Ruling Date: June 22, 2012; Ruling No. 2012-3300; 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 Department of Corrections
Ruling Number 2012-3300
June 22, 2012

The grievant has requested that this Department ("EDR") again administratively review the hearing officer's decision in Case Numbers 9682, 9683, and 9684. For the reasons set forth below, this Department will not disturb the hearing officer's decision.

FACTS

The procedural history of this case is as follows:

On February 23, 2011, the grievant was issued two Group III Written Notices and a Group II Written Notice with removal. On March 21, 2011, the grievant timely filed three grievances to challenge the agency's action. The outcomes of the management resolution steps were not satisfactory to the grievant and she requested a hearing. The grievances advanced to hearing and in a November 21, 2011 hearing decision, the hearing officer upheld the Group III Written Notice of disciplinary action with removal regarding bringing into and using tobacco products at the facility. He reduced the Group II Written Notice of disciplinary action regarding making derogatory/revengeful comments to a Group I Written Notice. Finally, he rescinded a Group III Written Notice of disciplinary action regarding having employees cook at grievant's daughter's wedding.

The grievant appealed to both this Department and the Department of Human Resource Management ("DHRM"). In a January 31, 2012 Administrative Review—EDR Ruling Number 2012-3188—this Department remanded the decision to the hearing officer to address the timeliness of the issuance of the discipline, which this Department pointed out is essentially an argument that the discipline is inconsistent with policy in that it was not promptly issued. EDR Ruling Number 2012-3188 further noted that DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy but because the hearing officer had not addressed this issue and the facts surrounding it, it would be premature for the DHRM Director to make her final determination before the hearing officer addressed the issue.

EDR Ruling Number 2012-3188 further held, regarding the smoking Written Notice, that it would seem unlikely that an employee's supervisory status would in every case justify raising the level of an offense. The Ruling went on to note that in this case, both the agency and the

hearing officer seem to have focused on the grievant's apparent willful disregard of the policy and the resultant erosion of the agency's ability to enforce its policy. The Ruling concluded that the question of whether, under the particular facts of this case, the agency violated policy by elevating the level of the offense to the next level is a policy call that the DHRM Director must make.

The Hearing Officer issued a Reconsideration Decision on March 12, 2012, holding that the delay in issuing the discipline in this case could not serve as a basis to reduce or reverse the discipline. On March 23, 2012, the DHRM Director's designee issued an Administrative Review holding that: "[w]hile this Department does not condone excessive delays before initiating disciplinary action, we concur with the hearing decision that there is no misapplication of policy." The March 23rd Ruling addressed the grievant's objections relating to raising the discipline for violating the smoking policy from the normal Group II level to the Group III level. The Ruling held that: "Concerning elevating the Group II Written Notice to the level of a Group III Written Notice, this Agency has determined that DHRM Policy No. 1.60 gives agencies that option based on the impact of the violation." Thus, DHRM declined to disturb the decision.

In an April 2, 2012 request for an additional Administrative Review, the grievant challenged the DHRM decision on several bases, including the DHRM's alleged failure to adequately address the issue of raising the Group II to a Group III. On April 25, 2012, the DHRM Director's designee issued a clarification in which he provided further discussion regarding the agency's ability to raise the level of discipline in certain extreme cases, which he agreed with the agency and hearing officer existed in this case.

On April 30, 2012, the grievant challenged the DHRM April 25th clarification on several bases including the designee's misstatement that the derogatory/revengeful Written Notice had been rescinded, when in fact it had been reduced to a Group I. On June 1, 2012, the DHRM's designee issued another clarification in this matter. In that Ruling the DHRM designee conceded the misstatement but ultimately upheld the hearing officer's decision.

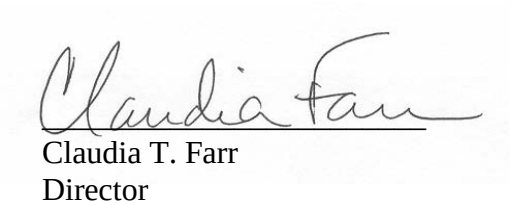
DISCUSSION

This Department has no further jurisdiction to rule in this matter. It has ruled once, remanding the decision and confirming DHRM's duty to rule on policy issues. This Department has no authority to rule further or to overrule DHRM policy interpretations. This matter is now final and the only remaining appeal available is to the circuit court on the basis that the decision is contradictory to law.

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.[1] That has now occurred. The hearing decision becomes final as of today and may be appealed within 30 calendar days by either party to the circuit court in the jurisdiction in which the grievance arose.[2] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[3]



Claudia T. Farr
Director

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