

Issue: Administrative Review of Hearing Officer's decision in Case No. 9750; Ruling  
Date: April 20, 2012; Ruling No. 2012-3317; Agency: Virginia Department of  
Transportation; Outcome: No ruling – untimely.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Virginia Department of Transportation  
Ruling Number 2012-3317  
April 20, 2012

The agency has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9750. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

In his February 15, 2012 decision in Case No. 9750, the hearing officer reduced the agency's Group II Written Notice of disciplinary action to the grievant to a Group I Written Notice.<sup>1</sup> In a document dated March 1, 2012, the agency requested the Department of Human Resource Management (DHRM) review the February 15, 2012 decision, alleging that the hearing decision was inconsistent with agency and state policy. DHRM responded on March 28, 2012, declining to disturb the decision. On April 4, 2012, this Department received a request for administrative review from the agency, indicating that DHRM failed to address the agency's issues raised in its March 1, 2012 administrative review request to DHRM, and as such, requested this Department review the hearing decision for alleged inconsistency with state or agency policy and the hearing officer's alleged inappropriate application of mitigating circumstances.

DISCUSSION

As set forth in Section 7 of the *Grievance Procedure Manual*, a hearing officer's original decision is subject to three types of administrative review. First, a request for reconsideration, generally based on newly discovered evidence or incorrect legal conclusions, must be addressed by the hearing officer. A request for review on the grounds of inconsistency with state or agency policy must be addressed by DHRM. Finally, a request for review on the grounds that the hearing decision does not comply with the grievance procedure must be addressed by this Department. Administrative review requests must be made in writing, and *received* within 15 calendar days of the date of the original hearing decision.<sup>2</sup> In this case, the February 15, 2012 hearing decision also advised the parties that any request they may file for administrative review to the hearing officer, DHRM, or EDR must be received by the reviewer within 15 calendar days of the date the original decision was issued.<sup>3</sup>

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<sup>1</sup> Decision of Hearing Officer, Case No. 9750 ("Hearing Decision"), Feb. 15, 2012, at 7.

<sup>2</sup> *Grievance Procedure Manual* § 7.2(a).

<sup>3</sup> Hearing Decision at 7-8.

Here, the hearing officer issued his original decision on February 15, 2012.<sup>4</sup> The agency submitted its request for administrative review to DHRM on March 1, 2012, however, the agency did not submit an administrative review request to this Department at that time. On April 4, 2012, the agency submitted a request for administrative review to this Department, which was 49 calendar days after the issuance of the hearing decision. The issue of mitigation could and should have been appealed within 15 days of the original hearing decision. Therefore, this Department finds that the agency's April 4, 2012 request for administrative review is untimely.

However, we are compelled to note that in its April 4, 2012 request for administrative review by this Department the agency alleges that "DHRM failed to address the issues raised" in the agency's March 1, 2012 request for administrative review and that [DHRM] "suggested that the review should be submitted to EDR." The Director of the Department of Human Resource Management ("DHRM") is the final authority regarding policy interpretation and her designee has issued a ruling in this matter.<sup>5</sup> To the extent that a party believes that the impact of a DHRM administrative review ruling on policy (or the impact of an EDR administrative review ruling on compliance with the grievance process) has caused the decision to be contradictory to law, 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, if the agency believes that DHRM has not fulfilled its duty under the law, the proper forum to raise that issue is with the circuit court in the jurisdiction in which the grievance arose.

#### 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 and any reconsidered hearing decisions following such review have been decided.<sup>6</sup> In this case, the decision became final when DHRM issued its administrative review on March 28, 2012. 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>7</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>8</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>4</sup> Hearing Decision at 1.

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

<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 *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E. 2d 319, 322 (2002).

<sup>9</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).