Issue: Misapplication of Policy (VSDP), Separation from State; Hearing Date: 11/17/09; Decision Issued: 03/20/09; Agency: JMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8957; Outcome: No Relief – Agency Upheld In Full; **Administrative Review: EDR Ruling Request received 04/07/09; EDR Ruling #2009-2274 issued 04/13/09; Outcome: Request untimely; Second Ruling Request received 04/21/09; EDR Ruling #2009-2288 issued 04/29/09; Outcome: No change – Request untimely; Administrative Review: DHRM Ruling Request received 04/07/09; DHRM Ruling issued 04/16/09; Outcome: Request untimely; Second Ruling Request received 04/21/09; DHRM Ruling issued 04/28/09; Outcome: No change – Request untimely.**

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8957

Hearing Date: November 17, 2008
Decision Issued: March 20, 2009

PROCEDURAL HISTORY

The Agency removed Grievant from employment because she transitioned from Short Term Disability status to Long Term Disability status. On July 23, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 23, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

James Madison University employed Grievant as a Food Technician III. She was responsible for operating a variety of kitchen equipment and ensuring quality and safety of food production at one of the Agency's food service locations. She had a working knowledge of kitchen equipment, food preparation techniques, and food merchandise display. She assisted in the development of menu items and specials.

Grievant was hard working and dedicated to the Agency. Rather than complaining about her medical condition she continued to work while experiencing pain. Grievant received an overall rating of Extraordinary Contributor on her September 2007 performance evaluation.[1]

On January 22, 2007, Grievant slipped on ice on a loading dock while at work. She landed hard on her right hip and also injured her right shoulder. The injury to her shoulder gradually healed. Her back and hip, however, remained problematic.

Grievant's injury was compensable under workers' compensation. She continued to work. On May 21, 2007, Grievant's medical provider placed restrictions on Grievant that she could stand for 3.5 hours and could sit as needed. In addition, Grievant was restricted to lifting no more than 20 lbs. On July 9, 2007, Grievant's medical provider changed her restrictions to permitting her to stand eight hours and to sit as needed while at work. On August 6, 2007, Grievant was also restricted from bending, pushing, or pulling while at work. On October 8, 2007, Grievant's medical provider added a restriction that she should not stand any longer than two hours at a time with a break of at least ten minutes. In addition, she could not perform repetitive work.

Grievant worked until November 16, 2007. She had surgery to her hip on November 20, 2007. Her worker's compensation benefits began November 20, 2007. Grievant's short term disability effective date was also on November 20, 2007.[2]

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[1] Grievant Exhibit 4.

[2] Grievant began receiving short term disability benefits on November 27, 2007 after a seven day waiting period.

On January 9, 2008, one of Grievant's medical providers wrote that Grievant was "struggling. She's still having a lot of pain and using a cane. *** We'll allow her to return to light duty February 1 and hopefully regular duty March 1. She works in a kitchen and it sounds like her job is rather physical."[3] On April 2, 2008, Grievant's medical provider specified that she would perform sedentary work only. That medical provider continued the sedentary work restriction on May 28, 2008 and July 9, 2008.

On April 30, 2008, her workers' compensation status ended.

On May 21, 2008, one of Grievant's medical providers diagnosed her with a "torn labrum of the right hip and a L4-5 annulus tear."[4]

Grievant continued to work for the Agency from February 1, 2008 through April 30, 2008 despite the pain she experienced and subject to medical restrictions. On May 2, 2008, Grievant spoke with the Workers' Compensation Coordinator and "talked about her back being the problem all along."[5]

Several Agency staff wanted Grievant to continue her employment with JMU despite her medical condition. They devised a plan to permit Grievant to use annual and sick leave in order to remain employed without transitioning to long term disability status. The objective was to retain Grievant in her short term disability status as long as possible. From May 1, 2008 through June 9, 2008, Grievant used approved annual leave. Grievant was to be permitted to take several periods of annual leave. These periods included: June 4, 2008 to June 22, 2008, June 25, 2008 to July 7, 2008 and July 26, 2008 to August 8, 2008.

Agency managers consulted with DHRM staff and were informed that they could not extend the time period for short term disability and delay transition to long term disability.

On June 23, 2008, the Benefits Administrator sent Grievant a memorandum stating:

> As you are aware, you were placed on leave effective May 1, 2008 in order for your JMU employment to continue. If you had not been placed on leave at that time, your employment would have ended on May 19 because you would have been transitioned to long-term disability on May 20. Once an employee is moved to long-term disability status, their employment with the University ends.

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[3] Agency Exhibit 11.

[4] Agency Exhibit 15.

[5] Agency Exhibit 13.

> All documentation was completed by our office and submitted to the [Third Party Administrator] and the Workers Compensation Administrator. During an audit of your claim by [the Workers Compensation Administrator], we were contacted by [Ms. H]. That discussion led to the discovery by [the Workers Compensation Administrator] that your claim was processed without full coordination of the dates of your return to work conditions, reduced schedule and modified duty as required by VSDP. In short, because of a combination of your claim, as well as your days on a reduced schedule and modified duty, you are automatically transferred into long-term disability status effective May 20.
>
> This means that, as of May 20, 2008, you would no longer be an employee of James Madison University and your status with the Commonwealth of Virginia and the Virginia Retirement System has been changed to long-term disability participant.
>
> However, as a gesture of good faith, dining services will hold your position open for you – should you be able to return to full-time, full-duty – until July 10. You disclose previously that you have a doctor's appointment on July 9. Should you be released at that time to return to full-time, full-duty, you are expected to return to work on July 10. However, if you are unable to return full-time, full-duty to work on July 10, your long-term disability status continues and your employment with JMU is terminated effective May 19, 2008.[6]

On July 9, 2008, Grievant's health care provider continued to restrict Grievant to sedentary work only. Grievant was not able to return to work full-time, full-duty.[7] Grievant transitioned to Long Term Disability and became separated from employment with the Agency.

CONCLUSIONS OF POLICY

The *Virginia Sickness and Disability Program* arises from *Va. Code § 51.1-1100 et seq.* "Disability" means a partial disability[8] or total disability.[9] Disabled State

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[6] Agency Exhibit 5.

[7] "Full-duty" means that an employee can complete all of the essential job duties of his or her normal position. See, DHRM VSDP, An Information Guide.

[8] "Partial disability" exists during the first twenty-four months following the occurrence or commencement of an illness or injury when an employee is earning less than eighty percent of his predisability earnings and, as a result of an injury or illness, is (i) able to perform one or more, but not all, of the essential job functions of his own job on an active employment or a part-time basis or (ii) able to perform all of the essential job functions of his own job only on a part-time basis. *Va. Code § 51.1-1100*.

employees may be entitled to a Short Term or Long Term Disability benefit. "Disability benefit" means income replacement payments payable to a participating employee under a short-term or long-term disability benefit program ….[10]

Va. Code § 51.1-1110(A) provides:

> Short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period. The waiting period shall commence the first day of a disability or of maternity leave. If an employee returns to work for one day or less during the seven-calendar-day waiting period but cannot continue to work, the periods worked shall not be considered to have interrupted the seven-calendar-day waiting period. Additionally, the seven-calendar-day waiting period shall not be considered to be interrupted if the employee works 20 hours or less during the waiting period. Short-term disability benefits payable as the result of a catastrophic disability or major chronic condition shall not require a waiting period.

Va. Code § 51.1-1112 provides:

> A. Long-term disability benefits for participating employees shall commence upon the expiration of the maximum period for which the participating employee is eligible to receive short-term disability benefits under § 51.1-1110. If an employee returns to work for 14 or fewer consecutive calendar days during the period in which he is receiving short-term disability benefits and cannot continue to work, the periods worked shall not be deemed to have interrupted the short-term disability benefits period. However, if the cause of the participating employee's disability is a major chronic condition, as defined by the Board or its designee, the short-term disability benefits period is cumulative from the first day of the period and can be interrupted by periods of active employment.

The Department of Human Resource Management (DHRM) is responsible for creating policy governing the VSDP. DHRM Policy 4.57, *Virginia Sickness and Disability Program* defines disability as:

> A medical condition that renders an eligible employee partially or totally incapable of performing the duties of his/her job. After the period of short-term disability, the condition must render the eligible employee unable to

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[9] "Total disability" exists during the first twenty-four months following the occurrence or commencement of an illness or injury if an employee is unable to perform all of his essential job functions or (ii) after twenty-four months following the occurrence or commencement of an illness or injury if an employee is unable to perform any job for which he is reasonably qualified based on his training or experience and earning less than eighty percent of his predisability earnings. *Va. Code § 51.1-1100.*

[10] *Va. Code § 51.1-1100.*

perform the main duties of any job for which he/she is reasonably qualified based on training or experience.

DHRM Policy 4.57 defines Short Term Disability Benefits as:

> Commences upon the expiration of a 7 calendar day waiting period, and provides replacement income for a maximum of 125 work days at either 100%, 80% or 60% for defined periods of time based on an employee's total months of state service. If the disability/illness is deemed catastrophic, the employee would receive 100% or 80% income replacement and the waiting period would be waived.[11]

DHRM Policy 4.57 defines Long Term Disability Benefit as:

> An income replacement benefit that commences upon the expiration of a 7 calendar day waiting period and 125 work days of receipt of STD benefits (unless catastrophic or major chronic), and provides income replacement in an amount equal to 60% of participating employee's creditable compensation or 80% income replacement if the disability has been designated catastrophic.

Although not expressly set forth in statute, the DHRM has created employee benefits entitled Short Term Disability - Working (STD-W) and Long Term Disability – Working (LTD-W).

DHRM Policy 4.57 does not define Short Term Disability - Working. DHRM's Information Guide explains that:

> STD-W is when an employee whose claim has been accepted by the TPA as a qualifying condition continues to work part-time, with or without modifications to his or her essential job functions. VSDP recognizes partial disabilities as qualifying events; therefore, some employees might be able to work while in STD (STD-W). The term "STD-W" is not an official term of the Program or Policy, but in practical terms, an employee who works during an approved VSDP condition can be referred to as STD-W.

DHRM Policy 4.57 defines Long Term Disability – Working as:

> An income replacement benefit that commences upon the expiration of a 7 calendar day waiting period and 125 work days of receipt of STD benefits (unless catastrophic or major chronic), and allows employees to continue to work for their agencies from STD working status into LTD-W. In LTD-W the employee must work at least 20 hours or more per workweek in his

[11] Short term disability benefits end when an employee begins receiving Long Term Disability benefits.

own position. Qualified part-time employees continue to work for their agency when moving from STD into LTD-W for 20 or more hours per week.

Under DHRM Policy 4.57, the following are the effects of LTD and conditions that must be met to receive the benefit.

- Employees in LTD are considered to be inactive employees of the Commonwealth. Return to pre-disability position is not guaranteed. Once in LTD, employees cannot return to LTD-W.
- Employees must apply for social security disability income benefits immediately upon going into LTD unless otherwise instructed by the TPA. Within 60 days of being placed in LTD, the TPA must receive notification that application for Social Security Disability Insurance Benefits (SSDIB) has been made or VSDP benefits will be terminated.
- Employees are separated in PMIS (PSE139) when they are released by their LTP to return to full-time/full-duty without restrictions and their pre-disability positions are no longer available.

LTD-W is intended to be a transitional status to help an employee return to full employment, and it should be approved for only a short time, not on a continuing basis. LTD-W was established to help employees who are working with restrictions in STD, and who are expected to be able to return fully to work ***soon*** after transitioning to LTD. If it appears that an employee's restrictions will prevent a full return to work within a short time, the agency can determine that the employee must revert to LTD.[12]

Grievant met the standard for an employee who could be placed on Short Term Disability status. Although Grievant was on STD, she continued to work. Thus, Grievant transitioned to STD-W status.[13] Because Grievant was in STD-W status when the time period for her STD benefits expired, she was eligible to transition to LTD-W or to LTD. The Agency has sole discretion as to whether an employee on STD-W moves to LTD-W or to LTD status. In this case, the Agency elected to change Grievant's status to LTD. One Agency witness testified that the Agency does not afford its employees the option of LTD-W and that decision was made in 1997 by Agency managers. When Grievant changed from STD-W to LTD, her employment with the Agency ended. Although the Agency had the option of keeping Grievant's job open

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[12] See, DHRM VSDP, An Information Guide.

[13] The Agency argued that Grievant was not on STD-W because on the 125th day of STD she was not working at the Agency. Grievant had been prohibited from working during a 90 day period to enable her to recover fully and return to work. The Hearing Officer will consider Grievant as being in STD-W status because she was working for many weeks (often full time) while on STD and was capable of continuing to work if the Agency has not prevented her from doing so.

once she entered LTD, the Agency was not obligated to do so by DHRM policy. The Agency has complied with DHRM policies governing STD and LTD.

Grievant contends that the Employee Work Profile (EWP) that was sent to the Third Party Administrator was not her EWP in effect at the time she was working. Grievant's disability status depends primarily on her medical condition and not on which EWP the Third Party Administrator received. The outcome of this case is not affected by which EWP the Agency sent to the Third Party Administrator.

Grievant argues the Agency should have permitted a plan to go into effect that would have delayed her transition from STD-W to LTD. The transition from STD or STD-W to LTD is automatic and based on the passing of the time period for STD. To the extent some of the Agency's employees attempted to delay the onset of LTD, it was harmless error because Grievant suffered no adverse consequences from that Agency error.

Americans with Disabilities Act

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination against otherwise qualified persons with disabilities.[14] Employees may not be discriminated against regarding many aspects of employment including, for example, hiring, transfer, demotion, layoff, termination, rehiring, and any other term, condition, or privilege of employment.[15]

The Agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[16]

A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[17]

An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such

[14] DHRM Policy 2.05.

[15] 42 U.S.C. § 12112. 29 CFR § 1630.4(b)(i). (Although no federal agency has been given authority to issue regulations interpreting the Americans with Disabilities Act, the EEOC has done so.)

[16] 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

[17] 29 CFR § 1630.2(m).

an impairment.[18] Under the first option, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."[19] "Major life activities[20] mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[21] An individual must also show that the limitation on a major life activity is substantial.[22] "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[23] The existence of a disability must be determined on a case-by-case basis.[24]

In this case, the Agency did not conduct an analysis of whether Grievant was a qualified individual with a disability. The DHRM VSDP, An Information Guide suggests:

> Conditions that qualify under the ADA should be carefully reviewed for required accommodations, but no employee should expect that he or she can continue to work indefinitely with restrictions. Any employee working with restrictions must have their continuing need for restrictions periodically reviewed (consistent with the agency's Return to Work Policy). The agency should communicate the timetable for review when the employee is allowed to return with restrictions, and *adhere to its schedule.* (See Section 2: ADA, "Light Duty" and VSDP.)

The Agency was presented with sufficient information to enable it to identify as an issue for its consideration whether the ADA should be applicable to Grievant's circumstances. For example, Grievant had experienced an injury requiring extensive and continued medical treatment of which the Agency was aware. Grievant endured surgeries of which the Agency was aware. Grievant may have an impairment necessary to establish a disability. In addition, walking, sitting, standing, and reaching are major life activities under the ADA. Grievant presented the Agency with notes from her medical provider indicating she had some restrictions regarding these activities. It is unclear whether her

[18] DHRM Policy 2.05. 42 U.S.C. § 12102(2).

[19] Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

[20] Other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 CFR § 1630.2(h)(Appendix).

[21] 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

[22] 42 U.S.C. § 12102(2)(A).

[23] Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

[24] Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

restrictions were substantially limited by her possible impairment. Furthermore, Grievant has demonstrated she has the skill, education and experience for her position. It is unclear whether she can perform the essential functions of her job with a reasonable accommodation.[25] Although the evidence before the Hearing Officer is lacking in sufficient detail for the Hearing Officer to reach a conclusion regarding whether Grievant is a qualified individual with a disability, the evidence is sufficient for the Hearing Officer to conclude that the Agency should have considered Grievant's circumstances under the ADA prior to her removal. Accordingly, the Hearing Officer will remand this matter to the Agency for the Agency to evaluate whether Grievant was a qualified individual with a disability under the ADA at the time of her removal.

DECISION

For the reasons stated herein, Grievant's request for relief regarding her transition from Short Term Disability to Long Term Disability is **denied**. The Agency is ordered, however, to evaluate whether Grievant is a qualified individual with a disability under the Americans with Disabilities Act.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

    Director
    Department of Human Resource Management
    101 North 14th St., 12th Floor
    Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

[25] It is unclear whether a reasonable accommodation exists. Given Grievant's strong work ethic, however, there may be a reasonable accommodation that might not be suitable for other employees.

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[26]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[26] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

April 16, 2009

RE: **Grievance v. James Madison University**
Case No. 8957

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), a request for review must be received by the reviewing entity within 15 calendar days from the date the original decision was issued.

The evidence supports that the original hearing decision was issued on March 20, 2009. Our records show that your request was received by the Department of Human Resource Management on April 7, 2009. The due date for receipt of your request was April 4, 2009. However, because April 4, 2009 was on a Saturday, as per the Department of Employment Dispute Resolution, your due date became the first work day, which was Monday, April 6, 2006. Thus, this Agency received your request for an administrative review one day beyond the permissible time period. Therefore, we have no authority to conduct the administrative review you requested.

Sincerely,

Ernest G. Spratley

April 28, 2009

RE: **<u>Grievance v. James Madison University</u>**
Case No. 8957

Dear :

I am writing in response to your letter dated April 20, 2009, in which you challenge this Department's decision (dated April 16, 2009) to deny your request for an administrative review of the subject case because it was not submitted to this Department in a timely manner. In support of your challenge, you stated, in part, "I am in receipt of your letter (postmarked 4-14-09 and received 4-17-09) indicating that my request for an administrative review was received too late to be accepted. After waiting from November 17, 2008 until March 21, 2008 for YOUR decision, I cannot believe that my request was denied based on receipt of mail (which is totally out of my control!)" In addition, you submitted a chronology which details the steps you took in pursuing relief through the grievance process.

I find it necessary to list the guidelines to be followed when requesting an administrative review. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the original decision is issued if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In each instance, where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent and must be received timely in this Agency. In the instant case, the records show that the hearing officer issued his decision on March 20, 2009, and your request was received at this Agency on April 7, 2009. Contrary to your inference, the Department of Human Resource Management was not involved in either the grievance procedure or in determining the outcome of your case. Your request for an administrative review was received beyond the time period for accepting your request. Similarly, in a ruling by the Department of Employment Dispute Resolution (DHRM) dated April 8, 2009, you were

informed that your request to that agency for an administrative review was not timely. A copy of that ruling was received by this Agency on April 16, 2009, and our decision was mailed to you on that same date.

Please be advised that the issue you raised is one of compliance. This Agency does not have the authority to waive the 15-day time period for receiving and honoring requests for administrative reviews. It is the responsibility the grievant to submit the request to the relevant entities (i.e., the hearing officer, EDR or DHRM) within 15 days of the date of issuance of the original hearing. Please be informed that if you wish to challenge this determination, you may request a compliance ruling from the Director of EDR regarding timeliness.

Sincerely,

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services