

Issue: Second Administrative Review in Case No. 10879; Ruling Date: March 1, 2017;
Ruling No. 2017-4505; Agency: Virginia Commonwealth University; Outcome:
Remanded for Clarification.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2017-4505
March 1, 2017

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review for a second time the hearing officer's decision and remand decision in Case Number 10879. For the reasons set forth below, the decision is remanded to the hearing officer for further clarification.

The hearing officer's findings in his decision in Case Number 10879,² as recounted in EDR's first administrative review in this case (EDR Ruling Number 2017-4462), are hereby incorporated by reference. In the hearing officer's reconsideration decision, the agency was ordered to "**reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue."³ After having been informed by the agency that, under this directive, it must retroactively reinstate the grievant's prior health benefits and collect the employee portion of the premiums from her backpay, the grievant requests that the hearing officer review his decision in this case in order to allow her to waive health insurance coverage for the months during which she obtained alternate insurance.

DISCUSSION

By statute, EDR 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, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁵

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

² Decision of Hearing Officer, Case No. 10879, December 5, 2016 (citations omitted).

³ Reconsideration Decision, Case No. 10879, February 8, 2017, at 1.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

DHRM Policy 1.60, *Standards of Conduct*, provides that “[i]f an agency reinstates a terminated employee with back pay, unless otherwise directed in the hearing officer’s decision, health benefits must be made effective retroactive to the date of termination.”⁶ In this case, the agency indicates that, following the grievant’s reinstatement by the hearing officer, it has complied with this mandate. However, the grievant asserts that, during the period of time in which she obtained other health insurance, she wishes to waive retroactive coverage. DHRM Policy 1.60 grants hearing officers the authority to “exclude back benefits for health insurance coverage if the employee was enrolled in other coverage during a period of suspension or termination and awarding back benefits would present undue financial hardship to the employee. The employee must provide proof of the other coverage.”⁷ In this instance, the grievant wishes to waive retroactive benefits and requests that the hearing officer reconsider his decision with respect to retroactive health benefits coverage.

As it does not appear that the grievant had opportunity to address this issue at the hearing, EDR finds it appropriate to remand the decision to the hearing officer such that he may re-open the hearing record in order to accept evidence solely regarding the issue of retroactive health insurance coverage. The hearing officer is directed to accept and consider any additional evidence that the parties may wish to present, testimonial or otherwise, pertaining to the period of time during which the grievant had been terminated from the agency and the costs of any alternate insurance she may have obtained. The hearing officer should then issue a remand decision that addresses only whether back benefits for health insurance coverage should be excluded from his order to reinstate the grievant, pursuant to DHRM Policy 1.60.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration as set forth above. 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.⁸ Within thirty 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.⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁶ DHRM Policy 1.60, *Standards of Conduct*, (D)(3)(b).

⁷ DHRM Policy 1.60, *Standards of Conduct*, (F)(2)(d).

⁸ *Grievance Procedure Manual* § 7.2(d).

⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁰ *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).