

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: April 4, 2018;
Ruling No. 2018-4699; Agency: Department of Social Services; Outcome: Grievant
in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

COMPLIANCE RULING

In the matter of the Virginia Department of Social Services
Ruling Number 2018-4699
April 4, 2018

The Virginia Department of Social Services (the “agency”) seeks a ruling concerning EEDR Case Numbers 11073, 11076.

FACTS

The two grievances at issue are 1) a June 2, 2017 grievance challenging the agency’s issuance of a Group I Written Notice for alleged unsatisfactory performance, and 2) a July 20, 2017 grievance challenging the agency’s issuance of another Group I Written Notice, with termination, for alleged continued unsatisfactory performance. Both matters were qualified for hearing in full. On August 3, 2017, EEDR issued Ruling No. 2018-4597, consolidating these matters for a single hearing.

Subsequently, the grievant and the agency agreed to temporarily suspend the grievance hearing process, due to the grievant’s medical needs at the time. The grievant obtained new employment with a different state agency on or about July 25, 2017. Because of the termination, the grievant was considered by the new employing agency to have a “break in service” which would require her to serve a new probationary period. Neither party contacted EEDR to request that the grievances proceed to hearing until on or about February 13, 2018, when the grievant contacted EEDR via email regarding the status of her case. On March 27, 2018, EEDR sent correspondence appointing the consolidated cases to a hearing officer, effective March 30, 2018.

On March 29, the agency requested a ruling from EEDR, asserting that the case should be closed, as no live issues remain for the hearing officer to adjudicate. The agency argues that the Written Notices have become inactive due to the grievant’s break in service and re-employment with a new agency, in which she is presently serving a new probationary period. Thus, the agency claims that the issues presented in the grievances are now moot.¹

DISCUSSION


By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices, terminations, suspensions, demotions, transfers and assignments resulting from formal

¹ To the extent that the agency also argues that the grievances should be closed due to the grievant’s failure to advance them once she returned to work, EEDR finds there exists no basis for such a conclusion.

discipline) automatically qualify for a hearing.² However, EEDR has recognized that in some cases a hearing may be inappropriate if an issue has become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief.³ In this instance, in support of its argument that the issues in this case are moot, the agency points to DHRM Policy 1.60, *Standards of Conduct*, which indicates that Written Notices “expire when an employee voluntarily or involuntarily separates provided that re-employment with the same or different agency occurs after a formal break in service and a new probationary period is required.”⁴ Because the grievant has obtained new employment and is serving a new probationary period, the agency asserts that the Written Notices have expired and thus do not constitute an active matter to be challenged at hearing.

In this instance, the break in the grievant’s service exists solely due to her termination on June 23, 2017. She timely initiated a grievance to challenge the termination; and, as she has not been reinstated to employment with the agency, the issue remains live and shall proceed to a hearing. The fact of her subsequent re-employment with the Commonwealth has no effect on whether either grievance may proceed. At the hearing, the agency will have the burden of proving that the Written Notices were “warranted and appropriate under the circumstances.”⁵ The employee will have the burden of raising and establishing any affirmative defenses, as well as any evidence of mitigating circumstances.⁶

Accordingly, Case Numbers 11073 and 11076 may proceed forward as described above. As EEDR has already appointed a hearing officer to hear these consolidated matters, we will now direct the hearing officer to schedule the pre-hearing conference call to establish a date and location for the hearing. EEDR’s rulings on matters of compliance and qualification are final and nonappealable.⁷



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

² Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1(a).

³ See EDR Ruling No. 2014-3925.

⁴ DHRM Policy 1.60, *Standards of Conduct*.

⁵ *Grievance Procedure Manual* § 5.8.

⁶ *Id.*

⁷ Va. Code § 2.2-1202.1(5).