

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10740; Ruling Date: March 29, 2016; Ruling No. 2016-4325; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2016-4325
March 29, 2016

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10740. For the reasons set forth below, EDR remands the decision to the hearing officer for further action consistent with this ruling.

FACTS

The grievant was employed as an Administrative and Office Specialist III by the Department of Behavioral Health and Developmental Services (“agency”).¹ On September 22, 2015, the agency advised the grievant that her position would be abolished effective October 25, 2015.² On October 22, 2015, the agency issued the grievant a Group III Written Notice with termination for alleged wrongful destruction of documents.³ The grievant timely grieved the disciplinary action.⁴ A hearing was subsequently held on February 11, 2016.⁵ On March 2, 2016, the hearing officer issued a decision rescinding the Written Notice and restoring the grievant “to her status prior to removal,” but finding that there exists “no basis to reinstate Grievant since she had been placed on lay off status. There is no basis to award attorney’s fees since Grievant cannot be reinstated.”⁶ The grievant has now requested administrative review of the hearing officer’s decision.

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”⁷ If the hearing

¹ See Decision of Hearing Officer, Case No. 10740 (“Hearing Decision”), March 2, 2016, at 2; *see also* Agency Exhibit 2 at 1.

² Agency Exhibit 3 at 1.

³ Agency Exhibit 1 at 1. During the period from the conclusion of her workday on October 7, 2015 through her termination on October 22, 2015, the grievant used accrued annual and layoff leave. *See* Agency Exhibit 2 at 2.

⁴ Agency Exhibit 2; *see* Hearing Decision at 1.

⁵ *See* Hearing Decision at 1.

⁶ *Id.* at 1, 4.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁸

The grievant asserts that the hearing officer erred in finding that because the grievant had been laid off, she could not be reinstated and thus cannot be awarded attorney's fees.⁹ She argues that in restoring the grievant to her status prior to removal,¹⁰ the hearing officer "necessarily" reinstated the grievant to her former position or an equivalent position.¹¹

As the hearing officer properly recognized, where an employee has prevailed at a hearing involving termination, the employee should be returned to her status prior to the disciplinary action.¹² At the time of the grievant's termination, she was employed as an administrative and office specialist at Facility X, although she was using accrued annual and layoff leave.¹³ Thus, upon the hearing officer's finding that the termination was not warranted, there was no longer any agency action separating the grievant until the effective date of her layoff on October 25, 2015. Consequently, to effectuate the hearing officer's directive that the grievant be returned to her status prior to her removal, the grievant was effectively reinstated for the period between her termination, which is now rescinded, and her layoff date. After the grievant is deemed to have been reinstated to her previous position, she then stands in the same position as she would have stood absent the disciplinary action—and as such, she is subject to the layoff and entitled to any layoff and/or severance benefits she would otherwise have received. Because returning the grievant to her previous status requires an effective reinstatement to her previous position (even if she never physically returns to the workplace due to her subsequent layoff), the grievant is entitled to attorney's fees under Section 7.2(e) of the grievance procedure. The grievant is not, however, entitled to continued employment in her previous position, because the layoff acted as an unrelated, intermediary cause of her loss of position.

As the hearing officer erred in finding that the grievant was not entitled to attorney's fees, the hearing decision is remanded to the hearing officer for further action consistent with this ruling.

CONCLUSION AND APPEAL RIGHTS

The hearing decision is remanded to the hearing officer. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ See Hearing Decision at 4. To the extent that the grievant seeks an award of "costs" as well as attorney's fees, this relief is not available under Section 7.2(e) of the grievance procedure, and EDR will not address this claim further.

¹⁰ Hearing Decision at 4.

¹¹ The grievant also argues, as an alternative theory, that the grievance procedure is inconsistent with the Virginia Code, in that it improperly restricts the award of attorney's fees. As EDR determines that the hearing officer erred in not awarding fees, there is no need to reach this alternative argument.

¹² In this case, the agency has not sought administrative review of the hearing officer's decision.

¹³ See Agency Exhibit 2. The grievant's layoff was not to become effective until October 25, 2015. See Agency Exhibit 3.

the original decision).¹⁴ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.¹⁵ 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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸



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¹⁴ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹⁵ See *Grievance Procedure Manual* § 7.2.

¹⁶ *Id.* § 7.2(d).

¹⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).