

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10140; Ruling
Date: September 12, 2013; Ruling No. 2014-3674A; Agency: Old Dominion
University; Outcome: Hearing Decision in Compliance.



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

AMENDED ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2014-3674A
September 12, 2013

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 10140.¹

FACTS

The grievant was previously employed by Old Dominion University (the “University”). On June 12, 2013, the University issued the grievant a Group III Written Notice with termination, effective June 11, 2013. He challenged the disciplinary action through a dismissal grievance initiated on July 1, 2013. A hearing officer was appointed on July 18, 2013, and a pre-hearing conference was held on July 24, 2013.² On July 25, 2013, the University advised the hearing officer that the Group III Written Notice had been removed and asked the hearing officer to dismiss the grievance.³ Effective July 1, 2013, the grievant had entered disability retirement. After hearing arguments from both sides, the hearing officer dismissed the grievance on August 1, 2013.⁴ The grievant now seeks administrative review of the hearing officer’s decision to dismiss the grievance.

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.”⁵ 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 a party; the sole remedy is that the action be correctly taken.⁶

¹ EDR previously issued a ruling on this matter on September 5, 2013. However, based on additional information submitted by the grievant, it was determined that errors were made in that version as to the facts and conclusions. Therefore, this amended ruling will replace the prior September 5, 2013 ruling.

² Order of Dismissal, Case No. 10140 (“Decision”), Aug. 1, 2013, at 1.

³ *Id.* at 2.

⁴ *Id.*

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

⁶ *See Grievance Procedure Manual* § 6.4(3).

In this case, the grievant asserts that the hearing officer acted outside her authority in dismissing his grievance without a hearing. To the extent the grievant argues that a hearing officer may never dismiss a grievance over a grievant's objection, we disagree. Although the power to dismiss is not expressly stated, we believe that such power clearly falls within the authority granted to hearing officers by both the grievance statutes and the *Grievance Procedure Manual* to rule on procedural requests, to render written decisions and provide appropriate relief, and to take any other necessary actions.⁷ This power is not without limitation, however.

Dismissal can be appropriate when it is clear that a hearing is unnecessary because the underlying dispute has in fact been resolved in full and the grievant has been returned to the same position in which he or she would have been but for the agency action being challenged, leaving nothing for a hearing to address. Thus, in a situation in which a grievant challenged a Group III Written Notice with termination and the agency unilaterally rescinded the disciplinary action and reinstated the grievant with back pay and benefits, dismissal of the grievance without hearing would in many cases be an appropriate result. In such cases, the grievant would already have been provided with the only relief a hearing officer is entitled to grant⁸ and no controversy would exist under the grievance procedure that could be remedied by the hearing officer.⁹

In this case the University rescinded the Group III Written Notice and termination, but did not return the grievant to employment, as the grievant went on disability retirement after the issuance of the Written Notice. Based on the attachments to the hearing officer's order, the University changed the grievant's work record to reflect separation due to disability retirement rather than termination and paid him from his sick leave balances for the period from his termination to his retirement. Accordingly, the issues grieved in this case, the Group III Written Notice and termination, have been resolved to the extent they can be under the grievance procedure and no further relief could be awarded by the hearing officer. Although the grievant may still dispute the basis for the University's original decision to terminate him or other surrounding issues, those matters are either not the subject of this grievance¹⁰ or are unavailable to be remedied in a grievance hearing, i.e., through an award of damages.¹¹

⁷ *Id.* at § 5.7; *see also* Va. Code § 2.2-3005(C). The grievant relies upon EDR Ruling No. 2002-191 in challenging the hearing authority's authority. That case is inapposite, however, as it involves a hearing officer dismissing a case on *res judicata* grounds after it had been qualified by a circuit court.

⁸ *See Grievance Procedure Manual* §§ 5.9(a), (b).

⁹ Courts apply a similar, if not identical, principle that "a case is moot and must be dismissed when the case or controversy that existed between litigants has ceased to exist:

Whenever it appears or is made to appear that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded.

E.C. v. Va. Dep't of Juvenile Justice, 283 Va. 522, 530, 722 S.E.2d 827, 831 (2012) (quoting *Franklin v. Peers*, 95 Va. 602, 603, 29 S.E. 321, 321 (1898)).

¹⁰ Decision at 1 – 2.

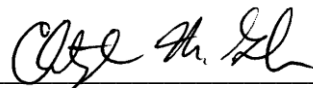
¹¹ *Grievance Procedure Manual* § 5.9(b).

Given what was at issue in this grievance and based on the record provided with the hearing officer's order, EDR cannot find that there remain any live issues the hearing officer could address. Because this grievance is essentially moot under the grievance procedure, the hearing officer's dismissal was an appropriate result. Furthermore, given that the basis of the grievant's separation from state service is now a voluntary disability retirement, the grievant could be viewed as no longer having access to the grievance procedure.¹² Therefore, we have no basis to disturb the result reached by the hearing officer in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing officer's order/decision in this case. EDR's rulings on matters of compliance are final and nonappealable.¹³ 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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Although this case is procedurally unique from many grievance hearings, it is not EDR's role to determine whether either party has appeal rights following the decision of the hearing officer to dismiss this case. We leave that determination to the appropriate circuit court should either party seek such an appeal. To the extent the dismissal is appealable to circuit court, the hearing decision is now final as of the date of this ruling, which begins the 30 calendar day period for filing an appeal.



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¹² See *Grievance Procedure Manual* § 2.3. The grievant's dismissal grievance is dated the same day as the effective date of his disability retirement, although the grievant had submitted the retirement paperwork in April 2013, far in advance of the agency's notification of intent to terminate his employment. In that way, this case would be distinguished from a case in which a grievant submits retirement paperwork *after* being terminated. In such a case, the agency's rescission of the termination would not necessarily resolve the case as the grievant may not have opted for retirement had he/she not been terminated.

¹³ See Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).