

Issue: Compliance/conduct of hearing; Ruling Date: November 13, 2002; Ruling #2002-191; Agency: Department of Corrections; Outcome: hearing will be conducted based on circuit court decision.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2002-191
November 13, 2002

The grievant has requested a compliance ruling in the February 26, 2002 grievance (case #5426) that he initiated with the Department of Corrections (the agency). The grievant claims that the hearing officer's written decision and failure to conduct a hearing does not comply with the grievance procedure. Specifically, the grievant claims that under the Grievance Procedure Manual, a hearing officer does not have the authority to grant a motion to dismiss or override a court order.

FACTS

On January 28, the grievant filed a grievance challenging a Group III Written Notice with recommendation for termination received on January 23, 2002. On January 29, he received a formal letter of termination, effective February 1, based on the recommendation in the January 23 Written Notice. On February 26, he initiated a second grievance, challenging the February 1 termination.

The January 28 grievance proceeded to hearing before an administrative hearing officer on March 15. The hearing officer upheld the Written Notice and the recommended removal.¹ On March 27, the grievant requested another hearing on his February 1 termination, this one based on the February 26th grievance. DOC initially qualified the grievance for a hearing, then rescinded the qualification after the hearing officer issued his decision in the January 28th grievance upholding the discipline and recommended termination. The grievant requested qualification of the February 26th grievance from this Department on the issue of termination, on the basis that the second grievance had never been consolidated with his earlier grievance. On June 5, 2002, this Department denied qualification of the February 26th grievance based on the principles of finality and *res judicata*.² Subsequently, the grievant appealed this Department's denial of qualification. The circuit court, by letter ruling dated August 27, 2002, held that "[s]ince neither party requested consolidation of the two grievances and since the Court cannot determine from the record before it that the concerns of the second grievance were

¹ See Decision of Hearing Officer, April 11, 2002.

² See Qualification Ruling of Director No. 2002-074, June 5, 2002.

addressed, it is the Court's opinion that [the grievant] should be given a hearing on the second grievance." Consequently, on September 17, 2002, a hearing officer was appointed to hear the February 26th grievance.

Thereafter, the agency submitted to the hearing officer a Motion to Dismiss the February 26th grievance, on the basis that the facts at issue had been previously adjudicated by another hearing officer.³ On October 2, 2002, the grievant submitted a written response to the Motion to Dismiss.⁴ The following day a telephonic pre-hearing conference was held in order to afford both parties the opportunity to present oral argument on the dismissal issue.⁵ In an October 4, 2002 written decision, the hearing officer granted the agency's Motion to Dismiss,⁶ on the basis of res judicata. Consequently, no hearing was held on the February 26th grievance.

DISCUSSION

By statute, this Department 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 "In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR."⁸ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁹

Under the grievance procedure, if the Director of this Department rules that a grievance does not qualify for hearing, the employee may appeal the decision to the circuit court.¹⁰ "The court may affirm the decision of the Director or may reverse or modify the decision."¹¹ The circuit court's decision is final and nonappealable.¹² Grievances qualified by the circuit court "shall advance to a hearing that shall be the final step in the grievance procedure."¹³ "The hearing must be tape recorded verbatim to create a record should there be an administrative review or judicial review of the

³ See Decision of Hearing Officer, October 4, 2002.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Va. Code § 2.2-1001(2), (3), and (5).

⁸ See *Grievance Procedure Manual* §6.4, page 18.

⁹ See *Grievance Procedure Manual* § 6.4(3), page 18.

¹⁰ See *Grievance Procedure Manual* §4.4, page 12.

¹¹ See Va. Code § 2.2-3004(E).

¹² *Id.*

¹³ See Va. Code § 2.2-3003(H) (emphasis added).

decision.”¹⁴ The hearing officer is limited to providing relief only for those issues qualified for hearing.¹⁵

In the present case, the grievant’s February 26th grievance was qualified for hearing by the circuit court. Subsequently, a hearing officer was appointed and the normal preparations for a hearing commenced. However, prior to an actual hearing, the hearing officer dismissed the grievance on the basis of *res judicata*. As such, no record was created for future potential administrative or judicial review of the decision. Furthermore, while this Department had indeed ruled that the February 26th grievance did not qualify for a hearing due to *res judicata*, a circuit court determined that the grievance qualified for a hearing. Under the grievance statutes and procedure, once a grievance is qualified for hearing, the grievance “shall advance to hearing” and neither this Department nor the hearing officer has the authority to deny the grievant a hearing. Accordingly, this Department directs the hearing officer to conduct a hearing on the record, in compliance with the court’s August 27, 2002 order. This ruling in no way precludes the application of collateral estoppel to this case at the hearing on the record.

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¹⁴ See *Rules for Conducting Grievance Hearings*, page 6.

¹⁵ See Va. Code § 2.2-3005(6) and *Rules for Conducting Grievance Hearings*, page 9.