

Issue: Appeal Review Ruling of Director/Agency request to appeal; Ruling Date: April 25, 2003; Ruling #2003-084; Agency: Department of Transportation; Outcome: Agency out of compliance/appeal not timely.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling No. 2003-084
April 25, 2003

Pursuant to Va. Code 2.2-3006(B), the Virginia Department of Transportation (VDOT or agency) seeks approval from the Director of this Department to appeal the final hearing decision in Case No. 5654 on the basis that it is contradictory to law.

The Grievance Procedure Manual requires that an agency request approval to appeal from this Department within 10 calendar days of issuance of the final hearing decision.¹ In this case, the original hearing decision became a final hearing decision on March 24, 2003.² Accordingly, the agency was required to request approval to appeal within ten calendar days of March 24th, which was April 3, 2003. The agency's request was not made until April 21, 2003, well beyond the 10-calendar day period.

The only remaining question is whether there was "just cause" for the agency's delay.³ The agency explained that the reason for the delay was that "[t]he employee relations staff believed that a 30 day deadline was in effect." This Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.⁴ Likewise, it is incumbent on agencies to know their responsibilities under the grievance procedure. Indeed, the hearing officer's original

¹ *Grievance Procedure Manual* § 7.3(a), p. 20.

² An original hearing decision becomes a final hearing decision when one of two things occur: (1) the ten calendar day period for filing an administrative review has expired and neither policy has filed such a request; *or* (2) all timely administrative reviews have been decided and the hearing officer has issued a revised decision (if so ordered). *Grievance Procedure Manual* § 7.2(d), p. 20. In this case, the original decision was issued on March 12, 2003. In that decision, the hearing officer reinstated the grievant, who had received a Group III Written Notice with discharge for allegedly testing positive for illegal drugs. The hearing officer found that the agency had not carried its burden of proof because it had not produced evidence of a proper chain of custody of the grievant's urine sample. The agency requested the hearing officer to reconsider his decision and provided chain of custody evidence. On March 24th, the hearing officer issued a reconsideration opinion in which he affirmed his earlier decision, holding that the additional custody evidence was not "newly discovered" evidence in that it had been in existence at the time of hearing, when it could have been presented.

³ "Just cause" is defined as a "reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual* § 9, page 24.

⁴ See, e.g., EDR Rulings 2002-202; 2002-159; 2002-057; 2001-145; 2001-085; 2001-024.

decision in this case notifies both parties of their rights and obligations regarding appeals, and provides citations to the relevant sections of the Grievance Procedure Manual as well as a toll-free number to call for more information. In sum, neither a grievant's nor an agency's lack of knowledge about the grievance procedure and its requirements constitutes just cause for failure to act in a timely manner.

The agency requested an extension of the 10-day filing deadline because it contends that if it implements the hearing officer's decision to reinstate the grievant, it will be in violation of Title 49 of the Code of Federal Regulations (CFR), §382.501(b). This regulation prohibits an employee from performing safety-sensitive functions, including driving a commercial vehicle, if the employer determines that the employee has violated the CFR provisions relating to illegal drug use. We note, however, that if agency management has reason to believe that assigning certain tasks to *any* employee would violate a state or federal law, it may decide to reassign those duties. Thus, the grievant's reinstatement to his position or to an objectively similar one pursuant to the hearing decision may not necessarily preclude the agency from removing any safety-sensitive duties and replacing them with comparable duties that are not safety-sensitive. Further, if the grievant believes that the agency has not properly implemented the hearing officer's reinstatement order, he may petition the circuit court in the jurisdiction in which the grievance arose for an order of implementation,⁵ after which both parties should be able to present their respective arguments to the court.

Claudia T. Farr
Director

⁵ Va. Code § 2.2-3006(C); *Grievance Procedure Manual* § 7.3(c), page 21.