

Issue: Compliance/Appeal Review Ruling/Hearing Decision; Ruling Date: December 7, 2004; Ruling #2004-914; Agency: Virginia Commonwealth University; Outcome: permission to appeal is premature.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of Virginia Commonwealth University/ No. 2004-914
December 7, 2004

Pursuant to Va. Code 2.2-3006(B), the Virginia Commonwealth University (VCU or the University) seeks approval from the Director of this Department to appeal the hearing decision in Case No. 867 on the basis that it is contradictory to law. For the reasons set forth below, this request is premature. The University may resubmit its request to appeal to circuit court once the hearing decision, with its attorneys fees addendum, becomes "final," as described below.

FACTS

The grievant timely filed a grievance asserting that the University had misapplied the state's layoff policy and discriminated against her on the basis of her age. The grievance advanced to hearing and in his October 21, 2004 hearing decision, the hearing officer found that VCU had misapplied the layoff policy by targeting the grievant's position first and then restructuring the work units to facilitate her layoff.¹ He concluded that the University's actions constituted a "gaming of the system."² Accordingly, the hearing officer's decision ordered the grievant's reinstatement, awarded attorney's fees, and notified the grievant's counsel that a petition for attorney's fees must be received by the hearing officer within 15 calendar days by the hearing officer.

On November 1, 2004, the agency appealed the hearing officer's award of attorney's fees to this Department asserting that the hearing office exceeded the scope of his authority. Specifically, the University asserted that a hearing officer cannot award attorney's fees to an employee who prevails in a layoff case because the statute authorizing fees is limited to "discharge" cases.

The grievant's petition for attorney's fees was received by the hearing officer on November 4, 2004.

In the November 16, 2004 Compliance Ruling of the Director, this Department observed that the hearing officer found that the University had violated state layoff policy by manipulating the system to reach a particular result -- the grievant's involuntary

¹ October 21, 2004, Hearing Decision, p. 8.

² November 2, 2004, Reconsideration Decision, p. 3.

separation from employment -- an action that was, in essence, a discharge. This Department concluded that under the facts of this particular case, the hearing officer did not abuse his authority under the grievance procedure by ordering the grievant's reinstatement or by awarding attorney's fees.

On November 30, 2004, VCU submitted the instant request for permission to appeal to the Circuit Court.

On December 3, 2004, the hearing officer issued a response to the grievant's petition for attorney's fees awarding the requested fees in part.

DISCUSSION

Under Section 7.2(e) of the *Grievance Procedure Manual*, when the hearing officer issues the initial decision ordering reinstatement, the decision is considered an "original" decision (as described in §7.2(a) of the *Grievance Procedure Manual*.) Within 15 calendar days of the issuance of the original decision, either party may seek administrative review in accordance with §7.2(a) of the *Grievance Procedure Manual*. In addition, counsel for a reinstated grievant in a discharge case shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. The petition shall include an affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the *Rules for Conducting the Grievance Hearings*. A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The agency may contest the fees petition by providing a written rebuttal to the hearing officer.

If either party has timely requested an administrative review as described in §7.2(a), all administrative reviews must be issued (i.e. any reconsidered decision by the hearing officer, or review by the EDR or DHRM Directors) before the hearing officer issues the fees addendum. The hearing officer should issue the fees addendum within 15 calendar days of the issuance of the last of the administrative review decisions.

Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.

In this case, the fees addendum was issued by the hearing officer on December 3, 2004. Accordingly, as the 10 calendar day period for requesting EDR review of the fees

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addendum has not yet expired, the request for permission to appeal to the circuit court is premature because the hearing decision is not “final.” If *neither* party appeals the fees addendum to the EDR Director, the original decision, along with the fees addendum, will become “final” 10 days following the issuance of the fees addendum. If *either* party appeals the fees addendum to the EDR Director, the original decision becomes “final” and may be appealed to the Circuit Court after the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum.

Claudia T. Farr
Director