

Issue: Administrative Review/claim of hearing officer bias; Ruling Date: May 2, 2005;
Ruling #2005-1009; Agency: Department of Health; Outcome: grievant's review
request untimely



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Health
Ruling Number 2005-1009
May 2, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7982/7983/8009. The grievant presents several arguments to support his claim that the hearing officer was biased and failed to consider or properly weigh the evidence. However, because the grievant's request for administrative review was untimely, this Department will not review the hearing officer's actions or decisions.

FACTS

The grievant is employed by the agency as a Field Services Engineer. On January 7, 2004, the grievant applied for a promotion to the position of Technical Services Administrator. The grievant was not selected for the position and subsequently initiated a grievance challenging his nonselection as retaliatory. Thereafter, on August 26, 2004, the grievant was issued a Group II Written Notice for failure to report to work as scheduled without proper notification to his supervisor. On the same date, he was also issued a Group III Written Notice with suspension for sleeping during work hours. On September 24, 2004, the grievant initiated separate grievances challenging each of the disciplinary actions.

The three grievances were qualified and consolidated and proceeded to a single hearing on March 7, 2005. In a March 22, 2005 hearing decision, the hearing officer found that the grievant had failed to present sufficient evidence demonstrating that the Virginia Department of Health (VDH or the agency) had misapplied the hiring policy or otherwise acted retaliatory in its decision. Moreover, the Group II Written Notice for failure to report to work as scheduled was reduced to a Group I Written Notice while the Group III Written Notice with 6 workday suspension was reduced to a Group III Written Notice with 5 workday suspension. Additionally, the hearing officer ordered the agency to provide the grievant with "back pay for the period of suspension exceeding five workdays less any interim earnings that the employee received during the period of

suspension and credit for annual and sick leave that the employee did not otherwise accrue.”

Following receipt of the hearing decision, the grievant e-mailed the hearing officer on March 29, 2005, presenting his (the grievant’s) view of the facts and circumstances surrounding his hearing and the subsequent hearing decision, along with questions to the hearing officer, but without requesting an administrative review, either expressly or otherwise, and without copying the agency. In response, the Director of this Department wrote the grievant in a March 30, 2005 letter to advise him that under the *Rules for Conducting Grievance Hearings* (the *Rules*), it would be inappropriate for the hearing officer to respond to the grievant’s correspondence. The grievant was further advised that if he intended to request an administrative review of the hearing officer’s decision, under the grievance procedure, he had until **April 6, 2005** to do so, and that any questions he had about the grievance process could be addressed via this Department’s AdviceLine. On April 7, 2005, the grievant hand-delivered his request for administrative review to this Department. On that same day, the grievant requested an administrative review from the Department of Human Resource Management (DHRM).

DISCUSSION

The *Grievance Procedure Manual* provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.”¹ In this case, this Department received the grievant’s request for administrative review on April 7, 2005, beyond the 15 calendar days following the March 22, 2005 decision. Furthermore, the grievant has presented no evidence of a “just cause” for the delay.² Specifically, when questioned why he failed to initiate his request within 15 calendar days of his hearing decision (on or before April 6, 2005) as provided in the grievance procedure and as instructed in this Department’s March 30, 2005 letter, the grievant stated that he assumed that the 15-calendar days began to run from the date he *received* the hearing decision and that he marked the deadline on his calendar at work and he is definite his request for administrative review was timely. However, under the grievance procedure, the 15 calendar day time period runs from the date of the hearing decision, not the date of a party’s receipt. Accordingly, the grievant’s request for administrative review is untimely.

APPEAL RIGHTS

A hearing officer’s decision becomes a final hearing decision when (i) the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request or (ii) once all timely requests for review have been

¹ See *Grievance Procedure Manual* § 7.2(a).

² “Just cause” is defined as a “reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9.

decided.³ Because the grievant's request to this Department and to DHRM for administrative review were untimely, the hearing decision became a final hearing decision on April 6, 2005. The grievant has 30 calendar days from that date, by **Friday May 6, 2005**, to appeal the decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must have been that the final decision is contradictory to law.

Claudia T. Farr
Director

³ See *Grievance Procedure Manual* § 7.2(d).