

Issue: Administrative Review of Director/grievant claims that hearing officer's decision and conduct do not comply with grievance procedure; Ruling date: May 3, 2005; Ruling # 2005-956; Agency: Virginia School of the Deaf, Blind and Multi-Disabled; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Virginia School of the Deaf, Blind, and Multi-Disabled
Ruling Number 2005-956
May 3, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 7898. The grievant claims that the hearing officer's written decision and conduct do not comply with the grievance procedure. Specifically, the grievant alleges that the hearing officer failed to issue his decision within 35 days of his appointment and gave the Department of Education (DOE or the agency) notice of his decision prior to providing the grievant with his decision.

FACTS

The grievant is employed by the agency as a school superintendent. On September 9, 2004, the grievant was issued a Group II Written Notice for performance reasons. The grievant subsequently initiated a grievance challenging the Written Notice. The grievance was qualified for hearing and assigned to a hearing officer on October 14, 2004. A hearing was held on November 8, 2004.

On January 10, 2005, the hearing officer issued a decision upholding the Group II Written Notice. On January 25, 2005, this Department received the grievant's request for an administrative review of the hearing officer's January 10th decision. The grievant also asked the Department of Human Resource Management (DHRM) to review the decision, as well as requesting reconsideration of the decision by the hearing officer. DHRM subsequently ruled on March 18, 2005 that it "had no authority to interfere with the application of [the hearing officer's] decision." On March 31, 2005, the hearing officer denied the grievant's request for reconsideration.

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.”¹ 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 action be correctly taken.²

The grievant alleges that the hearing officer failed to issue a timely decision and improperly gave the agency notice of his decision “days prior” to providing notice to the grievant. She further alleges that the hearing officer’s alleged noncompliance with the grievance procedure resulted in her legal representative of choice being unable to represent her during the appeal process, as well as in substantial emotional distress and distraction from her job duties.³

Failure to Issue a Timely Decision

According to the grievance procedure rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of their appointment.⁴ In this case, the hearing officer was appointed on October 14, 2004, and the hearing was held on November 8, 2004. The hearing decision, however, was not issued until January 10, 2005, more than 35 days after the hearing officer’s appointment. During the investigation for this ruling, the hearing officer stated that the decision was delayed by the complexity of the grievant’s case, as well as by his full hearing schedule.

Preferably, decisions are written as soon as possible after the hearing, when testimony of the witnesses is fresh. This Department recognizes, however, that circumstances such as case volume and complexity may impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing. Such is the case here.

Prior Notice to Agency

The grievant also alleges that the hearing officer failed to comply with the grievance procedure by notifying the agency of his decision by e-mail days before giving notice to her through the United States Postal Service. The grievance procedure provides that the hearing officer is to send his decision to each party by certified mail, return receipt requested, or by fax or e-mail, provided that proof of receipt is established.⁵ There is no specific requirement that the decisions be provided to the parties at the same time or in the same manner.

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4.

³ During the course of this Department’s investigation, the grievant raised additional claims regarding alleged errors in the hearing officer’s decision. Because these claims were not asserted by the grievant in her initial request for administrative review, they will not be considered here.

⁴ *Grievance Procedure Manual* § 5.1.

⁵ *Grievance Procedure Manual* § 5.9.

During the course of our investigation, a representative of the Division of Hearings stated that the Division's general practice is to e-mail the hearing decision where there is an e-mail address on file for the party. In all other cases, the Division's practice is to send the hearing decision to the party by certified mail. In this case, the individual responsible for disseminating decisions to the parties mistakenly believed that there was no e-mail address on file for the grievant. As a result, a copy of the hearing officer's decision was sent to the grievant by certified mail on January 10, 2005. That same day, the decision was e-mailed to the agency, with acknowledgement of receipt requested. The agency received its e-mail copy of the decision on January 11, 2005, while the certified mail receipt returned to the Division of Hearings indicates that the grievant received her copy of the decision on January 12, 2005. The grievant was provided notice of the hearing officer's decision in accordance with the grievance procedure, thus this Department cannot conclude that the hearing officer failed to comply with that procedure.⁶

APPEAL RIGHTS AND OTHER INFORMATION

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.⁷ 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.⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁶ Although the grievant alleges that she was adversely affected by the "delay of notice" to her, she has not presented any evidence that she was in fact prejudiced by the one-day difference between the agency's apparent receipt of the hearing decision and her own receipt of that decision.

⁷ *Grievance Procedure Manual*, § 7.2(d).

⁸ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

⁹ *Id.*

¹⁰ Va. Code § 2.2-1001 (5).