

Issue: Compliance/grievance procedure/hearing decision; Ruling Date: March 9, 2006;  
Ruling #2006-1289; Agency: Virginia Department of Health; Outcome: hearing  
decision became final on February 26, 2005.



## ***COMMONWEALTH of VIRGINIA***

### ***Department of Employment Dispute Resolution***

#### **COMPLIANCE RULING OF DIRECTOR**

In the matter of the Virginia Department of Health  
Ruling Number 2006-1289  
March 9, 2006

The grievant has requested that the Department of Employment Dispute Resolution (EDR or this Department) issue a compliance ruling ordering the Virginia Department of Health (VDH or agency) to implement the hearing officer's October 14, 2004 decision, which ordered the reinstatement of the grievant's employment.

#### **FACTS**

The grievant was employed as an Office Service Specialist at a county VDH facility. She had been employed by VDH for over 28 years and was covered by the Commonwealth's Virginia Sickness and Disability Program (VSDP).

In December of 2002, the grievant began suffering back pain. She was placed on Short Term Disability (STD) on December 18, 2002. (This date was subsequently changed to December 19, 2002, and again to December 30, 2002.) The grievant received STD benefits and returned to work on or about April 9, 2003 for regular duty but with a reduced schedule of four hours per day.

On or about June 16, 2003, the grievant's health care provider wrote a note stating that the grievant could return to work on June 17<sup>th</sup> 2003 for light duty and should be granted a five-minute break each hour. The medical provider issued a second note on June 16<sup>th</sup> which eliminated the break restriction and indicated that the grievant had a follow-up medical appointment on July 1, 2003.

On June 25, 2003, the day the agency first asserted that the grievant moved into Long Term Disability (LTD), the grievant was sent home. She was told that the agency would no longer accommodate her request for an accommodation (the 5-minute break each hour.) On Friday, June 27, 2003, the grievant saw her doctor, who provided her with a release to work full-duty with no restrictions as of the next workday, Monday, June 30<sup>th</sup>.

On Saturday, June 28<sup>th</sup>, the agency again asserted that the grievant moved into LTD, this time based on the grievant's amended STD start date. On Monday, June 30<sup>th</sup>,

when the grievant attempted to return to work, she was told that she had been separated from state service as of June 28<sup>th</sup> when she moved into LTD. She was further advised that because her doctor had released her to work without restrictions as of June 30<sup>th</sup>, she was no longer eligible for continued LTD benefits. Thus, she lost both her job and LTD benefits as a result of being moved into LTD status on Saturday, June 28<sup>th</sup>, and being cleared for unrestricted work on Monday, June 30<sup>th</sup>.

On July 21, 2003, the grievant timely challenged her separation from state employment alleging that the agency had discriminated against her based on her age and disability. She also claimed that the agency had “misapplied the policy regarding short-term disability and long-term disability.” The agency denied qualification of the grievance for a hearing. The grievant then sought qualification from this Department. On March 26, 2004, the EDR Director issued a qualification ruling denying qualification for hearing, based, in part, on a Department of Human Resources Management (DHRM) Policy Analyst interpretation of the VSDP policy.<sup>1</sup>

The grievant appealed the EDR Director’s decision to the Circuit Court in the jurisdiction where the grievance arose. On August 2, 2004, the Circuit Court ordered the qualification of the grievance on the issue of whether the Agency “may have misapplied or unfairly applied state policy when the [Grievant] was placed on long-term disability on June 28, 2003.”<sup>2</sup>

On August 19, 2004, EDR assigned the single issue of misapplication or unfair application of policy to a hearing officer. On September 17, 2004, a hearing was held at the agency’s regional office. In his October 14, 2004 hearing decision, the hearing officer found that the agency misapplied state policy when it removed grievant from employment. The hearing officer ordered the agency to reinstate the grievant to an objectively similar position. Specifically, the hearing officer held that the agency misapplied DHRM policy 4.57 by: (1) treating as disabled an employee who was no longer disabled; (2) placing the grievant on STD instead of STD-Working status; (3) not considering whether grievant should be placed on LTD-Working status prior to sending her home; and (4) not attempting to determine whether grievant’s medical restrictions could be accommodated.

The agency appealed the hearing officer’s decision to both the EDR and DHRM Directors. The agency did not ask the hearing officer to reconsider his decision. On November 5, 2004, the EDR Director issued her ruling upholding the hearing officer’s decision. On February 16, 2005, the DHRM Director’s designee issued a ruling also upholding the hearing officer’s decision. On March 2, 2005 the agency requested that DHRM reconsider its ruling.

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<sup>1</sup> See EDR Ruling #2003-487.

<sup>2</sup> The age and disability discrimination claims were rejected by the Circuit Court for the reasons set forth in EDR Ruling #2003-487.

On June 16, 2005, the grievant petitioned the circuit court in the jurisdiction in which the grievance arose for an order implementing the hearing officer's decision. On July 11, 2005, the agency filed a Demurrer, Motion to Dismiss, and Motion for Summary Judgment with the circuit court arguing that the grievant's petition was premature because DHRM had not issued a reconsidered opinion and the grievant had failed to establish that a final decision of a hearing officer has been rendered. On January 18, 2006, the court concluded that DHRM has not ruled on DHRM's request for reconsideration, and for that reason, the grievant's petition was premature.

### DISCUSSION

The grievant has requested that this Department issue a compliance ruling ordering the Department of Health to implement the hearing officer's October 14, 2004 decision which ordered the reinstatement of the grievant's employment.

As an initial point, this Department has no authority to order the agency to implement the hearing officer's decision. That authority is vested solely in the circuit court that the grievant petitioned on June 16, 2005.<sup>3</sup> However, by statute, this Department has been given the exclusive 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."<sup>4</sup> In accordance with this exclusive authority, EDR has previously held that neither EDR nor DHRM may reconsider or reissue their administrative review rulings.<sup>5</sup> For the reasons set forth below and explained in EDR Ruling No. 2004-859, we continue to hold that neither EDR nor DHRM can reconsider and reissue administrative review rulings. Thus, as a matter of compliance, this Department holds that that the hearing decision became final on February 16, 2005, the date of DHRM's administrative ruling in this case.

As we explained in EDR Ruling No. 2004-859, EDR promulgated the *Grievance Procedure Manual*, to set forth the rules that govern the grievance procedure. In keeping with the statutory mandate of providing a fair and expeditious<sup>6</sup> dispute resolution process, the *Grievance Procedure Manual* has established a framework to allow for prompt administrative and judicial review of hearing decisions.

Pursuant to the *Grievance Procedure Manual*, a hearing officer's original decision is subject to three types of administrative review and a party may request more than one type of review. A request to reconsider a decision or reopen a hearing is made to the hearing officer; a challenge that a hearing decision is inconsistent with state or agency policy is made to the DHRM Director; and a challenge that a hearing decision

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<sup>3</sup> Va. Code § 2.2-3006(D).

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> EDR Rulings Nos. 2004-859 and 2006-1273.

<sup>6</sup> See Va. Code § 2.2-3000 which states that "the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between agencies and those employees who have access under Va. Code § 2.2-3001."

does not comply with the grievance procedure is made to the EDR Director. There is no provision in the *Grievance Procedure Manual* authorizing EDR or DHRM to reconsider their administrative review decisions.

Indeed, the *Grievance Procedure Manual* instructs that “[a] hearing officer’s original decision becomes a **final hearing decision with no further possibility of administrative review**, when: (1) the 10 calendar day period for filing requests for administrative review has elapsed and neither party has filed such a request; or, (2) all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.”<sup>7</sup> After a decision becomes a final hearing decision, it may be appealed to the circuit court<sup>8</sup> and then to the Court of Appeals.<sup>9</sup> A party may petition the circuit court in the jurisdiction in which the grievance arose for an order implementing a final decision once all administrative appeals available under the grievance procedure have been exhausted.<sup>10</sup>

The plain language of the *Grievance Procedure Manual* precludes the issuance of multiple (revised) administrative review rulings by the DHRM and EDR Directors. Section 7.2(d) of the *Grievance Procedure Manual* states that a “hearing officer’s original decision becomes a final hearing decision with no further possibility of administrative review, when . . . all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.” In this case, the hearing officer was not asked to reconsider his decision; EDR issued its decision on November 5, 2004, upholding the decision; and on February 16, 2005, the DHRM Director’s designee issued DHRM’s administrative review ruling also affirming the hearing decision. Thus, pursuant to § 7.2 (d), the last of the timely requests for administrative reviews was decided on February 16, 2005 and the hearing officer had not been ordered to issue a revised decision by EDR or DHRM. Accordingly, on February 16, 2005, the original hearing decision became the final hearing decision with no further possibility of administrative review.

The grievance procedure’s appeal framework was never intended to impede administrative reviewers, including the DHRM Director, from carrying out their statutory obligations, such as interpreting state policy. However, if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal. The grievance process would be effectively placed in legal limbo. Similarly, as witnessed in the instant case, the process for seeking implementation of a final hearing decision would be thwarted by the absence

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<sup>7</sup> *Grievance Procedure Manual*, § 7.2(d), (emphasis added).

<sup>8</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a). The basis of an appeal to the circuit court must be based on the assertion that the decision is contradictory to law. The appeal is filed in the circuit court in the jurisdiction in which the grievance arose.

<sup>9</sup> See, Va. Code 17.1-405. *Grievance Procedure Manual*, § 7.3(b).

<sup>10</sup> Va. Code § 2.2-3006 (D); *Grievance Procedure Manual*, § 7.3(c).

of any definitive point at which decisions could be considered final and ripe for petition.<sup>11</sup>

For the reasons set forth above, this Department holds, under its exclusive authority to establish the grievance procedure and “[r]ender final decisions...on all matters related to procedural compliance with the grievance procedure,” that the hearing decision became final on February 16, 2005.<sup>12</sup>

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Claudia T. Farr  
Director

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<sup>11</sup> Va. Code § 2.2-3006 (C) states “[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation. Section 2.2-3006 (D) states “[e]ither party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer.” Va. Code § 2.2-3006 (D).

<sup>12</sup> Va. Code § 2.2-1001 (5).