

Issue: Compliance: Grievance Procedure – Hearing Decision Appeals; Ruling Date: May 2, 2007; Ruling #2007-1655; Agency: Department of Corrections; Outcome: Both agency and grievant in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2007-1655
May 2, 2007

The grievant has requested a ruling from this Department regarding when the hearing officer's decision in Case No. 8520 becomes a "final" hearing decision under the grievance procedure.

FACTS

On October 20, 2006, the grievant was issued a Group III Written Notice with removal for using a state computer to access pornographic material.¹ The grievant subsequently grieved the disciplinary action and a hearing was held on March 1, 2007.²

In his March 5, 2007 hearing decision, the hearing officer rescinded the Group III Written Notice and ordered the agency to reinstate the grievant with back pay.³ In addition, the hearing officer found that the grievant is entitled to recover attorney fees and the grievant's attorney was advised of his obligation to submit a petition for fees to the hearing officer in a timely manner.⁴

The agency subsequently sought a reconsideration decision from the hearing officer, as well as administrative reviews by this Department and the Department of Human Resource Management (DHRM). In a reconsideration decision dated March 29, 2007, the hearing officer rescinded the earlier March 5th decision and instead reduced the Group III Written Notice it to a Group II Written Notice with 10 days suspension.⁵ In addition, the grievant was reinstated to his employment, awarded back pay and found to be entitled to attorney's fees.⁶

¹ Hearing Decision, Case No. 8520 ("Hearing Decision") at 2.

² *Id.* at 1.

³ *Id.* at 1 and 6.

⁴ *Id.* at 6.

⁵ Reconsideration Decision of the Hearing Officer, Case No. 8520-R ("Reconsideration Decision") at 7.

⁶ *Id.* at 8.

The agency subsequently withdrew its pending requests for administrative review of the hearing officer's decision by this Department as well as DHRM. By letter dated April 20, 2007, the grievant's representative seeks a ruling on when the hearing officer's decision is considered a "final" decision.

DISCUSSION

A hearing decision becomes final when either the 15-calendar-day period for filing requests for administrative review has expired and neither party has filed such a request, or all timely requests for administrative review have been decided and, if ordered by this Department or DHRM, the hearing officer has issued a revised decision.⁷ However, in certain cases, such as the instant, another provision of the *Grievance Procedure Manual* comes into play in determining when a hearing decision becomes a final decision and thus ripe for appeal to the circuit court. Under § 7.2(e) of the *Grievance Procedure Manual*, an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. Section 7.2(e) states that in such cases "counsel for the grievant 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." Furthermore,

[i]f either party has timely requested an administrative review as described in § 7.2(a), all other administrative reviews must be issued (including any reconsidered decision by the hearing officer) 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.⁸

Finally, § 7.2(e) explains that:

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 this *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.

⁷ *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

⁸ *Grievance Procedure Manual* § 7.2(e).

In this case, the grievant's counsel submitted a petition for attorney fees and the hearing officer issued the fees addendum on April 26, 2007.⁹ As such, the parties have 10 calendar days, or until May 7, 2007,¹⁰ to appeal the hearing officer's fees decision to the EDR Director.¹¹ If neither party appeals the fees decision, the hearing decision will become a "final" decision on May 7, 2007. If, however, there is an appeal of the fees decision, the hearing decision will become a final hearing decision only after all timely and appropriate requests for administrative review of the fees addendum have been decided by the EDR Director, and if ordered by EDR, the hearing officer has issued a revised fees addendum.

Claudia T. Farr
Director

⁹ Addendum to Decision of Hearing Officer, Case No. 8520 ("Fees Addendum") at 1.

¹⁰ When the 10th day falls on a weekend, as is the case here, the party shall have until the following business day to timely seek an appeal. *See, e.g.*, EDR Ruling No. 2007-1556, EDR Ruling No. 2003-486 and EDR Ruling No. 2002-140.

¹¹ *Grievance Procedure Manual* § 7.2(e).