

Issue: Agency requests permission to appeal to court; Ruling Date: August 25, 2006;  
Ruling #2007-1406; Agency: Old Dominion University; Outcome: request premature



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**APPEAL REVIEW RULING OF DIRECTOR**

In the matter of Old Dominion University  
Ruling No. 2007-1406  
August 25, 2006

Old Dominion University (ODU or the agency) has requested permission to appeal the hearing officer's May 25, 2006 reconsideration decision in Case No. 8116-R3. For the reasons set forth below, the agency's request is premature.

**FACTS**

The grievant was employed by the agency as a Law Enforcement Officer II in its internal police department.<sup>1</sup> He was removed from employment effective March 22, 2005 after receiving a Group III Written Notice for allegedly making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department, and shirking official duty.<sup>2</sup>

On April 15, 2005, the grievant filed a grievance challenging the disciplinary action.<sup>3</sup> After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.<sup>4</sup> The hearing was held on July 14, 2005.<sup>5</sup> On July 20, 2005, the hearing officer issued a decision reducing the disciplinary action against the grievant to a Group I Written Notice and ordering that the grievant be reinstated to employment.<sup>6</sup> The hearing decision also found that the grievant had not proven that the Written Notice was issued as a result of discrimination.<sup>7</sup>

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<sup>1</sup> Hearing Decision dated July 20, 2005 (Hearing Decision) at 2.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1, 6.

<sup>7</sup> *Id.* at 4.

By letters dated August 2, 2005, the agency, through its counsel, requested an administrative review by this Department of the hearing officer's decision and requested an administrative review by the Department of Human Resource Management (DHRM) as well. By letter dated August 4, 2005, the grievant's counsel requested an administrative review by this Department. In addition, the grievant requested reconsideration of the decision by the hearing officer and an administrative review of the hearing decision by DHRM.

The hearing officer issued his reconsideration decision on August 26, 2005.<sup>8</sup> In his decision, the hearing officer affirmed his earlier ruling and also awarded attorneys' fees to the grievant.<sup>9</sup> On September 1, 2005, the agency requested an administrative review by EDR of the reconsideration decision, with respect to that portion of the decision awarding attorneys' fees. By letters dated September 9, 2005, the grievant also requested an administrative review by this Department and DHRM of the reconsideration decision.<sup>10</sup>

On November 22, 2005, the Director of this Department issued a ruling addressing the claims raised by the grievant in his first and second requests for administrative review and by the agency in its first request for administrative review.<sup>11</sup> In that ruling, the Director concluded that the hearing officer had erred with respect to the scope of the issue qualified for hearing and directed that the hearing officer reconsider his decision accordingly.<sup>12</sup>

The hearing officer subsequently advised the parties that he would reopen the hearing to take additional evidence. The agency objected, and on December 20, 2005, the EDR Director issued a ruling concluding that the hearing officer had not abused his discretion in re-opening the hearing to take additional evidence.<sup>13</sup>

A re-opened hearing was held the week of March 6, 2006. On May 25, 2006, the hearing officer issued a third reconsideration decision, in which he found in favor of the grievant.<sup>14</sup> On June 9, 2006, the agency requested an administrative review by EDR of the hearing officer's May 25<sup>th</sup> decision. In a ruling dated July 10, 2006, this Department concluded that the hearing officer had not failed to comply with the grievance procedure, with respect to those objections raised by the agency in its June 9<sup>th</sup> request.<sup>15</sup>

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<sup>8</sup> Reconsideration Decision dated August 26, 2005 (Reconsideration Decision) at 1.

<sup>9</sup> *Id.* at 1-5.

<sup>10</sup> In addition, he asked the hearing officer for reconsideration of his reconsideration decision. The hearing officer subsequently denied the grievant's request for a second reconsideration, on the ground that he no longer had jurisdiction over the grievance.

<sup>11</sup> EDR Ruling Nos. 2006-1099, 2006-1104. The hearing officer issued his addendum decision addressing attorney's fees on September 12, 2005. By letter dated September 13, 2005, the agency also requested an administrative review of this addendum.

<sup>12</sup> *Id.* at 3-5.

<sup>13</sup> EDR Ruling No. 2006-1202.

<sup>14</sup> See Third Reconsideration Decision, dated May 25, 2006.

<sup>15</sup> EDR Ruling No. 2006-1376.

At this time, the parties' appeals to DHRM are still pending, as is the agency's appeal to EDR regarding the hearing officer's September 12, 2005 award of attorney's fees. Further, the hearing officer stated in his May 25<sup>th</sup> reconsideration decision that he will award attorney's fees for the work performed by the grievant's counsel in relation to his claim of discrimination,<sup>16</sup> and by letter dated July 11, 2006, advised the parties that he would issue an attorney's fee addendum after DHRM has issued its ruling on the parties' pending appeals.

### DISCUSSION

Pursuant to Va. Code 2.2-3006(B), Old Dominion University (ODU or agency) seeks approval from the Director of this Department to appeal the hearing officer's May 25, 2006 reconsideration decision in Case No. 8116-R3 to the circuit court.

As explained in § 7.3(a) of the *Grievance Procedure Manual*, "[o]nce an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law." 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.<sup>17</sup>

In this case, there are pending requests for administrative review to both DHRM and this Department. In addition, the hearing officer retains jurisdiction over the case for the purpose of issuing an award of attorney's fees, which can subsequently be appealed to the EDR Director.<sup>18</sup> We do not assume that the agency intends to waive these pending and possible future objections by seeking permission to appeal. Therefore, the May 25<sup>th</sup> reconsideration decision is not a final hearing decision, and the agency's request for permission to appeal to the circuit court is premature. The May 25<sup>th</sup> reconsideration decision will become a final hearing decision only after all pending requests for review by DHRM and this Department have been addressed (and, if ordered by either, the hearing officer has issued a revised opinion); the hearing officer has issued the remaining attorney's fees addendum; and all future timely and appropriate requests for administrative review have been addressed (including any challenges to the expected fees addendum).

Finally, in light of the unusual circumstances of this case, we wish to clarify the order in which these pending matters will be resolved. DHRM will rule first on the requests for administrative review currently pending before it (the agency's August 2, 2005 request and the grievant's August 4, 2005 and September 9, 2005 requests). After DHRM has ruled, the hearing officer will address the fee issues pending before him, as

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<sup>16</sup> Third Reconsideration Decision at 14.

<sup>17</sup> *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

<sup>18</sup> *Id.* at § 7.2(e).

indicated in his July 11, 2006 letter. EDR will then issue an administrative review ruling on any remaining matters then pending before it (the agency's September 1, 2005 and September 13, 2005 requests for review of the attorney's fees award and addendum, as well as any timely requests regarding the expected additional award of attorneys' fees by the hearing officer). Copies of this ruling are being provided to DHRM and to the hearing officer to clarify the order in which they should proceed.

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Claudia T. Farr  
Director