

Issue: Permission to Appeal Ruling/agency seeks permission to appeal hearing decision to Circuit Court; Ruling Date: December 20, 2006; Ruling #2007-1509; Agency: Virginia Community College System (NVCC); Outcome: request premature



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

PERMISSION TO APPEAL RULING OF DIRECTOR

In the matter of the Northern Virginia Community College  
Ruling No. 2007-1509  
December 20, 2006

The Northern Virginia Community College (or the agency) has requested permission to appeal the hearing officer's decision in Case Nos. 8299, 8300, 8301 and 8302. For the reasons set forth below, the agency's request is premature.

FACTS

The grievant is a former employee of NVCC. She was removed from employment effective December 19, 2005, after receiving three Group II Written Notices.<sup>1</sup> The grievant subsequently grieved the disciplinary actions, as well as her 2005 performance evaluation.<sup>2</sup> A hearing was held on the grievances on March 30, 2006.<sup>3</sup>

In his April 21, 2006 hearing decision, the hearing officer reduced two of the Written Notices, upheld the third, and ordered the agency to reinstate the grievant with back pay.<sup>4</sup>

On May 5, 2006, the agency sought a reconsideration decision from the hearing officer, as well as administrative reviews by this Department and the Department of Human Resource Management (DHRM).<sup>5</sup>

In his May 10, 2006 reconsideration decision, the hearing officer found that "[t]he Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration

---

<sup>1</sup> Hearing Decision in Case No. 8299/8300/8301/8302 ("Hearing Decision") at 1-2, 5-7.

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

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

<sup>4</sup> *Id.* at 10. The hearing officer also ordered the agency to revise the grievant's performance evaluation.

<sup>5</sup> See EDR Ruling Nos. 2006-1341 and 1374.

is **denied.**<sup>6</sup> On July 19, 2006, this Department upheld the hearing decision and subsequent reconsidered decision, and on November 27, 2006, the Department of Human Resource Management did likewise.

### DISCUSSION

Pursuant to Va. Code 2.2-3006(B), the agency seeks approval from the Director of this Department to appeal the hearing officer's decision in Case Nos. 8299, 8300, 8301 and 8302.

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>7</sup>

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.”<sup>8</sup> 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.<sup>9</sup>

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

---

<sup>6</sup> Reconsideration Decision of Hearing Officer, Case No. 8299/ 8300/ 8301/ 8302-R, issued May 10, 2006 (emphasis in original).

<sup>7</sup> *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

<sup>8</sup> The grievant's counsel timely submitted a petition for fees on May 3, 2006.

<sup>9</sup> *Grievance Procedure Manual* § 7.2(e).

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.

At this juncture, 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>10</sup> Therefore, the hearing decision is not a final hearing decision, and the agency’s request for permission to appeal to the circuit court is premature. The hearing decision will become a final hearing decision only after the hearing officer has issued the remaining attorney’s fees addendum, and all future 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. At that time, the agency may renew its request for permission to appeal to the circuit court in accordance with §7.3(a). The basis for any such appeal is limited to the argument that the final hearing decision is contradictory to law.<sup>11</sup>

---

Claudia T. Farr  
Director

---

<sup>10</sup> *Id.*

<sup>11</sup> *Grievance Procedure Manual* § 7.3(a).