

Issue: Compliance – Grievance Procedure: Other Issue (Reconsideration Request of EDR Ruling #2008-1735); Ruling Date: August 2, 2008; Ruling #2008-1752; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Agency's request denied – Agency Not In Compliance.



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

**RECONSIDERATION RULING OF DIRECTOR**

In the matter of Department of Mental Health,  
Mental Retardation, and Substance Abuse Services  
Ruling Number 2008-1752  
August 2, 2007

The Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or the agency) has asked this Department to reconsider Ruling No. 2008-1735. For the reasons set forth below, the agency's request is denied.

FACTS

The underlying facts of this case are set forth in Ruling No. 2008-1735 and repeated below:

The grievant is employed by the agency as a Care Worker at one of its facilities. On or about March 20, 2007, the grievant was apparently transferred from the living area to which she had previously been assigned. On April 20, 2007, the grievant initiated a grievance challenging her reassignment.<sup>1</sup>

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. On June 13, 2007, the agency head signed the Grievance Form A, which indicated that the grievance was qualified because "[d]isciplinary actions must be heard by a hearing officer." By letter dated June 15, 2007, the agency's human resources office informed the grievant that the

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<sup>1</sup> The grievant apparently signed and dated the Grievance Form A on April 2, 2007, but the Form A indicates that the grievance was not received by the first-step respondent until April 20, 2007. As the date of grievance initiation is not relevant to our decision, we will assume, for purposes of this ruling only, that the grievance was initiated on April 20, 2007.

agency head had qualified her grievance for hearing.<sup>2</sup> The original Form A was enclosed with the June 15<sup>th</sup> letter.

The grievant states that she received the June 15<sup>th</sup> letter on June 20, 2007. Subsequently, on June 21, 2007, the agency apparently advised the grievant by telephone that the letter had been sent in error. The grievant states that on June 25, 2007, she received a "corrected" copy of the Form A. On the corrected copy, the statement regarding disciplinary actions qualifying had been lined out and the box indicating the grievance was not qualified was circled. In addition, a statement explaining the non-qualification had been appended to the Form A. The agency head does not appear to have re-signed the form; instead, the additions appear to have been made by the human resources office to a copy of the original signed Form A.<sup>3</sup>

On July 26, 2007, this Department issued Ruling 2008-1635. In that qualification ruling, EDR held that the agency head's initial election to qualify the grievance was binding on the agency and could not subsequently be revoked. The agency has asked this Department to reconsider its qualification ruling.

#### DISCUSSION

As explained in Ruling 2008-1635, this Department has long held that once an instruction or direction has been communicated through the Grievance Form A (or an attachment), it may not later be revoked, even if given in error. For example, in EDR Ruling No. 2004-696, we held that a former DMHMRSAS employee was bound by having checked the "concluded" box on the Grievance Form, even though the employee claimed she had checked it in error. As a result, she was deemed to have concluded rather than to have continued her grievance. Similarly, in Ruling No. 2004-611, this Department found that an agency was bound by having checked the box on the Grievance Form A qualifying the grievance for hearing, even though the agency subsequently claimed the check mark was made in error.

The agency also asserts that the hearing officer lacks jurisdiction to hear the grievance in this case, as it is not a matter which automatically qualifies for hearing. This assertion is without merit. While the *Grievance Procedure Manual* identifies those

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<sup>2</sup> The June 15<sup>th</sup> letter stated, "After careful review of your request for qualification, regarding a disciplinary action, the Commissioner has qualified your grievance for hearing."

<sup>3</sup> The cover letter for the corrected Form A explained: "Recently the Commissioner received a request from you to qualify your grievance to be heard before a hearing officer. You previously received a letter dated June 15<sup>th</sup> in error that indicated that your grievance qualified for hearing. Unfortunately, after a closer review of your complaint, the Commissioner has determined the issue you presented does not qualify for hearing. Enclosed, is a **corrected** copy of your Grievance Form A. Please refer to the Commissioner's response that is attached to the Grievance Form A."

issues which must qualify for hearing, it in no way precludes the qualification of other issues by the agency head. To the contrary, an agency head is free to qualify any issue presented in a grievant's Form A.<sup>4</sup>

The agency's assertion that it was not afforded an opportunity to provide input regarding this ruling request is equally without merit. The grievant's request for a qualification ruling came not from the grievant herself, but through the agency. Moreover, on July 9, 2007, this Department sent notice of its receipt of the grievant's qualification request to both the grievant and the agency. This notice stated:

NOTE: In some cases, the assigned EDR Consultant will contact one or both parties for additional information. In other cases, where the issues are clear and the material facts are contained in the ruling request and attachments, EDR may rule without contacting either party.

If a party wants to provide EDR with information not previously provided with the ruling request, they must contact EDR **immediately** (toll free-1-888-232-3842) to advise that additional information will be forthcoming. Any such information should be provided within 5 workdays of receipt of this memo.

The agency did not provide this Department with any additional information in response to this notice, as it could have.

In any event, however, the issue of notice is immaterial because the explanation proffered by the agency in its reconsideration request (that the qualification determination was made in error) does not change the result.

Accordingly, for all the foregoing reasons, this Department affirms its previous decision in Ruling No. 2008-1635. This Department's rulings on compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>4</sup> In this respect qualification differs from access, which this Department has held is jurisdictional.

<sup>5</sup> Va. Code § 2.2-1001 (5).