

Issue: Compliance – Grievance Procedure: Other Issue (implementation of hearing officer's decision); Ruling Date: October 12, 2007; Ruling #2008-1794; Agency: Department of Corrections; Outcome: 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. 2008-1794  
October 12, 2007

The Department of Corrections (the agency) seeks to administratively close the grievant's September 5, 2006 grievance. The agency alleges that the grievant has failed to comply with the provisions of this Department's Ruling Number 2007-1464.

FACTS

This grievance relates to a prior grievance hearing decision dated July 24, 2006, which concerned the grievant's challenge to his performance evaluation, re-evaluation, and subsequent termination. In the decision, the hearing officer reinstated the grievant and ordered the agency to repeat the three-month re-evaluation process and "provide a rating with a reasoned basis related to established expectations."<sup>1</sup> The agency re-evaluated the grievant as "Below Contributor" and again terminated him. On September 5, 2006, the grievant initiated a grievance challenging the agency's re-evaluation and termination. In EDR Ruling Number 2007-1464, this Department, on the grievant's request for qualification for hearing, determined that before a qualification determination could be made, "it must be determined whether or not the July 24<sup>th</sup> hearing decision was correctly implemented."<sup>2</sup> Consequently, this Department explained that the grievant may petition the circuit court for an order requiring implementation of the final hearing decision. Based on information provided by the agency, the grievant has not yet pursued such a petition.

DISCUSSION

This matter presents unique procedural questions. What is clear, however, is that the grievant's September 5, 2006 grievance has been stayed at the qualification stage with this Department. Procedurally, the grievance is not before the agency to close. In EDR

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<sup>1</sup> EDR Ruling No. 2007-1464 (quoting Decision of Hearing Officer, Case Nos. 8337/8373, July 24, 2006, at 8).

<sup>2</sup> EDR Ruling No. 2007-1464.

Ruling Number 2007-1464, this Department stated that whether the September 5, 2006 grievance qualified for a hearing could not be determined until the grievant petitioned the circuit court for an implementation review. EDR did not mandate, however, any period by which the grievant needed to seek implementation from the circuit court. Indeed, there is no express time period in the Code of Virginia by which a circuit court implementation order must be sought. It appears that the grievant has not petitioned the circuit court for over nine months since EDR's ruling.

This Department recognizes, however, that this matter should not remain in abeyance indefinitely. The assertion of rights and claims in a reasonably timely manner is essential to resolving those rights and claims in a reasonably timely manner.<sup>3</sup> Therefore, EDR will re-activate the September 5, 2006 grievance and proceed with its investigation and ruling as to the question of qualification of the grievance for hearing. The requisite Notice of Receipt of Ruling Request will be forthcoming. Once EDR has issued the qualification ruling, the effectiveness of the ruling will be stayed for 30 calendar days to allow the grievant an additional opportunity to pursue a petition to the circuit court for implementation of the July 24, 2006 hearing decision prior to the qualification ruling becoming effective.

Petitioning the court for implementation of the hearing decision is preferable before a qualification determination is made because of the impact the court's ruling might have on this grievance. If the circuit court were to adopt the grievant's interpretation of the hearing decision, the grievant's September 5, 2006 grievance would be rendered moot as the grievant's termination would no longer be an issue. Therefore, if the grievant still wishes to pursue his claim that the agency has not properly implemented the hearing officer's orders for reinstatement and evaluation, he may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision.<sup>4</sup> If the grievant does file such a petition, EDR will continue to stay the qualification ruling until the court has ruled on implementation. The grievant must notify this Department in writing **within 10 calendar days** of receiving the circuit court decision as to the result of that action.

If no petition for implementation is sought, this Department will not consider in the qualification ruling the matters raised by the grievance questioning the propriety of the agency's implementation of the July 24, 2006 hearing decision because those issues are for a circuit court to decide. Moreover, even if the grievance does qualify for a hearing, the hearing officer will have to assume the hearing decision was implemented correctly and only address any new (non-implementation) matters raised by the grievance.

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<sup>3</sup> See Va. Code § 2.2-3000(A) (“[T]he grievance procedure shall afford an immediate and fair method for the resolution of employment disputes.”).

<sup>4</sup> Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c). Indeed, it would appear that the grievant would continue to have the right to petition for implementation even after EDR's qualification ruling became effective.

Based on the foregoing, the agency's request to close the grievant's September 5, 2006 grievance is denied. EDR will proceed with its investigation and rule on the issue of qualification. The effectiveness of the resulting ruling will be stayed for 30 calendar days.<sup>5</sup> If the grievant petitions the circuit court to challenge the agency's implementation of the July 24, 2006 hearing decision prior to the expiration of the 30 calendar-day period, EDR will continue to stay the effectiveness of the ruling until the court issues a decision on implementation, after which EDR may reconsider its ruling in light of the court's decision. This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> In addition, the grievant may request that the period of stay be extended further based on a showing of just cause. Such arguments must be presented in writing to this Department, providing a copy of the request to the agency.

<sup>6</sup> See Va. Code § 2.2-1001(5).