

Issue: Appeal Review – Permission to Appeal Hearing Decision to Circuit Court (Case No. 8614); Ruling Date: October 18, 2007; Ruling #2008-1844; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Permission granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

APPEAL REVIEW RULING OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation
And Substance Abuse Services
Ruling No. 2008-1844
October 18, 2007

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) has requested permission to appeal the hearing officer's decision in Case No. 8614. For the reasons set forth below, the agency's request is premature.

FACTS

On December 27, 2006, the grievant initiated a grievance. The grievance was qualified for a hearing by this Department on April 6, 2007¹ and a hearing was held on June 28, 2007. In a July 19, 2007 hearing decision, the hearing officer reinstated the grievant to her former position and awarded the grievant backpay, restoration of benefits and leave, and attorneys fees.² The agency subsequently requested that the hearing officer reconsider his decision and also requested an administrative review by the Director of the Department of Human Resource Management (DHRM). In addition, counsel for the grievant submitted a petition for attorneys' fees on August 1, 2007.

In an August 7, 2007 reconsideration decision, the hearing officer upheld his earlier July 19, 2007 decision.³ On October 5, 2007, DHRM issued its administrative review decision upholding the hearing officer's determination. The hearing officer subsequently ruled on the grievant's August 1, 2007 request for attorney's fees on October 12, 2007 and awarded the grievant's counsel attorneys' fees in the amount of \$2,220.00.⁴ On October 16, 2007, the agency requested permission to appeal the hearing officer's decision in Case No. 8614.

¹ See EDR Ruling #2007-1584.

² See Decision of Hearing Officer ("Hearing Decision"), Case No. 8614, issued July 19, 2007.

³ See Decision Upon Request for Reconsideration of Decision ("Reconsideration Decision"), Case No. 8614, issued August 7, 2007.

⁴ See Addendum to Hearing Decision ("Fees Addendum"), Case No. 8614, issued October 12, 2007.

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 No. 8614.

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.⁵

In certain cases, such as this one, 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 her 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.⁶

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.

⁵ *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

⁶ *Grievance Procedure Manual* § 7.2(e).

At this juncture, the hearing decision is not a “final” decision because it has not been 10 calendar days since the hearing officer issued his October 12, 2007 Fees Addendum and as such, the parties still have time to petition the EDR Director for an administrative review of the Fees Addendum.⁷ Therefore, 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 10 calendar days for challenging the Fees Addendum have passed and neither party has challenged the Fees Addendum or if challenged, 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.⁸

Claudia T. Farr
Director

⁷ *Id.*

⁸ *Grievance Procedure Manual* § 7.3(a). It should be noted that in its request for permission to appeal, the agency failed to state how the hearing officer’s decision is contradictory to law. Any future request for permission to appeal should state specifically how the hearing officer’s decision is contradictory to law.