

Issue: Permission to Appeal Hearing Decision in Case No. 8567 to Circuit Court;  
Ruling Date: October 26, 2007; Ruling #2008-1853; Agency: Department of  
Mines, Minerals and Energy; Outcome: Permission Denied (premature).



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

**PERMISSION TO APPEAL RULING**

In the matter of the Department of Mines, Minerals and Energy  
Ruling No. 2008-1853  
October 26, 2007

Pursuant to Va. Code § 2.2-3006(B), the Department of Mines, Minerals and Energy seeks approval from the Director of this Department to appeal the hearing decision in Case No. 8567 on the basis that it is contradictory to law. For the reasons set forth below, the agency's request is premature.

**FACTS**

The grievant is a former employee of Department of Mines, Minerals and Energy (agency). He was removed from employment effective January 22, 2007. The grievant challenged his removal through a grievance and was ultimately reinstated to his position by means of an April 26, 2007 grievance hearing decision. The agency appealed the hearing decision to this Department and the Department of Human Resources Management, and asked the hearing officer to reconsider his opinion. Each of these administrative reviewers has now issued their ruling and none found any basis to disturb the original hearing decision. The agency now seeks permission to appeal the hearing decision to the circuit court on the basis that it is contradictory to law.

**DISCUSSION**

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>1</sup>

---

<sup>1</sup> *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

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." 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>2</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 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 decision is not a "final" decision because it has not been 10 calendar days since the hearing officer issued his October 25, 2007 Fees Addendum and as such, the parties still have time to petition the EDR Director for an administrative review of the Fees Addendum.<sup>3</sup> 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

---

<sup>2</sup> *Grievance Procedure Manual* § 7.2(e).

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

October 26, 2007  
Ruling #2008-1853  
Page 4

basis for any such appeal is limited to the argument that the final hearing decision is contradictory to law.<sup>4</sup>

---

Claudia T. Farr  
Director

---

<sup>4</sup> *Grievance Procedure Manual* § 7.3(a).