

Issue: Permission to Appeal to Circuit Court Hearing Officer's Decision in Case No. 8666; Ruling Date: January 4, 2008; Ruling #2008-1891; Agency: Virginia Community College System; Outcome: Permission Denied (premature).



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

**PERMISSION TO APPEAL RULING OF DIRECTOR**

In the matter of the New River Community College  
Ruling No. 2008-1891  
January 4, 2008

The New River Community College (NRCC or the college) has requested permission to appeal the hearing officer's decision in Case No. 8666. For the reasons set forth below, the agency's request is premature.

FACTS

Prior to the elimination of her position and layoff in January 2007, the grievant was employed as a horticulture specialist with the college. The grievant challenged the elimination of her position by filing a grievance on January 31, 2007. In EDR Ruling #2007-1601, this Department qualified the grievant's January 31<sup>st</sup> grievance for hearing. A hearing was subsequently held on the grievance on September 26 and October 9, 2007.<sup>1</sup>

In her hearing decision dated November 12, 2007, the hearing officer concluded that the grievant's position was eliminated out of retaliation for her prior protected acts and recommended that the grievant be reinstated to her former position or to a similar position.<sup>2</sup> On November 29, 2007, the grievant's counsel submitted to the hearing officer a petition for attorneys' fees. On December 11, 2007, the agency faxed to the hearing officer its request for reconsideration.

On January 2, 2008, the hearing officer issued a decision on the agency's request for reconsideration and the grievant's request for attorneys' fees. The hearing officer's January 2<sup>nd</sup> decision ruled the agency's request for reconsideration untimely. In addition, in her January 2<sup>nd</sup> decision, the hearing officer concludes that she does not have the

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8666, issued November 12, 2007 ("Hearing Decision").

<sup>2</sup> *Id.* at 9.

authority to award attorneys' fees because this case does not involve a disciplinary dismissal.<sup>3</sup>

### 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. 8666.

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>4</sup>

In this case, however, the hearing decision is not yet final. As this Department has previously held, when the hearing officer's reconsideration decision raises issues that could not have been challenged by the parties until after that reconsideration decision was issued, the parties will be permitted to timely challenge any new issues raised by the hearing officer's reconsideration decision with the appropriate administrative reviewer.<sup>5</sup> In this case, the hearing officer's reconsideration decision raises an issue that could not have been challenged (i.e., timeliness of the original request for reconsideration of the hearing decision) until the decision was issued. Accordingly, this Department concludes that the agency has **15 calendar days from the date of this ruling** to challenge the hearing officer's conclusion that the agency's request for reconsideration was untimely.

In addition, assuming without deciding that the grievant is entitled to attorneys' fees,<sup>6</sup> under the grievance procedure, the parties would have 10 calendar days from the

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<sup>3</sup> In this case, it might appear that the grievant's counsel was also untimely with his request for attorneys' fees since such request was not received by the hearing officer until November 29, 2007, or 17 days after the date of issuance indicated on the hearing decision (i.e., November 12<sup>th</sup>). However, in this case, while the hearing decision is dated November 12, 2007, it appears that the decision was not actually mailed until November 20, 2007. The date of issuance of the hearing decision should correspond with the day of its mailing. In other words, it is expected that if a hearing decision is dated November 12, 2007 that it will also be mailed to the parties on this day as well. Because it appears that the hearing decision was not actually mailed in this case until November 20, 2007, this Department concludes that the issuance date of the hearing decision was November 20<sup>th</sup> and not November 12<sup>th</sup> as indicated on the decision itself. With an issuance date of November 20, 2007, the grievant's counsel had 15 calendar days from this date to submit his request for fees. Because the petition for fees was submitted on November 29, 2007, within the 15 calendar days from November 20<sup>th</sup>, this Department concludes that the petition for fees was timely.

<sup>4</sup> *Grievance Procedure Manual* § 7.2(d); see also *Grievance Procedure Manual* § 7.2(e).

<sup>5</sup> See e.g., EDR Ruling Nos. 2007-1563, 2007-1637, 2007-1691 and 2004-870.

<sup>6</sup> As stated above, the hearing officer has determined that the grievant is not entitled to attorneys' fees because she was not dismissed for disciplinary reasons. Whether or not the hearing officer's conclusion in this regard is correct is not for this Department to decide in this ruling. However, as stated above, the

date of issuance to challenge with this Department any fees award.<sup>7</sup> Accordingly, this Department concludes that the grievant has **10 calendar days from the date of the hearing officer's January 2, 2008 decision** to challenge to this Department the hearing officer's decision regarding fees.

If either one or both of the parties so challenge the hearing officer's decisions, the hearing decision will become a final hearing decision when all future timely and appropriate requests for administrative review of the reconsideration decision and fees issue have been decided by the EDR Director, and if ordered by EDR, the hearing officer has issued any revised decisions. 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>8</sup> If neither party challenges the January 2, 2008 decision on the basis of the timeliness of the reconsideration request or the appropriateness of attorneys' fees, the decision will become final and appealable to the circuit court on January 17, 2008, 15 days from January 2<sup>nd</sup>. At that time, the agency may then renew its request for permission to appeal.

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Claudia T. Farr  
Director

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parties may challenge to this Department the hearing officer's conclusion regarding fees within 10 calendar days of the issuance of this ruling.

<sup>7</sup> See *Grievance Procedure Manual* § 7.2(e) ("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.")

<sup>8</sup> *Grievance Procedure Manual* § 7.3(a).