

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: April 10, 2009; Ruling #2009-2216; Agency: Department of Corrections; Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2216
April 10, 2009

The grievant has requested a compliance ruling in her September 18, 2008 grievance with the Department of Corrections (DOC or the agency).

FACTS

The grievant was previously employed as an Institution Superintendent with DOC. On November 13, 2006, the grievant was informed that as a result of an internal affairs investigation concerning sexual misconduct cases at her facility, she was being removed from her position as Institution Superintendent. To effectuate the removal, the agency gave the grievant the option of either using the “voluntary demotion” pay practice to a different position in a lower pay band with the same salary or receiving a Group III Written Notice with demotion. The grievant chose a “voluntary demotion” without the Written Notice.

On November 19, 2006, the grievant initiated three grievances challenging her demotion. After the parties failed to resolve the grievances during the management resolution steps, the grievances advanced to hearing. In his October 4, 2007 hearing decision, the hearing officer directed that the grievant be reinstated “to a comparable position as either a Superintendent or an Assistant Warden, such that she will be in the same Pay Band as she was when she was involuntarily demoted. . . . If the Agency is unable to provide an Assistant Wardenship, which is in the same Pay Band that the Grievant occupied when she was Superintendent, along with the appropriate housing or housing allowance, the Hearing Officer orders that the Agency return the Grievant to her original position with her original Pay Band and the housing provided at that Unit.”¹

In response to the hearing officer’s order, the agency placed the grievant in a “deputy warden” position. Believing this position was not “comparable” to the one she held prior to her demotion, the grievant initiated an implementation action with the circuit court. The circuit court agreed that the agency had failed to comply with the hearing

¹ Hearing Decision Case No. 8655 issued October 4, 2007 at 11.

officer's orders and directed the agency to reinstate her to her previous position. The agency has appealed the circuit court's decision to the Virginia Court of Appeals.

On September 18, 2008, the grievant initiated a grievance challenging the agency's failure to reinstate her in accordance with the hearing officer's decision. Her grievance also challenged the issue of attorneys' fees in connection with the implementation hearing. At the second step, the agency advised the grievant that her grievance was out of the compliance with the grievance procedure, in that it challenged the implementation of a hearing decision. By letter dated January 23, 2009, the grievant appealed the second-step respondent's decision to this Department. In addition, the grievant asks this Department to examine its policy on attorneys' fees as a result in a successful implementation proceeding. These issues are addressed below.

DISCUSSION

Implementation

In her September 18, 2008 grievance, the grievant challenges the agency's alleged failure to reinstate her in accordance with the decision by the hearing officer. In reply, the agency asserts that it is not required to implement the decisions until judicial appeals have been exhausted. The agency further argues that because the September 18th grievance essentially challenges the implementation of a hearing decision, it is not an appropriate subject for a grievance.

Under the grievance procedure, if a grievant believes that an agency has not properly implemented a hearing officer's orders, she may petition—as the grievant in this case has done—the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision.² Any determination by the circuit court may presumably in turn be appealed to the Virginia Court of Appeals, as has occurred in this case.

This Department has previously recognized that because there is an independent judicial procedure for the implementation of a hearing officer's order, a grievance may not be initiated for this purpose.³ To the extent an agency fails to comply with an order by a hearing officer or an implementation order by a district court, any remedy lies in the judicial system, not the grievance procedure. Accordingly, the September 18th grievance may be administratively closed by the agency.

Attorneys' Fees

The grievant also apparently challenges the attorneys' fee award issued by the circuit court in the implementation action. The grievant argues that the court lacked

² Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

³ See EDR Ruling No. 2007-1429.

direction regarding what constituted “reasonable” fees and suggests that EDR should provide that guidance.⁴

Any challenge to the court’s fee award must be made through the judicial system, as EDR lacks jurisdiction to assess the reasonableness of a circuit court fee award. Accordingly, this Department cannot grant relief with respect to this issue.

This Department’s rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

⁴ Va. Code § 2.2-3006 provides that a court “shall award reasonable attorneys’ fees and costs” to an employee who prevails in an implementation action.

⁵ See Va. Code § 2.2-1001(5), 2.2-3003(G).