

Issue: Compliance – Grievance Procedure (Hearing Decision); Ruling Date: November 23, 2010; Ruling No. 2011-2836, 2011-2837; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Numbers 2011-2836, 2011-2837
November 23, 2010

The grievants have requested that this Department withdraw its Administrative Rulings in Cases Number 9383 and 9384 (EDR Ruling Nos. 2011-2817 and 2011-2818, respectively). For the reasons set forth below, this Department will not withdraw or otherwise disturb those decisions.

FACTS

The facts of these cases are set forth in detail in EDR Rulings No. 2011-2817 and 2011-2818. For purposes of this ruling, the procedural facts of the cases are summarized below. In their original requests for administrative review, the grievants raised two objections, both of which they characterized as due process issues. In their requests for administrative review, the grievants asked for 45 days to obtain a copy of the hearing recording and an opportunity to have it transcribed. This Department administratively ruled on the merits of the two objections without granting the 45 day extension, finding that, based on the nature of the objections, such an extension was unnecessary.

The first objection raised by the grievants was the hearing officer's alleged failure to consider evidence of potential inconsistency in discipline issued to purportedly similarly situated employees. This Department took the position advanced by the grievants at face value: that the grievants submitted false reports following an accident and other involved employees did not report the incident at all. Having adopted as fact the grievants' position that the grievants falsified reports and other employees (who were disciplined less harshly) filed no reports, this Department ruled that the hearing officer did not abuse his discretion by finding the two groups distinguishable.

The second objection was that the hearing officer erred by not ordering the production of a report, which the grievants asserted surprised the agency. As the EDR rulings noted, the grievants had long known of the existence of the salient fact contained in the requested report: that an inspector had allegedly asserted that if they provided a report, their jobs would be protected. This issue too was fully addressed in the original rulings and this Department found that the grievants had long known of the alleged deal offered by the investigator and therefore evidence that the investigator had allegedly offered a deal could not be viewed as newly discovered evidence.

DISCUSSION

Once this Department issues its administrative review, it no longer has jurisdiction to rule further. As we have ruled in other prior cases, the plain language of the *Grievance Procedure Manual* precludes the issuance of multiple administrative review rulings by the EDR and Department of Human Resources Management (“DHRM”) Directors.¹ Even if this Department could further rule, however, none of the representations in the instant ruling requests would have altered the underlying reasoning set forth in its administrative review rulings.

The grievants assert that both of the objections ruled on by this Department in the administrative review rulings raise due process concerns. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.² Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴ The grievants are free to raise their due process and any other legal objections with the circuit court but must do so within 30 calendar days of November 16, 2010, when the original hearing decisions became final. Finally, we note the grievants also appealed to DHRM to withdraw its administrative review decisions.⁵ Like this Department, the DHRM Director no longer has authority to rule in this matter. The only review remaining for either party in this matter is circuit court review, which must be initiated within 30 calendar days of November 16, 2010.

Claudia T. Farr
Director

¹ See EDR Ruling Nos. 2010-2538; 2010-2500, 2009-2328; 2006-1348; 2006-1289; 2004-859. Moreover, if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions become final and ripe for judicial appeal.

² *Grievance Procedure Manual* § 7.2(d).

³ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

⁴ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

⁵ It is not entirely evident whether one or both grievants requested that DHRM withdraw its administrative reviews. However, because the DHRM Director no longer had any authority to rule, the point is essentially moot.