

Issue: Second Administrative Review of Hearing Decision in Case No. 9476; Ruling
Date: April 14, 2011; Ruling No. 2011-2952; Agency: University of Virginia;
Outcome: Grievant Not In Compliance – Untimely.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of University of Virginia
Ruling Number 2011-2952
April 14, 2011

On April 11, 2011, this Department (EDR) received a letter from the grievant's representative which argues that the grievant's request to EDR for administrative review of the Decision of the Hearing Officer in Case Number 9476 was timely and as such, EDR Ruling No. 2011-2951 was wrongfully decided. As EDR previously ruled, the grievant's request is untimely and there is no just cause for the delay.

FACTS

The hearing decision for Case Number 9476 was issued March 21, 2011.¹ EDR received the grievant's request for administrative review on April 6, 2011. In EDR Ruling No. 2011-2951, issued April 8, 2011, this Department determined that the grievant's request for administrative review was not timely.² The grievant, through his representative, requests that this Department reconsider its April 8th ruling and argues that the request for administrative review should be considered timely.

DISCUSSION

As previously discussed in EDR Ruling No. 2011-2951, appeals to this Department considered under section 7.2 of the *Grievance Procedure Manual* as administrative reviews "must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."³ The March 21, 2011 hearing decision also advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM), or EDR must be *received* by the reviewer within 15 calendar days of the date the original decision was issued.⁴ As determined in EDR Ruling No. 2011-2951, and consistent with this Department's past precedent, because this Department did not receive the grievant's initial request for administrative review until April 6, 2011, one day beyond the expiration of the 15 calendar-day period, it was untimely and could not be considered.⁵

¹ Decision of Hearing Officer, Case No. 9476, Mar. 21, 2011 ("Hearing Decision"), at 1.

² EDR Ruling No. 2011-2951.

³ *Grievance Procedure Manual* § 7.2(a).

⁴ Hearing Decision at 5-6.

⁵ See, e.g., EDR Ruling No. 2009-2274; EDR Ruling No. 2009-2288; EDR Ruling No. 2009-2252; EDR Ruling No. 2008-1811; EDR Ruling No. 2006-1078; EDR Ruling No. 2001-051.

In support of his argument that the administrative review request to EDR was timely, the grievant states that the Rules of the Supreme Court of Virginia (regarding appeals pursuant to the Virginia Administrative Process Act “APA”) require that three days be added to the computation of time to request an administrative review.⁶ In the alternative, the grievant appears to argue that because the hearing decision was sent electronically to the grievant’s representative on the day of issuance, the Rules of the Supreme Court of Virginia require that a minimum of one day be added to the computation of time to request an administrative review.⁷

As noted in EDR Ruling No. 2006-1117, while potentially instructive, this Department is not bound by the provisions of the Virginia APA. Likewise, the computation of time periods as set forth in Rule 1:7 of the Rules of the Supreme Court of Virginia does not apply to this Department’s administrative review process. More importantly, this Department has consistently and strictly adhered to the grievance procedure requirement that a request for administrative review must be received by the administrative reviewer within 15 calendar days from the date of the hearing decision. This Department has been consistent in its practice of not extending the 15-day timeframe except under extraordinary circumstances.

To the extent that the grievant is arguing that he was denied adequate time to prepare and file his request for administrative review based on the method by which he received his copy of the hearing decision, that is, certified mail, this argument is unpersuasive. The grievant’s representative in this case appears to have received the hearing decision on the same day that it was issued and as such, had ample time to submit his request for an administrative review. Accordingly, any delay that was caused by a certified mailing was certainly offset by the grievant’s representative’s essentially immediate receipt of the decision.

The grievant further asserts that he gave “notice” of his intent to file a request for administrative review when he phoned the Department of Human Resource Management (DHRM) on April 4, 2011 and inquired as to whether a request for administrative review could be transmitted via facsimile. As noted in prior rulings rendered by this Department, a notice of intent to later request an administrative review, received by the administrative reviewer within the 15 calendar day period, will not automatically preserve one’s rights to request such a review at a later time and in most cases, it will not. The grievance procedure requires that the party provide the grounds for the administrative review at the time of submitting the request.⁸ Accordingly, the phone call to the DHRM by the grievant’s representative to inquire as to whether he could fax in the request for administrative review did not preserve his rights to challenge the hearing decision through the administrative review process at a later time.

⁶ In support of this contention, the grievant cites to Virginia Supreme Court Rule 2A:2(a), Notice of Appeal which provides that, “[a]ny party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party’s counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party’s last address known to the agency.”

⁷ In support of this contention, the grievant cites to Virginia Supreme Court Rule 1:7 which states “[w]henver a party is required or permitted under these Rules, or by direction of the court, to do an act within a prescribed time after service of a paper upon counsel of record, three (3) days shall be added to the prescribed time when the paper is served by mail, or one (1) day shall be added to the prescribed time when the paper is served by facsimile, electronic mail or commercial delivery service.”

⁸ See, e.g., EDR Ruling Nos. 2008-1910, 2008-1915, 2008 -1916.

Based on the foregoing, this Department concludes that the grievant has presented insufficient grounds to alter the result of EDR Ruling No. 2011-2951.⁹ That ruling will stand.

APPEAL RIGHTS

A hearing officer's decision becomes a final hearing decision when the 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request or once all timely requests for review have been decided.¹⁰ Because the grievant's administrative review requests to this Department and DHRM were untimely, the hearing decision became a final hearing decision after the 15 calendar day period expired on **April 5, 2011**. The grievant has 30 calendar days from that date to appeal the hearing decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must have been that the final decision is contradictory to law.¹¹

Claudia T. Farr
Director

⁹ Finally, the grievant has also challenged EDR's decision to send Ruling No. 2011-2951 via e-mail when the grievant does not have the ability to use e-mail. The grievant further argues that sending an EDR ruling via e-mail instead of certified mail impinges upon his due process rights by shortening the time period in which he has to respond or take action. It is difficult to see how the delivery method of the EDR ruling that held the grievant's request for administrative review to be untimely has anything to do with the timeliness of the original submission. Notwithstanding the irrelevance of this issue, we note that contrary to the grievant's assertion, there is nothing in the *Grievance Procedure Manual* or the *Rules for Conducting Grievance Hearings* that requires an administrative review ruling from the EDR Director to be sent to the parties via certified mail. The hearing officer is required to send his or her hearing decision to the parties via certified mail, but an administrative review decision rendered by the EDR Director is not subject to the same requirement. See *Grievance Procedure Manual* § 5.9. Moreover, even if EDR had sent Ruling No. 2011-2951 via certified mail, it does not appear that the grievant would have had more time to pursue his right to appeal to circuit court, the only course of action available to him at this time. More specifically, according to the grievance procedure, a party has 30 calendar days from a "final hearing decision" to appeal to circuit court. When all requests for administrative review are untimely, as in this case, the original hearing decision *is* the "final hearing decision," and may be appealed to the circuit court within 30 calendar days of its issuance. Further, even assuming that the grievant does not have the ability to use e-mail, he has chosen a representative to act on his behalf and this representative has been communicating with this office via e-mail. Accordingly, communicating via e-mail is appropriate in this case. Most importantly, EDR's use of e-mail in a case such as this when the time for appeal to circuit court is running seems especially prudent so as to ensure that the grievant has as much time as possible to pursue an appeal to circuit court should he desire to do so. It should also be noted that while this Department finds no merit to the grievant's contention that his due process rights have been abridged by this Department's use of e-mail, the grievant is free to present that argument before the circuit court in the jurisdiction where the grievance arose. Va. Code § 2.2-3006(B).

¹⁰ See *Grievance Procedure Manual* § 7.2(d).

¹¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).