

Issue: Compliance/other grievance procedure issue; attorney's fees; Ruling Date: March 31, 2006; Ruling #2006-1322; Agency: Department of Juvenile Justice; Outcome: no non-compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Juvenile Justice  
Ruling Number 2006-1322  
March 31, 2006

The grievant has requested a compliance ruling from this Department in Case No. 8213.

**FACTS**

The grievant is an employee of the Department of Juvenile Justice (DJJ or the agency).<sup>1</sup> On August 19, 2005, he initiated a timely grievance challenging his receipt of a Group III Written Notice and his subsequent termination.<sup>2</sup> After the parties failed to resolve the grievance during the management resolution steps, the agency head qualified the grievance for hearing.<sup>3</sup>

A hearing was held on December 5, 2005.<sup>4</sup> In a decision issued on December 7, 2005, the hearing officer upheld the Group III Written Notice but mitigated the grievant's termination to an unpaid suspension of 30 days.<sup>5</sup> The decision also stated that the grievant was entitled to recover a reasonable attorney's fee from the agency and advised the "[g]rievant's attorney" of his obligation to submit a fee application within 15 calendar days of the hearing decision.<sup>6</sup> No fees petition was subsequently submitted on behalf of the grievant.

On December 22, 2005, the grievant requested reconsideration of the decision.<sup>7</sup> The hearing officer issued a ruling on December 27, 2005 upholding his previous decision.<sup>8</sup> The grievant also sought an administrative review by the EDR Director, and on March 2, 2006, this Department issued an administrative review decision which advised the grievant that within 15 calendar days, he could seek a ruling from the Department of Human Resource Management (DHRM) regarding his objections to the

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<sup>1</sup> Hearing Decision in Case No. 8213 ("Hearing Decision") at 2.

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

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

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 1, 6.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> Reconsideration Decision in Case No. 8213 at 1.

<sup>8</sup> *Id.* at 1, 2.

hearing officer's interpretation of policy.<sup>9</sup> Following this ruling by EDR, the grievant made a timely request for a ruling to DHRM on March 16, 2006, and DHRM's ruling is currently pending. On March 22, 2005, this Department received a second ruling request from the grievant, in which he asked the EDR Director to order the agency to reimburse him for his out-of-pocket "lawyer fees."

### DISCUSSION

The grievance statutes provide that "[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."<sup>10</sup> For fees to be available, the grievant must have been represented by an attorney admitted to practice in the Commonwealth of Virginia.<sup>11</sup>

The grievant has asked the EDR Director to order the agency to reimburse him for the cost of his representative at hearing. Under the grievance procedure, only a hearing officer may award fees.<sup>12</sup> Normally, this Department would forward such a request, if timely made, to the hearing officer.<sup>13</sup> In this case, however, it is unnecessary to do so, because the hearing officer could not, as a matter of law and the grievance procedure, grant the relief sought by the grievant.

The grievant is ineligible for an award of attorney's fees because his representative is not an attorney admitted to practice in the Commonwealth of Virginia. Although the hearing officer assumed that the grievant's representative was admitted to practice in Virginia when he issued his December 7, 2005 decision, during the course of this Department's investigation, the representative stated that he was not admitted in Virginia. He also explained that he had not made an application for fees because he was not admitted, and that he had disclosed his status to the grievant in his fee agreement. As the grievant was not represented by an attorney admitted to practice in Virginia, he is ineligible for an award of attorney's fees. This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>14</sup>

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Claudia T. Farr

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<sup>9</sup> EDR Ruling No. 2006-1228.

<sup>10</sup> Va. Code § 2.2-3005.1(A).

<sup>11</sup> See Addendum to Decision of Hearing Officer in Case No. 7908.

<sup>12</sup> Va. Code § 2.2-3005.1(A); *Grievance Procedure Manual* § 7.2(e).

<sup>13</sup> We will assume, for purposes of this ruling only, that the grievant's request for attorney's fees was timely.

<sup>14</sup> Va. Code § 2.2-1001 (5).

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