

Issue: Administrative Review of Case #8272; attorney's fees issues; Ruling Date: May 16, 2006; Ruling #2006-1336; Agency: Department of Social Services; Outcome: hearing officer is directed to reconsider decision in accordance with this ruling.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2006-1336
May 16, 2006

The grievant has requested that this Department administratively review the fees addendum issued by the hearing officer in Case No. 8272. The grievant challenges the hearing officer's determination that she was not entitled to an award of attorney's fees.

FACTS

The grievant was employed by the Department of Social Services (DSS or the agency).¹ On December 12, 2005, the agency gave the grievant a Group III Written Notice for allegedly violating the agency's Conflict of Interest guidelines and terminated her employment.² That same day, the grievant initiated a grievance challenging the agency's actions.³ After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.

A hearing was conducted on March 16, 2006.⁴ On March 24, 2006, the hearing officer issued a written decision upholding the Group III Written Notice, but directing that the grievant be reinstated, with a 30 day suspension, because of "the failure of the agency to follow its own procedures."⁵ The grievant subsequently submitted a timely petition for attorney's fees.⁶ On April 10, 2006, the hearing officer issued a fees addendum denying the grievant attorney's fees, on the basis that she had not "substantially prevailed."⁷ The grievant has appealed the denial of attorney's fees.⁸

¹ Hearing Decision at 4.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1, 11.

⁶ Fees Addendum at 1.

⁷ *Id.* at 2-3.

⁸ In her April 19, 2006 letter appealing the hearing officer's ruling on attorney's fees, the grievant also states that she "hope[s] there is some way to have the Group III rescinded." She appears to admit, however, that any appeal of the hearing officer's March 24, 2006 decision on the merits of the grievance is time-barred, stating that she recognizes that her concerns regarding the Written Notice "cannot be addressed at this time." See *Grievance Procedure Manual* at §§ 7.2(a), 7.2(e).

DISCUSSION

Virginia Code § 2.2-3005.1 provides 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.” That statute further provides that all awards of attorney’s fees “must be in accordance with rules established by the Department of Employment Dispute Resolution.”⁹

The hearing officer in this case found that the grievant had not “substantially prevailed” in her grievance because she was “unsuccessful in having the Written Notice rescinded [sic]” and because she was not reinstated to full benefits and back pay, but rather was subject to a 30 day suspension.¹⁰ Although the hearing officer acknowledged that the grievance procedure requires that a grievant be reinstated in order to “substantially prevail” for purposes of attorney’s fees, he concluded this requirement was “a necessary, but not sufficient condition for the award of attorneys fees.”¹¹ The grievant asserts that the hearing officer erred in concluding that she had not substantially prevailed on her grievance.¹²

The *Grievance Procedure Manual* states:

Attorneys’ fees are not available under the grievance procedure, **with one exception:** an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust. For such an employee to “substantially prevail” in a discharge grievance, the hearing officer’s decision must contain an order that the agency reinstate the employee to his former (or an objectively similar) position.¹³

This Department interprets this provision to mean a grievant “substantially prevails” in a discharge grievance if she gets her job back, in other words, whenever a hearing officer’s decision contains an order of reinstatement, regardless of whether all disciplinary actions against her were reduced or rescinded. Therefore, because the March 24th hearing decision directed her reinstatement to employment, the hearing officer erred in finding that the grievant

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ Hearing Decision at 3.

¹¹ Hearing Decision at 2-3.

¹² The grievant also argues that the agency did not challenge the reasonableness of the attorney fee, allege any special circumstances that would make an award unjust, or file an answer to the fee petition. The agency challenges the grievant’s contention, asserting that it challenged the reasonableness of the fees, as well as the grievant’s entitlement to fees.

¹³ *Grievance Procedure Manual* § 7.2(e) (underlining added). See also *Rules for Conducting Grievance Hearings* § VI(D).

did not substantially prevail at hearing. For this reason, this Department directs the hearing officer to reconsider his decision in the April 10th fees addendum in accordance with this ruling.

The grievant also requests clarification of whether her benefits have been “fully reinstated” as a result of the hearing decision. In the March 24th hearing decision, the hearing officer awarded the grievant “full back pay and restoration of benefits, subject to a 30 day suspension.”¹⁴ The grievant notes that in the fees addendum, however, the hearing officer states that “she was not restored to full benefits and back pay.”¹⁵

We understand the hearing officer’s statement in the fees addendum to indicate merely that the grievant’s relief was limited by the 30 day suspension. Such a reading is consistent with the hearing officer’s statement in the March 24th decision awarding the grievant “full” back pay and benefits, “subject to a 30 day suspension.” However, as this matter is being remanded to the hearing officer with respect to attorney’s fees, we direct that, in his reconsidered opinion, he also clarify the issue of back pay and benefits raised by the grievant.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer is ordered to reconsider his decision in accordance with this ruling. 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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸ This Department’s rulings on matters of procedural compliance are final and nonappealable.¹⁹

Claudia T. Farr
Director

¹⁴ Hearing Decision at 11; *see also* Fees Addendum at 2.

¹⁵ Fees Addendum at 3.

¹⁶ *Grievance Procedure Manual*, § 7.2(d).

¹⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁸ *Id.* *See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

¹⁹ Va. Code § 2.2-1001 (5).