

Issue: Administrative Review: Appeal of the Fees Addendum in Case No. 8520;  
Ruling Date: June 4, 2007; Ruling #2007-1671; Agency: Department of Corrections;  
Outcome: Fees Addendum not in compliance - remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2007-1671  
June 4, 2007

By letter dated May 2, 2007, the grievant has requested an administrative review of the hearing officer's April 26, 2007 award of attorneys' fees in Case Number 8520.

**FACTS**

In Case Number 8520, the grievant challenged a Group III Written Notice with termination.<sup>1</sup> The hearing officer, in the revised decision, modified the discipline to a Group II Written Notice with ten days suspension and reinstated the grievant to his former position.<sup>2</sup> Because the grievant substantially prevailed, the hearing officer found that the grievant was entitled to recover reasonable attorneys' fees.<sup>3</sup>

The hearing officer awarded \$5,848.50 in fees to the grievant in an addendum decision.<sup>4</sup> This award did not include fees for the travel time of the grievant's attorney to and from the hearing. In addition, the hearing officer did not grant recovery for fees incurred prior to the date the agency head qualified the grievance for a hearing.<sup>5</sup> There were approximately 13.6 hours of attorney time not provided for in the award that occurred before the qualification date, December 11, 2006.<sup>6</sup>

**DISCUSSION**

Section 7.2(e) of the *Grievance Procedure Manual* provides that a grievant "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

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<sup>1</sup> Revised Decision of Hearing Officer, Case No. 8520-R, Mar. 29, 2007 ("Revised Hearing Decision"), at 3.

<sup>2</sup> *Id.* at 7-8.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> Addendum to Decision of Hearing Officer, Case No. 8520, Apr. 26, 2007 ("Fees Addendum"), at 2.

<sup>5</sup> *Id.*

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

circumstances would make an award unjust.”<sup>7</sup> An employee “substantially prevails” where the hearing officer’s decision contains an order directing reinstatement of the employee to his former (or an objectively similar) position.<sup>8</sup> The grievant has challenged the award of fees on two grounds. The grievant asserts that: (1) the grievant was entitled to recover fees that were incurred prior to qualification of the grievance for hearing; and (2) fees for travel time should have been included in the award. Each of these arguments will be addressed below.

### *Pre-Qualification Fees*

The hearing officer determined that “fees incurred during the grievance procedure’s Management Resolution Step stage are not expenses arising from the hearing.”<sup>9</sup> As such, the hearing officer did not award any attorneys’ fees for services that occurred prior to the date of qualification for a hearing. The grievant contends that the grievance statute provides no such limitation on what fees may be awarded. The EDR Director has not had the opportunity to rule on this precise issue until this case. Thus, it is an issue of first impression.

Based on the placement of the fees provision in the portion of the grievance statute related to hearings, it is this Department’s construction of the grievance statute, the *Grievance Procedure Manual*, and the *Rules for Conducting Grievance Hearings* that attorneys’ fees are only awardable to the extent they relate to the hearing. The *Grievance Procedure Manual* conditions the recovery of attorneys’ fees on the basis that an attorney represents the grievant, and the grievant substantially prevails, *at hearing*.<sup>10</sup> There is no such provision for representation of the grievant, for instance, at the second resolution step meeting. Moreover, the management step portion of a grievance is not a process that requires the services of an attorney. However, simply limiting the recovery to fees that are incurred post-qualification is an inaccurate approach.

To the extent that the grievant is able to show that there were services rendered by his attorney prior to qualification that directly related to preparation or work for the hearing, those fees can be compensable. However, fees incurred for the representation of the grievant in conjunction with the management steps are not compensable. The statute is meant to reimburse a grievant only for attorneys’ fees related to the hearing. Therefore, the hearing officer is directed to reconsider his award of attorneys’ fees in light of this ruling. If the fees incurred prior to qualification of this grievance can be shown to have been related to or for the preparation of the grievant’s case for hearing, those fees must be awarded if reasonable. However, if the fees relate primarily to the management steps, the award should not include those amounts.

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<sup>7</sup> See also Va. Code § 2.2-3005.1(A) (“In 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>8</sup> *Grievance Procedure Manual* § 7.2(e).

<sup>9</sup> Fees Addendum at 2.

<sup>10</sup> See *Grievance Procedure Manual* § 7.2(e).

*Travel Time*

The hearing officer determined that “traveling to and from a hearing does not involve legal work, counsel, or attorney work product and is, therefore, not compensable.”<sup>11</sup> This, too, is an issue of first impression for the EDR Director upon administrative review. Certainly travel time is not *per se* unreasonable and non-compensable as attorneys’ fees: in other contexts, courts in many jurisdictions have awarded attorneys’ fees for travel time.<sup>12</sup> However, under the grievance procedure, only *reasonable* attorneys’ fees are available,<sup>13</sup> thus the hearing officer should have determined whether the fees incurred for travel were reasonable.

To determine whether attorneys’ fees are reasonable, courts in Virginia assess certain criteria: “the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.”<sup>14</sup> Factors like these may not be readily applicable to the issue of travel time. Indeed, some courts have determined that although compensable, attorneys’ fees for travel time should be paid at a lower rate than the full billable rate,<sup>15</sup> which may be a reasonable result given the totality of the circumstances in any given case.

In light of all of the above, it is this Department’s determination that under the grievance procedure, the hearing officer must determine the reasonableness of attorneys’ fees for travel time under the facts and circumstances of this case.<sup>16</sup> The hearing officer is directed to revise his decision concerning the award of attorneys’ fees for travel time consistent with this ruling.

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<sup>11</sup> Fees Addendum at 2.

<sup>12</sup> *E.g.*, Craik v. Minnesota State Univ. Bd., 738 F.2d 348 (8<sup>th</sup> Cir. 1984); Henry v. Webermeier, 738 F.2d 188, 193-94 (7<sup>th</sup> Cir. 1984); United States *ex. rel.* Abbott-Burdick v. University Med. Assocs., No. 2:96-1676-12, 2002 U.S. Dist. LEXIS 26986, at \*60-64 (D.S.C. May 23, 2002); Page v. Trustees of Sandhills Cmty. College, No. 3:96CV00358, 1999 U.S. Dist. LEXIS 16513, at \*46 (M.D.N.C. Aug. 31, 1999); Rosenberger v. Rector & Visitors of Univ. of Va., No. 91-0036-C, 1996 U.S. Dist. LEXIS 13799, at \*19-20 (W.D. Va. Sept. 17, 1996); Sun Publ’g, Inc. v. Mecklenburg News, Inc., 594 F. Supp. 1512, 1520 (E.D. Va. 1984).

<sup>13</sup> Va. Code § 2.2-3005.1(A).

<sup>14</sup> Chawla v. Burgerbusters, Inc., 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998) (citing Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P’ship., 253 Va. 93, 96-97, 480 S.E.2d 471, 473 (1997)).

<sup>15</sup> *E.g.*, Page, 1999 U.S. Dist. LEXIS 16513, at \*46 (awarding fees for travel at 50% of normal rate); Sun Publ’g, 594 F. Supp. at 1520 (awarding fees for travel at about 20% of normal rate). *But Abbott-Burdick*, 2002 U.S. Dist. LEXIS 26986, at \*62 (awarding fees for travel at full rate); Saunders v. City of Roanoke, 13 Va. Cir. 378, 379 (Roanoke 1988) (same).

<sup>16</sup> A general guide of reimbursing attorneys’ fees for travel time at a rate of 50% might be reasonable in many cases. However, there may be instances when departure from such a guideline, either upward or downward, is necessary based on an assessment of the totality of the circumstances and the reasonableness of the fees billed.

CONCLUSION

As set forth above, this Department orders the hearing officer to reconsider his decision with respect to his award of fees relating to the hearing in this matter.<sup>17</sup> The hearing officer's decision on reconsideration following this ruling is not subject to further administrative review.<sup>18</sup> Any appeals must be made directly to the appropriate circuit court, in accordance with the provisions of § 7.3(a) of the *Grievance Procedure Manual*.

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Claudia T. Farr  
Director

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<sup>17</sup> As the hearing officer who rendered the initial decision in this matter has resigned his employment with this Department, this case will be remanded to Hearing Officer Carl Wilson Schmidt for consideration of the fees issues.

<sup>18</sup> *Grievance Procedure Manual* § 7.2(e) (“Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes ‘final’ as described in § 7.2(d) and may be appealed to the Circuit Court in accordance with § 7.3(a). The fees addendum shall be considered part of the final decision.”)