

Issue: Administrative Review and Compliance Ruling/agency appeals award of attorneys' fees; Ruling Date: December 8, 2006; Ruling #'s 2006-1125, 2007-1456; Agency: Old Dominion University; Outcome: this Department orders hearing officer to reconsider decision with respect to fees relating to initial hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**ADMINISTRATIVE REVIEW AND COMPLIANCE RULING OF
DIRECTOR**

In the matter of Old Dominion University
Ruling Nos. 2006-1125, 2007-1456
December 8, 2006

By letter dated October 16, 2006, Old Dominion University (“ODU” or “the agency”) has requested an administrative review of the hearing officer’s October 5, 2006 award of attorneys’ fees in Case Number 8116.

FACTS

The grievant was employed by the agency as a Law Enforcement Officer II in its internal police department.¹ He was removed from employment effective March 22, 2005 after receiving a Group III Written Notice for allegedly making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department, and shirking official duty.²

On April 15, 2005, the grievant filed a grievance challenging the disciplinary action.³ After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.⁴ The hearing was held on July 14, 2005.⁵ On July 20, 2005, the hearing officer issued a decision reducing the disciplinary action against the grievant to a Group I Written Notice and ordering that the grievant be reinstated to employment.⁶ The hearing decision also found that the grievant had not proven that the Written Notice was issued as a result of discrimination.⁷

¹ Hearing Decision (Case No. 8116) dated July 20, 2005 (“Hearing Decision”) at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1, 6.

⁷ *Id.* at 4.

By letters dated August 2, 2005, the agency, through its counsel, requested an administrative review by this Department of the hearing officer's decision and requested an administrative review by the Department of Human Resource Management (DHRM) as well. By letter dated August 4, 2005, the grievant's counsel requested an administrative review by this Department. In addition, the grievant requested reconsideration of the decision by the hearing officer and an administrative review of the hearing decision by DHRM.

The hearing officer issued his reconsideration decision on August 26, 2005.⁸ In his decision, the hearing officer affirmed his earlier ruling and also awarded attorneys' fees to the grievant.⁹ On September 1, 2005, the agency requested an administrative review by EDR of the reconsideration decision, with respect to that portion of the decision awarding attorneys' fees. By letters dated September 9, 2005, the grievant also requested an administrative review by this Department and DHRM of the reconsideration decision.¹⁰

On September 12, 2005, the hearing officer issued a fees addendum awarding the grievant fees of \$7,692.00, for 64.1 hours of attorney time.¹¹ Excluded from this award of fees was time spent by the grievant's counsel on the general claim of discrimination, as the hearing officer had determined that issue was not qualified for hearing.¹² By letter dated September 13, 2005, the agency requested an administrative review of this addendum.

On November 22, 2005, the Director of this Department issued a ruling addressing the claims raised by the grievant in his first and second requests for administrative review and by the agency in its first request for administrative review.¹³ In that ruling, the Director concluded that the hearing officer had erred with respect to the scope of the discrimination claim qualified for hearing and directed that the hearing officer reconsider his decision accordingly.¹⁴

⁸ Reconsideration Decision (Case No. 8116-R) dated August 26, 2005 ("Reconsideration Decision") at 1.

⁹ *Id.* at 1-5.

¹⁰ In addition, he asked the hearing officer for reconsideration of his reconsideration decision. The hearing officer subsequently denied the grievant's request for a second reconsideration, on the ground that he no longer had jurisdiction over the grievance. Reconsideration Decision (Case No. 8116-R2) dated September 12, 2005.

¹¹ Fees Addendum dated September 12, 2005.

¹² Reconsideration Decision at 6.

¹³ See EDR Ruling Nos. 2006-1099, 2006-1104. This Department's November 22, 2005 ruling did not address the agency's objections to the attorneys' fees awarded to the grievant. To the extent the objections raised in the agency's September 1, 2005 and September 13, 2005 requests for review were not repeated in the agency's October 16, 2006 request for review, the objections have been rendered moot by the hearing officer's May 25, 2006 reconsideration decision and/or this Department's determination, in this ruling, that the grievant may not receive fees for work performed for the initial hearing. Accordingly, these objections will not be addressed in this ruling.

¹⁴ *Id.* at 3-5.

The hearing officer subsequently advised the parties that he would reopen the hearing to take additional evidence. The agency objected, and on December 20, 2005, the EDR Director issued a ruling concluding that the hearing officer had not abused his discretion in reopening the hearing to take additional evidence.¹⁵

A reopened hearing was held the week of March 6, 2006. On May 25, 2006, the hearing officer issued a third reconsideration decision, in which he rescinded the grieved disciplinary action in its entirety.¹⁶ That decision advised the grievant to submit an attorneys' fees petition, which was to include all three days of hearing, within 15 days.¹⁷

On June 9, 2006, the agency requested an administrative review by EDR of the hearing officer's May 25th decision. In a ruling dated July 10, 2006, this Department concluded that the hearing officer had not failed to comply with the grievance procedure, with respect to those objections raised by the agency in its June 9th request.¹⁸

On October 3, 2006, DHRM issued its ruling in response to the pending requests by the agency and the grievant. Finding that the May 25, 2006 reconsideration decision rendered the requests moot, DHRM concluded it had no basis to interfere with the hearing officer's decision.

Subsequently, in a fees addendum dated October 5, 2006, the hearing officer issued a second award of attorneys' fees.¹⁹ This award included the fees initially awarded in the hearing officer's September 12, 2005 decision, as well as fees for work performed by the grievant's attorney on the grievant's claim of discrimination and other work performed after his initial hearing (including work performed after the reopened hearing).²⁰ On October 16, 2006, the agency appealed the October 5th fee award to the EDR Director.

DISCUSSION

Section 7.2(e) of the *Grievance Procedure Manual* (the *Manual*) provides that a grievant "who is represented at hearing by an attorney and substantially prevails on the

¹⁵ EDR Ruling No. 2006-1202.

¹⁶ See Third Reconsideration Decision (Case No. 8116-R3), dated May 25, 2006. The hearing officer concluded that the agency had not met its burden of showing that the disciplinary action was "warranted and appropriate," as the action "was motivated, in part by racial discrimination." *Id.* at 13-14. Moreover, the hearing officer found, even if he were to assume that the disciplinary action was "warranted and appropriate, the Agency's racial discrimination against Grievant is a mitigating circumstance justifying removal of the disciplinary action." *Id.* at 14. In addition, the hearing officer held that the grievant had prevailed on his "[g]eneral claim of discrimination," because the grievant "has established that the Agency discriminated against him because of his race." *Id.*

¹⁷ *Id.* at 14. The grievant submitted the requested fee petition on June 2, 2006. In addition, the grievant submitted a supplemental fee petition on October 4, 2006. See Fees Addendum dated October 5, 2006.

¹⁸ EDR Ruling No. 2006-1376.

¹⁹ Fees Addendum dated October 5, 2006.

²⁰ *Id.*

merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."²¹ 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.²²

The agency objects to the October 5th award of fees on several grounds. In particular, the agency asserts that: (1) the grievant is barred from recovering any award of fees as he failed to make a timely initial fee petition; (2) the grievant is precluded from recovering any fees related to the reopened hearing as that hearing did not address his discharge; (3) the hearing officer improperly awarded fees for several activities for which compensation is not available; and (4) the grievant's fee request is unreasonable and undocumented.²³ Each of these arguments will be addressed below.

Failure to Make a Timely Initial Fee Petition

Under the grievance procedure, either party may seek administrative review of an original hearing decision within 15 calendar days of the decision's issuance.²⁴ The *Grievance Procedure Manual* further provides that in cases in which attorneys' fees are available, "counsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees."²⁵

In his initial decision of July 20, 2005, the hearing officer did not direct the grievant's counsel to submit a fee petition.²⁶ On August 10, 2005, more than 15 calendar days after the initial decision, the grievant's attorney submitted his initial fee petition. In the cover letter to the petition, the grievant's attorney acknowledged that the petition was late, but he argued that his untimeliness should be excused because the hearing officer had failed to inform him of the obligation to timely submit the fee petition, as required by § VI(D) of the *Rules for Conducting Grievance Hearings* (the *Rules*), the hearing decision was not yet final, and the agency would suffer no prejudice.

Subsequently, in a reconsideration decision dated August 26, 2005, the hearing officer stated that he "did not award attorneys' fees in the original Hearing Decision

²¹ 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.")

²² *Grievance Procedure Manual* § 7.2(e).

²³ The agency's objections are set forth in an October 16, 2006 letter to the EDR Director, as well as letters to the hearing officer dated May 19, 2006, June 19, 2006, and October 5, 2006, which are incorporated by reference in the October 16th letter. We note that it appears the October 16th letter erroneously describes the May 19th letter as having been written on May 16th and the June 19th letter as having been written on June 15th.

²⁴ See *Grievance Procedure Manual* § 7.2(e).

²⁵ *Id.*

²⁶ Hearing Decision dated July 20, 2005.

because the Hearing Officer upheld disciplinary action, namely a Group I Written Notice.”²⁷ “Normally,” the hearing officer wrote, “upholding disciplinary action would be a special circumstance making an award of attorneys’ fees unjust because the employee had some fault in causing the Agency to initiate disciplinary action against him.”²⁸ However, the hearing officer explained, “[u]pon further reflection” he had concluded “that the existence of special circumstances making an award of attorneys’ fees unjust depends not merely on whether the Agency was justified in taking disciplinary action, but rather depends on all of the circumstances of the case...”²⁹ Here, the hearing officer found, “the Group I Written Notice Grievant received is not a special circumstance making an award of attorneys’ fees unjust.”³⁰ As previously noted, on September 12, 2005, the hearing officer issued a fees addendum awarding the grievant fees of \$7,692.00, for 64.1 hours of attorney time.

The agency argues that the grievant’s failure to submit a timely fees petition precludes any award of fees. With respect to the award of fees from the initial hearing, we agree. The August 26, 2005 reconsideration decision makes clear that the hearing officer deliberately omitted any award of fees from his initial decision, on the ground that special circumstances existed which would render a fee award unjust. Thus, the hearing officer’s silence as to the fees petition was not an error, as the grievant submits, but rather was consistent with the hearing officer’s apparent conclusion that fees were not appropriate due to special circumstances. To the extent the grievant disagreed with the hearing officer’s decision not to award fees, he was required to challenge that decision through the administrative review process within 15 calendar days of the initial hearing decision.³¹

Here, the grievant timely raised a number of objections to the initial hearing decision through the administrative review process, but did not timely object to the hearing officer’s failure to award fees. In the absence of a timely challenge to his initial decision with respect to fees, the hearing officer could not revisit this issue on reconsideration. Accordingly, this Department finds that the hearing officer erred in awarding the grievant any attorneys’ fees for the work performed by his counsel up to and including the first hearing and directs the hearing officer to reconsider his October 5, 2006 fees addendum in accordance with this ruling. If necessary, the hearing officer may ask the parties to provide additional information or evidence to allow him to make this determination.

²⁷ Reconsideration Decision dated August 26, 2005, at 4 .

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 5.

³¹ Even if we were to accept the grievant’s apparent argument that the hearing officer merely failed to advise the grievant’s attorney of his obligation to submit a fee petition, the grievant was required to challenge any such failure through the administrative review process.

The grievant's failure to raise timely objections to the initial hearing decision has no bearing on any award of fees for activities relating to the reopened hearing, however. In his May 25, 2006 decision after the reopened hearing, the hearing officer advised the grievant to submit a revised fees petition within 15 days.³² The grievant's counsel timely complied with this directive on June 2, 2006. Although the grievant's failure to timely object to the initial decision cannot be cured by the subsequent hearing and decision, his initial failure should not act as a bar to any fees for the work performed by the grievant's counsel with respect to those issues addressed by the reopened hearing.

Availability of Fees for Reopened Hearing

The agency also asserts that no attorneys' fees are available for work associated with the reopened hearing, as the reopening addressed only with the grievant's claim of discrimination. The agency cites for this proposition § 5.9 of the *Grievance Procedure Manual*, which prohibits the award of attorneys' fees in grievance hearings not challenging discharge.

The agency's argument overlooks a critical point, however: at the time of the reopened hearing, the hearing officer's initial decision reinstating the grievant was not a final hearing decision. To the contrary, at the time of the reopening, the agency had a pending ruling request to DHRM, in which it sought to have the hearing officer's decision ordering reinstatement reversed. Had the agency been successful, the only basis on which the grievant could have prevailed in his quest for reinstatement was the discrimination claim at issue in the reopened hearing—and, in fact, the grievant succeeded in the reopened hearing in having the disciplinary action against him rescinded in its entirety. As a result, at the time of the reopened hearing, it was entirely possible that any reinstatement of the grievant would be the result of the reopened hearing, not the initial hearing. Under these circumstances, we find that the hearing officer did not err in awarding fees for the work performed in relation to the reopened hearing.

Award of Fees for Allegedly Non-Compensable Activities

The agency also argues that the hearing officer improperly awarded fees for activities which may not be compensated under the grievance procedure—specifically, for work performed as part of the administrative review process, work performed in relation to the grievant's post-hearing brief, and work performed “researching, preparing and /or defending a legal bill.”³³

³² Reconsideration Decision dated May 25, 2006, at 14.

³³ The agency also raised objections to work performed by a paralegal in its June 19, 2006 letter to the hearing officer. This argument was not specifically renewed in the agency's October 16th letter to the EDR Director, presumably because the hearing officer did not award fees for the 47.40 hours of time sought for paralegal work. See Fees Addendum dated October 5, 2006.

Administrative Review Process

When an administrative review is requested by either party, the original hearing decision is not “final” for purposes of judicial review; a hearing decision is “final” only after all timely requested administrative review rulings have been issued, and, if ordered by EDR or DHRM, the hearing officer issues a revised decision.³⁴ Thus, as a general rule, attorneys’ fees for work performed as part of the administrative review process may be compensated under the grievance procedure. There can be no justification for awarding fees to a grievant who is successful in obtaining reinstatement through the hearing officer’s initial decision, but not to a grievant who, due to hearing officer error or oversight, finds it necessary to pursue relief through the administrative review process. Similarly, it would make little sense to award fees to a grievant who is successful in the initial decision, but to deny fees related to a grievant’s attempts to defend that result during the period between the issuance of the initial decision and the hearing officer’s decision becoming final.³⁵

A hearing officer may in his or her discretion find that, under the circumstances present in a particular case, fees sought for this purpose are unreasonable and deny or limit fees on that basis. Here, the hearing officer apparently concluded that the fees sought for administrative review work were reasonable, and the agency has not shown that the award of fees by the hearing officer was an abuse of discretion.

Under the unique circumstances of this case, however, the hearing officer erred by awarding fees for work performed to defend that portion of the initial decision in which the grievant prevailed (*i.e.*, that portion of the decision not involving the grievant’s claims of discrimination, in which the hearing officer concluded that the discipline should be reduced from a Group III to a Group I).³⁶ Because, for the reasons previously set forth, the grievant is not entitled to attorneys’ fees for the initial hearing, he may not receive fees for his efforts to preserve any results of that hearing. Accordingly, the hearing officer is directed to reconsider his October 5th fees addendum to award fees only for that time spent on administrative review-related activities related to the grievant’s claims of discrimination. If necessary, the hearing officer may ask the parties to provide additional information or evidence to allow him to make this assessment.

Post-Hearing Brief

The agency also challenges any award of fees for time spent by the grievant’s attorney on his post-hearing brief, noting that such briefs are not authorized by the Virginia Code or the *Grievance Procedure Manual*. As this Department explained in Ruling No. 2006-1376, although the agency is correct that the *Manual* does not expressly

³⁴ See Va. Code § 2.2-3006(B); see also *Grievance Procedure Manual* § 7.2(d) and (e).

³⁵ Under the circumstances present in this case, this post-hearing activity would include the grievant’s response to the agency’s premature request for permission to appeal, as that request was made prior to a final hearing decision in this matter.

³⁶ Hearing Decision (Case No. 8116) dated July 20, 2005.

authorize the submission or acceptance of post-hearing briefs, it is equally true that neither the Code nor the *Manual* specifically prohibits these actions. Rather, in accordance with the broad language of § 5.7 of the *Manual*, which grants hearing officers the authority to “[r]ule on procedural requests” and to “[t]ake other actions as necessary or specified in the grievance procedure,” a hearing officer may accept a post-hearing brief so long as that action would not constitute an abuse of discretion.³⁷

Just as fees may be awarded for work performed in conjunction with administrative reviews, a hearing officer may, in his or her discretion, award fees for the preparation of a post-hearing brief, provided that acceptance of the brief would not in itself be an abuse of discretion. In this case, the agency has not shown that either the acceptance of the brief³⁸ or the awarding of fees for work performed on that brief constituted an abuse of the hearing officer’s discretion. Accordingly, we cannot find that the hearing officer failed to comply with the grievance procedure with respect to this issue.

Fees-Related Work

The agency further asserts that the grievance procedure does not authorize the hearing officer to award attorneys’ fees for “the time spent researching, preparing and/or defending a legal bill.” However, while the agency correctly notes that the grievance procedure does not expressly authorize fees for this purpose, nothing in the statute or the *Manual* precludes such an award. To the contrary, if grievants are to be able to exercise their statutory right to attorneys’ fees, the compensable time should include not simply an attorney’s efforts in representing a grievant at hearing, but also time spent assisting the grievant in receiving his statutory entitlement to fees.

Certainly, a hearing officer may in his or her discretion find that, under the circumstances present in a particular case, fees sought for this purpose are unreasonable and deny or limit fees on that basis. Here, while the agency appears to argue that the amount of time spent by the grievant’s attorney was unreasonable, it has not demonstrated that the award of fees by the hearing officer was an abuse of discretion.

Under the facts of this case, however, we find that the hearing officer erred by including in the fee award time spent by the grievant’s counsel to recover fees for the initial hearing. Because the grievant was not entitled to receive fees relating to that hearing, his attorney may not be compensated for his efforts to recover those disallowed fees. Accordingly, the hearing officer is directed to reconsider the October 5, 2006 fees addendum to exclude any time spent by the grievant’s counsel regarding fees from the initial hearing. If necessary, the hearing officer may ask the parties to provide additional information or evidence to allow him to make this determination.

³⁷ See EDR Ruling No. 2006-1376.

³⁸ *Id.*

“Unreasonable and Undocumented” Fee Request

The agency also argues that the grievant’s fee request was unreasonable and undocumented. With respect to the reasonableness of the fees sought by the grievant, that determination is left to the discretion of the hearing officer, as he is in the best position to judge the complexity of the case and the nature, extent and appropriateness of the attorney’s preparation. As the agency has not demonstrated that the hearing officer abused his discretion in assessing the reasonableness of the fees sought by the grievant, we cannot find that he erred in this regard.

With respect to the agency’s claims that the grievant’s request was “undocumented” or otherwise lacking sufficient specification, we note that the *Rules* simply require “an affidavit itemizing services rendered, the time billed for each service, and the attorney’s customary rate not to exceed \$120 per hour...”³⁹ There is no particular level of specificity required, nor is there any requirement that supporting documentation be produced. Whether a grievant has produced adequate information regarding attorneys’ fees is within the hearing officer’s sound discretion. Because the agency has not shown that an abuse of discretion exists, we will not disturb the hearing officer’s decision on this basis.

Remaining Objections

In addition to the objections which have been addressed above, the agency also “demands subtractions” for a number of other specific activities for which the hearing officer awarded fees. Although it is impractical, given the number and length of the agency’s objections, to address each individual objection in this ruling, we note that these activities include, in part, a conference with the hearing officer on December 29, 2005; the drafting of witness and exhibit lists on January 20, 2006, February 24, 2006, and February 27, 2006; and the interviewing of potential witnesses on February 20, 2006, February 27, 2006, March 1, 2006.

Although many of these remaining objections involve different services by the grievant’s counsel, the objections are all, in effect, challenges to determinations squarely within the hearing officer’s discretion regarding what fees are reasonable and appropriate. As the agency has failed to demonstrate that the hearing officer’s actions in regard to these matters constitute an abuse of discretion, we cannot find that the hearing officer failed to comply with the grievance procedure.

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 initial hearing in this matter. The hearing officer’s decision on reconsideration following this ruling is not subject to

³⁹ *Rules for Conducting Grievance Hearings* § VI(D).

further administrative review.⁴⁰ 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*.

This Department's rulings on matters of compliance are final and non-appealable.⁴¹

Claudia T. Farr
Director

⁴⁰ *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.”)

⁴¹ Va. Code § 2.2-1001(5).