

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8666;  
Ruling Date: February 12, 2008; Ruling #2008-1910, 2008-1915, 2008-1916;  
Agency: Virginia Community College System; Outcome: Remanded to Hearing  
Officer.



COMMONWEALTH of VIRGINIA  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia Community College System  
Ruling Numbers 2008-1910, 2008-1915 and 2008-1916  
February 12, 2008

Both the grievant and the Virginia Community College System (VCCS or the agency) have requested that this Department (EDR) administratively review the hearing officer's decisions in Case Number 8666.

FACTS

Prior to the elimination of her position and layoff in January 2007, the grievant was employed as a horticulture specialist with the agency. The grievant challenged the elimination of her position by filing a grievance on January 31, 2007. In EDR Ruling #2007-1601, this Department qualified the grievant's January 31<sup>st</sup> grievance for hearing. A hearing was subsequently held on the grievance on September 26 and October 9, 2007.<sup>1</sup>

In her hearing decision dated November 12, 2007,<sup>2</sup> the hearing officer concluded that the grievant's position was eliminated out of retaliation for her prior protected acts and recommended that the grievant be reinstated to her former position or to a similar position.<sup>3</sup> By e-mail dated November 27, 2007, the agency advised the hearing officer of its intent to request administrative review of the hearing decision.<sup>4</sup> Additionally, on November 29, 2007, grievant's counsel submitted to the hearing officer a petition for attorneys' fees.<sup>5</sup>

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<sup>1</sup> See Decision of Hearing Officer, Case No. 8666, issued November 12, 2007 ("Hearing Decision").

<sup>2</sup> In this case, while the hearing decision is dated November 12, 2007, it appears that the decision was not actually mailed until November 20, 2007. The date of issuance of the hearing decision should correspond with the day of its mailing. In other words, it is expected that if a hearing decision is dated November 12, 2007 that it will also be mailed to the parties on this day as well. Because it appears that the hearing decision was not actually mailed in this case until November 20, 2007, this Department concludes that the issuance date of the hearing decision was November 20<sup>th</sup> and not November 12<sup>th</sup> as indicated on the decision itself.

<sup>3</sup> See Hearing Decision at 9.

<sup>4</sup> The agency later faxed its more detailed request for administrative review to the hearing officer on December 11, 2007.

<sup>5</sup> In this case, it might appear that the grievant's counsel was untimely with his request for attorneys' fees since such request was not received by the hearing officer until November 29, 2007, or 17 days after the

Moreover, on December 27, 2007, the grievant sent the hearing officer a remedies proposal. The remedies proposal specifically identified the income and benefits allegedly lost by the grievant from the date of her layoff, February 1, 2007, through December 31, 2007 and requested that she be compensated for such lost income and benefits. By letter dated January 2, 2008, the hearing officer responded to the grievant's remedies proposal by stating: "[t]his is not a hearing officer matter. The allocation of wages should be negotiated between the employee and her employer. Should disagreement occur, a civil suit may be considered."

Also on January 2, 2008, the hearing officer issued a decision on the agency's December 11, 2007 request for reconsideration and the grievant's request for attorneys' fees. The hearing officer's January 2<sup>nd</sup> decision ruled the agency's request for reconsideration untimely.<sup>6</sup> In addition, in her January 2<sup>nd</sup> decision, the hearing officer concludes that she does not have the authority to award attorneys' fees because this case does not involve a disciplinary dismissal.<sup>7</sup>

The agency now asks this Department to review the hearing officer's January 2<sup>nd</sup> determination that its request for reconsideration was untimely. Also, the grievant asks this Department to review the hearing officer's determination that she is not entitled to attorney fees as well as the hearing officer's failure to consider her December 27<sup>th</sup> remedies proposal. Each of these issues will be addressed below.

### DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."<sup>8</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>9</sup>

#### *Agency's Request for Reconsideration*

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date of issuance indicated on the hearing decision (i.e., November 12<sup>th</sup>). However, as indicated in footnote 2 above, the actual issuance date of this decision was November 20, 2007, thereby rendering the November 29<sup>th</sup> petition for fees timely.

<sup>6</sup> See Reconsideration Decision of Hearing Officer ("Reconsideration Decision"), issued January 2, 2008, at 2. In addition, on January 9, 2008, the agency requested that the hearing officer reconsider her January 2, 2008 reconsideration decision, which the hearing officer declined to do in an e-mail dated February 6, 2008.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Va. Code §§ 2.2-1001(2), (3), and (5).

<sup>9</sup> *Grievance Procedure Manual* §§ 6.4; 7.2.

The Grievance Procedure Manual provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.”<sup>10</sup> As stated above and as noted in EDR Ruling No. 1891, the date of the original hearing decision in this case was actually November 20, 2007. Accordingly, the agency had 15 calendar days, or until December 5, 2007, to request an administrative review by the hearing officer of her original decision. In her January 2, 2008 reconsideration decision, the hearing officer concludes that the agency’s request for reconsideration was untimely because it was not received until December 11, 2007. However, the agency claims, and the hearing officer admits, that it sent an e-mail to the hearing officer on November 27, 2007 indicating the agency’s intent to request a reconsideration decision from the hearing officer.<sup>11</sup>

In its November 27<sup>th</sup> notice of intent to request reconsideration, the agency identified three issues that it intended to include in its more fully developed forthcoming request for reconsideration. More specifically, in its November 27<sup>th</sup> e-mail, the agency states: (1) the hearing officer makes an incorrect material factual conclusion when she finds that “there was no evidence that the president requested that department heads to reduce the operational budget;” (2) the hearing officer incorrectly concluded that an 8-month period between the protected activity and the alleged materially adverse action was sufficient for a finding of causation; and (3) the hearing officer erred in shifting the burden of proof to the agency. Although in somewhat more detail, these same issues were subsequently included in the agency’s December 11, 2007 request for reconsideration. Accordingly, it appears that the December 11, 2007 request was merely a more detailed recounting of the agency’s November 27, 2007 e-mail.

Based on the foregoing, this Department concludes that in this case, the agency’s November 27, 2007 e-mail of its intent to request reconsideration was sufficient in form and content to actually be considered a request for administrative review despite the agency’s characterization of the purpose of the e-mail.<sup>12</sup> Because this e-mail was received by the hearing officer on November 27, 2007, eight days prior to the deadline for any submissions of requests for administrative review, this Department concludes that the agency’s request for reconsideration by the hearing officer was timely. Accordingly, the hearing officer is ordered to consider on reconsideration the issues raised in the agency’s November 27, 2007 e-mail.

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

<sup>11</sup> The agency was apparently awaiting copies of the hearing tapes and all exhibits before submitting its “fully-briefed request for reconsideration.”

<sup>12</sup> It should be noted that 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. Because the agency provided the grounds for its request for administrative review in its timely November 27, 2007 e-mail, this e-mail is appropriately considered a request for administrative review.

### *Attorneys Fees*

Under § 7.2(e) of the *Grievance Procedure Manual*, an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. In this case, the hearing officer has denied the grievant's request for attorneys fees because the grievant's separation from employment with the agency was not a "disciplinary dismissal."<sup>13</sup> The grievant has requested that this Department administratively review the hearing officer's decision with regard to her eligibility to be awarded such fees.

As outlined above, the hearing officer has not yet addressed the allegations contained in the agency's request for reconsideration and as such, her order for relief could change in light of her consideration of these issues. Accordingly, it would be premature for this Department to make a determination at this time on whether the relief ordered, including an award of attorneys fees, is in accordance with the grievance procedure rules. If, in her reconsideration decision, the hearing officer upholds her original recommendation that the grievant be reinstated, the grievant may thereafter renew her request with this Department for an administrative review of the hearing officer's January 2, 2008 determination that the grievant is not entitled to attorneys fees. The grievant must submit her renewed request for administrative review of the hearing officer's decision regarding attorney fees within **10 calendar days** of the date of the hearing officer's forthcoming reconsideration decision.

### *Remedies Proposal*

Although not specifically designated as a request for administrative review, the grievant's December 27, 2007 "remedies proposal" is most appropriately viewed as such because it asks the hearing officer to take some action to modify and/or supplement her original decision, and there is no provision in the grievance procedure manual allowing for such an action. The *Grievance Procedure Manual* provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."<sup>14</sup> Here, however, the hearing officer received the grievant's remedies proposal on December 27, 2007, well beyond the 15 calendar days following the November 20, 2007 decision. Accordingly, the grievant's request for administrative review by the hearing officer was untimely and as such, the hearing officer did not err in failing to consider the remedies proposal.<sup>15</sup>

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<sup>13</sup> See Reconsideration Decision at 1.

<sup>14</sup> *Grievance Procedure Manual* § 7.2(a).

<sup>15</sup> It should be noted that had the grievant's "remedies proposal" been timely, while a hearing officer has the authority to award back pay, the specific amount of back pay to which a grievant is entitled is generally a straightforward computation that the parties determine without the need for a hearing officer's order. If the grievant believes the agency has not properly calculated the back pay amount, then he or she may petition the circuit court in the jurisdiction in which the grievance arose for an order requiring implementation of the final decision. See Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer is ordered to consider and issue a decision addressing the agency's November 27, 2007 request for reconsideration. This Department further concludes that the grievant's request for administrative review of the hearing officer's January 2, 2008 decision regarding attorneys' fees is premature. However, the grievant may renew her request in accordance with this decision should the hearing officer's decision remain intact after her consideration of the agency's request for reconsideration. Finally, this Department concludes that the grievant's remedies proposal was untimely.

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.<sup>16</sup> 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.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>

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Claudia T. Farr  
Director

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The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation. *Id.*

<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also *Virginia Dept. of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).