

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: February 12, 2008; Ruling #2008-1930; Agency: Virginia Department of Transportation; Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF THE DIRECTOR

In the matter of Department of Transportation
Ruling Number 2008-1930
February 12, 2008

The grievant has requested a ruling from this Department in Case Number 8734. The grievant seeks to be reimbursed for the difference between the amount that the hearing officer awarded her in his January 4, 2008 award of attorney fees and the grievant's remaining out-of-pocket legal expenses incurred while successfully defending disciplinary charges brought against her by the Virginia Department of Transportation (the agency).

FACTS

The grievant was issued a Group III Written Notice and was terminated from employment with the agency for alleged violation of state Policy 2.30, Workplace Harassment. In his November 21, 2007 hearing decision, the hearing officer reversed the agency action and reinstated the grievant. On January 4, 2008, the hearing officer issued his Decision of Hearing Officer on Award of Attorneys' Fees (Fees Addendum), which awarded the grievant the full amount requested by her attorney in the grievant's fees petition. The grievant, however, claims that the amount awarded by the hearing officer does not completely cover her total out-of-pocket legal expenses. Accordingly, she has petitioned this agency to intervene.¹

DISCUSSION

Under the grievance procedure, 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.² 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.³ Within 15 calendar days of the issuance of the original decision, counsel for the grievant shall ensure that the hearing officer receives a petition for reasonable attorneys' fees including an affidavit itemizing services rendered, time billed for each service, and the hourly

¹ The grievant's ruling request does not appear to be a request for administrative review. The grievant appears to have no issue with the hearing decision or the Fees Addendum, which awarded the grievant the full amount requested by her attorney. Rather her request is as she characterizes it one of "last resort," through which she hopes to recoup the difference between what her lawyer customarily charges and the rate authorized by the *Rules for Conducting Grievance Hearings*.

² See *Grievance Procedure Manual* § 7.2(e).

³ *Id.*

rate charged in accordance with the *Rules for Conducting the Grievance Hearings (Rules)*, which, for grievances initiated prior to August 1, 2007, is \$127.00 per hour.⁴

In this case the hearing decision ordered the reinstatement of the grievant and the grievant's attorney submitted a fees petition. The total number of hours listed in the fees petition was 40.70 hours. Thus, the petition sought a total of \$5,168.90 (40.70 x \$127.00). The hearing officer subsequently awarded the entire \$5,168.90 in his January 4, 2008 Addendum. The grievant asserts, however, that although the hearing officer awarded the full amount sought by her attorney in the fees petition, the award does not cover her entire out-of-pocket expenses because the fee charged by her attorney, \$185.00 per hour, is significantly higher than the allowable \$127.00 per hour.⁵

As stated above, the amount that can be awarded as reasonable attorney's fees is set forth in the *Rules*. Through the years, this amount has been adjusted upwardly by the Director to account for cost-of-living increases. Hearing officers are bound, however, to use the established rate and may not substitute another in its place. While this Department recognizes that the maximum allowable fee is not always sufficient to cover fees for a grievant's attorney of choice in every case, there is simply no provision under the grievance procedure to upwardly adjust a hearing officer's fee award to compensate for a deficit between an award and actual costs if a grievant utilizes the services of an attorney who charges more than the allowable rate. Accordingly, this Department is unable to provide any relief to the grievant regarding the bill rate deficit.

The grievant also objects to the agency's reduction of her back pay award. According to the grievant, the agency improperly reduced her award by subtracting interim earnings.⁶ Issues relating to the back pay award are properly viewed as implementation matters and are properly raised with the circuit court in the jurisdiction in which the grievance arose. If the grievant wishes to pursue this matter further she may do so under the provisions of Va. Code § 2.2-3006 (D). Under the grievance statutes, the court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the petition for implementation.⁷

Claudia T. Farr
Director

⁴ Through the years, the attorney fees rate has been adjusted upward by the Director to account for inflation. Hearing officers are bound, however, to use the established rate and may not substitute another in its place.

⁵ The grievant also claims that the total number of hours charged by her attorney was 42.3 or 1.60 higher than the 40.7 submitted and approved by the grievant's attorney in the fees petition. However, the January 15, 2008 payment to which the grievant refers appears not to be an additional charge but rather a transfer from her retainer account to cover for a service provided on December 21, 2007, a service which was included in the fees petition and approved by the hearing officer.

⁶ See *Rules for Conducting Grievance Hearings* § VI B (4) which states that:

If back pay is awarded, it must be offset by interim earnings. Interim earnings include unemployment compensation and other income earned or received to replace the loss of state employment. Thus, if an employee had previously engaged in gainful employment in addition to his or her state employment, the earnings from this ancillary employment would not count as interim earnings.

⁷ Va. Code § 2.2-3006 (E).