

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8666;  
Ruling Date: July 7, 2008; Ruling #2008-2039; Agency: Virginia Community  
College System; Outcome: Hearing Decision In Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia Community College System  
Ruling Number 2008-2039  
July 7, 2008

The grievant has submitted a timely renewal of her request that this Department (EDR) administratively review the hearing officer's decision in Case Number 8666 regarding the denial of attorneys' fees. For the following reasons, there is no basis to disturb the hearing officer's determination.

FACTS

Prior to the elimination of her position and layoff in January 2007, the grievant was employed as a horticulture specialist with a Community College. The grievant challenged the elimination of her position by filing a grievance on January 31, 2007. A hearing was subsequently held on the grievance on September 26 and October 9, 2007.<sup>1</sup> In the original hearing decision, 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>2</sup> The grievant's counsel submitted a petition for attorneys' fees, which was denied by the hearing officer.<sup>3</sup> The grievant's original request for review was addressed by this Department in EDR Ruling Nos. 2008-1910, 2008-1915 and 2008-1916. EDR determined that consideration of the attorneys' fees issue was premature because the case was being remanded to the hearing officer for further consideration. However, as stated in the ruling, the grievant had 10 calendar days after the hearing officer issued a reconsideration decision to renew her request for administrative review of the hearing officer's denial of attorneys' fees.<sup>4</sup> This Department has now received such a timely request, as well as the agency's rebuttal, which are considered 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

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<sup>1</sup> Decision of Hearing Officer, Case No. 8666, Nov. 12, 2007 ("Hearing Decision"), at 1-3.

<sup>2</sup> *Id.* at 9.

<sup>3</sup> Reconsideration Decision of Hearing Officer, Case No. 8666, Jan. 2, 2008 ("Reconsideration Decision").

<sup>4</sup> EDR Ruling Nos. 2008-1910, 2008-1915 and 2008-1916.

decisions ... on all matters related to procedural compliance with the grievance procedure.”<sup>5</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>6</sup>

Virginia Code § 2.2-3005.1(A) provides, in part,

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. All awards of relief, including attorneys’ fees, by a hearing officer, must be in accordance with rules established by the Department of Employment Dispute Resolution.

Rules established by this Department are contained in the *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings*. The *Grievance Procedure Manual* states that for 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.”<sup>7</sup> However, the hearing decision in this case does not contain an “order” reinstating the grievant. Rather, the hearing officer only “recommend[ed]” that the grievant be reinstated.<sup>8</sup> Because the hearing decision did not include an order that the agency reinstate the grievant, the grievant did not “substantially prevail” in her grievance as provided in the *Grievance Procedure Manual* and *Rules for Conducting Grievance Hearings*. As such, there is no basis upon which this Department may disturb the hearing officer’s denial of attorneys’ fees.<sup>9</sup>

#### CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer’s decision regarding attorneys’ fees. 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.<sup>10</sup> Based on the review requests of which this Department is aware, all such requests for administrative review have now been decided. Therefore, the hearing decision is final as of the date of this ruling.

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

<sup>6</sup> *Grievance Procedure Manual* §§ 6.4, 7.2(a)(3).

<sup>7</sup> *Grievance Procedure Manual* § 7.2(e) (emphasis added); see also *Rules for Conducting Grievance Hearings* § VI(D) (containing identical language).

<sup>8</sup> Hearing Decision at 9; see also Second Reconsideration Decision of Hearing Officer, Case No. 8666, May 29, 2008, at 5.

<sup>9</sup> The hearing officer denied the grievant’s request for attorneys’ fees because, in her view, the case did not involve “discharge.” See Reconsideration Decision. However, this Department need not reach the question of whether the retaliatory elimination of the grievant’s position was equivalent to a “discharge,” because the grievant is not entitled to attorneys’ fees on the other grounds described above.

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

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>11</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>12</sup>

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Claudia T. Farr  
Director

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<sup>11</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>12</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 323 (2002).