

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8929;  
Ruling Date: February 6, 2009; Ruling #2009-2209; Agency: Virginia  
Commonwealth University; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Virginia Commonwealth University  
Ruling No. 2009-2209  
February 6, 2009

By letter dated January 9, 2009, the grievant's attorney has requested an administrative review of the hearing officer's January 5, 2009 award of attorneys' fees in Case Number 8929.

FACTS

In Case Number 8929, the grievant challenged a Group III Written Notice with termination.<sup>1</sup> The hearing officer reduced 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 a total of \$3,668 in fees to the grievant in an addendum decision.<sup>4</sup> Although the hearing officer awarded the grievant's attorney full reimbursement for work performed through the date of the hearing, the hearing officer limited fees for work performed on a rebuttal to the University's request for administrative review to the Department of Human Resource Management (DHRM).<sup>5</sup> The grievant's attorney had submitted documentation reflecting 17.1 hours of work related to the rebuttal. The hearing officer determined that full reimbursement for this amount of time was excessive given the nature of the issues raised by the University to DHRM.<sup>6</sup> As such, the hearing officer reduced the amount recoverable to seven hours of time.<sup>7</sup>

DISCUSSION

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

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<sup>1</sup> Decision of Hearing Officer, Case No. 8929, Oct. 2, 2008, at 1.

<sup>2</sup> *Id.* at 5.

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

<sup>4</sup> Addendum to Decision of Hearing Officer, Case No. 8929-A, Jan. 5, 2009 ("Fees Addendum"), at 2.

<sup>5</sup> *Id.* at 1-2.

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

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

attorneys' fees, unless special circumstances would make an award unjust."<sup>8</sup> In this case, the hearing officer essentially determined that the amount of claimed attorneys' fees was not "reasonable." The grievant's attorney now appeals that determination.

As indicated by the language quoted above, under the grievance procedure, only *reasonable* attorneys' fees are available.<sup>9</sup> The Virginia Supreme Court standard is instructive. To determine whether attorneys' fees are reasonable, that Court has assessed "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>10</sup> This Department will only disturb a hearing officer's determination of the reasonableness of attorneys' fees if there has been an abuse of the hearing officer's discretion.<sup>11</sup>

In this case, the hearing officer determined that the grievant's rebuttal to the University's request for administrative review to DHRM did not require as much time and effort as was apparently expended by the grievant's attorney given the nature and complexity of the issues raised by the University. Though not by citation, the hearing officer appears to have assessed the fees request consistent with the criteria listed above.<sup>12</sup> The hearing officer essentially found that the evidence did not indicate that three drafts of the rebuttal by the grievant's attorney were "necessary and appropriate." While this Department understands the grievant's attorney's explanation for drafting a lengthy rebuttal to discuss more than solely what version of a policy should apply, it cannot be said that the hearing officer abused his discretion in finding that the amount of time expended was excessive.<sup>13</sup>

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<sup>8</sup> *Grievance Procedure Manual* § 7.2(e) (emphasis added); *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."). 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. *Grievance Procedure Manual* § 7.2(e).

<sup>9</sup> Va. Code § 2.2-3005.1(A).

<sup>10</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>11</sup> *See, e.g.*, *Holmes v. LG Marion Corp.*, 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999). "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." *Black's Law Dictionary* 10 (6<sup>th</sup> ed. 1990). "It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts." *Id.*

<sup>12</sup> In the future, hearing officers should determine the reasonableness of attorneys' fees in accordance with the criteria listed in the *Chawla* case cited above.

<sup>13</sup> The hearing officer appeared to consider the fact that an attorney did not file the University's request. However, this Department would caution hearing officers that simply because a non-attorney prepares a filing does not mean that the arguments asserted do not raise complex and/or legal issues. In this case, even if the fact that a non-attorney submitted the University's request is ignored, it appears that the hearing officer's determination was still not clearly erroneous.

Further, consistent with a previous ruling of this Department, it must be concluded that the grievant's attorney is not entitled to fees for time spent preparing his request for this current ruling. In EDR Ruling Nos. 2006-1125, 2007-1456, this Department determined that because a grievant was not entitled to attorneys' fees for the initial hearing, he was not entitled to receive attorneys' fees for his efforts to preserve any results of that hearing. Similarly, in this case, because the grievant is not entitled to receive the fee amounts that are the subject of this ruling (fees for 10.1 hours of work performed on a rebuttal), it follows that the grievant is not entitled to recover attorneys' fees for his effort to recover those fee amounts for the 10.1 hours of work. The absence of an underlying entitlement to fees is sufficiently analogous here that the guidance provided in EDR Ruling No. 2006-1125, 2007-1456 requires this result.

#### 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>14</sup> Based on the review requests of which this Department is aware, all such requests for administrative review and reviews of the Fees Addendum have now been decided. Therefore, the hearing decision is final as of the date of this ruling.<sup>15</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>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>

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Claudia T. Farr  
Director

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

<sup>15</sup> *Grievance Procedure Manual* §§ 7.2(d), 7.2(e).

<sup>16</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).