

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9329;  
Ruling Date: July 16, 2010; Ruling #2011-2694; Agency: Department of  
Correctional Education; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW RULING OF DIRECTOR**

In the matter of Department of Department of Correctional Education  
Ruling Number 2010-2694  
July 16, 2010

The agency has requested that this Department administratively review hearing decision in Case No. 9329. The agency challenges the hearing officer's determination that the grievant was entitled to an award of attorney's fees.

FACTS

The salient facts of this case are as follows: The grievant was employed by the Department of Correctional Education (DCE or the agency).<sup>1</sup> The agency presented the grievant with two Group II Written Notices which, in combination, were used to terminate her employment.<sup>2</sup> The grievant challenged the discipline via the grievance process and after the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing.<sup>3</sup> A hearing was conducted, and on June 21, 2010, the hearing officer issued a written decision upholding one Group II Written Notice, but reversing the second.<sup>4</sup> In addition, because a single active Group II Written Notice cannot sustain a discharge, the hearing officer reinstated the grievant.<sup>5</sup> Because he reinstated the grievant, the hearing officer awarded the grievant attorney's fees.<sup>6</sup> It is this award of fees that the agency contests here.

DISCUSSION

Virginia Code § 2.2-3005.1 provides that "[i]n 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." That statute further provides that all

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<sup>1</sup> Decision of the Hearing Officer in Case No. 9329, issued June 21, 2010 ("Hearing Decision") at 1-10.

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

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 1; 7-10.

<sup>5</sup> *Id.* at 9-10.

<sup>6</sup> *Id.* at 10.

awards of attorney's fees "must be in accordance with rules established by the Department of Employment Dispute Resolution."<sup>7</sup>

The agency asserts that it is improper to award the grievant attorney's fees under the facts of this case. The agency's position is that because only one Written Notice was rescinded, the grievant did not substantially prevail and winning half of a grievance is not substantial.<sup>8</sup>

The *Grievance Procedure Manual* states:

Attorneys' fees are not available under the grievance procedure, **with one exception**: an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. 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.<sup>9</sup>

This Department has long interpreted this provision to mean a grievant "substantially prevails" in a discharge grievance if she gets her job back, in other words, whenever a hearing officer's decision contains an order of reinstatement, regardless of whether all disciplinary actions against her were reduced or rescinded.<sup>10</sup> Therefore, because the June 21, 2010 hearing decision directed the grievant's reinstatement to employment, the hearing officer properly concluded that the grievant substantially prevailed at hearing. For this reason, this Department finds no error with the award of attorney's fees.

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the hearing officer did not err in awarding attorney's 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>11</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>12</sup> Any such appeal must be based on the

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<sup>7</sup> Va. Code § 2.2-3005.1(A).

<sup>8</sup> The agency subsequently amended its position by asserting that the grievant "won one third of her grievance" because she had claimed that the agency had retaliated against her, a claim rejected by the hearing officer.

<sup>9</sup> *Grievance Procedure Manual* § 7.2(e)(emphasis in original). See also *Rules for Conducting Grievance Hearings* § VI(D).

<sup>10</sup> See EDR Ruling No. 2006-1336.

<sup>11</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>12</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

assertion that the final hearing decision is contradictory to law.<sup>13</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>14</sup>

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Claudia T. Farr  
Director

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<sup>13</sup> *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>14</sup> Va. Code §§ 2.2-1001(5); 2.2-3003(G).