

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: September 20, 2010; Ruling #2011-2770; Agency: Department of Correctional Education; Outcome: Hearing Officer in Compliance.



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

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Correctional Education  
Ruling No. 2011-2770  
September 20, 2010

By letter dated August 31, 2010, the Department of Correctional Education (“DCE” or “the agency”) has requested a compliance ruling regarding the grievant’s attorney’s fees petition in Case Number 9329.

FACTS

The salient facts of this case are that the grievant was discharged from her position with DCE but subsequently reinstated as a result of a grievance hearing decision issued on June 21, 2010.<sup>1</sup> The June 21<sup>st</sup> decision concluded that “Grievant is further entitled to seek a **reasonable attorney’s fee**, which cost shall be borne by the agency.”<sup>2</sup>

On July 1, 2010, the hearing officer received a request for administrative review from the agency. The same day, this Department also received a request for administrative review from the agency. The agency asserted that the grievant had not substantially prevailed with her grievance and thus was not entitled to attorney’s fees. On July 6, 2010, the grievant’s counsel submitted an attorney fees petition to the hearing officer, with supporting affidavits containing billing details and fee amounts. On July 12, 2010, the hearing officer issued a Reconsideration Decision, upholding his conclusion that the grievant substantially prevailed and was thus entitled to an award of attorney’s fees.<sup>3</sup> The Reconsideration Decision further stated that “[a]lthough the Grievant has already submitted a petition for attorneys’ fees, following the administrative reviews the hearing officer will accept a revised petition for attorneys’ fees,”<sup>4</sup> noting that certain fees incurred were not compensable. On July 16, 2010, this Department also affirmed the hearing officer’s determination that the grievant substantially prevailed and accordingly was entitled to attorney’s fees.<sup>5</sup>

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<sup>1</sup> Hearing Decision (Case No. 9329) dated June 21, 2010 (“Hearing Decision”). The hearing officer reversed one of the two Group II Written Notices issued to the grievant. The full decision is available at EDR’s website: <http://www.edr.state.va.us/searchhearing/2010-9329%20Decision.pdf>.

<sup>2</sup> Hearing Decision at 10 (emphasis in original).

<sup>3</sup> Reconsideration Decision (Case No. 9329) dated July 12, 2010 (“Reconsideration Decision”) at 2.

<sup>4</sup> *Id.*

<sup>5</sup> EDR Ruling No. 2010-2694.

On August 16, 2010, the hearing officer contacted the parties and noted that he had “expressed [his] expectation of a revised attorney’s fees petition from [the grievant’s counsel].” He went on to state that “I have not seen that, but I wanted to ask if there was anything further regarding appeals or if a final attorney’s fees petition has been submitted.” The grievant’s counsel responded the same day, copying the agency and stating that “[a] revised fee petition has not been submitted as I am working with [an agency representative] on the fee issue.” On August 20, 2010, the grievant’s counsel submitted a revised fee petition by email. On August 31, 2010, the hearing officer queried of the grievant’s counsel’s office, copying the agency: “[d]oes this submission indicate that you were unable to reach agreement with the agency?” The agency responded that it not only did not agree but believed that the hearing officer no longer had any jurisdiction over the case because more than 30 days had passed since the hearing officer ruled. The agency indicated that it would be seeking a ruling from this Department on the matter of jurisdiction.

### DISCUSSION

Section 7.2(e) of the *Grievance Procedure Manual* (the *Manual*) provides that 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 attorneys’ fees, unless special circumstances would make an award unjust.”<sup>6</sup> 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.<sup>7</sup> The agency objects to the hearing officer’s finding that the grievant was entitled to a fee award, on several grounds not previously raised or addressed in EDR Ruling No. 2010-2694.

#### *Lack of Jurisdiction*

First, the agency asserts that the hearing officer no longer has jurisdiction over this case as more than 30 days have passed since the hearing officer issued his original and reconsidered decisions that grievant substantially prevailed and was entitled to fees. The *Grievance Procedure Manual* states that the hearing officer “should issue the fees addendum within 15 calendar days of the issuance of the last of the administrative reviews.”<sup>8</sup> Here, all administrative reviews have been issued, the last on July 16, 2010. Preferably, fees addendums should be issued within this 15 calendar day timeframe. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure.<sup>9</sup> Here, it appears that the hearing officer was

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<sup>6</sup> 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.”)

<sup>7</sup> *Grievance Procedure Manual* § 7.2(e).

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., EDR Ruling Nos. 2010-2557, 2010-2558; EDR Ruling No. 2008-1747; EDR Ruling No. 2006-1135. This Department views the somewhat analogous 35-day timeframe for holding the grievance hearing and issuing the initial decision as directive rather than mandatory. We view the fees petition language the same way: directive as opposed to mandatory. Standing alone, failure to issue a fees addendum within the 15-day timeframe does not

awaiting an updated fees petition from the grievant's counsel. The grievant's counsel informed the hearing officer that she had been "working with [the agency] on the fee issue." Thus, it appears that a fees addendum was not issued within 15 days of the last administrative review for a valid reason. Even if the delay was not for a valid reason, the hearing officer would not have been stripped of jurisdiction. Without the issuance of the fees addendum, the original hearing decision is incapable of becoming a final decision.<sup>10</sup> If a fees addendum is delinquent, a party is free to request a compliance ruling from this Department. This Department will, in turn, order the hearing officer to issue the addendum, assuming there is no just cause for the delay.

#### *Award of Fees for Allegedly Non-Compensable Activities*

The agency also argues that the grievant has requested fees for work unrelated to the actual grievance hearing. It would be premature for this Department to rule on the fees petition before the hearing officer has issued a fees addendum. Consistent with §7.2(e) of the *Grievance Procedure Manual* within "10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with this Grievance Procedure Manual and the Rules for Conducting Grievance Hearings." Thus, the agency may renew its request once the hearing officer issues the fees addendum. (The grievant may also appeal if she has objections with the addendum.)

### CONCLUSION

As set forth above, the hearing officer still has jurisdiction in this case and shall issue a fees addendum as soon as reasonably feasible.

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Claudia T. Farr  
Director

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foreclose a hearing officer's jurisdiction over a case. *Cf.* Va. Dept. of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 (Jan. 15, 2008) (unpublished decision).

<sup>10</sup> Under *Grievance Procedure Manual* § 7.2(e):

Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with this Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.