

Issue: Eligibility for VaLORS Benefits; Hearing Date: February 19, 2002; Decision Date: February 28, 2002; Agency: Department of Game and Inland Fisheries; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5382; **Judicial Review: Appealed to the Circuit Court in the County of Bath on 04/15/02; Outcome: Circuit Court upheld Hearing Officer's decision (05/29/02) Final Order issued 06/14/02; Judicial Review: Appealed to the Court of Appeals (date unknown); Outcome: Upheld decision of Circuit Court (03/11/03) [Record No. 1767-02-3]**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5382**

Hearing Date: February 19, 2002  
Decision Issued: March 27, 2002

**PROCEDURAL HISTORY**

Grievant asked his employer to include him among those employees eligible for the Virginia Law Officers' Retirement System. After the Agency denied his request, Grievant filed a grievance seeking relief as follows:

*Certification of eligibility for VaLORS benefits effective as of October 1, 1999 and a declaration of eligibility to receive the annual allowance under § 51.1-217(B).*

The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 29, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 19, 2002, final briefs were submitted for the Hearing Officer's consideration.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Grievant's Counsel  
Agency Party Designee

Agency's Counsel  
Wildlife Biology Assistant  
Human Resource Manager  
Chief, Law Enforcement Division  
Director  
Human Resource Generalist

## **ISSUE**

Whether Grievant is covered by the Virginia Law Officers' Retirement System ("VaLORS").

## **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that he is covered by the Virginia Law Officers' Retirement System. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Game and Inland Fisheries has numerous responsibilities intended to enable Virginians to enjoy wildlife, inland fish, boating, and related outdoor recreation. It is the largest landowner in Virginia. The Agency is divided into three divisions, including an Enforcement Division and a Wildlife Division.

Since not all Virginians and visitors abide by the law, the Department employs regular game wardens to summon or arrest "any person found in the act of violating any of the provisions of the hunting, trapping, inland fish and boating laws."<sup>1</sup> Regular game wardens work as part of the Agency's Enforcement Division. They are "vested with the same authority as sheriffs and other law-enforcement officers to enforce all of the criminal laws of the Commonwealth."<sup>2</sup> Regular game wardens have the required certification by the Criminal Justice Service Commission to be law-enforcement officers. The Enforcement Division has characteristics of a paramilitary organization in that its

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<sup>1</sup> *Va. Code* § 29.1-205.

<sup>2</sup> *Va. Code* § 29.1-205.

supervisors hold rank. For example, the head of the Enforcement Division holds the rank of Colonel.

The Agency employs Grievant as a Wildlife Biologist Assistant in its Wildlife Division. The purpose of his position is to provide technical support to the Wildlife Division by developing and maintaining “fish and wildlife populations by manipulating habitats, collecting and analyzing biological data, developing and maintaining necessary facilities and equipment and by explaining VDGIF programs to the public.”<sup>3</sup> Grievant’s core responsibilities include: Wildlife Habitat Management; Wildlife Research and Survey; Facilities and Equipment Maintenance; Project Administration; and Technical Guidance. Grievant reports to a Scientist Manager I. Grievant is not part of the Enforcement Division. None of his current duties involve law-enforcement and he is not a law-enforcement officer.

Grievant began working for the Agency on November 1, 1971. He was appointed by a former Agency Head as a special game warden on February 11, 1972. He took an oath of office before the Circuit Court of Chesterfield County.<sup>4</sup> As evidence of his appointment, Grievant received (1) a letter-sized certificate signed by the Executive Director of the Commission of Game and Inland Fisheries<sup>5</sup> stating that Grievant was commissioned as a special game warden in a named locality with statewide authority “so long as he is employed by this Commission,” (2) a letter-size certificate from the Commission of Game and Inland Fisheries stating that Grievant “took and subscribed the oath required by the laws of the State of Virginia to qualify him to discharge the duties of Special Game Warden”, and (3) a wallet-size card from the Commission of Game and Inland Fisheries stating that he “has been appointed and is a qualified Special Game Warden of the State of Virginia” with authority expiring with the termination of his employment.<sup>6</sup> The Agency provided Grievant with a firearm and badge.

Following his appointment, Grievant enforced the criminal and other laws of the Commonwealth on Department and State-owned land. He issued summons, obtained arrest warrants, arrested violators, and testified in court. As a special game warden, Grievant was given “general police powers while performing his duty on properties owned or controlled by the Board [of Game and Inland Fisheries]”<sup>7</sup>

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<sup>3</sup> Agency Exhibit 15. This exhibit is Grievant’s Employee Work Profile effective April 1, 2001. Neither party offered as an exhibit Grievant’s 1999 performance plan. No evidence was presented suggesting Grievant’s job duties in 1999 were materially different from this 2001 duties.

<sup>4</sup> The evidence is unclear regarding whether Grievant took his oath before a judge as claimed by Grievant’s counsel or only before the Clerk of the Circuit Court.

<sup>5</sup> The Department of Game and Inland Fisheries was formerly known as the Commission of Game and Inland Fisheries. See, 1987 Acts of Assembly, Chapter 54.

<sup>6</sup> Grievant Exhibit 13.

<sup>7</sup> *Va. Code* § 29.1-205. See, former *Va. Code* § 29-30 for his jurisdiction at the time of his original appointment.

Grievant's law-enforcement authorization has varied over the past 30 years due to the Agency's concerns about training requirements and liability issues. In February 1982, Grievant was advised to "curtail law enforcement activities ...."<sup>8</sup> Sometime thereafter, his law-enforcement duties were restored until they were again removed in 1991. Grievant received a memorandum<sup>9</sup> dated May 24, 1991 informing him:

Effective immediately you are no longer authorized to perform the duties of a Special Game Warden. Your Job Description, and performance Planning and Evaluation form will both be revised to reflect this change in work tasks and duties and performance expectations.

Grievant understood this directive and turned in his law-enforcement equipment including his identification card, badge, gun, and handcuffs. Although Grievant's law-enforcement duties were removed, the Agency retained those duties for some of its other special game wardens.

Law-enforcement duties were never the primary focus of Grievant's position. His December 1990 performance plan shows law-enforcement as the sixth most important out of seven job elements. The Agency expected him to "Enforce game/fish laws and regulations on assigned work area, as outlined in the division law enforcement handbook."<sup>10</sup> Grievant's October 1991 performance plan deleted this expectation.<sup>11</sup>

Law-enforcement duties of the remaining special game wardens were removed in 1994. On March 11, 1994, a memorandum<sup>12</sup> was distributed to Agency Regional Managers directing them to:

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2. Collect all law enforcement equipment from employees under your command. This includes all handcuffs, armor, blue lights, sirens, unlicensed radios and other issued equipment that has no value for wildlife management purposes. \*\*\*

3. We will continue to issue pistols to our field personnel for non-law enforcement activities. Make it clear to the employee that they are no longer involved in law enforcement.

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<sup>8</sup> Grievant Exhibit 4.

<sup>9</sup> Grievant Exhibit 5.

<sup>10</sup> Agency Exhibit 13.

<sup>11</sup> Agency Exhibit 14.

<sup>12</sup> Agency Exhibit 6.

4. No law enforcement equipment will remain installed on wildlife division vehicles. Please see that this is not ignored.

The individual in charge of the special game warden program described the 1994 change as, “we discontinued the special game warden appointments for Department employees due to the costs in time and money that would be required for these part-time officers.”<sup>13</sup>

In 1999, VaLORS was passed by the General Assembly and signed by the Governor into law. Before passing VaLORS, the General Assembly considered the budgetary impact of the proposed legislation. It reviewed a legislative impact statement containing financial data from the agencies affected by the legislation.<sup>14</sup> The Agency submitted an estimated fiscal impact based upon 193 eligible positions. With the exception of the Agency Director, all of these positions were for game wardens in the Enforcement Division. Whether an employee is a member of VaLORS or simply the retirement system available to other State employees affects the Agency’s budget. The HR Manager testified that the Agency’s contribution for a VRS employee was approximately ten percent of the employee’s salary, whereas the contribution for a VaLORS employee was approximately twenty-five percent of salary.

### CONCLUSIONS OF LAW

The Virginia General Assembly enacted the Virginia Law Officer’s Retirement System (“VaLORS”) effective October 1, 1999.<sup>15</sup> Grievant is entitled to benefits under VaLORS only if the General Assembly intended to include him as a member.<sup>16</sup> “If statutory language is not ambiguous but has a usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper. Instead, we determine legislative intent from the plain meaning of the words used.” Marsh v. City of Richmond, 234 Va. 4, 15, (1987) (citations omitted). VaLORS is not ambiguous.<sup>17</sup>

Grievant argues he should be included in VaLORS because: (1) VaLORS covers game wardens; (2) the definition of game warden includes special game wardens; (3) Grievant is a special game warden; therefore, (4) Grievant is covered by VaLORS. The

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<sup>13</sup> Grievant Exhibit 7.

<sup>14</sup> Agency Exhibit 6.

<sup>15</sup> The program is administered by the Virginia Retirement System. *Va. Code* § 51.1-211.

<sup>16</sup> “Membership in the Retirement System shall be compulsory for all employees.” *Va. Code* § 51.1-213.

<sup>17</sup> Since the statute is not ambiguous, it is not necessary to consider the Agency’s arguments regarding subsequent attempts and failures to have the Legislature include special game wardens in VaLORS.

beauty of Grievant's argument is its simplicity. The tragedy of Grievant's argument is that it is an oversimplification. The weakness in Grievant's argument is that he is a special game warden in title only and not in substance. Grievant is not a special game warden as envisioned by Title 29.1 because his enforcement powers have been removed.

### Background

The General Assembly has authorized the creation of retirement programs for State employees. Most State employees are provided for under the Virginia Retirement System.<sup>18</sup> Once a State employee satisfies certain requirements (such as length of service and/or age), he or she may begin receiving financial and other compensation in the form of retirement benefits. A State agency contributes to the Virginia Retirement System during an employee's career.

Effective October 1, 1999, certain game wardens became members of the Virginia Law Officers' Retirement System. VaLORS provides for more favorable retirement benefits than those available to these game wardens prior to October 1, 1999. VaLORS enabled game wardens to retire at an earlier age and with better benefits. In addition, some game wardens could qualify for a hazardous duty supplement.

To receive VaLORS benefits, one must be an "employee." *Va. Code § 51.1-212* states:

"Employee" means any (i) member of the Capitol Police Force as described in § 30-34.2:1, (ii) campus police officer appointed under the provisions of Chapter 17 (§ 23-232 et seq.) of Title 23, **(iii) game warden in the Department of Game and Inland Fisheries appointed under the provisions of Chapter 2 (§ 29.1-200 et seq.) of Title 29.1**, (iv) special agent of the Department of Alcoholic Beverage Control appointed under the provisions of Chapter 1 (§ 4.1-100 et seq.), (v) law-enforcement officer employed by the Virginia Marine Resources Commission as described in § 9-169, (vi) correctional officer as the term is defined in § 53.1-1, and including correctional officers employed at a juvenile correction facility as the term is defined in § 66-25.3, (vii) any parole officer appointed pursuant to § 53.1-143, and (viii) any commercial vehicle enforcement officer employed by the Department of State Police. (Emphasis added).

If Grievant meets the definition of an "employee", then he is entitled to VaLORS benefits.

### Legislative Intent

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<sup>18</sup> Formerly known as the Virginia Supplemental Retirement System. *Va. Code § 51.1-124.2*.

The General Assembly's intent can be discerned from a close review of several aspects of the legislation: (1) the title; (2) the typical responsibilities and duties of other members; (3) nature of the Director's appointment; and (4) the degree of delegation to the Agency Director.

*Title.* Titles to Virginia statutes provides more than a general reference; they explain the purpose of the legislation.<sup>19</sup> Section 12 of Article IV of the Constitution of Virginia states:

No law shall embrace more than one object, which shall be expressed in its title. Nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length.

By elevating titles to a Constitutional requirement<sup>20</sup>, the Commonwealth of Virginia has placed a duty on its Legislature to utilize forethought when titling a statute.

The General Assembly enacted a new retirement program and titled it, "Virginia Law Officers' Retirement System." From this title, one can infer that the General Assembly intended to create a retirement system for Virginia law officers. Although not defined in the statute, the plain meaning of the words "law officer" suggests someone who has unique status and responsibilities regarding law. Grievant does not have any unique status or responsibilities regarding the law.

*Other Members.* Prior to October 1, 1999, all game wardens were covered by the same retirement system covering the majority of other State employees. A question arises regarding why would the General Assembly create a separate retirement system for a specific group of State employees. Retirement benefits are a form of compensation. There must be some reason or reasons why the General Assembly selected certain employees to receive more favorable retirement benefits than other State employees. By examining the statutory duties of the VaLORS members, this reasoning is revealed.

VaLORS members include employees in the Capitol Police force as described in *Va. Code § 30-34.2:1*. Capitol Police may exercise "all the powers, duties and functions

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<sup>19</sup> Compare titles with section headlines. "The headlines of the several sections of this Code printed in black-face type are intended as mere catchwords to indicate the contents of the sections ...." *Va. Code § 1-13.9*. "It is well-settled, however, that the words of the statute, not its heading, carry the force of law." *Jones v. Division of Child Support Enforcement*, 19 Va. App. 184, 189, (1994).

<sup>20</sup> "The title of an act is often, but not always, a sure guide to the true meaning and intent of the legislature, especially in this State, where the Constitution in terms requires that the object of the law shall be expressed in its title." *Chambers v. Higgins*, 169 Va. 345, 351, (1937) *citing Peters v. Auditor*, 33 Gratt. (74 Va.) 368.



which are exercised by the police of the city, or the police or sheriff of the county ....<sup>21</sup>  
In other words, Capitol Police officers are criminal law-enforcement officers.

VaLORS members include campus police officers appointed under the provisions of Chapter 17 (§ 23-232 *et seq.*) of Title 23. *Va. Code* § 23-234 authorizes campus police officers to “exercise the powers and duties conferred by law upon police officers of cities, towns, or counties ....” In other words, campus police officers are criminal law-enforcement officers.

VaLORS members include special agents of the Department of Alcohol and Beverage Control (ABC). A special agent is “an employee of the Department of Alcoholic Beverage Control ... designated as a law-enforcement officer pursuant to § 4.1-105”<sup>22</sup> *Va. Code* § 4.1-105 authorizes the ABC Board to designate special agents with several powers including the power to enforce the provisions of “the criminal laws of the Commonwealth as is vested in the chief law-enforcement officer of a county, city, or town ....” In other words, ABC special agents are criminal law-enforcement officers.

VaLORS members include law-enforcement officers employed by the Virginia Marine Resources Commission as described in *Va. Code* § 9-169.<sup>23</sup> This section defines law-enforcement officers to include “any officer of the Virginia Marine Patrol”.

VaLORS members include correctional officers as defined in *Va. Code* § 53.1-1. This section defines a correctional officer as “a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility.” In other words, correctional officers are sworn to enforce criminal law sentences given to prisoners.

VaLORS members include parole officers appointed pursuant to *Va. Code* § 53.1-143. The Director of the Department of Corrections has the authority to direct and supervise the work of probation and parole officers.<sup>24</sup> Probation and parole officers have numerous powers and duties including: supervising persons released on parole; arresting and recommitting to the place of confinement persons violating terms of their probation, post-release supervision, or parole; order and conduct drug and alcohol screening tests of any probationer, person subject to post-release supervision, and parolee; and carrying a concealed weapon.<sup>25</sup>

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<sup>21</sup> *Va. Code* § 30-34.2:1.

<sup>22</sup> *Va. Code* § 4.1-100.

<sup>23</sup> *Va. Code* § 9-169 was repealed effective October 1, 2001. *Va. Code* § 51.1-212 now refers to *Va. Code* § 9.1-101, a similar provision.

<sup>24</sup> *Va. Code* § 53.1-140.

<sup>25</sup> *Va. Code* § 53.1-145.

VaLORS members include commercial vehicle enforcement officers employed by the Department of State Police. These officers are responsible for conducting commercial vehicle inspections to ensure compliance with size, weight, and safety requirements.<sup>26</sup> In other words, commercial vehicle enforcement officers enforce the traffic, criminal, and other public safety laws governing commercial motor vehicles.

The common elements among VaLORS members are (1) enforcement duties, (2) focus on criminal or quasi-criminal laws, and (3) some elevated status such as being called an “officer”. Grievant’s position has none of these elements. His core responsibilities do not include the application or enforcement of criminal or quasi-criminal laws.<sup>27</sup> He does not have any elevated status or position denoting any public authority.

*Nature of the Director’s Appointment.* The VaLORS legislation defines a member employee to include a “game warden<sup>28</sup> in the Department of Game and Inland Fisheries appointed<sup>29</sup> under the provisions of Chapter 2 (§ 29.1-200 et seq.) of Title 29.1.” *Va. Code § 29.1-200(A)* states:

The Director shall appoint regular and special game wardens as he may deem necessary to enforce the game and inland fish laws and shall issue a certificate of appointment to each game warden.

This statute shows that the Director is authorized to appoint special game wardens to enforce game and inland fish laws. He is not authorized to appoint special game wardens without enforcement powers. When the General Assembly used the phrase “game warden” it had reason to expect that VaLORS would apply only to special game wardens in 1999 with enforcement powers. There is no reason to believe that the General Assembly intended to include in VaLORS special game wardens without law-enforcement duties.

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<sup>26</sup> *Va. Code § 52-8.4; See, Va. Code § 46.2-1001 et seq. and 19 VAC 20-10 et seq.*

<sup>27</sup> Grievant contends that teaching all-terrain-vehicle (ATV) courses is law-enforcement. Agency witnesses did not consider teaching ATV courses to be law-enforcement and the Hearing Officer agrees. Grievant also gave examples of where he assisted regular game wardens in their duties and argued that he was engaged in law-enforcement duties. The Hearing Officer rejects this argument because the assistance he gave regular game wardens was the same type of assistance a private citizen could give a regular game warden.

<sup>28</sup> *Va. Code § 29.1-100* defines game warden as “supervising wardens, and regular and special game wardens.”

<sup>29</sup> Grievant’s appointment in 1971 as a special game warden was pursuant to *Va. Code § 29-28* which stated, “The Executive Director shall issue a certificate of appointment, over his signature, to each game warden.” *Va. Code § 29.1-200* was not enacted until 1987. One could argue that Grievant was not appointed pursuant to *Va. Code § 29.1-200* because it did not exist at the time of his appointment, and, thus, Grievant does not meet the requirements of VaLORS. The Hearing Officer rejects this argument because *Va. Code § 29-28* is the predecessor to *Va. Code § 29.1-200* and the purpose of each section is the same – to enable the appointment of game wardens by the Agency Head.

*Degree of Delegation.* Neither party presented detailed evidence or argument regarding the mandatory requirements for the appointment<sup>30</sup> and for the removal of an appointment of a special game warden. *Va. Code § 29.1-200* shows that the Director is the sole “gatekeeper” regarding which individuals will be regular or special game wardens.<sup>31</sup> The Director may appoint and remove regular or special game wardens “as he may deem necessary.”

The General Assembly could have written into the VaLORS legislation in Title 51.1 the phrases “regular game warden” and “special game warden” thereby avoiding any need to refer to Title 29.1. Instead, the General Assembly chose to refer to game wardens in general, but rely on the Director of the Department of Game and Inland Fisheries to identify through his appointment powers those individuals eligible for membership. By retaining a role for the Director in membership selection, the General Assembly intended to rely on the Director’s judgment to resolve disputes regarding eligibility for VaLORS membership. The Director’s judgment in this case is that Grievant does not qualify for VaLORS membership. Since the Director’s judgment is consistent with the underlying Legislative intent, the Hearing Officer has no basis to disturb his conclusion.<sup>32</sup>

*Conclusion.* The General Assembly did not intend to include Grievant in VaLORS because it only intended VaLORS to cover individuals engaged in law-enforcement activities on or after October 1, 1999.

Grievant contends that managers in the enforcement division are not law enforcement personnel because they do not regularly arrest, issue summons, and

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<sup>30</sup> Grievant presented evidence that he had sworn his oath before a Circuit Court, but each of his certificates originated from the Agency.

<sup>31</sup> Surprisingly, the Agency has not argued that Grievant is no longer a special game warden even in title. No evidence was presented suggesting that Grievant was referred to as a special game warden at any time after his law enforcement duties were removed. Indeed, in a memorandum dated March 1, 1994, one Agency manager states, “As our people are no longer Special Game Wardens ....” See, Agency Exhibit 4. Furthermore, Agency Exhibit 3 contains a document entitled Direction for Special Game Warden Assignments issued in August 1990. This document states, “The term ‘Special Game Warden’ does not denote a title or position but rather is an authority to enforce certain laws of the Commonwealth.” If this statement is true, then the act of removal of enforcement authority is a removal of one’s status as special game warden. Grievant, on the other hand, contends that he retained his original appointment because when his law-enforcement duties were restored, he was never issued a new credential card or required to retake his oath of office. Former *Va. Code § 29-28* and current *Va. Code § 29.1-200* merely require a certificate of appointment from the Director in order to create the status of a special game warden.

<sup>32</sup> To reach this conclusion, the Hearing Officer is giving deference to the Agency Director’s factual conclusion because the General Assembly intended to rely on the Director to identify those individuals qualifying as special game wardens. It is not necessary, however, to give any deference to the Director’s decision in order to reach the conclusion that the General Assembly did not intend Grievant to be a VaLORS member employee. Deference given to the Agency Director simply confirms the Legislature’s intent.

testify in court. The Hearing Officer rejects this conclusion. Direct supervision of law-enforcement officers is itself law-enforcement. When a supervisor possesses all the requisite capabilities of a law-enforcement officer and directs subordinate law-enforcement officers, that supervisor is engaged in law-enforcement even though the supervisor may not be arresting, issuing summons, or testifying in court. Adopting Grievant's argument would be akin to saying that a military General is not engaged in war simply because he is not on the front line shooting a rifle. Furthermore, if the Hearing Officer assumes Grievant's argument is true, it would not make Grievant eligible for VaLORS – it would merely show that the Agency was acting contrary to law.

Grievant argues that because the Agency Director has obtained certification for VaLORS and he is not a law-enforcement officer, the Agency does not consider law-enforcement duties to be a pre-requisite to eligibility. The Hearing Officer finds that, based on the credibility of the Agency's witnesses including the Director, the Director began pursuing law-enforcement status well before VaLORS was initiated. He sought status as a conservator of the peace and intended to obtain law-enforcement status in order to match the status held by another law-enforcement agency director. Once the Department of Criminal Justice Services allowed him to substitute his military experience for additional training, the Director achieved the status of a law-enforcement officer. Nevertheless, if the Hearing Officer were to assume for the sake of argument that the Director obtained law-enforcement status merely to obtain VaLORS benefits, it would not show that Grievant is eligible for VaLORS.

Grievant argues that when the 1999 General Assembly passed *Va. Code § 65.2-402(B)* which specifically references "wardens who are full-time sworn members of the enforcement division", the General Assembly knew the distinction between special and regular game wardens. Grievant is correct that the General Assembly could distinguish between special and game wardens when it chose to do so. Grievant's argument does not show Grievant is eligible for VaLORS because the issue is whether the General Assembly intended to include special game wardens without law-enforcement duties. Knowing how to distinguish between regular and special game wardens does not mean the General Assembly knew some special game wardens lacked law-enforcement duties.

Grievant contends that he is a law-enforcement officer by virtue of his appointment. He merely lacks the permission of the Director to engage in law-enforcement activities even though he is authorized to do so. The Hearing Officer disagrees. Although Grievant may have the title special game warden, he does not have the duties of a law-enforcement officer and, thus, cannot be considered a law-enforcement officer under VaLORS.

The Agency offers the opinion of an Assistant Attorney General in support of its position. Because this opinion is not a formal opinion of the Attorney General, the Hearing Officer accords it little weight.

## DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer