

Issue: Group I Written Notice (rude, disruptive, insubordinate behavior) and Group II Written Notice (unacceptable behavior and failure to follow supervisor's instructions); Hearing Date: 10/15/02; Decision Date: 10/24/02; Agency: University of Virginia; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5514/5547; **Administrative Review: Hearing Officer Reconsideration Request received 11/01/02; Reconsideration Decision dated: 11/01/02; Outcome: No newly discovered evidence or incorrect legal conclusions; request to reconsider denied.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5514 / 5547**

Hearing Date: October 15, 2002  
Decision Issued: October 24, 2002

**PROCEDURAL HISTORY**

On December 14, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

*Rude, disruptive and insubordinate behavior and demonstrating behavior that was disruptive to supervisors and business functions within the [Division] and other university administrative offices through inappropriately sent emails.*

On May 17, 2002, Grievant was issued a Group II Written Notice of disciplinary action for "*Unacceptable behavior and failure to follow supervisor's instructions.*"

Grievant timely filed grievances to challenge the disciplinary actions. The outcome of the Third Resolution Step for each grievance was not satisfactory to the Grievant and she requested a hearing. The Department of Employment Dispute Resolution consolidated the grievances into one hearing. On September 23, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Administrator  
Medical Professor

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action for disruptive behavior.

Whether Grievant should receive a Group II Written Notice for failure to follow supervisor's instructions.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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:

Medical faculty at the University of Virginia both teach and treat patients. The University has created administrative divisions to provide patient support for patients being treated by medical faculty. Patient support includes coordinating referrals and appointments and maintaining patient records. Grievant works for one of these administrative units. She has two supervisors. For her daily patient support duties, she reports to the Medical Professor. For all other duties, she reports to the Administrator. Both the Medical Professor<sup>1</sup> and the Administrator report to the Division Chief.

### **Disruptive Behavior**

When the Administrator is absent, the Division Chief's Secretary notifies all other secretaries in the division to inform them of the absences of any supervisors. This is important to division operations because several employees work in different buildings and in different parts of buildings.

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<sup>1</sup> The Medical Professor has a nurse reporting to him and assisting him with medical treatment.

On December 11, 2001, the Administrator was ill and took sick leave. At 9:33 a.m., Grievant sent an email to the University President, Chief Financial Officer, and several other high-ranking individuals within the University. The email states:

[Unit] apparently has no supervision today. [Administrator] apparently contacted one secretary and told her that she was not coming in [Division Chief's Secretary] but [she] had to leave for a court date. [Division Chief's Secretary] apparently told [Ms. K], who did not notify anyone else. In addition, two other secys are out in this area.

It is a mystery to me that [Administrator] did not contact [Ms. C] who is our other administrator. In the past it was always the case that ... if the administrator were out, the fiscal senior, our only other administrator, took over. I notified [Ms. C] of these absences – which I only knew about by accident, having passed [Division Chief's Secretary] as she was leaving the building. [Ms. C] was unaware of them. [Ms. C] consistently arrives early, never later than 7:30 and it is peculiar that neither [Administrator] nor [Ms. K] bothered to notify her or other people not in this immediate area. Of course none of the nurses and I guess none of the docs got emails either. I believe [Ms. C] contacted [HR Manager] about this, but then [Ms. C] was confronted by [Ms. K] who demanded to know why she had called [HR Manager]. I heard this myself.

As usual, I presume none of you are bothered by what goes on here. But somebody ought to pay attention.

Neither the Administrator nor the Division Chief was copied on the email.

When the Administrator returned to work on December 12, 2001, she learned of the confusion surrounding her absence on the prior day. She sent an email to her staff stating:

When I am out, I will call [Division Chief's Secretary], as she is in the most direct contact with [Division Chief]. I will also ask [Division Chief's Secretary] to oversee any little details, as she did so ably yesterday.

I believe I addressed the issue of who to call when you are sick in the very first staff meeting we had. Historically, you all had called [former Supervisor] or [Fiscal Tech] with the idea you were to call until 'you reached a person' not voice mail. I said that even if I were out I would check my phone, to please call me and in fact, everyone has been very good about that.

Let me clarify again that I am the one you need to call if you are out, and if I am sick I will call [Division Chief's Secretary]. [Fiscal Tech] is not acting

in that secondary call capacity anymore, and hasn't been since I came here.

Grievant responded to the Administrator by stating:

There is NO way we can keep up with the way the rules change around here. When did this rule change? [Division Chief's Secretary] wasn't even here when you came. I only knew anything about who was out because I happened to pass [Division Chief's Secretary] as I was coming out of radiology yesterday morning and she was leaving to go to court. Had I not seen her, I would have known nothing about who was out/in. The un-updated coverage list had her listed as out all day for yesterday, and no one took the time – no one who knew who was where –bothered to send an email about anything about absences, lunch etc. [Division Chief's Secretary] told me she had only told [Ms. K] period. So just how did [Division Chief's Secretary] so "ably" notify people? What details! The place was unsupervised. I am OH so tired of hearing about "members of the division" – around here some people get info, other people don't. ( I can't even get info about office supply orders!). So even if you chose to portray yesterday as ok, it was not in terms of administration. And you cannot change the rules here and there as you see fit, after the fact. And could you please not insult my intelligence [by] mischaracterizing facts?

The Administrator responded:

[Grievant], who I call should not be of such consequence, as long as those people who need to know do know that I am out.

Of course it was unsupervised yesterday, but I would assume we are all mature adults and don't need supervision every minute. As best I can tell, the only crisis came from: a crisis being made out of my not being here.

Grievant replied:

Nobody knew who was here, who was out, who was covering for what. And you are side stepping the question of when and how you change your 'rules'. And the unupdated phone list, which we used to be able to consult no one was around to figure out who was covering what. Either [Ms. K] OR [Division Chief's Secretary] – the only ones who had direct knowledge of your whereabouts – should have notified the rest of use. PERIOD. And [Division Chief's Secretary] is an odd one to pick, because SHE DOESN'T HAVE EMAIL ACCESS. IS SHE SUPPOSED TO CALL EVERYONE?

And, for a case in point, I emailed [R] yesterday and will forward to you, on [C]'s status. As shorthanded as we were yesterday, and often are, [C] spent her time tidying up filed in [H's] file drawers, going to the trouble of

dusting them and the drawers with a dustbuster – not even filing. [R] said it was HIS understanding hammered out with [JB], that yes, [C] had only been hired to take up [J]'s slack since she had [M]'s files while he was gone, but [R] and [JB] agreed that because there was not that much for [C] to do in that respect, that she could have other duties IN THE DIVISION – not just for a chosen few. And why in the world can't she answer phones??? I saw in the emails you cancelled a Friday morning 'make up' of the staff meeting because [P] couldn't cover phones. With phone coverage such an issue, why isn't that something [C] can do? She's certainly professional enough to manage that.

So there were issues here yesterday, no matter what you say about them the day after.

### Failure to Follow Instructions

One of Grievant's duties includes transcribing tapes dictated by the Medical Professor. The Medical Professor regularly works well into the late evening after Grievant has gone home for the day. He sometimes needs to find out the status of tasks assigned to Grievant and must review items on or about Grievant's desk when she not at work. He became frustrated at not being able to tell the progress of certain tasks assigned to Grievant, so he devised a way for Grievant to separate her work based on level of completion. On February 13, 2002, the Medical Professor sent Grievant an email stating:

Your desk remains unacceptable. I cannot tell what is in progress and what is not. Please use the lab box as you are, writing on the form what has been done and putting the request in the box so we can find it. Please also use the box above your desk, next to the ... alphabetized box for finished stuff. Please write on it what was done and when. Please put a separate box on your desk, or a neat pile, of things in progress. Place the stuff which is simply untouched back in the "in box" at the end of the work day.

On February 18, 2002, the Medical Professor sent Grievant an email<sup>2</sup> stating:

There are many (5) tapes scattered around your desk. How can you tell which ones are transcribed and which are not? Are they completed? Please get a box for tapes that are not transcribed and a box for tapes that are so you can distinguish them. These can be small boxes but there must be a way to distinguish them.

On March 5, 2002, the Medical Professor sent Grievant an email<sup>3</sup> stating:

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<sup>2</sup> Agency Exhibit 15.

<sup>3</sup> Agency Exhibit 16.

Again, please put together a box, small, around or on your desk for tapes which are to be typed and those that are done. Please also put together a box for stuff you are working on; notate on it what is in progress.

On April 11, 2002, the Medical Professor sent Grievant an email<sup>4</sup> stating:

NOTE: In addition, I note that the boxes I asked you to place to hold tapes for transcription and those transcribed are still not there. I do not intend to argue about this any longer, although I know you do not believe they are necessary. Humor me, since I am, by your own description your supervisor. Obtain them on Monday. I will look to see that they are there.

On April 15, 2002, Grievant replied:

Re boxes: I have not had anything close to a chance to look for anything like a box or resembling a box. So I put the thermostat cover by the machine to humor you. It will hold tapes and obviously doesn't have any influence or connection to the temperature here.

The Medical Professor became concerned about whether Grievant was collecting all of the necessary information for new patients. He created a form for her to use. His February 13, 2002 email states:

I would like to make up a simple form for new patients to include:

NAME:  
TEL NO. OF REFERRING DOC:  
DIAGNOSIS:  
URGENCY PER DOC: (this is simply a direct statement from the doc's office.)

Let me see this this PM.

On March 18, 2002, the Medical Professor sent Grievant an email<sup>5</sup> stating:

We went over how to [do] this several times. I made out forms for you to use to record the patient information but you persist in not following the instructions. You are to record the information from the phone call on the new patient referral form, a copy of which is again in your box. Then, at

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<sup>4</sup> Agency Exhibit 18.

<sup>5</sup> Agency Exhibit 17.

the end of the day, email [Nurse] or call her to appraise her of the new patients.

Grievant never developed or used the form.

The Medical Professor receives patients by three methods – (1) from other physicians at the University hospital, (2) from physicians working outside of the University hospital, and (3) from patients who know of the Medical Professor's or University hospital's reputation and ask for services from the Medical Professor. The Medical Professor has instructed Grievant that if any issues arise regarding the urgent need to see a patient, she is to notify the Medical Professor or his Nurse for a decision of what to do. An outside physician referred a patient to see the Medical Professor. Grievant spoke with that patient's relative to obtain patient history information. The relative informed Grievant that the patient's problems were immediate and described the patient's problems. Grievant concluded that the Medical Professor's schedule would not permit him to timely see the patient and that the patient needed services from another specialist within the University hospital. Grievant contacted that specialist's office and scheduled an appointment for the patient.

One of Grievant's strengths is her ability to relate well with the Medical Professor's patients. Grievant has access to the patient's treatment plans and some test results. On one occasion, Grievant became friends with a patient whose medical condition turned out to be worse than originally expected based on medical tests. Grievant visited the patient in the hospital and concluded that the patient was not aware of a recent medical test showing the patient's condition was more serious than the patient believed. Grievant approached the Medical Professor in a hospital hallway and asked him if he had told the patient about the new medical test. Grievant asked this question with other medical professionals standing close enough for them to hear the conversation. The Medical Professor said "no" but that it was none of Grievant's business. Grievant responded that it was really important for the patient to learn of the test results. The Medical Professor concluded that Grievant had read the patient's test results.

## **CONCLUSIONS OF LAW AND POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>6</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior

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<sup>6</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.



of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

### Group I Written Notice – Emails

The University has a practice of permitting and encouraging its employees to bypass their supervisory chain of command in order to express concerns and complaints.<sup>7</sup> Although this practice is not followed in many other State agencies, it appears to be an acceptable method of communication within the University.<sup>8</sup>

The primary reason the University contends Grievant’s December 11, 2001 email is disruptive is because it was sent to senior managers in the University, it incorrectly stated the facts that occurred, and the Administrator did not have an adequate opportunity to respond to Grievant’s allegations.

Grievant’s December 11, 2001 email was intended to notify senior University managers of Grievant’s belief that the Unit was not being properly managed and that problems existed within the Unit. Grievant was engaging in behavior sanctioned by the University. She brought her concerns about how the unit was being managed to managers outside of her chain of command as permitted by the University’s practice. The fact that the Administrator and other managers had a different opinion from Grievant’s opinion does not make Grievant’s email disruptive.

No evidence was presented suggesting the recipients of Grievant’s December 11, 2001 email read or responded to it. These recipients may have simply ignored the email in which case their activities were not disrupted.

Employees may express their concerns to their supervisors. Grievant’s December 12, 2001 email to her supervisor represents Grievant’s “venting” of her concerns about how the division is managed. Part of the Administrator’s responsibilities as a supervisor include listening to and responding to the concerns of subordinates. The fact that the Administrator did not agree with or wish to hear Grievant’s contrary opinion does not make Grievant’s December 12, 2001 email disruptive. Although Grievant’s December 12, 2001 email was not polite or as professional as one would desire, the emails do not reflect disruptive behavior, given that the emails were directed to the Administrator.

### Group II Written Notice -- Failure to Follow Supervisor’s Instructions

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<sup>7</sup> Remarkably, the Administrator testified that she could not tell Grievant to refrain from sending emails. Many State agencies treat email as a privilege that can be revoked or restricted, especially in light of an agency’s ability to monitor employee use of computer systems. See DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*.

<sup>8</sup> No evidence was presented suggesting that if an employee chose to circumvent the chain of command the employee assumed the risk of discipline if he or she incorrectly stated the facts underlying his or her opinion.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>9</sup> There is little doubt that one of Grievant’s supervisors repeatedly instructed her to use boxes to separate her completed and uncompleted work. The instruction was clear and within the scope of the Medical Professor’s authority. Grievant refused to follow the instruction. There is also little doubt that Grievant’s supervisor repeatedly instructed Grievant to use a simple data collection form and Grievant refused to do so. Her failure to comply with her supervisor’s instructions rises to the level of a Group II offense.

Grievant contends that by requiring her to use two boxes and to use a specific form, the Medical Professor was “micromanaging” her activities. Assuming for the sake of argument that the Medical Professor was “micromanaging” Grievant, all this would mean is that the Medical Professor was a poor manager. It would not mean that Grievant could disregard the instruction from her supervisor.

The University argues Grievant acted outside of the scope of her authority by scheduling an appointment for a patient with a specialist other than the Medical Professor. The Hearing Officer agrees. Grievant knew or should have known that she was not authorized to re-refer a patient to another specialist without first obtaining the consent of the Medical Professor. Making a decision (even an informed decision) regarding what services a patient needs involve medical decision-making and is clearly outside the scope of Grievant’s administrative duties.

The University argues Grievant should not have read a patient’s test results and then confronted the Medical Professor regarding whether he had informed the patient of the test results. If Grievant’s actions are considered separately, they do not rise to the level requiring disciplinary action. Grievant regularly came into contact with patient test results and her duties required her to have intimate knowledge of medical terminology. Without evidence that the Medical Professor had previously instructed Grievant not to read medical reports, Grievant’s review of medical reports is not inconsistent with her duties. Her enthusiasm for patients is one of Grievant’s strengths that the University encourages. Although this instance may not in itself rise to the level requiring disciplinary action, the University has presented overwhelming evidence to support its Group II Written Notice.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action for disruptive behavior is **rescinded**. The University’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow supervisor’s instructions is **upheld**.

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<sup>9</sup> DHRM § 1.60(V)(B)(2)(a).

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>10</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 5514 / 5547-R**

Reconsideration Decision Issued: November 1, 2002

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant raises numerous points<sup>11</sup> in her request for reconsideration. All<sup>12</sup> of these items were either argued during the hearing or could have been argued during the hearing. All arguments, witness testimony, Grievant Exhibits,<sup>13</sup> and Agency Exhibits were reviewed and considered by the Hearing Officer in reaching a decision. Grievant has not identified any errors of law. She cites only her presentation of facts.

Grievant fails to recognize that the Agency issued her one Group II Written Notice based on three (of four) factual scenarios upheld by the Hearing Officer. The

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<sup>11</sup> Grievant refers to numerous irrelevant matters. For example, she objects to the Medical Professor referring to her as a secretary because “use of the terms such as ‘secretary’ may carry unfortunate and belittling connotations ....” Grievant’s statement is nonsense. There is nothing unfortunate or belittling about the term “secretary.” Grievant also debates the facts concerning whether she acted appropriately when asking the Medical Professor about whether he had informed a patient of test results. The Hearing Officer concluded that the University had not shown facts sufficient to justify disciplinary action for that confrontation.

<sup>12</sup> Grievant discusses several events subsequent to the hearing, but states they are subject to a separate grievance.

<sup>13</sup> Grievant suggests the Hearing Officer did not review her position description and that her position description is central to this grievance. The Hearing Officer carefully reviewed the position description but not to the exclusion of other witness testimony. Grievant’s position description is not central to the resolution of this grievance.

University could have issued her three separate Group II Written Notices and sought her removal based on three separate factual scenarios. Conversely, any one of the three factual scenarios is necessary to support the Group II Written Notice. When the Medical Professor instructed Grievant to begin using a specific form for data collection, Grievant was obligated to comply with that instruction. When the Medical Professor instructed Grievant to place boxes on her desk, Grievant was obligated to comply with that instruction. Nothing in Grievant's position description, or otherwise, granted her the authority to make medical decisions such as choosing<sup>14</sup> which specialist a patient should see and then referring a caller to that specialist's office so that an appointment could be scheduled. The evidence is overwhelming that Grievant failed to comply with several instructions from her supervisor.

Grievant contends the Medical Professor did not comply with the timeliness criteria for the Written Notices because he took no disciplinary action for months. This argument fails because the Medical Professor took timely action following his last instructions to Grievant. The Medical Professor repeated his instructions to Grievant numerous times. His failure to discipline her after she failed to comply with his first requests only shows he gave Grievant the benefit of the doubt that she would ultimately comply. Grievant ignored her responsibility to her supervisor and chose not to comply with his instructions.

Grievant contends the volume of work she was obligated to perform somehow excused her failure to follow her supervisor's instructions. Grievant's volume of work did not affect her refusal to comply with the Medical Professor's instructions. She could have easily complied with his instructions.

Grievant questions why her most recent evaluations<sup>15</sup> were not affected by the disciplinary actions against her. She suggests this shows the disciplinary actions were not material. It is irrelevant whether Grievant's evaluations are accurate. The University has established the basis for its Group II Written Notice.

Grievant contends she should have been issued a counseling memorandum before disciplinary action was taken in order to comply with a requirement of progressive disciplinary action. Grievant's argument fails because an agency is not obligated to issue counseling before taking formal disciplinary action.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments

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<sup>14</sup> The evidence was undisputed that Grievant used her judgment to decide which specialist should see the patient and that Grievant suggested that the caller schedule an appointment with that specialist because that specialist would be the appropriate medical professional to treat the patient. Grievant's judgment was a medical decision for which she was neither trained nor authorized to make.

<sup>15</sup> Grievant's evaluations and other evidence are not sufficient to mitigate the disciplinary action against her. She knowingly chose to reject a supervisor's instruction.

and evidence presented at the hearing. For this reason, Grievant's request for reconsideration is **denied**.

### **APPEAL RIGHTS**

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