Issue: Group II Written Notice with termination due to accumulation (failure to follow supervisor's instructions, perform assigned work, comply with established written policy); Hearing Date: 11/29/04; Decision Issued: 12/01/04; Agency: Longwood Univ.; AHO: David J. Latham, Esq.; Case No. 7908; **Administrative Review: Hearing Officer Reconsideration Request received 12/16/04; Reconsideration Decision issued 12/18/04; Outcome: No newly discovered evidence or incorrect legal conclusion. No basis to change original decision; Addendum Decision addressing attorney's fees issued 01/21/05**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7908

Hearing Date: November 29, 2004
Decision Issued: December 1, 2004

PROCEDURAL ISSUES

Grievant requested as part of the relief she seeks that she be reemployed in a different position or department. A hearing officer has authority to reinstate an employee to her former position or, if occupied, to an objectively similar position.[1] A hearing officer may not transfer any employee.[2] Grievant also requested that she be given a salary increase in November 2004. A hearing officer has no authority to revise an employee's compensation.[3] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant

[1] § 5.9(a)1. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[2] § 5.9(b)3. *Ibid.*
[3] § 5.9(b)4. *Ibid*.

Human Resource Director
Attorney for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from two Group II Written Notices issued for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy.[4] Grievant was removed from employment in conjunction with the second Group II Written Notice. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[5] Longwood University (Hereinafter referred to as "agency") has employed grievant as a human resources analyst for ten years.

Among grievant's responsibilities, she is required to manage personnel information by keying into the computer data base salary changes and faculty/staff contract data. Until March 2004, grievant's work description had stated that, "All information will be keyed within 48 [hours] of the occurrence (update, new, etc.)."[6] In March 2004, the Human Resources Director revised grievant's work description, showed it to her, and they discussed it in detail; grievant did not suggest any changes. The new description specified that, "Information will be keyed within 48 hours of receipt."[7] Such data must be entered into the state payment system by specified payroll cutoff deadlines in order for the changes to become effective as scheduled. Checks are generated in Richmond and mailed to the agency.

In late May 2004, the human resources compensation manager prepared contracts for faculty members for the 2004-05 school year and mailed them to the faculty for their review and signature. She spoke with grievant and advised her that 12 athletic coaches were switching from nine-month contracts to 12-month contracts. She offered to give grievant a typed list that identified the 12 coaches but grievant said she would not need it because she could pick up the required information from their contracts.[8] As faculty members returned their signed contracts beginning in early June, the compensation manager recorded

[4] Agency Exhibit 2. Written Notices, issued September 7 & 15, 2004.
[5] Agency Exhibit 1. Grievance Form A, filed July 27, 2004.
[6] Grievant Exhibit 12. EWP Work Description, effective November 1, 2002.
[7] Agency Exhibit 5-13. Employee Work Profile (EWP) Work Description, effective October 25, 2003.
[8] Agency Exhibit 5-16. Athletic administration salary list.

the returns on a spreadsheet and gave the contracts to grievant for data entry into the computer data base.[9] Grievant failed to enter the appropriate information into the system before the payroll cutoff deadline. As a result, the checks had to be prepared manually in order to pay the coaches on time. A similar problem occurred in August 2004, when grievant failed to timely input information about a coach's salary increase. Grievant acknowledged having the contract change in her office but had no explanation for failing to timely key in the necessary data.

The contracts for approximately 200 or more faculty members had also been mailed out in late May. Those contracts were returned in June and July and grievant could have input the required information into the data base as she received them but she instead chose to accumulate the contracts. The final deadline to have information into the data base was August 20, 2004. Grievant went on vacation from August 6-16, 2004 without having entered contract information in the data base. Upon return from her vacation, grievant keyed in the data on August 19, 20 and 21, 2004. Because of the delay in making this information available to the Finance Department, a finance analyst was required to work overtime on Saturday and Sunday, August 20 & 21, 2004, to calculate proper payments for the 200+ faculty members' paychecks.

The Human Resources Director (grievant's immediate supervisor) had spoken with grievant and other staff in the past about the necessity to improve performance in the department, particularly the need to assure correct and prompt data entry. She had also advised grievant during an interim evaluation session that she was dissatisfied with grievant's failure to provide certain reports in a timely manner.[10] The Director concluded that grievant's failures to process contracts within the 48-hour requirement constituted poor timeliness, inattention to detail, and lack of follow-through. On September 7, 2004, she issued a Group II Written Notice to grievant citing her failures to follow supervisory instructions, perform assigned work or comply with established written policy. She advised grievant that future occurrences of this nature would result in another Group II Notice and removal from employment.

Another of grievant's responsibilities is records management. She is required to monitor record destruction in accordance with appropriate laws.[11] On September 9, 2004, the Director learned that grievant had failed to obtain the requisite approval of a university officer before outdated records were shredded. Outdated records had been correctly identified but procedure requires that a certification form be signed by an appropriate university officer prior to destruction.[12] During the week in early June 2004 when the form was to be signed, the officer was on vacation and grievant planned to obtain the signature the following week. She forgot to do and the form was never signed. The

[9] Agency Exhibit 6. Athletic coaches' contracts.
[10] Agency Exhibit 5-14. Self-evaluation form, August 17, 2004.
[11] Agency Exhibit 5-13. Employee Work Profile (EWP) Work Description, effective October 25, 2003.
[12] Agency Exhibit 5-6. Certificate of Records Destruction.

Benefits Administrator had been assigned to oversee the shredding process. She *assumed* that grievant had obtained the necessary certification and proceeded to shred the documents in the latter part of June. She did not ask grievant if the certification had been obtained. The shredded documents were properly identified for destruction and therefore, grievant's only impropriety was the failure to obtain the signature of the required official.

The Human Resources Director notified grievant on September 14, 2004 that she would issue a second Group II Written Notice and terminate grievant's employment the following day.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules

[13] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failures to perform assign work, or to otherwise comply with established written policy, are Group II offenses.[14]

Group II Notice – September 7, 2004

While grievant's performance in the first few years of employment was good, her performance slipped during the past three years. In 2001, her overall rating was Contributor but she was rated Below Contributor on a core responsibility.[15] In 2003, grievant was rated Contributor overall but received a Below Contributor rating on two core responsibilities.[16] The agency has shown, and grievant has forthrightly acknowledged, that her performance during the weeks and months preceding the first written notice was substandard. In a remarkably candid self-evaluation, grievant admitted that her performance was Below Contributor in three of the six core responsibilities assigned to her.[17] Thus, grievant had known for a significant length of time that her performance did not fully meet the agency's expectations. Moreover, grievant was objective enough to recognize her own shortcomings and acknowledged them in her self-evaluation.

Grievant asserts that the agency violated the Standards of Conduct because she was disciplined rather than counseled. The Standards provide for various types of corrective action to address undesirable behavior. Corrective action may be either counseling (non-disciplinary) or formal Written Notices (disciplinary).[18] The appropriate type of corrective action is determined by the nature of the offense, the existence or nonexistence of prior similar behavior, previous corrective actions, and the individual circumstances of the offense. There is no requirement that an employee be counseled before being disciplined. Accordingly, the agency's decision to utilize disciplinary action in this case is not, by itself, a violation of the Standards.

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[14] Agency Exhibit 3. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[15] Grievant Exhibit 9. Performance evaluation, November 5, 2001.

[16] Grievant Exhibit 14. Performance evaluation, November 11, 2003.

[17] Grievant Exhibit 18. Self-evaluation, August 17, 2004.

[18] It should be observed that performance evaluations, particularly interim evaluations, can be considered a form of corrective action because the evaluation brings to the employee's attention areas of performance that should be improved.

Counseling sessions may be either verbal or in writing. Supervisors may elect to memorialize a counseling session with written documentation but are not required to do so.[19] In this case, grievant denies that she was ever counseled while her supervisor claims she counseled grievant on numerous occasions. There is no written documentation to substantiate any of the alleged counseling sessions. The agency submitted monthly calendars that reflect that grievant and her supervisor met to discuss interim evaluations and changes in her EWP but there is no documentation of what was discussed in those meetings.[20] In any case, whether or not counseling sessions occurred is not dispositive. Since it is clear that grievant had been on notice about her performance shortcomings for some time, it was entirely reasonable that the agency concluded that disciplinary action was needed to get grievant's attention and to effect a change in behavior.

Grievant argues that, at most, her work was unsatisfactory and that such an offense warrants only a Group I Written Notice. Grievant cites a 2002 decision (Case # 5540) as being analogous to the instant case. While there are certain similarities to the prior case, it may be distinguished from the instant case. In the prior case, it was concluded that the grievant was not sufficiently on notice of her performance deficiencies to warrant discipline without first having counseling or some other form of notice such as a performance evaluation. In the instant case, grievant knew from past evaluation that aspects of her performance were substandard, and she knew how to prevent the problems that occurred.

In this case, grievant failed to perform assigned work by failing to key information within 48 hours of receipt. Grievant had been on notice since March 2004 of the requirement in her EWP Work Description. Grievant argues that prior to the EWP change, she had interpreted "Within 48 hours of occurrence" to mean within 48 hours of the effective date of the change. However, grievant has provided no written or other support for her interpretation. In any case, grievant did not disagree with the March 2004 change requiring her to key data within 48 hours of receipt. She was therefore obligated to comply with the changed requirement. Her failure to do so is a failure to follow the supervisor's instructions (as written in grievant's work description) – a Group II offense.

In addition, grievant's failure to timely input data on the 12 coaches' contracts reflects a lack of attention to detail and follow-through. On one hand, grievant told the Compensation Manager that she did not need a list of the 12 coaches to identify which ones changed to 12-month contracts. On the other hand, grievant attempted to explain her failure to properly input data by claiming that reading contracts is not part of her job. Grievant can't have it both ways; if

[19] Even though not required, supervisors are well-advised to document counseling sessions with a detailed memorandum, especially when an on-going problem is the subject of multiple counseling sessions. A copy of the memorandum should be given to the counseled employee.
[20] Agency Exhibit 5-2. Calendar pages. November 2003; February, July & August 2004.

she said she was going to pick up the correct information from the contracts, then she is obligated to read them. If she was unsure, she could have asked the Compensation Manager for help. Grievant's somewhat lackadaisical attitude about this situation suggests a behavioral problem that requires disciplinary action. Therefore, the agency has borne the burden of proof necessary to show that a Group II Written Notice was reasonable and appropriate.

Group II Notice – September 14, 2004

It is undisputed that grievant forgot to obtain authorization from a university officer before records identified for destruction were shredded. Grievant's forgetfulness did not result in any substantive harm because the documents destroyed had been correctly earmarked for shredding and the authorization has subsequently been obtained, albeit on an ex post facto basis. The agency has not demonstrated that the certification signature is anything other than a virtual rubber-stamp approval since there was no showing that the signing officer would have personally examined the records identified for destruction. However, such procedural requirements must be complied with and grievant's failure to do so was a procedural violation. Nevertheless, in considering the totality of the circumstances, grievant's error was a technical error of omission – not commission. It was not a *deliberate* failure to follow instructions, perform assigned work or comply with established policy. Rather, it was a single occurrence of unsatisfactory work performance. In most cases, Group II offenses involve some degree of willfulness. When one makes an error because of forgetfulness, lack of understanding, or inattentiveness, the offense is considered less severe and is generally corrected either by counseling or, at most, a Group I Written Notice.

In this case, the issuance of a Group II Written Notice appears especially disproportionate in view of the fact that the Benefits Administrator who actually shredded the documents was not even counseled. The Benefits Administrator knew that written authorization was required before shredding could begin but she never attempted to determine whether the authorization had been obtained. She admitted that she just *assumed* the certification had been obtained because grievant never told her otherwise. The Benefits Administrator was the person assigned to shred the documents; as the *person who was directly responsible* for the shredding, her culpability is at least equal to, if not greater than grievant's. The agency's failure to take any corrective action with respect to the Benefits Administrator constitutes disparate treatment.

It is especially instructive to consider that the Standards of Conduct policy not only sets forth disciplinary actions but is also intended to correct employment problems by utilizing corrective action to prevent a recurrence of unacceptable behavior or performance. Thus, the policy may be viewed as primarily remedial in nature, while reserving punitive measures for more egregious offenses. In this case, the issuance of the second most severe form of discipline for grievant's forgetfulness is akin to using a mallet to swat a fly.

Most troubling, however, is the context of the issuance of the second disciplinary action. Only one week earlier, grievant had been told that any *future* occurrences of inattention to detail and lack of follow-through would result in removal from employment. The grievant's failure to obtain a signature occurred three months earlier – not after the first written notice. The agency argues that it only discovered the omission after issuance of the first written notice. While the delayed discovery is not disputed, the decision to use this relatively minor incident of unsatisfactory performance as a reason to immediately terminate grievant's employment is fundamentally unfair. When the agency tells the employee that *future* occurrences will result in discipline, that is fair because it places the employee on notice that she must improve future performance or face consequences. However, it is inherently unfair to use the subsequent discovery of a mistake made months before the notice as a "gotcha" to discipline her for a second similar offense. The employee must be given a reasonable period of time within which to improve her performance before discipline can appropriately be utilized.[21]

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on September 7, 2004 for failing to follow a supervisor's instructions and perform assigned work is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

The Group II Written Notice issued on September 15, 2004 for failing to follow a supervisor's instructions and perform assigned work is hereby RESCINDED.

Grievant is reinstated to her former position, or if occupied, to an objectively similar position. She is awarded full back pay, from which interim earnings must be deducted and is entitled to the restoration of full benefits and seniority. She is further entitled to recover a reasonable attorney's fee, which

[21] The "reasonable period of time" will vary with the circumstances, but in any case, discipline should be issued for *same or similar offenses* that occur only after the first disciplinary action. [NOTE: The agency would not be precluded from disciplining prior offenses that are totally unrelated to the first offense. For example, if the agency disciplines an employee for unsatisfactory attendance and then subsequently discovers that the employee had stolen state property months earlier, a second disciplinary action for the earlier unrelated offense would be reasonable and appropriate.]

cost shall be borne by the agency.[22] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer.[23]

APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.[24] You must file a notice of appeal with the clerk of the circuit court in the

[22] Va. Code § 2.2-3005.1.A & B.

[23] *See* Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

[24] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[25]

[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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David J. Latham, Esq.
Hearing Officer

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[25] 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: 7908

Hearing Date:	November 29, 2004
Decision Issued:	December 1, 2004
Reconsideration Request Received:	December 16, 2004
Response to Reconsideration:	December 18, 2004

PROCEDURAL ISSUE

During the hearing, the agency was represented by an Assistant Attorney General. Subsequent to issuance of the Decision, the Hearing Officer has not received correspondence either from the agency's attorney or from the agency stating that the attorney is no longer representing the agency. Until such written notice is received, the hearing officer must presume that the Office of Attorney General (OAG) continues to represent and speak for the agency. Accordingly, requests for administrative review should be filed by the OAG until the hearing officer is notified otherwise. In this case, an employee of the agency filed a request for reconsideration. Since the request was not filed by the agency's representative (OAG), the hearing officer is not obligated to respond to the request. However, in this case only, the hearing officer has elected to respond since the request is brief, and since the time limit for filing administrative requests has now expired.

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within

15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[26]

OPINION

The agency requested a reconsideration of the decision because it believes that the decision did not reflect the importance of the documents shredded. The hearing officer agrees with the agency's recitation of facts regarding the shredded documents. However, the decision does not give these facts much weight because it was undisputed that the shredded documents had been retained for the mandated period of time and were properly scheduled for destruction. Therefore, the records destroyed were properly shredded on schedule as they should have been.

Grievant's failure to obtain the required signature was a significant failure to perform work satisfactorily. As stated in the decision, in the absence of other extenuating circumstances, a first-time failure to obtain the required signature would normally justify either counseling or a Group I Written Notice. However, for the reasons discussed on pages 7 & 8 of the Decision, it was inherently unfair to discipline grievant in this case for that offense.

The agency has not identified any constitutional provision, statute, regulation, or judicial decision as a basis to challenge the hearing officer's conclusions of law. The agency takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The agency's disagreement, when examined, simply contests the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency's argument and concludes that there is no basis to change the Decision issued on December 1, 2004.

APPEAL RIGHTS

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

[26] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

1. The 15 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 HRM, 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.[27]

David J. Latham, Esq.
Hearing Officer

[27] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 7908

Hearing Date:	November 29, 2004
Decision Issued:	December 1, 2004
Reconsideration Request Received:	December 16, 2004
Response to Reconsideration:	December 18, 2004
Addendum Issued:	January 21, 2005

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[28] For 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 or her former (or an objectively similar) position.[29]

DISCUSSION

The decision in this case included an award of attorney fees. That award was premised on the assumption that grievant's representative was entitled to receive attorney fees. For the reasons that follow, it is concluded that grievant's representative is not entitled to receive attorney fees.

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[28] Va. Code § 2.2-3005.1.A.

[29] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

The statute providing for the awarding of reasonable attorneys' fees was enacted in 2004.[30] The Code of Virginia provides that grievants may be represented in EDR hearings by legal counsel or lay advocates.[31] Thus, grievants may be represented by attorneys, foreign attorneys, non-lawyers, paralegals, union representatives, friends, or even spouses. However, the statute provides for the award of attorneys' fees only to *attorneys*. In the absence of any clarifying language, it is presumed that the General Assembly meant that fees may be awarded only to those *attorneys* who are duly licensed in Virginia and who are in good standing with the Virginia State Bar.

Grievant's representative of record, and the person who represented her throughout this case, is licensed to practice law in New Jersey and Pennsylvania, but is not licensed to practice law in the Commonwealth of Virginia.[32] Because the statute does not define what is meant by the word "attorney," it is necessary to look to the licensing authority to determine whether grievant's representative is an attorney for purposes of administering the Virginia grievance statute. The Virginia State Bar defines "non-lawyer" in its Unauthorized Practice Rules stating, in pertinent part:

> The term "non-lawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, the term "non-lawyer" shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:
>
> (1) Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
> (2) The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
> (3) The client must be informed that the attorney is not admitted in Virginia.[33]

In the instant case, grievant's representative is a foreign attorney because he has been admitted to practice law in two other states. However, there is no assertion or evidence that he provided services to grievant under the restrictions cited above, i.e., that he satisfies criterion two which requires that he represents the grievant elsewhere. Thus, pursuant to the definition above, and for purposes of applying the unauthorized practice rules, grievant's representative is considered a "non-lawyer." Moreover, even if grievant's representative met all three foreign attorney criteria, there is authority to support the position that his services would not be considered the authorized practice of law. A Virginia Unauthorized Practice of Law (UPL) opinion holds that a foreign attorney who represents the interest of another in Virginia is engaged in the unauthorized practice

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[30] Va. Code § 2.2-3005.1.A. provides: "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. All awards of relief, including attorneys' fees, by a hearing officer must be in accordance with rules established by the Department of Employment Dispute Resolution."

[31] Va. Code § 2.2-3004.F.

[32] Attorney's letterhead submitted with Petition for Attorneys' Fees, December 13, 2004.

[33] *Virginia State Bar 2004-2005 Professional Guidelines*, Unauthorized Practice Rules, Section (C), Practice of Law in the Commonwealth of Virginia.

of law.[34] To reiterate, the grievance statute does not require representation by someone who is authorized to practice law in Virginia; we simply decide that under the grievance statute attorneys' fees can be awarded only to attorneys authorized to practice law in this state.

While there have been no Virginia state decisions directly on point, a U.S. District Court in the Fourth Circuit has held that one of 12 relevant factors for consideration in determining attorneys' fees is whether the petitioner is licensed to practice in the jurisdiction in which the services were performed.[35] In a case where a foreign attorney billed attorney fees for services performed in South Carolina where he was not licensed, the court held that allowing recovery of fees would be condoning the unauthorized practice of law.[36] In a federal administrative proceeding, it was held that attorneys' fees may be awarded only to licensed attorneys.[37] In a case similar to the instant case, an attorney not licensed in California sought to recover attorney fees after appearing in a California state administrative proceeding. The U.S. Court of Appeals, Ninth Circuit, held that the attorney "was not licensed to practice law [in California] and, therefore was not entitled to attorney's fees for his services in the state administrative proceeding."[38]

It must be emphasized that EDR takes no issue with the right of grievant to utilize the services of anyone she chooses to represent her; however, the authority of the hearing officer is limited to awarding attorneys' fees only to duly licensed attorneys authorized to practice law in the Commonwealth of Virginia.

AMENDED DECISION

That portion of the decision that awarded attorneys' fees is hereby rescinded. The agency is not required to pay grievant's attorneys' fees.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. 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 hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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[34] Virginia UPL Opinion 119 states that an attorney who is a member of the District of Columbia and Maryland bars and who represents the interest of another before any tribunal in Virginia is engaging in the unauthorized practice of law, even if the services are provided on a *pro bono* basis.

[35] *In re Wiesen-Kosinski*, 1996 WL 264762 (D.S.C.).

[36] *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 571; 511 S.E.2d 372 (1998). See also *Pierce v. Reichard*, 163 N.C. App.294, 299-300 (2004) in which the issue of whether an attorney was duly licensed to practice in the jurisdiction was a factor in whether to award fees.

[37] *Jenkins v. Peters*, 1998 EEOPUB Lexis 1714 (March 17, 1998).

[38] *Z.A. v. San Bruno Park School District*, 165 F.3d 1273, 1275 (1999).

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David J. Latham, Esq.
Hearing Officer