Issue: Group III Written Notice with termination (violating safety rules where there is a threat of physical harm, willfully or negligently damaging or defacing state property, unsatisfactory work performance, and using obscene language); Hearing Date: 06/21/05; Decision Issued: 06/24/05; Agency: DGIF; AHO: David J. Latham, Esq.; Case No. 8096; **Addendum Decision addressing attorney's fees issued: 07/15/05**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8096

Hearing Date: June 21, 2005
Decision Issued: June 24, 2005

PROCEDURAL ISSUE

Grievant requested as part of his relief that, if reinstated, he be paid interest on any award of back pay. Interest on back pay would constitute an award of damages. A hearing officer does not have the authority to award damages.[1] Grievant also requested that, if the disciplinary action is rescinded, all documents related to the action be removed from personnel files of the agency. While rescinded disciplinary actions should be removed from a *grievant's* personnel file, Human Resources is permitted to retain such documentation in a separate file. Therefore, the hearing officer is without authority to direct these two forms of relief requested by grievant.

Chief of Law Enforcement
Attorney for Agency
One witness 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? Did the agency unfairly apply or misapply state and agency policies, procedure, rules, or regulations?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for violating safety rules where there is a threat of physical harm, willfully or negligently damaging or defacing state property, unsatisfactory work performance, and using obscene language.[2] As part of the disciplinary action, grievant was removed from state employment. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Game and Inland Fisheries (DGIF) (Hereinafter referred to as "agency") has employed grievant for 17 years. He was a game warden at the time of the disciplinary action.

The Army Corps of Engineers planned to detonate explosives in order to breach a dam. Several governmental agencies were involved in planning the breaching operation in order to assure that it could be conducted safely. DGIF was assigned a role patrolling areas around the dam to assure that everyone was kept out of the area at the time of detonation. The Virginia State Police planned to utilize a helicopter to patrol the dam area prior to detonation to help spot any unauthorized people near the detonation site. Grievant was assigned with another game warden and a lieutenant to utilize all-terrain vehicles (ATVs) to patrol the wooded area on the north side of the dam.[4] At some point during planning of the operation, a suggestion was made to the DGIF chief of law enforcement (a colonel) that game wardens should wear blaze orange baseball-type caps so that the state police observer in the helicopter would be able to distinguish between authorized people and unauthorized civilians. The colonel strongly recommended to the captain in charge of the operation that the ATV operators wear orange caps.

The captain thought about the law that requires ATV operators to wear a helmet but he did not discuss it with anyone.[5] Early in the morning of February

[2] Agency Exhibit 1. Group III Written Notice, issued November 17, 2004.
[3] Agency Exhibit 16. Grievance Form A, filed December 7, 2004.
[4] A similar three-person team was assigned to the area on the south shore of the river.
[5] Agency Exhibit 10. Va. Code § 46.2-915.1.A.3 states "No all-terrain vehicle shall be operated by any person unless he is wearing a protective helmet of a type approved by the Superintendent of State Police for use by motorcycle operators."

23, 2004, the captain conducted a briefing of all agency employees who had been assigned to the operation. After the captain instructed the ATV operators to wear blaze orange hats, the lieutenant of grievant's team raised a question about wearing helmets.[6] The captain responded that the decision not to wear helmets had been "up and down the chain of command and been approved."[7] At this point grievant reasonably relied on the representation of his superior officer that an exception had been approved by agency's upper management. The captain said that those who wanted to wear helmets could wear a blaze orange vest in lieu of the blaze orange cap. It was clear from the discussion that the captain gave the employees the option of wearing either the orange cap, or a helmet and orange vest. All six ATV operators opted to wear orange caps.

Game wardens receive ATV training when hired.[8] The training covers vehicle operation and instruction about the helmet law. Grievant received this training. He was the most experienced ATV operator on the three-person team; the lieutenant is less experienced; the female game warden on the team was the least experienced. She is significantly smaller than grievant and the lieutenant (both of whom are male), and was not able to physically maneuver the ATV as well as the two males.

Grievant and his team began patrolling their assigned area around 8:00 or 9:00 a.m. As they patrolled, it became evident to grievant that the female game warden was not as proficient an ATV operator as either he or the lieutenant. Riding an ATV through wooded, hilly terrain requires using one's body to shift weight on the ATV to change the center of gravity when turning, and ascending or descending a hill. The female had more difficulty making sharp turns, negotiating the ATV over logs, and negotiating steep hills. Grievant attributed this to her relative inexperience on an ATV and to her smaller physical size.

The detonation of the dam was scheduled for noon. One detonation occurred at about that time but the engineers determined that not all of the explosives had detonated. After an hour or so, a second detonation was triggered. Once an "all clear" had been given at about 3:00 p.m., grievant and his team were released from patrolling the dam area. The three team members mutually agreed to ride their ATVs upriver from the dam site in order to familiarize the two game wardens with the ATV trails in that area, and to give the female additional ATV operation experience. Afterwards, the team rode back to the dam and then towards the parking area where their vehicles and ATV trailers were located. As they passed the dam, the grievant and the female game warden rode on ahead. The lieutenant stopped at the dam for a few moments.

When grievant and the female warden reached a steep rise at the edge of an old logging trail, grievant was able to negotiate the hill and rode to the top. The female game warden was not confident of her ability to negotiate the hill and

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[6] Agency Exhibit 6. Interview of lieutenant in charge of grievant's team, February 23, 2004.
[7] Grievant Exhibit 7. Lieutenant's affidavit, signed February 3, 2005.
[8] See generally Agency Exhibit 8. ATV Training material, September 2000.

did not immediately attempt to go up. The male game warden explained the techniques necessary to ascend the hill and encouraged her to try. The female made the attempt but apparently over-accelerated as she ascended causing the ATV to upend. She fell off and the ATV fell backwards on her resulting in several injuries, the most severe of which was a brain injury.

The agency investigated the accident and interviewed employees during the next several days. Because of the female warden's injuries, she could not be interviewed until late June 2004. The agency disciplined grievant on November 16, 2004. The agency disciplined the lieutenant.[9] The female warden was not disciplined. The captain who gave the ATV operators the option to not wear helmets received a Group I Written Notice. The lieutenant supervising the team on the south side of the river was also disciplined because he did not require his team to wear helmets; neither of the team members on that team were disciplined. The chief of law enforcement was not disciplined.

Prior to issuing discipline, the agency's Human Resource Director did not review the disciplinary action to determine whether mitigating circumstances exist as required by state policy.[10] Discipline was issued on November 17, 2004, nearly nine months after the alleged offenses occurred.

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

[9] The lieutenant grieved his discipline and it went to a hearing, which resulted in a decision of the hearing officer to reduce the level of discipline.

[10] Agency Exhibit 2. Section VII.E.1.a., Department of Human Resource Management Policy 1.60, *Standards of Conduct*, effective September 16, 1993, requires that the agency's Human Resource Director is responsible for reviewing all disciplinary actions involving discharge to determine whether mitigating circumstances exist that warrant a modified disciplinary action.

> 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 his evidence first and must prove his claim by a preponderance of the evidence.[11]

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 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.3 of the Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Violating safety rules where there is a threat of physical harm, and willfully or negligently damaging or defacing state property are two examples of a Group III offense.[12] Unsatisfactory work performance and use of obscene or abusive language are Group I offenses.

Violating safety rules where there is a threat of physical harm

The grievant acknowledges that on February 23, 2004, he operated his ATV without a helmet. Operation of an ATV without a helmet constitutes a rule violation, and increases the threat of physical harm in the event of an accident. The remaining issue is what discipline is appropriate for this offense, given the unique circumstances of this case. This was probably a one-time event for all those involved. The blowing up of a dam with observers hovering overhead in a police helicopter is something that occurs very infrequently. This was a new and unusual experience for the participants. In such situations, it is not uncommon that circumstances dictate following different procedures than one utilizes in day-to-day work.

It is undisputed that the instruction to wear ball caps originated (at least within this agency) with the Chief of Law Enforcement. The Chief of Law Enforcement reasonably should have known about this law requiring helmets, especially since the agency owns and operates a large number of ATVs, and he was the *Chief of Law Enforcement*. The Chief of Law Enforcement was not

[11] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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

disciplined. The captain who instructed grievant (and the other ATV operators) to wear ball caps in lieu of helmets knew about the helmet law. When the captain questioned his superiors about the helmet issue, they said that game wardens could be given an option to wear helmets or not. The captain's superiors were not disciplined. Grievant was given a Group III Written Notice because he failed to wear a helmet and because he allowed coworkers to wear ball caps. However, the captain who issued the instruction to *six* people to wear ball caps received only a Group I Written Notice. The agency offered no explanation as to why grievant's discipline for this specific offense was so much greater than the captain's discipline.

When given the instruction to wear ball caps, a lieutenant raised a question about helmets. The captain responded that the decision not to wear helmets had been "up and down the chain of command and been approved." At this point grievant reasonably relied on the representation of his superior officer that an exception had been approved by agency's upper management. It is true that grievant could have exercised the option to wear a helmet with orange vest. In fact, it would have been prudent for him to have done so. However, grievant could not have ***required*** a peer to wear a helmet because a superior officer had already instructed them that ball caps were permissible and that the chain of command had approved the instruction. Certainly, grievant could not have ordered a lieutenant, who was grievant's superior officer, to wear a helmet. Thus, even if grievant had worn a helmet himself, it would not have prevented either the accident or injuries to the female game warden.

Accordingly, the totality of the facts in this case support a conclusion that grievant's offense of not wearing a helmet was no greater than that of the captain. Both grievant and his captain relied on the representations of agency upper management that the issue of helmets had been considered, reviewed, and that an exception was permissible on this one occasion. When one is told that the agency's chief law enforcement officer and other superiors have approved the exception, it is reasonable that subordinates will rely on that assurance. Therefore, it is concluded that grievant's failure to wear a helmet on this unique occasion, while technically a violation of law, was condoned by grievant's superiors up to and including the agency's Chief of Law Enforcement. Under these circumstances grievant's discipline for this offense must be reduced.

Willfully or negligently damaging or defacing state property

There was no evidence that grievant himself damaged or defaced state property, either willfully or negligently. While there was minor damage to the female warden's ATV and some of her clothes were bloodstained, grievant did not cause this damage. In fact the allegation on the Written Notice specifies that "This charge is based on your comments and/or actions prior to the incident." The allegation cites three comments (but no actions) made by grievant as the basis for this charge.

First, grievant had told the female warden that if the ATV begins to overturn, "… just jump off the bastard. It ain't yours."[13] The agency infers that grievant's statement demonstrates a disregard for state property and that this (presumably) might have been a factor in the subsequent damage to the ATV. However, when grievant's statement is examined in the context in which it was made, it is apparent that he was trying to reassure the female warden that, if a turnover appeared imminent, she should think first of her own safety and not worry about the equipment. Grievant's statement in this context was reasonable and showed that his first concern was the safety of the person over an inanimate piece of expendable equipment. In fact, in his very next statement, grievant recognizes that his statement was callous-sounding because he stated, "Not a good way to talk about the department [equipment] but you, I mean, you know, 'Just get off the damn thing.'" The agency's own witness, an ATV training instructor, reinforced grievant's position when he testified that one should get away from an ATV if it is about to overturn; safety of the person should be the first priority. Thus, grievant's priority in focusing on personnel safety first was correct (although his use of vulgar language was not appropriate).

Second, the agency cited grievant's statement that he had "flipped" his ATV in the past.[14] The agency infers that this demonstrates a disregard for equipment because of the flippant tone of the comment. However, one must again consider the context of the statement. Grievant has extensive experience with ATVs and related some of his experience with the vehicles. In the context of explaining why he preferred his smaller, lighter ATV to a larger, heavier one, grievant explained that when he had overturned (flipped) his, it was easier to move the vehicle off himself. Grievant testified that when he had overturned his ATV in the past, there was no damage to the equipment; the agency failed to rebut grievant's testimony.

Finally, the agency cited grievant's statement that "… you just kinda man-handle it …" as evidence of willful or negligent damage to state property.[15] This statement was made as part of the same answer discussed in the preceding paragraph. Grievant explained that in certain situations, an ATV must be physically man-handled to get it righted squarely on all four wheels. The hearing officer takes administrative notice that an ATV may weigh several hundred pounds and that they cannot simply be lifted up and righted. It is necessary to use one's physical strength in combination with leverage to right an overturned ATV. Grievant's characterization of this process as "man-handling" is common usage and does not imply disregard for the equipment, or mean that grievant willfully or negligently damaged equipment when righting it after an overturn. The agency's ATV instructor testified that they teach "rider active" riding of the ATV, i.e., the rider must shift weight to maneuver the machine.

[13] Agency Exhibit 4. P. 4, Interview of grievant, February 23, 2004.
[14] Agency Exhibit 4. P. 18, grievant's interview, February 23, 2004.
[15] *Ibid*.

Accordingly, it is concluded that: 1) grievant did not damage or deface any state property, and 2) that his statements when understood in context, do not demonstrate a willful or negligent disregard for state property.

Unsatisfactory work performance

Grievant has acknowledged that, during the morning of February 23, 2004, he became aware of the female game warden's inexperience and shortcomings in ATV operation. The agency infers that he should not have allowed her to continue on the patrol after recognizing these problems. The evidence reflects that the female game warden's problems were due in part to her smaller physical size, and in part to her relative inexperience on an ATV. However, grievant knew that, like all game wardens, she had passed an ATV training course after being hired. Thus, he knew that she had sufficient experience and skill to satisfy the ATV instructor who had trained her. Making a decision about whether she should have been taken off the patrol would have required a subjective judgement by grievant. The agency asserted that grievant was the female warden's "mentor" and "trainer". However, there was no evidence that grievant either was assigned any such roles or took on such roles. He did voluntarily offer coaching on riding techniques during the day when the female warden encountered an unusual obstacle.

Since grievant and the lieutenant were the only ones to actually observe her operational skills and abilities on the day in question, they were in the best position to make such a judgement. One cannot necessarily conclude solely on the basis of the accident that grievant made an incorrect judgement. Grievant had no authority to relieve the female warden from her duties on that day; however, he could have made such a suggestion to the lieutenant. The lieutenant observed the female's riding ability that day and concluded that, while she was not as proficient as he and grievant, she nevertheless had the basic skills and ability to operate the ATV. During the day, they had observed the female negotiate other hills that were equally difficult; thus there was no reason to believe that she could not negotiate the last hill.

On the day of the incident, the lieutenant also observed that grievant was particularly effective in giving suggestions to the female warden when she encountered driving situations with which she was unfamiliar.[16] It is undisputed that grievant did coach and coax the female warden to attempt to negotiate the short rise that resulted in the accident and injury. It is easy in hindsight for one to conclude that grievant should not have done so. However, if the accident had not occurred, it is highly unlikely that grievant's judgement would have been questioned. It is more likely that he would have been commended for doing a good job of coaching during the day. Nonetheless, it appears more likely than not that grievant's encouragement of the female should have been tempered with more caution and deference to her feeling of reluctance to negotiate this particular hill.

[16] Agency Exhibit 6. Lieutenant's interview, February 23, 2004.

One factor that neither party discussed is the responsibility that must be assigned to the injured female warden. The fact is that she was not ordered or directed to negotiate the hill on her ATV. She could have asked grievant to take the ATV up the hill, or she could have found another route to return to the parking area. In an analogous situation, if grievant had been a passenger in a state car driven by the female, and he suggested that she could beat the red light at an intersection, it would ultimately be her decision as to whether to try to beat the light. If she was unsuccessful and collided with another car, she would bear the responsibility because she was in control of the car. In this case, the female was the sole person in control of the ATV. It was her decision to attempt to negotiate the hill rather than one of the available alternatives.

Accordingly, in the absence of any testimony from the female warden, it must be presumed that she felt able to perform the maneuver. And, therefore, she was at least partially, and probably primarily, responsible for the accident. The agency's ATV instructor testified that each rider's knowledge of his or her own skills should be the determinant as to whether they take on a particular hill. As the current Chief of Law Enforcement testified, game wardens are trained and taught to be independent thinkers because they are often working on their own in remote areas. Given the severity and nature of her injury, it is understandable that the agency decided not to discipline the female warden. However, grievant cannot be made a scapegoat because he suggested how to negotiate the hill and encouraged her to try it.

Use of obscene or abusive language

It is undisputed that grievant's interview on the day of the accident was replete with many instances of vulgar language. However, the interview was conducted with a few hours of the accident, at the scene of the accident, and in an automobile. Given that grievant was, by all accounts, extremely distraught at the scene, it is not surprising that he was upset.[17] The undisputed testimony is that grievant immediately rushed to the female warden's assistance, found her unconscious, not breathing, and with blood coming out of her mouth. He quickly attempted to clear her airway while also attempting to call for help. Being the only other person at the scene of such a serious accident is undoubtedly traumatic for most people. While not everyone in such a situation would have used vulgar language, it is not uncommon that such language is used by some people following a traumatic event. It may well be that grievant commonly uses foul language in his daily life and thinks little about how others react to and perceive such vulgarity.

Grievant offered the testimony of a licensed professional counselor (LPC) who counseled grievant for several months after the accident. She has concluded that grievant was significantly affected by the accident and ultimately diagnosed grievant as having post traumatic stress syndrome (PTSD). It is not

[17] Testimony of witnesses. See also Grievant Exhibit 6. Accident report.

uncommon for people suffering from PTSD to be angry and to use vulgar language in the period immediately after a traumatic event. The LPC concluded that grievant was still in a state of shock when he was interviewed at the scene of the accident. The hearing officer does not condone grievant's use of such language. However, in deciding whether the offense should be disciplined, one must consider the entire situation at the time grievant used the offensive language.

Also, it must be observed that grievant did not direct the vulgar language at either of his interviewers or at any specific person. The agency did not offer any testimony or evidence suggesting that either interviewer was offended by grievant's language. Grievant did not employ the language in an abusive manner. He used the vulgarities primarily in adjectival form related to inanimate objects (radio, mike, thing, etc.). Given the totality of the circumstances, it is concluded that grievant was not in full control of his faculties at the time of the interview, and that his use of vulgar language was unintentional and a byproduct of the state of shock in which grievant found himself. It is not appropriate to discipline an employee for this offense in this circumstance.

Unfair Application and Misapplication of policy

The agency administered discipline pursuant to the Standards of Conduct policy. It is incumbent upon the agency to comply with all procedural aspects of the policy when it utilizes the policy to administer discipline. The evidence reveals that the agency misapplied policy when it failed to properly involve the Human Resource Director in the disciplinary process. Although the agency notified the HR Director that disciplinary action would be taken, the HR Director did not review the proposed action to determine whether mitigating circumstances existed. It is concluded that this failure constitutes a misapplication of applicable established written policy.

Mitigation

The *Standards of Conduct* provide for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance.[18] In this case, grievant has both long service and an otherwise satisfactory performance record.

In addition, the extraordinary delay in the issuance of discipline constitutes an additional factor that compels a reduction in the disciplinary action. One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or

[18] Agency Exhibit 2. Section VII.C., DHRM Policy 1.60, *Standards of Conduct,* effective September 16, 1993.

commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[19] Management should issue a written notice as soon as possible after an employee's commission of an offense.[20] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

The agency delayed taking action immediately because the injured game warden could not be interviewed until June 2004. Had the agency issued discipline within a short time after the final interview in June, the four-month delay would be considered reasonable and necessary. However, following this final interview, discipline was not issued until five months later. The agency has not provided any reasonable explanation for this significant delay. Such a delay suggests to the grievant that his offense is not as serious as the agency now asserts. In delaying discipline without reasonable explanation, the agency has failed to comply with policy. In the interests of fairness and objectivity, the agency's failure to comply with policy constitutes a condition that compels a reduction in the disciplinary action.

Summary

It is unfortunate that another employee sustained such a severe injury. However, the fact is that if she had *not* sustained an injury as a result of the accident, it is entirely possible that there would not have been any disciplinary action issued to grievant. One cannot allow the seriousness of the injury to overshadow or adversely affect the appropriate level of discipline. Given that grievant's superiors approved the wearing of ball caps in lieu of helmets and issued that instruction in the presence of the entire group, a Group III written notice for this offense is unsustainable. The agency has failed to bear the burden of proof to show that grievant damaged or defaced any state property, and therefore, a Group III offense has not been demonstrated for this allegation. The agency has shown that grievant's coaching of the female warden at the final hill could have more deferential to the female's feeling of reluctance. To the extent that he over-encouraged her to make the attempt, this constituted unsatisfactory job performance. Finally, although grievant did use obscene language, the emotionally charged circumstances just prior to and during the interview serve to mitigate the offense.

If further justification for reducing the discipline is needed, the agency has provided such justification by its unfair application and misapplication of the Standards of Conduct policy.

[19] Agency Exhibit 2. Section VI.A. *Ibid.*
[20] Agency Exhibit 2. Section VII.B.1. *Ibid.*

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice is REDUCED to a Group I Written Notice for failing to comply with the state helmet law, and for unsatisfactory job performance. Grievant is reinstated to the position of game warden or, if occupied, to an objectively similar position. He is awarded full back pay from which any interim earnings must be deducted. Full benefits and seniority are restored.

Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.[21] Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer for review.[22]

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

[21] Va. Code § 2.2-3005.1.A & B.

[22] *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.

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.[23] 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.[24]

[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]

_____
David J. Latham, Esq.
Hearing Officer

[23] 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).

[24] 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

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8096

Hearing Date:	June 21, 2005
Decision Issued:	June 24, 2005
Addendum Issued:	July 15, 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.[25] 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.[26]

DISCUSSION

Following issuance of the hearing officer's decision ordering reinstatement of the grievant, grievant submitted a petition for attorney's fees and costs. Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the May 18, 2005 qualification of his grievance for hearing. Not all grievances proceed to a hearing; only

[25] Va. Code § 2.2-3005.1.A.

[26] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

grievances that challenge certain actions qualify for a hearing.[27] The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.[28] Attorney's fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorneys' fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. Therefore, grievant's attorney fees for services performed prior to May 18, 2005 are not included in the award.

The request for attorney fees included time expended *after* qualification of the grievance requesting the agency head to reconsider the disciplinary action. Once a grievance has been qualified for hearing, an agency may agree to a negotiated settlement with a grievant. However, time expended in a settlement attempt is not an expense associated with the hearing. Therefore, the request for time expended on May 24 requesting the agency head to reconsider (.2 hours) and on June 1 corresponding with grievant on this issue (.3 hours (estimated)), is denied.

The request for attorney fees also asked that a cost of living increase be included in the award. The EDR Director has not implemented any cost of living adjustment to the maximum allowance of $120 per hour. However, even if such an adjustment had been made, it would not be applied retroactively to services rendered prior to July 1, 2005. Since all attorney fees at issue herein were for services rendered prior to July 1, 2005, any cost of living adjustment would be inapplicable to the fee allowance in this case.

AWARD

The petition for fees for services rendered prior to May 18, 2005, and for non-hearing activity is denied. The grievant is awarded attorneys' fees incurred from May 18, 2005 through June 29, 2005 in the amount of $5,688.00 (47.4 hours x $120.00 per hour).[29]

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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[27] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

[28] Va. Code § 2.2-3005.1.B.

[29] Section VI.D. EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004, limits attorney fee reimbursement to $120.00 per hour.

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David J. Latham, Esq.
Hearing Officer