

Issue: Group III Written Notice with termination (making a false official statement, undermining the effectiveness of the department, impairing the efficiency of the department, and shirking official duty); Hearing Date: 07/14/05; Decision Issued: 07/20/05; Agency: Old Dominion University (ODU); AHO: Carl Wilson Schmidt, Esq.; Case No. 8116; Outcome: Employee granted partial relief; **Administrative Review**: HO Reconsideration Request received 08/04/05; Reconsideration Decision issued 08/26/05; Outcome: Original decision affirmed; **Administrative Review**: EDR Administrative Review received 08/03/05 from agency and 08/04/05 from grievant; EDR Ruling No. 2006-1099, 2006-1104 issued 11/22/05; Outcome: Remanded to Hearing Officer; HO reopens hearing; **Compliance Ruling Request** received 12/06/05; Compliance Ruling No 2006-1202 issued 12/20/05; Outcome: HO's decision to reopened affirmed; Reopened Hearing Date: 03/06/06; Reopened Hearing Decision Issued: 05/25/06; Outcome: Employee granted full relief; **Administrative Review**: EDR Ruling Request on Reopened Hearing Decision received 06/09/06; EDR Ruling No. 2006-1376 issued 07/10/06; Outcome: HO's decision affirmed; **Administrative Review**: DHRM Administrative Review request received 08/03/05 from agency and 08/04/05 from grievant; DHRM Administrative Review request on Reconsideration Decision received 09/09/05; DHRM Ruling issued 10/03/06; Outcome: Issues are now moot. HO's decision affirmed. Administrative Review: EDR requested to address issuance of Attorney's Fees; EDR Ruling No. 2006-1125, 2007-1456 issued on 12/08/06; Outcome: Remanded Fees Addendum to HO; Amended Fees Addendum issued on 02/21/07.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8116**

Hearing Date: July 14, 2005  
Decision Issued: July 20, 2005

**PROCEDURAL HISTORY**

On March 22, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violation of State Policy 1.60, Standards of Conduct and Old Dominion University Police Department Directives manual, Disciplinary Procedures, C-4.0, Article V, Section C, Para 3; lines 2, making false official statement; s., undermining the effectiveness of the department; v., impairing the efficiency of the department; and x., shirking official duty.

On April 15, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 15, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 14, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel

Agency Party Designee  
Agency Counsel  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for making a false official statement, undermining the effectiveness of the department, impairing the efficiency of the department, and shirking official duty.

## **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:

Old Dominion University employed Grievant as a Law Enforcement Officer II within its Police Department until his removal effective March 22, 2005. The chief objective of his position was to, “[p]atrol jurisdiction to prevent, detect and investigate criminal acts; to enforce Federal, State Law and University regulations; to protect the lives and property of its citizens.”<sup>1</sup> On May 20, 2004, Grievant was issued a Group II Written Notice for failure to comply with established written policy and procedures.<sup>2</sup>

Four roads on the University’s campus form a rectangular block. Inside the block are three buildings. Building OW and Building PL are attached by a common wall. They are positioned as if they are one building. Building PL opens into a long and narrow parking lot. On the other side of the parking lot is Building AS. If one drives on the roads forming the rectangular block and then drives into the long and narrow parking lot, one will have passed all four sides of Building AS, the three visible side of Building OW and the three visible sides of Building PL. All of the doors and windows to these buildings can be observed from a vehicle driving this route.

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> Agency Exhibit 14.

On February 22, 2005, Grievant was working the midnight shift as a Police Officer. His shift began at approximately 11 p.m. and ended the following morning. He was in uniform and driving a marked police vehicle. One of Grievant's responsibilities was to verify that University buildings are locked and secured.

At approximately, 1:26 a.m. on February 23, 2005, Grievant drove his police vehicle over the road forming the rectangular block and into the long and narrow parking lot. He observed the windows and doors of all three buildings and concluded they were secure. He used his radio to call to the police dispatcher and inform the dispatcher that he had completed a "256" with respect to Building OW, Building PL, and Building AS. A 256 code means that Grievant had secured the buildings. Grievant did not leave his vehicle and walk to each building to shake the doors and verify the windows were closed.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses include, [o]ffenses of minor severity, yet require correction in the interest of maintaining a productive and well-managed Department."<sup>3</sup> Group II offenses include "[o]ffenses which include more severe acts and misbehavior."<sup>4</sup> Group III offenses include "[o]ffenses that include acts of such severity as to merit suspension or dismissal at a single occurrence."<sup>5</sup>

"Inadequate or unsatisfactory work performance" is a Group I offense.<sup>6</sup> In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's Employee Work Profile requires him to, "Conduct security patrol of all University buildings and grounds. Check doors and windows to ensure they are secured thereby preventing unauthorized entry."<sup>7</sup> In order to meet this requirement, Grievant must leave his patrol vehicle and walk around a building to observe that the doors and windows are locked and secure. On February 23, 2005, Grievant drove around three buildings and observed the building exteriors from his police vehicle. By

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<sup>3</sup> ODU Police Department Standards of Conduct, (V)(C)(1).

<sup>4</sup> ODU Police Department Standards of Conduct, (V)(C)(2).

<sup>5</sup> ODU Police Department Standards of Conduct (V)(C)(3).

<sup>6</sup> ODU Police Department Standards of Conduct, (V)(C)(1)(a).

<sup>7</sup> Agency Exhibit 2.

failing to exit his vehicle and walk around each building, Grievant's work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.<sup>8</sup>

Grievant contends that the disciplinary action against him should be reversed because, Detective B, the person who filed the complaint about him, lacks credibility. Detective B drafted a memorandum dated February 23, 2005 in which he claimed he observed Grievant's vehicle for over 50 minutes beginning at approximately 12:50 a.m. Detective B wrote, "[a]t approximately 1:26 AM, [Grievant] called out several building checks within his assigned zone but never moved from his location to physically check the buildings."<sup>9</sup> At 1:18 a.m., Grievant left the long and narrow parking lot and drove to a garage to lock the building. Grievant used his radio to notify the dispatcher that he had locked the garage. Detective B makes no mention of Grievant leaving at 1:18 a.m. If Grievant had not left the parking lot, Detective B should have noted that Grievant falsely claimed over the radio to have locked the garage. Grievant contends these inconsistencies in Detective B's presentation show he lacks credibility.

It is unnecessary for the Hearing Officer to address Detective B's credibility or to consider his testimony at all. Grievant admitted through his own testimony that he failed to exit his vehicle and walk around the three buildings as part of his building check. Grievant's admission alone provides sufficient evidence to support his unsatisfactory job performance.

Grievant contends the disciplinary action should be reversed because the ODU Police Department has engaged in racial discrimination against him and other employees of his race. Within the confines of this disciplinary grievance, however, the only issue before the Hearing Officer is whether the Police Department disciplined Grievant, in part, as a process of discriminating against Grievant because of his race. No credible evidence has been presented to show that the Police Department disciplined Grievant in order to discriminate against him because of his race. Grievant complained of a particular employee within the Police Department as the source of racial discrimination against him. That employee, however, had no involvement in the disciplinary action against Grievant.

ODU argues Grievant should receive a Group III Written Notice for "[f]alsification of any reports such as, but not limited to, vouchers, official reports, time records, leave records, or knowingly making any false official statement."<sup>10</sup> "Falsifying" is not defined by the Police Department Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous

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<sup>8</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

<sup>9</sup> Agency Exhibit 8. Detective B heard Grievant call the dispatcher over the police radio.

<sup>10</sup> ODU Police Department, Standards of Conduct (V)(C)(3)(e).

but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

ODU has not established that Grievant intended to falsify information when he reported that he had secured three buildings. Grievant testified that he frequently secured buildings by driving around them and looking to see that the windows and doors were secure from a distance. Grievant believed that Building OW, Building PL, and Building AS had active security alarms such that if someone were to break through a door the alarm would sound. Because the alarms were activated and the doors and windows secured by employees on the earlier shift, Grievant believed it was unnecessary to perform a physical check while walking around the buildings. Grievant testified that other police officers on the midnight shift followed the same practice he followed. Grievant presented credible testimony from another Police Officer working the midnight shift who testified that the preferred way to secure buildings was to walk around buildings, but that several officers on the midnight shift believed as did Grievant that an officer could drive around a building and appropriately determine that the building was secure. The evidence presented shows that Grievant believed he had in fact verified the security of three buildings when he reported to the dispatcher that he had done so. Thus, Grievant did not falsify any information.<sup>11</sup>

ODU argues Grievant should received a Group III Written Notice for “[e]ngaging in dishonest or immoral conduct that undermines the effectiveness of the Department’s activities or employee performance, whether on or off the job.”<sup>12</sup> This argument fails because Grievant did not engage in dishonest or immoral conduct. Grievant’s unsatisfactory job performance may have some effect on the Agency’s effectiveness but it clearly was not material such that it undermined the department’s effectiveness.

ODU argues Grievant should receive a Group III Written Notice for, “attempting to shirk official duty.”<sup>13</sup> Grievant did not shirk his official duty. He attempted to perform

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<sup>11</sup> ODU Police Department Standards of Conduct (IV)(H) states, “[d]ismissals are made in cases of extreme misfeasance, malfeasance, or nonfeasance of duty.” None of the facts of this case suggest Grievant’s behavior was extreme.

<sup>12</sup> ODU Police Department, Standards of Conduct, (V)(C)(3)(s).

<sup>13</sup> ODU Police Department, Standards of Conduct, (V)(C)(3)(x).

his duty of verifying the security of buildings, but failed to perform that duty in accordance with the University's expectations.

ODU argues that if the disciplinary action is reduced it should not be reduced any lower than a Group II Written Notice and that since Grievant has an active Group II Written Notice, his removal should be upheld. Grievant did not disregard an instruction from a supervisor. The Police Department's policy regarding checking the conditions of buildings was not an established written policy. Grievant did not refuse to perform assigned work, he merely failed to perform that work satisfactorily. The evidence presented does not support a Group II Written Notice.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice for unsatisfactory work performance. The Agency is ordered to reinstate Grievant to his former position, or, if occupied, to an objectively similar position. The Agency is ordered to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. The Agency is ordered to restore Grievant to full benefits and seniority. GPM § 5.9(a).

### 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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. 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>14</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>14</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: 8116-R**

Reconsideration Decision Issued: August 26, 2005

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. Grievant filed a timely request for reconsideration. The Hearing Officer grants reconsideration, and will review the original Hearing Decision. Upon granting the request for reconsideration all aspects of the Hearing Decision are open for the Hearing Officer's consideration and not just those items listed by the party requesting reconsideration.<sup>15</sup> Upon review of the entire case file, testimony, exhibits, and original Hearing Decision, the Hearing Officer re-states the original Hearing Decision but modifies that Decision with the following discussion.

On July 20, 2005, the Hearing Officer issued a decision reducing the Group III Written Notice issued to Grievant from a Group III with removal to a Group I Written Notice. The Hearing Officer ordered Grievant to be reinstated.

The Agency filed a separate appeal to the EDR Director alleging among other things that the Hearing Decision failed to address the charge by the Agency that Grievant's behavior "impaired the efficiency" of the Old Dominion University Police Department. For the sake of simplicity, the Hearing Officer will address the Agency's concern in this Reconsideration Decision. No credible evidence was presented to show that Grievant's actions had any significant or material impact on the efficient operations of the Police Department such that a Group III Written Notice would be appropriate.<sup>16</sup>

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<sup>15</sup> Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

<sup>16</sup> Grievant's behavior may have had some minimal effect on the University's level of security with respect to a few buildings, but Grievant's behavior had no effect on the Police Department's ability to operate efficiently.

Grievant contends the Hearing Officer erred by failing to fully address all alleged discrimination. Grievant's argument fails. The context of this case is important. Grievant received disciplinary action. As one of his defenses, he alleged that the Agency was engaged in unlawful discrimination against him. To qualify the matter for hearing, the Agency Head wrote, "[A]ccording to the Grievance Procedure, formal discipline accompanied by a written notice and termination of employment is an action which qualifies for a hearing." Thus, the issue qualified for hearing included the disciplinary action against Grievant and any defenses he had to that disciplinary action. Grievant's claim for discrimination arose only in the context of a defense to the disciplinary action. Grievant now contends the issue is broader than merely whether the Agency took disciplinary action because of discrimination but rather the issue is whether the Agency has taken any actions (in addition to discipline) against him that constitute unlawful discrimination. The Agency clearly did not intend to qualify the grievance under such a broad issue; nor is it clear Grievant's claim would qualify without challenge and independently of the Agency's disciplinary action. The original Hearing Decision appropriately addressed only whether the Agency took disciplinary action against Grievant because of racial discrimination and not whether the Agency discriminated against Grievant by taking actions against him other than disciplinary action.

Grievant contends the Hearing Officer erred by requiring Grievant to prove discrimination by direct rather than circumstantial evidence. Grievant's argument is untenable. The Hearing Officer considered all evidence presented by Grievant whether that evidence was direct or circumstantial within the context of Grievant's allegation that the Agency disciplined him because of his race. Neither Grievant's evidence nor his arguments regarding his interpretation of the evidence showed that the Agency disciplined him because of his race. Grievant's Exhibit 31 does not show that employees of Grievant's race are more severely disciplined than employees not of Grievant's race.<sup>17</sup> Grievant presented evidence that some other officers made visual inspections from their vehicles rather than on foot, but no evidence was presented showing that Agency managers knew of this practice and tolerated it for those other officers.

If the Hearing Officer assumes for the sake of argument that Grievant established his *prima facie* case for racial discrimination and the burden of production shifted to the Agency to prove a legitimate nondiscriminatory reason for disciplining Grievant, the Agency has met that burden. The Agency presented evidence of his Employee Work Profile which required Grievant to check windows and doors to make sure they are secure. Grievant admitted he failed to do so thereby justifying issuance of disciplinary

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<sup>17</sup> The Agency more frequently disciplined employees of another race than employees of Grievant's race. It is difficult to determine the inconsistency of disciplinary action merely from written notices because there are so many factors (such as length of employment and performance level) that the Agency must consider before deciding what level of disciplinary action should be taken. Grievant did not present any evidence of another employee behaving as did Grievant and then being disciplined differently.

action. Engaging in behavior contrary to the standards of conduct provides a legitimate nondiscriminatory reason to discipline Grievant.<sup>18</sup>

Grievant argues that even if the Agency carries its burden of production, its reasons for taking disciplinary action were pretext for discrimination. Grievant relies upon the testimony of Detective B as lacking credibility. Grievant is correct that Detective B's testimony lacked credibility. His story changed from the time of his initial report to his testimony at the hearing. He claimed he was in continuous observation of Grievant when he clearly was not. The Hearing Officer finds Detective B's testimony to lack credibility with one exception – Detective B's statement that Grievant did not inspect the buildings on foot. That statement is confirmed by other evidence, namely, Grievant's admission that he made a visual inspection of the buildings and not an inspection on foot. Furthermore, Detective B's expressed reason for devoting a significant amount of time observing co-workers seems suspect. Regardless of Detective B's motives, it is clear his actions were at his own direction and without any knowledge or instruction from Police Department managers. Thus, the actions of Detective B cannot be attributed to the Agency with respect to establishing a pretext for discrimination. Detective B's testimony can be disregarded in total without altering the outcome of this hearing.

Grievant argues Lieutenant D was a significant source of racial discrimination against Grievant. Lieutenant D was responsible for making copies of tapes of interviews made during the investigation. A portion of the tape of the interview of Sergeant B was missing without explanation. According to Grievant, during the interview of Sergeant B, another Police Department employee, Lieutenant M, "makes the astounding but very candid and direct statement to [Sergeant B] that the only reason the entire incident had not been 'forgotten' was that [Sergeant B] complained to [Detective B] that she and other [Grievant's race] officers were being subjected to racial harassment and discrimination by [another race] members of the ODU Police Department."

Contrary to Grievant's assertion, Lieutenant M's comments were directed at Sergeant B and not at Grievant. Grievant was not a party to the conversation between Sergeant B and Detective B on February 22, 2005. It is not clear that by referring to the "entire incident" that Lieutenant M was referring to Sergeant B and also was including Grievant. In addition, Lieutenant D was not involved in the disciplinary action against Grievant. The short gap in the tape is unusual but no explanation for that gap exists. Grievant's assertion that the gap was intended to remove offensive statements by Lieutenant M is speculation. Although Lieutenant M's statements are troubling with respect to how the Agency handled discipline against Sergeant B, they are not sufficient to establish a pretext with respect to Grievant.

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<sup>18</sup> Grievant contends the evidence showed that "conducting visual inspections from a cruiser was a commonplace and accepted practice among many officers on the midnight shift." Grievant misstates the evidence. Witness testimony showed that the best and preferred practice was for officers on all shifts to make inspections on foot but that some officers may be making visual inspections. No credible evidence was presented suggesting that visual inspections were acceptable to the Agency.

Grievant asserts the Hearing Decision is contrary to the workplace harassment policy of the Commonwealth of Virginia and ODU. Workplace harassment is defined by DHRM Policy 2.30 as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

No evidence was presented showing the Agency engaged in verbal, written or physical conduct against Grievant. Accordingly, the Agency did not act contrary to the workplace harassment policy.

In grievance filed on or after July 1, 2004, an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his or her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.<sup>19</sup> The Hearing Officer did not award attorneys' fees in the original Hearing Decision because the Hearing Officer upheld disciplinary action, namely a Group I Written Notice. Normally, upholding disciplinary action would be a special circumstance making an award of attorneys' fees unjust because the employee had some fault in causing the Agency to initiate disciplinary action against him.

Upon further reflection, the Hearing Officer concludes that the existence of special circumstances making an award of attorneys' fees unjust depends not merely on whether the Agency was justified in taking disciplinary action, but rather depends on all of the circumstances of the case (such as Grievant's behavior and the Agency's actions) including the level of disciplinary action upheld by the Hearing Officer.

Grievant's behavior could have been corrected easily by counseling rather than by taking disciplinary action. Once the Agency decided to take disciplinary action and presented sufficient facts to meet its *prima facie* case that Grievant engaged in unsatisfactory behavior, the *Rules for Conducting Grievance Hearings* remove<sup>20</sup> the Hearing Officer's discretion to reduce the disciplinary action to a counseling memorandum absence mitigating circumstances as specified in the *Rules*. When

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<sup>19</sup> *Rules for Conducting Grievance Hearings* § VI(D).

<sup>20</sup> "In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness." *Rules for Conducting Grievance Hearings* § VI(B).

considering the existence of special circumstances making an award of attorneys' fees unjust, however, the Hearing Officer is not obligated to give deference to the Agency's conclusion that disciplinary action is appropriate. The Hearing Officer may give some, little, or no deference to the Agency's conclusion that disciplinary action was appropriate.

Upon consideration of all matters in this case, the Hearing Officer finds that the Group I Written Notice Grievant received is not a special circumstance making an award of attorneys' fees unjust. Since Grievant has been ordered to be reinstated, he has substantially prevailed on the merits of his grievance. Grievant is entitled to an award of attorneys' fees.

Grievant's attorney is advised to submit an amended attorneys' fee petition to the Hearing Officer within 15 days of this Reconsideration Decision. Grievant's attorney already has submitted a petition to the Hearing Officer but that petition includes time spent by the attorney preparing for issues not qualified for the hearing. In particular, Grievant's attorney spent time to prepare a general allegation of racial discrimination instead of merely limiting the presentation of racial discrimination to the Agency's taking of disciplinary action. The attorney must reduce the hours claimed in his petition for attorneys' fees.

## **APPEAL RIGHTS**

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

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 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



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8116-R2**

Date Issued: September 12, 2005

**RECONSIDERATION DECISION**

Grievant seeks the Hearing Officer for administrative review of the August 26, 2005 Reconsideration Decision. The Grievance Procedure Manual does not authorize the Hearing Officer to provide administrative review of a Reconsideration Decision. Upon issuance of the Reconsideration Decision on August 26, 2005 and the Attorney Fee Addendum on September 12, 2005, the Hearing Officer no longer has jurisdiction of the grievance. Accordingly, Grievant's request is denied.

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Carl Wilson Schmidt, Esq.  
Hearing Officer



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8116-R3**

Reconsideration Decision Issued: May 25, 2006

**RECONSIDERATION HISTORY**

On November 22, 2005, the EDR Director issued Ruling Nos. 2006-1099 and 2006-1104 instructing the Hearing Officer to reconsider the original hearing decision. The Hearing Officer asked the parties if either wished to present additional testimony and Grievant requested the opportunity to do so. The Agency objected to this procedure. On December 20, 2005, the EDR Director issued Ruling No. 2006-1202 stating that the Hearing Officer did not abuse his discretion by permitting the parties to present additional evidence previously excluded. After initially scheduling a hearing for January 2006, the matter was re-scheduled for March 2006. The Hearing Officer granted the Grievant an opportunity to present evidence during an additional day of hearing. The Hearing Officer also granted the Agency a full day of hearing to present additional evidence. In order to write this Reconsideration Decision, the Hearing Officer considered the testimony presented during all three days of the hearing. The Hearing Officer considered the several hundred, possibly thousands, of pages of documents submitted by the parties. The Hearing Officer reviewed the video tapes, photographs, etc. presented by the parties. The Hearing Office believes the record as presented represents a full and complete representation of all relevant evidence for this dispute.

**RECONSIDERATON FINDINGS OF FACT**

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

Old Dominion University employed Grievant as a Law Enforcement Officer II within its Police Department until his removal effective March 22, 2005.<sup>21</sup> The chief

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<sup>21</sup> Grievant is white.

objective of his position was to, “[p]atrol jurisdiction to prevent, detect and investigate criminal acts; to enforce Federal, State Law and University regulations; to protect the lives and property of its citizens.”<sup>22</sup> On May 20, 2004, Grievant was issued a Group II Written Notice for failure to comply with established written policy and procedures.<sup>23</sup>

Grievant reported to Sergeant B.<sup>24</sup> Sergeant B reported to Lieutenant M<sup>25</sup> who headed the patrol division of the Police Department.

Detective B<sup>26</sup> reported to Sergeant R. Sergeant R reported to Lieutenant D<sup>27</sup> who headed the detective division of the Police Department.<sup>28</sup>

Dispatcher B<sup>29</sup> reported to Sergeant C who headed the training division of the Police Department. Dispatcher B is the aunt of Sergeant B. Dispatcher B believed the Police Department had discriminated against her based on her race. She told Sergeant B about what she perceived as discrimination. Dispatcher B told Sergeant B that Dispatcher B was in the process of filing an Equal Employment Opportunity claim alleging racial discrimination.<sup>30</sup>

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<sup>22</sup> Agency Exhibit 2.

<sup>23</sup> Agency Exhibit 14. Grievant challenged the disciplinary action. A Hearing Officer upheld the Agency’s issuance of the Group II Written Notice. See, Agency Exhibit 15.

<sup>24</sup> Sergeant B is white.

<sup>25</sup> Lieutenant M is an African American.

<sup>26</sup> Portions of Detective B’s testimony were credible. Several significant parts of his testimony were not credible. In particular, Detective B was untruthful regarding the reason why he was watching Sergeant B and inaccurately reported several key details of his conversation with Sergeant B. Lieutenant M did not realize Detective B was not accurately reporting the details of his conversation with Sergeant B. When determining Lieutenant M’s state of mind at the time he told Sergeant B she would be fired, it is necessary to determine only what Lieutenant M believed rather than what Sergeant B actually said to Detective B.

<sup>27</sup> Lieutenant D was not involved in issuing the disciplinary action against Grievant.

<sup>28</sup> Detective B and Lieutenant D are African Americans.

<sup>29</sup> Dispatcher B is white.

<sup>30</sup> Dispatcher B believed she was being discriminated against because of her race. The evidence showed, however, that when given the opportunity to complain to senior managers about the discrimination, Dispatcher B did not express her concerns. For example, she told the Assistant Director of EEO that she was working in a hostile environment, not because of race but because of the type of person she was. In February 2005, Dispatcher B sought a change in her work schedule. She sent Acting Chief Q a memorandum outlining concerns about her health. See, RGE 67(3). Acting Chief Q ultimately granted her request. Dispatcher B did not inform Acting Chief Q that she believed she was being discriminated against based on her race. Although there is no reason to believe Dispatcher B was discriminated against because of her race, Sergeant B and Grievant had no reason to doubt the sincerity of her complaints when they heard Dispatcher B’s allegations.



Sometime in January or the beginning of February 2005, Grievant met with Lieutenant M in Lieutenant M's office. Grievant told Lieutenant M that he believed Lieutenant D "has it out for him and it's a racial thing." Grievant asked Lieutenant M for permission to speak with Acting Chief Q. Lieutenant M told Acting Chief Q of Grievant's comments. Acting Chief Q told Lieutenant M that he would meet with Grievant. Grievant and Acting Chief Q met and discussed Grievant's concerns. Acting Chief Q called Lieutenant D into his office and the three of them discussed Grievant's concerns. Grievant stated he felt that Lieutenant D was harassing him because he was white and because he was a "pro-active law enforcement officer."<sup>31</sup>

Four roads on the University's campus form a rectangular block. Inside the block are three buildings. Building OW and Building PL are attached by a common wall. They are positioned as if they are one building. Building PL opens into a long and narrow parking lot. On the other side of the parking lot is Building AS. If one drives on the roads forming the rectangular block and then drives into the long and narrow parking lot, one will have passed all four sides of Building AS, the three visible sides of Building OW and the three visible sides of Building PL. All of the doors and windows to these buildings can be observed from a vehicle driving this route.

On February 22, 2005, Grievant was working the midnight shift as a Police Officer. His shift began at approximately 11 p.m. and ended the following morning. He was in uniform and driving a marked police vehicle. One of Grievant's responsibilities was to verify that University buildings were locked and secured. Grievant believed both buildings had entry alarms that were activated during his shift. He believed if someone attempted to open a window or door to these buildings, an alarm would sound.

At approximately 1:26 a.m. on February 23, 2005, Grievant drove his police vehicle over the road forming the rectangular block and into the long and narrow parking lot. He observed the windows and doors of all three buildings and concluded they were secure. He used his radio to call to the police dispatcher and inform the dispatcher that he had completed a "256" with respect to Building OW, Building PL, and Building AS. A 256 code means that Grievant had secured the buildings. Grievant did not leave his vehicle and walk to each building to shake the doors and verify the windows were closed.

Sergeant B was in the process of transferring to another shift. She wanted to speak with Grievant to discuss the transition and other matters related to the Police Department. In the early morning of February 23, 2005, Sergeant B parked her police vehicle near Buildings PL and AS. Periodically, Grievant would drive his police vehicle

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<sup>31</sup> When Grievant started working for the Police Department, he observed Lieutenant D passing out pamphlets to other officers. When Grievant approached her about obtaining her handouts, Lieutenant D told him it was none of his concern. Grievant later viewed one of the pamphlets and concluded it was a "black power" pamphlet. Grievant also had observed that Lieutenant D laughed and joked around with African American police officers, but rarely had that type of jovial conversation with white officers.

and position it next to Sergeant B's vehicle but facing the opposite direction. Grievant and Sergeant B could face each other and talk while seated in their respective police vehicles.

Detective B was also working that morning. He parked his vehicle a sufficient distance away so that he could observe Sergeant B without her knowing he was observing her. He began watching her rather than performing his regular duties. No one in the Police Department had instructed Detective B to observe Sergeant B. He watched her because of some personal motive or interest.<sup>32</sup> He also observed Grievant during those times Grievant's vehicle was parked next to Sergeant B's vehicle. Detective B observed the two talking. He waited until Grievant drove away in response to a radio call.<sup>33</sup>

Detective B approached Sergeant B's vehicle from the rear. He observed Sergeant B looking at a portable DVD player located on the passenger seat beside her. Once Detective B was next to the vehicle, Sergeant B rolled down the passenger side window and closed the portable DVD player. The two began speaking. The conversation began in a friendly manner but quickly became confrontational.

At approximately 6:30 a.m. several hours after her confrontation with Detective B, Sergeant B spoke with Acting Chief Q. She discussed changes in her work shift and problems she was having obtaining a daycare provider for her children.

Although Detective B reported to Lieutenant D, Detective B drafted a memorandum dated February 23, 2005 to Lieutenant M who worked in the patrol division. Detective B wanted to inform Lieutenant M of his confrontation with Sergeant B. The memo stated, in part:

[Sergeant B] rolled down the passenger's side window, at which point I told [Sergeant B] that she needed to [be] careful as to where she decides to sit and talk to her officer's. I then said to [Sergeant B] that it could have

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<sup>32</sup> Detective B's assertion that he was watching two police vehicles because he was concerned that the employees were not performing their patrol duties lacks credibility. Several portions of Detective B's testimony were untruthful. Devoting approximately an hour to observing two supposedly derelict employees would be outside the scope of Detective B's responsibilities and unnecessary to conclude the employees were not performing their duties. In particular, Detective B testified that, "I felt that due to everything that was happening, the armed robberies, the stolen vehicles, the vandalism to vehicles – I felt that in my opinion their time would have been spent more productively checking the lots and showing the police presence in the problem areas, but I am not a supervisor, but that's why I decided to turn around and see what was going on because we had a lot of things happen in that two week time frame." Furthermore, Detective B wrote that he observed Grievant's and Sergeant B's patrol vehicle side-by-side for over 50 minutes. In fact, Grievant responded to other calls throughout the campus and was not parked next to Sergeant B's vehicle for over 50 minutes. Why Detective B would be untruthful regarding this aspect of what he observed has not been explained.

<sup>33</sup> Detective B could have confronted both Sergeant B and Grievant if he believed they were not performing their duties. Instead, Detective B waited until Grievant left and then spoke with Sergeant B privately.

been [Lieutenant D] or [Lieutenant M] as opposed to me who caught her sitting in between the two buildings. [Sergeant B] responded by stating '[fuck Lieutenant D]' she needs to watch what the fuck she is doing because this department is about to have its ass handed to them. [Sergeant B] further stated that this department is becoming Pro-Black and if you are a black officer you could do no wrong. [Sergeant B] further stated that she didn't see me bothering [Officer P] or [Officer J] who were parked in lot 27.<sup>34</sup> I responded by stating that I didn't see [Officer P] or [Officer J] parked in lot 27 talking for over fifty minutes. I observed you and [Grievant]. [Sergeant B] also stated, 'this is bullshit that you guys are trying to sneak up on me to watch what I'm doing', I'm a sergeant and I should know when a fucken investigator is working. [Sergeant B] stated that this was harassment and she was going to see [Acting Chief Q] in the morning. [Sergeant B] also stated that she was a Sergeant and that she could park anywhere she chose. I responded by stating 'that's true' but as to [Grievant], he can not afford to sit in between these two buildings for over fifty minutes when we are having vehicles broken into in the campus parking lots. I also asked [Sergeant B] if she was aware of the recent vehicle break-ins that occurred in the campus parking lots. Sergeant B states, 'no I was off the last four days and I could not enforce something that I'm not aware of.' I then told [Sergeant B] that [Lieutenant D] wanted me to make sure that the officers on every shift were checking the parking lots around the campus during their tour of duty. I then stated, '[last name of Sergeant B] just be careful with what your doing.' [Sergeant B] responded by stating 'you don't' call me [Sergeant B's last name] you address me as [Sergeant B]. [Sergeant B] then rolled up the window and drove off.

Detective B discussed his memorandum with Lieutenant M. Detective B claimed to be upset about his interaction with Sergeant B. Detective B testified, "It – it really threw me for a loop because that's the first time I had ever heard her talk like that. Um, about the racism." Detective B also told Sergeant R about his encounter with Sergeant B. Sergeant R informed his supervisor, Lieutenant D.

On February 25, 2005, Grievant went to the Agency's Equal Employment Office. He had spoken with Dispatcher B prior to contacting the Agency's Equal Employment Office. Grievant spoke with the Assistant Director of EEO. Grievant told her of the problems he was having with Lieutenant D. He told her he "felt 'called out' because he is the only white officer."<sup>35</sup> The Assistant Director of EEO indicated she would contact Lieutenant D.

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<sup>34</sup> Officer P and Officer J are African American.

<sup>35</sup> Reconsideration Grievant Exhibit 72.

Based on Detective B's memo and discussions with Detective B, Lieutenant M drafted a memo dated March 1, 2005 and addressed to Grievant notifying him of an administrative suspension pending an internal investigation. Grievant was advised, "[t]his investigation will center on your conduct that took place on February 23, 2005 at approximately 0100 hours. As a result of your alleged conduct you are being charged with having violated Policies and Procedures C-4.0, Article V, Section C, Para 3; line e, s, v and x. These offenses are Group III offenses which include acts of such severity as to merit suspension or dismissal at a single occurrence."<sup>36</sup>

On March 1, 2005, Grievant called the Assistant Director of EEO and told her not to talk to Lieutenant D because he had been notified he was being suspended. The Assistant Director of EEO had not yet spoken with Lieutenant D or notified her of Grievant's concerns.<sup>37</sup>

Based on Detective B's memo, the Police Department began an investigation. The investigation included videotaping Sergeant B's answers to questions asked by Lieutenant M.<sup>38</sup> Lieutenant M had reviewed Detective B's memo to him and determined what questions to ask of Sergeant B based on that memorandum. Part of the questioning was as follows:

Lieutenant M - Would you be surprised in knowing that the reason why we are sitting here today, the only reason why we are sitting here today, is because [Detective B], was totally taken back at your response when he walked up on you, knocked on the window, and had a conversation with you. He said he had no idea that you were going to respond that way. He had no idea that you had such hatred for the department. He had no idea that you had such animosity for the department. He had no idea that you felt that the department was in any way, shape, or form pro-black, or for blacks, or even prejudiced against whites. He had no idea. This was a total shock to him. Which is why –

Sergeant B - Which can't be entirely true –

Lieutenant M - Which is why – let me finish –

Sergeant B – I'm sorry.

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<sup>36</sup> Grievant Exhibit 8.

<sup>37</sup> The Hearing Officer finds that the failure of the Agency's EEO Department to investigate Grievant's complaint was understandable because Grievant had requested that EEO Department stop its investigation.

<sup>38</sup> Lieutenant D did not take part in the video questioning of Detective B, Grievant, and Sergeant B.

Lieutenant M – Which is why he typed this up officially. Because if not for the fact that you responded the way he said you responded – it would have been forgotten. So go ahead.

Based on the memorandum Detective B drafted which contained references to race and the video taped interviews of Sergeant B, Detective B, and Grievant, Lieutenant M concluded that he wished to remove Sergeant B from her employment.<sup>39</sup> Lieutenant M did not believe the department favored African Americans. He did not wish to hear an allegation that the department favored African Americans. He disliked hearing the allegation especially since the person making the allegation was white. He concluded that a white employee making an allegation about race should not be employed by the Police Department.

Lieutenant M contacted Sergeant B and informed her that the Agency intended to issue her a Group III Written Notice and remove her from her position. He informed her that the Written Notice would not be issued if she chose to resign from her position. He told her the Agency would provide her with a favorable employment reference upon resignation. Sergeant B chose to resign rather than receive the disciplinary action.

Based on the memorandum drafted by Detective B, the video taped interviews of Sergeant B, Detective B, and Grievant, Lieutenant M concluded he wished to remove Grievant from his employment.

On March 9, 2005, Lieutenant M presented Grievant with a memorandum informing him that the Agency intended to issue him a Group III Written Notice with removal and presented him with the opportunity to respond within 24 hours.<sup>40</sup> Grievant, by counsel, responded on March 14, 2005. On March 22, 2005, Lieutenant M issued Grievant a Group III Written Notice of disciplinary action with removal effective March 22, 2005. The Written Notice was also signed by the Acting Chief of Police, the Vice President for Administration and Finance, and the Director of Human Resources.<sup>41</sup>

On April 15, 2005, Grievant filed a grievance challenging the Agency's disciplinary action. He also listed as an issue:

Whether Old Dominion University Police Department and/or any of its members have discriminated against [Grievant] on the basis of his race (white) and, if so, the relief to be provided to [Grievant] for same.

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<sup>39</sup> Sergeant B did not have any active prior disciplinary action.

<sup>40</sup> Grievant Exhibit 9. The date to respond was later extended until March 14, 2005. See, Grievant Exhibit 12.

<sup>41</sup> Grievant Exhibit 13.

Although the specific dates of several discussions are uncertain, the decision to discipline and remove Grievant from employment was made by Lieutenant M, the Director of Human Resources, the Acting Chief of Police, and University Counsel.

## **RECONSIDERATION CONCLUSIONS OF POLICY**

This Reconsideration Decision addresses two issues. First, whether Grievant should receive a Written Notice of disciplinary action and, if so, what level of disciplinary action? Second, whether the Agency discriminated against Grievant because of his race?

### Appropriateness of Disciplinary Action

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses include, [o]ffenses of minor severity, yet require correction in the interest of maintaining a productive and well-managed Department.<sup>42</sup> Group II offenses include “[o]ffenses which include more severe acts and misbehavior.”<sup>43</sup> Group III offenses include “[o]ffenses that include acts of such severity as to merit suspension or dismissal at a single occurrence.”<sup>44</sup>

“Inadequate or unsatisfactory work performance” is a Group I offense.<sup>45</sup> In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s Employee Work Profile requires him to, “Conduct security patrol of all University buildings and grounds. Check doors and windows to ensure they are secured thereby preventing unauthorized entry.”<sup>46</sup> In order to meet this requirement, Grievant must leave his patrol vehicle and walk around a building to observe that the doors and windows are locked and secure. On February 23, 2005, Grievant drove around three buildings and observed the building exteriors from his police vehicle. Although Grievant’s work performance would otherwise be unsatisfactory, the disciplinary action against him must be reversed for the reasons discussed below.

### Claim of Racial Discrimination

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<sup>42</sup> ODU Police Department Standards of Conduct, (V)(C)(1).

<sup>43</sup> ODU Police Department Standards of Conduct, (V)(C)(2).

<sup>44</sup> ODU Police Department Standards of Conduct (V)(C)(3).

<sup>45</sup> ODU Police Department Standards of Conduct, (V)(C)(1)(a).

<sup>46</sup> Agency Exhibit 2.

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination on the basis of race, gender, color, national origin, religion, age, or political affiliation, or against otherwise qualified persons with disabilities. State agencies must apply their employee compensation policies in accordance with the Governor's Executive Order.

DHRM Policy 2.05 prohibits employment discrimination with respect to the "application of corrective actions, including disciplinary actions ...." In other words, an agency may not issue a Written Notice to an employee as part of racial discrimination against that employee. In addition, if an employee has engaged in inappropriate behavior thereby justifying the issuance of a Written Notice, an agency may not inflate the level of discipline or sanction against that employee as a part of racial discrimination against the employee.

*Direct and Circumstantial Evidence.* Grievant may establish racial discrimination by demonstrating through direct or circumstantial evidence that race motivated the Agency's adverse treatment of him. Grievant does not need to demonstrate that race was the sole motivating factor in the Agency's actions. Grievant must merely show that race was a motivating factor.<sup>47</sup> In other words, Grievant can meet his burden of proof by showing the Agency acted against him for both permissible and forbidden reasons.

Lieutenant M engaged in racial discrimination against Sergeant B because she was a white employee who he believed complained about how the Agency treated her and other white employees. Lieutenant M stated as part of the video interview of Sergeant B, "[b]ecause if not for the fact that you responded the way he said you responded – it would have been forgotten." In this part of Lieutenant M's comment, he is admitting the Agency would not have taken disciplinary action including removal against Sergeant B but for her oral statements to Detective B. The oral statements of greatest significance to Detective B were Sergeant B's comments about racial discrimination. In other words, by having lengthy conversations with a subordinate or by briefly looking at a DVD player, Sergeant B did not engage in behavior Lieutenant M felt was sufficient to justify disciplinary action. By making statements about the Police Department being pro-Black, however, Lieutenant M believed Sergeant B should be removed from employment. The Hearing Officer finds that Lieutenant M intended to issue Sergeant B a Written Notice with removal with the objective of discriminating against her because of her race.

The Agency contends Sergeant B engaged in conduct justifying disciplinary action. The Hearing Officer finds that none of the possible misconduct by Sergeant B would justify issuance of a Group III Written Notice with removal. For example, Sergeant B used profanity, briefly watched a DVD player, and failed to properly supervise her subordinates, according to the Agency. Use of obscene or abusive

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<sup>47</sup> 42 U.S.C. § 2000e-2(m) provides: "an unlawful employment practice is established when the complaining party demonstrates that race ... was a **motivating factor** for any employment practice, even though other factors also motivated the practice." (Emphasis added).

language is a Group I offense. Abuse of State time is also a Group I offense. Failure to perform a job duty such as supervising subordinates is inadequate or unsatisfactory job performance, a Group I offense. The Agency was concerned that Sergeant B said “f—k, [Lieutenant D].” Sergeant B testified credibly that what she actually said was “f—k it. [Lieutenant D] is always after me.” Even if the Agency’s version of facts were supported by the evidence, Sergeant B’s statement would amount to no more than insubordination. Rarely is insubordination higher than a Group II offense. Since Sergeant B did not address her comments about Lieutenant D directly to Lieutenant D, her otherwise insubordinate comments could rise no higher than a Group I offense.

Lieutenant M also interviewed Grievant as part of the Agency’s investigation. During the video interview of Grievant, Lieutenant M did not make similar statements to Grievant that would reveal Lieutenant M’s intent to discriminate. The question becomes whether there is sufficient evidence to believe that when Lieutenant M issued Grievant a Group III Written Notice with removal Lieutenant M was discriminating against Grievant because of his race.

The evidence is sufficient for the Hearing Officer to conclude it is more likely than not that Lieutenant M issued Grievant a Group III Written Notice with removal in order to discriminate against Grievant because of his race. There are several reasons for this conclusion. First, in January or February 2005, Grievant met with Lieutenant M and expressed concern that Lieutenant D’s actions towards him were motivated by intentional racial discrimination. At the time Lieutenant M attempted to remove Sergeant B from employment because of her race and because of her complaint about the racism in the Police Department, Lieutenant M also knew Grievant’s feelings about the Police Department were similar to Sergeant B’s feelings. Second, both Grievant and Sergeant B are white. Third, Grievant and Sergeant B were involved in the same incident. Fourth, Lieutenant M used the incident as an excuse to remove Sergeant B from employment and likely viewed the incident as also an opportunity to remove Grievant from employment. Fifth, Lieutenant M wanted to issue Sergeant B and Grievant the same disciplinary action – a Group III Written Notice with removal. In short, the facts and circumstances of Sergeant B’s removal and Grievant’s removal are sufficiently similar to conclude that if Lieutenant M sought to remove Sergeant B because of her race, then he also sought to remove Grievant because of Grievant’s race. The Hearing Officer finds that Lieutenant M intended to issue Grievant a Written Notice with removal with the objective of discriminating against him because of his race.

*Primary Employees Involved In Issuing Discipline.*<sup>48</sup> Four different actors were involved in determining the level of disciplinary action against Grievant – (1) Acting Chief Q, (2) University Counsel, (3) Human Resource staff, and (4) Lieutenant M. There is no evidence whatsoever to suggest that Acting Chief Q sought or participated in the removal of Grievant because of Grievant’s race. University attorneys are especially talented and knowledgeable regarding the University’s obligation to act consistently with laws and policies prohibiting racial discrimination. Grievant’s race was

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<sup>48</sup> See footnote 21 of the EDR Director’s Ruling No. 2006-1099, 1104.



not a factor in the decision-making process of University Counsel. No evidence was presented suggesting the Agency's Human Resource staff sought Grievant's removal because of his race.

Lieutenant M was involved in the daily supervision of police officers. He was in a position to evaluate what impact the actions of police officers would have on the operations of the Police Department and the security of the Agency. Because of his status as Police Department supervisor, he was in the position to influence the decision-making of the other three actors. In other words, the three other actors were likely to believe Lieutenant M when he represented to them that Grievant should be removed from employment. The Hearing Officer finds that Grievant's race was a motivating factor in the Agency's decision to issue him a Group III Written Notice with removal.

*McDonnell Douglas "Pretext" Analysis.* In the August 26, 2005 Reconsideration Decision, the Hearing Officer addressed the *McDonnell Douglas* framework within the context of the evidence the Hearing Officer allowed Grievant to present during the hearing. The EDR Director ruled that the Hearing Officer erred by restricting Grievant's evidence. One of these errors involved the application of the *McDonnell Douglas* analysis. The EDR Director stated:

We nevertheless conclude that the hearing officer's application of *McDonnell Douglas* was flawed, however, because the hearing officer improperly limited his analysis of the grievant's discrimination claim to the discipline taken against the grievant. Therefore, on reconsideration, the hearing officer is directed to apply the *McDonnell Douglas* framework in light of all alleged discrimination for which the grievant presented evidence at hearing. In applying this framework, the hearing officer should consider evidence directly related to the grievant's termination as well as any other evidence of discrimination presented by the grievant. In this regard, we note that in considering the evidence presented by the grievant of disparate discipline, the hearing officer is not limited to considering only those examples, if any, where employees engaged in identical conduct as the grievant. Rather, the hearing officer may consider the discipline taken by the agency for misconduct of "comparable seriousness" to that allegedly committed by the grievant. The weight, if any, to be accorded to this evidence is to be determined by the hearing officer, in his discretion. (Footnotes omitted).

Based on the EDR Director's ruling, the Hearing Officer will reapply<sup>49</sup> the *McDonnell Douglas* analysis with consideration of the evidence presented on the first day as well as the subsequent two days of the hearing.

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<sup>49</sup> The Hearing Officer's analysis under *McDonnell Douglas* described in this Reconsideration Decision supersedes the analysis presented as part of the August 26, 2005 Reconsideration Decision.

Grievant claims he was subjected to harsher discipline because of his race. Under the *McDonnell Douglas* analysis, Grievant must show (1) he was a member of a protected class; (2) the prohibited conduct in which he was engaged was comparable in seriousness to the misconduct of employees outside the protected class; and (3) the disciplinary measures enforced against him were more severe than those enforced against those other employees.<sup>50</sup> If the Agency articulates a legitimate, non-discriminatory reason, then Grievant must show that the stated reason was false and a pretext for discrimination.

Grievant is white and is a member of a protected class by race. On December 18, 2001, an African American Police Officer received a Group I Written Notice that was later reduced to a counseling memorandum. The Written Notice described the facts as:

During roll call at approx. 2245 hrs, on 12-18-01, [Officer P] was assigned zones 4, 5 and was ordered to secure both gyms a.s.a.p. On 12-19-01 at approx. 0530 hrs, housekeeping made contact with ODUPD and advised that the Admin Gym (IAB) was found unsecured. When the reporting sergeant asked [Officer P] if he had secured the gym, [Officer P] stated that he forgot. This written notice is being issued to [Officer P] for failing to secure a building in a timely manner.

Grievant's and Officer P's conduct were similar and of comparable seriousness because both involved securing buildings.<sup>51</sup> The Agency could have issued Officer P a Group II Written Notice for failure to follow a supervisor's instructions. The result of Officer P's failure to act was an unsecured building. In contrast, Grievant verified that two buildings were secured except that he did not physically check the doors to the buildings. In Grievant's case, the two buildings remained secured. Grievant did not receive an instruction from a supervisor to secure buildings. In the light most favorable to the Agency, Grievant's behavior did not rise any higher than a Group I Written Notice for unsatisfactory work performance. Instead, the Agency gave him the highest possible sanction of a Group III Written Notice with removal. The Agency disciplined Grievant far more seriously than it did Officer P, an African American. Grievant has met his prima facie case.

Because Grievant had met his prima facie case under the *McDonnell Douglas* framework, the Agency must articulate a legitimate, non-discriminatory reason for its action. Issuing disciplinary action involves at least two steps. First, the Agency must decide whether to take disciplinary action. Second, if the Agency decides to take disciplinary action, it must decide what level of discipline to issue. The Agency has articulated a legitimate, non-discriminatory reason for taking disciplinary action under step one. In particular, the Agency has established that Grievant was responsible for securing buildings and that he failed to do so in accordance with the Agency's

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<sup>50</sup> The Agency's burden at this stage is merely a burden of production of evidence.

<sup>51</sup> Acting Chief Q was the Assistant Chief of Police at the time Officer P was disciplined.

customary practice. The Agency, however, has not established a legitimate reason for elevating the disciplinary action to a Group III offense with removal. To establish that elevating the disciplinary action to a Group III Written Notice was legitimate, the Agency would have to show that the disciplinary action was consistent with the Standards of Conduct. The Agency has not shown this. Thus, Grievant prevails under the *McDonnell Douglas* analysis.

If the Hearing Officer assumes for the sake of argument that the Agency has articulated a legitimate, non-discriminatory reason for taking disciplinary action against Grievant, then Grievant must establish that the Agency's disciplinary action was a pretext for discrimination. In other words, Grievant would have the burden to prove that the Agency's stated reasons for issuing a Group III Written Notice with removal were not its true reasons, but were a pretext for discrimination. Grievant has presented a preponderance of evidence that the Agency's action was a pretext for discrimination. The Agency's assertion that Grievant should be removed from employment for failing to exit his police vehicle and shake the doors of two buildings is not credible. Again, Grievant prevails under the *McDonnell Douglas* framework.<sup>52</sup>

## Conclusion

*Disciplinary Action.* Under the EDR Rules for Conducting Grievance Hearings, the Hearing Officer must determine whether the Agency has proven by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>53</sup> To be warranted and appropriate, disciplinary action must be "free of unlawful discrimination." If the Agency fails to meet this burden, the Agency has not presented a sufficient basis to uphold disciplinary action.<sup>54</sup>

If the Hearing Officer finds that an Agency has met its burden of proof to show its disciplinary action was warranted and appropriate, the Hearing Officer may reduce or eliminate the disciplinary action if Grievant shows mitigating circumstances. A mitigating circumstance exists if the "discipline was tainted by improper motive, such as retaliation or discrimination."<sup>55</sup>

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<sup>52</sup> In the Reconsideration Decision dated August 26, 2005, the Hearing Officer stated, "[a]lthough Lieutenant M's statements are troubling with respect to how the Agency handled discipline against Sergeant B, they are not sufficient to establish a pretext with respect to Grievant." After considering two additional days of testimony and further consideration of the EDR ruling, the Hearing Officer now believes Lieutenant M's statements with respect to Sergeant B are sufficient to establish a pretext with respect to Grievant.

<sup>53</sup> Rules for Conducting Grievance Hearings, VI(B)(1).

<sup>54</sup> See, Grievance Procedural Manual § 5.9.

<sup>55</sup> Rules for Conducting Grievance Hearings, VI(B)(1).

The disciplinary action issued to Grievant was motivated, in part, by racial discrimination. Accordingly, the Agency has not met its burden of proof to establish that the disciplinary action against Grievant was warranted and appropriate.

If the Hearing Officer assumes for the sake of argument that the Agency's disciplinary action was warranted and appropriate, the Agency's racial discrimination against Grievant is a mitigating circumstance justifying removal of the disciplinary action. The existence of racial animus is a sufficient reason to mitigate the disciplinary action against Grievant.

Regardless of how the disciplinary action is viewed, the Group III Written Notice with removal issued to Grievant must be reversed.

*General Claim of Discrimination.* DHRM Policy prohibits Agencies from discriminating against employees because of their race. Grievant has established that the Agency discriminated against him because of his race. In particular, the Agency issued to him a Group III Written Notice with removal, in part, because of his race. According, the Agency has misapplied State Policy.

#### Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "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." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust.<sup>56</sup>

The Hearing Officer initially limited Grievant's award of attorney's fees to an amount that omitted preparation time for issues not relevant to the hearing. Because the EDR Director ruled it was error to exclude Grievant's evidence regarding his general claim of discrimination and the Hearing Officer has now considered that evidence regarding the general claim of discrimination by itself and with respect to the disciplinary action, Grievant's attorney's fees previously denied by the Hearing Officer should be granted.<sup>57</sup>

Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Reconsideration Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings* and include time devoted to all three days of the hearing.

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<sup>56</sup> The EDR Rules do not define when special circumstances exist.

<sup>57</sup> During a telephone conference on May 16, 2006, the Hearing Officer advised the Agency's Counsel and Grievant's Counsel that he may award additional attorney's fees. The Hearing Officer informed counsel they could present argument in support of their positions regarding attorneys fees. The Hearing Officer has considered their arguments presented.

## Recommendation

The parties to this case have been especially contentious. Each party has strongly held views regarding the appropriate outcome of this case. Upon Grievant's reinstatement to his position, the Agency should be extraordinarily careful to ensure that it does not retaliate against Grievant with respect to performance evaluations, disciplinary action, etc. Likewise, if the Agency criticizes Grievant's work performance, Grievant should be careful not to assume that the Agency's actions are motivated by retaliation.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reversed**. The Agency is ordered to reinstate Grievant to his former position, or, if occupied, to an objectively similar position. The Agency is ordered to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. The Agency is ordered to restore Grievant to full benefits and seniority. GPM § 5.9(a).

The Agency is ordered to refrain from discriminating against Grievant because of his race. The Agency is ordered to comply with DHRM Policy 2.05 in its dealings with Grievant.

## **APPEAL RIGHTS**

The parties should review the Grievance Procedure Manual and *Code of Virginia* to determine their respective appeal rights.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
Old Dominion University  
October 3, 2006

The grievant and Old Dominion University each have requested administrative reviews of the hearing officer's decision in Case No. 8116. The employee objected to the hearing officer's decision on the basis that the hearing decision is contrary to the equal opportunity policy of the Commonwealth of Virginia as reflected in the Governor's Executive Order on Equal Employment Opportunity and the decision is contrary to the Workplace Harassment policy of the Commonwealth of Virginia. The agency appealed the decision to the Department of Human Resource Management as inconsistent with State and Agency policy. The agency head of the Department of Human Resource Management (DHRM) has requested that I respond to this administrative review request.

**FACTS**

Old Dominion University (ODU) employed the grievant as a Law Enforcement Officer II in its campus police department. The grievant was issued a Group III Written Notice with termination. He was charged with allegedly making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department and shirking official duty. He filed a grievance to have the disciplinary action reversed. He received no relief during the management steps of the grievance procedure and requested a hearing before a hearing officer. In a decision dated July 20, 2005, the hearing officer reduced the Group III Written Notice to a Group I Written Notice with reinstatement and back pay. The hearing officer also determined that the evidence did not support that the grievant had been disciplined because of race discrimination.

In a letter dated August 2, 2005, Old Dominion University, through its counsel, requested an administrative review by the Department of Human Management (DHRM) and an administrative review by the Department of Employment Dispute Resolution (DEDR). In a letter dated August 4, 2005, the grievant, through his counsel, requested an administrative review by this Agency and DEDR. In addition, the grievant requested a reconsideration of the decision by the hearing officer.

On August 26, 2005, the hearing officer issued his reconsideration decision in which he reaffirmed his earlier ruling. On September 1, 2005, with respect to that portion of the decision regarding the awarding of attorney's fees, Old Dominion University requested an administrative review by DEDR. By letters dated September 9, 2005, the grievant also requested administrative reviews by DHRM and DEDR of the reconsideration decision.

On November 22, 2005, DEDR issued a ruling addressing the issues raised by the grievant in his first and second requests for administrative reviews and by ODU in its first

request for an administrative review.\* In that ruling, DEDR determined that the hearing officer had erred with respect to the scope of the issues that had been qualified for hearing and directed that the hearing officer reconsider his decision.

The hearing officer reopened the hearing and permitted both parties to submit additional evidence. He issued his third reconsideration decision on May 25, 2006. In that decision he determined that officials had discriminated against the grievant because of his race, and thus took disciplinary action against him. The hearing officer stated, in part, “The disciplinary action issued to Grievant was motivated, in part, by racial discrimination. Accordingly, the Agency has not met its burden of proof to establish that the disciplinary action against Grievant was warranted and appropriate.” He continued further, “If the Hearing Officer assumes for the sake of argument that the Agency’s disciplinary action was warranted and appropriate, the Agency’s racial discrimination against Grievant is a mitigating circumstance justifying removal of the disciplinary action. The existence of racial animus is a sufficient reason to mitigate the disciplinary action against Grievant.” “Regardless of how the disciplinary action is viewed, the Group III Written Notice with removal issued to Grievant must be reversed.” The ruling continued, “Grievant has established that the Agency discriminated against him because of his race. In particular, the Agency issued to him a Group III Written Notice with removal, in part, because of his race. Accordingly, the Agency has misapplied State Policy. “

The relevant policy, the Department of Human Resource Management’s Policy No.1.60, states that it is the Commonwealth’s objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. Also, DHRM Policy No. 2.05, Equal Employment Opportunity, states as its purpose, “Provides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, disability, or political affiliation according to the Governor’s Executive Order on Equal Opportunity and state and federal laws. (For purpose of this policy “disability” is defined in accordance with the “Americans With Disabilities Act.)”

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human Resource Management has the authority to determine whether the hearing officer’s

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\* In response to the requests by both parties for reconsideration of the hearing decision of July 20, 2005, the hearing officer upheld his original decision. The Agency challenged the hearing officer’s decision on the basis that his decision failed to address all charges and the decision failed to apply the University regulations. The grievant challenged the decision on the basis that the decision did not address the issue of race discrimination.

decision is consistent with policy as promulgated by the Department of Human Resource Management or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

Summarily, the hearing officer, in successive decisions, made the following determinations: in his first decision that the evidence supported that the disciplinary action should be reduced from a Group III Written Notice with termination to a Group I Written Notice with reinstatement; in his second decision that the requests by both parties for reconsideration of his original decision should fail; that based on a ruling by DEDR he (hearing officer) would accept additional evidence from both parties and reopen the hearing; and, finally that in the third reconsideration decision the additional evidence supported that because of race discrimination, officials disciplined the grievant and all disciplinary actions should be rescinded.

In response to the requests by both parties for administrative reviews of the hearing officer's first decision of July 20, 2005, the hearing officer upheld his original decision. The Agency challenged the hearing officer's decision on the basis that his decision failed to address all charges and the decision failed to apply university regulations. The grievant challenged the decision on the basis that the decision did not address the issue of race discrimination. The requests for a ruling by DHRM were rendered as moot because in his third reconsideration decision, dated May 25, 2006, the hearing officer determined the Agency disciplined the grievant in order to effectuate an act of race discrimination. The decision rescinded all disciplinary actions and reinstated the grievant.

Concerning his third reconsideration decision dated May 22, 2006, the hearing officer addressed all of the issues that were raised in additional administrative review requests by both parties based on his second reconsideration decision dated August 26, 2005. The third reconsideration decision resulted from the hearing officer reopening the hearing and addressing the issues previously omitted. The reconsideration decision rendered the administrative review requests to DHRM as moot.

Based on the foregoing facts, this Department has no authority to rule on the propriety of the hearing officer's review of the evidence and/or merits of the case. Therefore, this Department has no basis to interfere with the application of the hearing officer's decision.

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Ernest G. Spratley  
Manager, Employment  
Equity Services





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

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 8116**

Addendum Issued: October 5, 2006

**DISCUSSION**

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.<sup>58</sup> 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.<sup>59</sup>

Grievant's attorney submitted a petition for attorney's fees on August 10, 2005 for 75.4 hours. Included in that first petition was 2.2 hours for time prior to qualification of the appeal for hearing<sup>60</sup> and, thus, 2.2 hours of the 75.4 hours is denied. The Hearing Officer has received a petition from Grievant's attorney dated June 2, 2006 for 183.60 hours of attorney time. The petition seeks fees for costs (i.e. clerical hours). The statute provides for the award of attorneys' fees, not costs. If the Legislature had intended to include costs, it would have included that term in the statute. Accordingly, the Hearing Officer has no authority to award costs. A supplemental fees petition dated October 4, 2006 has also been received by the Hearing Officer for an additional 40 hours of attorney time.

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<sup>58</sup> Va. Code § 2.2-3005.1.A.

<sup>59</sup> § 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.

<sup>60</sup> The Agency Head qualified the matter for hearing on June 2, 2005.

For grievances filed prior to August 1, 2005, the hourly rate authorized by the EDR Director is \$120. Grievant filed his grievance on April 15, 2005.

### **AWARD**

The grievant is awarded attorneys' fees for 296.80 hours at \$120 per hour for a total of \$35,616.00. The petition for costs is denied.

### **APPEAL RIGHTS**

The parties are reminded to carefully review the several rulings by the EDR Director in order to determine appeal rights. With respect to this Attorney's Fees Addendum Decision, the parties are reminded they must challenge this award within ten days of the date of this document (even if prior challenges have been made.)

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



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

**DIVISION OF HEARINGS**

**AMENDED ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 8116**

Addendum Issued: February 21, 2007

**DISCUSSION**

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.<sup>61</sup> 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.<sup>62</sup>

The Hearing Officer issued a Fees Addendum on October 5, 2006 awarding Grievant \$35,616.00 in attorneys' fees. The agency appealed the Fees Addendum to the EDR Director, who ruled that the Hearing Officer erred in awarding fees for services up to and including the initial hearing (Ruling No. 2006-1125, 2007-1456 dated December 8, 2006). The Hearing Officer was ordered to reconsider the October 5<sup>th</sup> Fees Addendum in accordance with the ruling.

The Hearing Officer finds that there are no special circumstances that would make unjust an award of attorney's fees to the Grievant. Although Grievant objects to the EDR Director's December 8, 2006 ruling, the Hearing Officer must comply with the *EDR Rules for Conducting Grievance Hearings*, regardless of Grievant's objection and will not consider it. The Agency has raised several objections to Grievant's calculation of attorney's fees. These objections and arguments are not persuasive.

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<sup>61</sup> Va. Code § 2.2-3005.1.A.

<sup>62</sup> § 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.

Based on the time consumed, effort expended, and nature of the services rendered, Grievant's Final Fee Petition is reasonable and documented. The Hearing Officer has reviewed each entry of Grievant's legal bill. Accordingly, the grievant is awarded attorneys' fees for 216.10 hours at \$120 per hour<sup>63</sup> for a total of \$25,932.00.

### **ORDER**

Old Dominion University is Ordered to pay immediately \$25,932.00 to Grievant's Attorney on behalf of Grievant.

### **APPEAL RIGHTS**

This Amended Addendum is not subject to further administrative appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>63</sup> For grievances filed prior to August 1, 2005, the hourly rate authorized by the EDR Director is \$120. Grievant filed his grievance on April 15, 2005.