

Issue: Formal Performance Improvement Counseling with termination; Hearing Date: 08/10/05; Decision Issued: 08/18/05; Agency: UVA Health System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8129; **Administrative Review: Hearing Officer Reconsideration Request received 09/01/05; Reconsideration Decision issued 09/07/05; Outcome: HO will reopen hearing to admit additional evidence; Second Reconsideration Decision issued 09/29/05; Outcome: Employee reinstated; Addendum Decision addressing Attorney's Fees issued 10/27/05.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8129

Hearing Date: August 10, 2005
Decision Issued: August 18, 2005

PROCEDURAL HISTORY

On April 22, 2005, Grievant was issued a Formal Performance Improvement Counseling Form with removal for:

[Grievant] received a Formal Performance Improvement Counseling on February 4, 2005. She was suspended and placed on Performance Warning from [February 4, 2005] to [May 5, 2005] for unauthorized absences from [December 12], 2004 to [January 28, 2005.] It was communicated to her during this counseling that she was not to take any additional unauthorized absences. On April 15, 2005 at approximately 0720, she left the facility and the [Facility] grounds while being on the clock and without notifying her supervisor. Her behavior represents an unauthorized absence and is noncompliance with her area's Guideline #2.

On April 29, 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 she requested a hearing. On July 6, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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:

The University of Virginia Health System employed Grievant as a Patient Access Specialist. She had been employed by the Agency for over 19 years¹ prior to her removal effective April 22, 2005. Grievant received satisfactory performance evaluations during her employment with the Agency. For example, on November 22, 2004, Grievant received a performance appraisal rating her overall performance as "Meets Expectations."² A nurse practitioner who regularly observed Grievant's work performance described her as "an integral part of our front desk staff for many years and I am very appreciative of her dedicated efforts on my behalf and the many times she has facilitated an optimal clinic experience for my patients"³

Beginning in 2004, Grievant's work attendance became unsatisfactory to the Agency. She was absent from work from December 13, 2004 to January 28, 2005.

¹ She started working for the Agency in October 1985.

² Agency Exhibit 2.

³ Grievant Exhibit 2.

Each day of her absence, she called her supervisor to state that she was unable to work due to illness.⁴

On February 4, 2005, Grievant received a Formal Performance Improvement Counseling Form with a suspension from January 31, 2005 to February 2, 2005. Grievant was informed that:

Description of the performance issue requiring improvement or correction (including specific dates, examples, and prior counseling dates):

Unauthorized Absences from December 13, [2004] to January 28, 2005.⁵

Specific changes in performance or behavior required and the time frame in which this must occur:

No further unauthorized absence not approved by supervisor or FMLA documentation. Lack of [appropriate] approval or documentation will lead to termination.

Grievant was placed on Performance Warning from February 4, 2005 to May 5, 2005 and was notified by the form that:

(All performance expectations for the role must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.)

Grievant and her sister had a practice where sometimes Grievant would take her dog with her to work and leave the dog inside her car in the Agency's parking lot. Grievant's sister would come by the parking lot a few minutes later and take the dog with her.

On April 15, 2005, Grievant arrived to work and clocked in at 7:18 a.m.⁶ She went to her desk. As she was starting her computer, she received a telephone call from her sister. Grievant's sister said she was running late and could not go to Grievant's parking lot to remove Grievant's dog from Grievant's car as planned. Grievant and her sister decided that Grievant would drive the dog approximately one mile away to a location easily accessible to the sister and the sister would take the dog from that

⁴ The Agency sent Grievant a letter dated December 16, 2004 advising her of the Family and Medical Leave Act benefits and requiring her to submit by January 6, 2005 required paper work including a certification from her medical provider.

⁵ In a letter dated December 16, 2004, UVA Health Systems informed Grievant that if she did not submit the required FMLA paperwork by January 6, 2005, her "absences will be deemed 'absence without authorization.'" See Grievant Exhibit 3.

⁶ Agency Exhibit 6.

location. Following this plan would enable Grievant's sister to make her appointment on time. Grievant immediately left her desk and went to her car. She did not clock out as she left the Facility. She drove her car to the location and then returned to work at approximately 7:30 a.m. Since her work shift did not start until 7:30 a.m., she did not miss any required work time.

CONCLUSIONS OF POLICY

Support Team Guideline No. 002 provides:

Anytime you leave the grounds of [the Facility] (run errands, go to doctor, dental or school appointments, etc.) you need to CLOCK OUT WITH A "9" AND WHEN YOU RETURN CLOCK BACK IN WITH A "1" AND CLOCK OUT WHEN YOU LEAVE WITH A "9" AS USUAL.⁷ (Emphasis original).

Grievant failed to comply with this policy because she clocked in at 7:18 a.m. and left the Facility to run an errand without clocking out. Grievant's behavior became a Standards of Conduct performance issue under the Agency's Policy #701: Employee Rights and Responsibilities because of her "Failure to follow applicable policy."⁸

On February 4, 2005, Grievant was notified by a Formal Performance Improvement Counseling Form that she was subject to a Performance Warning from February 4, 2005 to May 5, 2005. "A performance warning is issued to specify a period of time (not to exceed 90 days) during which the employee is expected to improve or correct performance issues and meet *all* performance expectations for [his or her] role, or face terminations."⁹ (Emphasis original.) The Formal Performance Improvement Counseling Form reminded Grievant that:

All performance expectations for the role must be met during this Performance Warning Period. Failure to meet performance expectations will result in termination.

Grievant's 2004 Annual Performance Planning and Appraisal Form "is a tool for (1) establishing performance expectations (2) evaluating and documenting performance, and (3) discussing career development."¹⁰ As part of Grievant's performance planning, Grievant was to be evaluated to ensure she "[p]ossesses basic knowledge of Health Systems policies and procedures."¹¹ Accordingly, one of

⁷ Agency Exhibit 3.

⁸ Agency Exhibit 5. Policy 701, Employee Rights and Responsibilities, Page 2 of 7.

⁹ Agency Exhibit 5, Policy 701, Employee Rights and Responsibilities, Page 6 of 7.

¹⁰ Agency Exhibit 2, Patient Access Specialist, Annual Performance Planning and Appraisal, Page 2.

¹¹ Id, at page 2.

Grievant's performance expectations was to be knowledgeable of and comply with Support Team Guideline 002. By failing to comply with Support Team Guideline 002, Grievant failed to meet a performance expectation. Grievant was notified that failure to meet any performance expectation would result in her removal from employment. The Agency has presented sufficient evidence to support its disciplinary action involving Grievant's removal from employment.

Grievant argues that the Formal Performance Improvement Counseling Form issued February 4, 2005 was not supported by sufficient evidence to show Grievant engaged in improper behavior. Grievant presented evidence she believes shows she did not have any unauthorized absences¹² from work because she notified her supervisor on a daily basis that she would be absent due to illness and she was experiencing legitimate medical concerns preventing her from working. Grievant presented evidence she believes shows the Agency unfairly disciplined her in February 2005 because her medical provider¹³ failed to timely submit medical certification of Grievant's medical condition under the Family Medical Leave Act. The Agency should have delayed the onset of FMLA as required by 29 CFR § 825.311(b)¹⁴ rather than disciplining her. For these reasons, Grievant contends there was no basis for the Agency to place her on a 90 day performance warning. Grievant's argument fails because Grievant did not appeal the February 4, 2005 Agency action. The Hearing Officer does not have jurisdiction to reverse or modify that action regardless of whether or not the Agency erroneously issued the February 2005 disciplinary notice. No credible evidence was presented suggesting the Agency retaliated against Grievant because she filed an FMLA claim. There is no basis for the Hearing Officer to ignore or minimize the February 4, 2005 Formal Performance Improvement Counseling Form.

Grievant argues that to the extent she acted contrary to the Support Team Guideline No. 002, her actions were insignificant. She points out that she was at her desk working when her shift began at 7:30 a.m.¹⁵ Although she was paid for the ten minutes she was away from her desk, the Agency permitted its employees to take a 15 minute paid break in mid-morning and a 15 minute paid break in mid-afternoon. Since she did not often take breaks, the ten minutes she was away from the Facility should serve as her break. From an objective standpoint, Grievant's behavior does not appear

¹² "Absence of three or more days without proper notice to supervisor" is serious misconduct justifying discipline including "suspension and/or performance warning, or termination without prior counseling." See Policy #701, Employee Rights and Responsibilities, Pages 2 and 3 of 7.

¹³ Upon receiving the required paperwork from the Agency, Grievant promptly presented the form to her doctor. Her doctor was derelict in processing the form and submitting it to the Agency.

¹⁴ 29 CFR § 825.311(b) provides, "If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave."

¹⁵ According to the Business Manager, Grievant's customary work shift began at 7:30 a.m. and ended at 4:30 p.m. On April 15, 2005, Grievant clocked out at 4:44 p.m.

to be so significant as to warrant removal. Her behavior could have been corrected simply by telling her to make sure she clocked out when she left the Facility. Grievant's argument, however, is untenable. The *Rules for Conducting Grievance Hearings* govern decision-making by Hearing Officers. These *Rules* remove the Hearing Officer's discretion to reverse disciplinary action simply because the consequences to an agency may not appear to be significant. Indeed, no credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant argues Support Team Guideline No. 002 is not a policy of the Agency but rather is a policy of a unit that is part of the Agency. She adds that she did not recall the policy and did not attend a meeting during which the policy was distributed to staff. Grievant's Facility was a divisional unit of the UVA Health System. No evidence was presented suggesting a divisional unit could not create a separate policy and expect its enforcement. By taking disciplinary action for violating a divisional policy, the Agency is asserting that the Facility has the authority from UVA Health System to issue policies that are binding on employees. The Agency presented testimony that Grievant's supervisor gave Grievant a copy of the policy the day following its distribution to Facility staff and explained the policy to Grievant. The Agency has presented sufficient evidence to support its contention that Grievant knew or should have known of the policy's content.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Formal Performance Improvement Counseling From with removal is **upheld**.

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 14th St., 12th 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.¹⁶

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁶ 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: 8129-R

Reconsideration Decision Issued: September 7, 2005

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. Grievant seeks reconsideration of the Hearing Decision.

The Hearing Decision is based on the sworn testimony of Ms. CF who stated that on October 28, 2004 she distributed Support Team Guideline No. 002 in a staff meeting that Grievant did not attend. Because Grievant did not attend the staff meeting, Ms. CF presented Grievant with a copy of the policy on the following day, Friday, October 29, 2004 and discussed the policy with Grievant. Grievant denied receiving a copy or knowing of the policy until after disciplinary action was taken against her.

As part of her request for reconsideration, Grievant has presented documents including flight reservations, boarding passes, and ticket image display from the airline's database to show that she left Richmond International Airport at 7:55 p.m. on October 27, 2004 and did not return until 2:16 p.m. on October 29, 2004. Grievant's workplace is in Charlottesville. Although it is possible she immediately returned to work on Friday October 29, 2004 and met with Ms. CF, there is sufficient uncertainty such that the Hearing Officer must reopen the hearing for the taking of additional evidence. It is necessary for the Hearing Officer to determine whether or not Ms. CF and Grievant met on October 29, 2004 and whether Support Team Guideline No. 002 was presented to Grievant.

Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. In the event the Agency is unable to

meet its burden of proof to establish that Grievant had reasonable notice of the policy, the parties should be prepared to address whether the disciplinary action against Grievant should be mitigated to include its reversal and to include Grievant's reinstatement to the Agency with back pay and attorney's 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.

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: 8129-R2

Issued: September 29, 2005

RECONSIDERATION FINAL DECISION

The original Hearing Decision was issued on August 18, 2005 upholding the Agency's disciplinary action and removal of Grievant from employment. The Agency established that Grievant left her workplace without clocking out and returned without clocking in contrary to Support Team Guideline No. 002 which provides:

Anytime you leave the grounds of [the Facility] (run errands, go to doctor, dental or school appointments, etc.) you need to CLOCK OUT WITH A "9" AND WHEN YOU RETURN CLOCK BACK IN WITH A "1" AND CLOCK OUT WHEN YOU LEAVE WITH A "9" AS USUAL.¹⁷ (Emphasis original).

As part of the original testimony, Grievant contested the Agency's assertion that she had received a copy of Support Team Guideline No. 002. The Agency presented the testimony of Ms. CF who stated that Guideline No. 002 was presented to all staff on Thursday, October 28, 2004 but that since Grievant did not attend that meeting, Ms. CF personally delivered Guideline No. 002 to Grievant the following morning. The following morning would have been Friday, October 29, 2004. Ms. CF testified that she told Grievant that the policy is what they discussed on the prior day. Ms. CF explained that Grievant was not at the staff meeting because Grievant had a doctor's appointment. During cross examination, Grievant's counsel expressly challenged Ms. CF's recollection of having given Grievant a copy of Guideline No. 002. Ms. CF withstood repeated questions and maintained with certainty that she gave Grievant a copy of the policy on October 29, 2005, the day following the staff meeting.

During the reconsideration testimony presented on September 29, 2005, Grievant presented documents and testimony showing that on October 27, 2004 Grievant and her fiancée departed Richmond International Airport at 7:55 p.m. and arrived in Orlando Florida at 11:23 p.m. They remained in Florida until 10:15 a.m. on Friday October 29, 2004 when they departed Orlando and arrived in Richmond, Virginia at 2:16 p.m.¹⁸ At approximately 3 p.m., after getting their luggage, they drove from Richmond International Airport to the Richmond Department of Motor Vehicles. Grievant's fiancée took a driver's license test and they left the DMV at approximately 4:30 p.m. or 4:45 p.m. to drive to Louisa for Grievant's fiancée's high school homecoming. Grievant did not go to the workplace on October 29, 2004. She did not meet with Ms. CF on October 29, 2004.

During the reconsideration testimony, Ms. CF testified that neither she nor Grievant were at the workplace on October 29, 2004. She added that she was not at the workplace on Monday, November 1, 2004. She apologized for her prior inaccurate testimony describing it as an "honest mistake". She stated that she and Grievant met on Tuesday, November 2, 2004 and that is when she presented Grievant with a copy of Guideline No. 002.

The Hearing Officer must rely on the accuracy of the testimony presented during a hearing in order to render an accurate and appropriate decision. Following the original decision, the Hearing Officer concluded that Ms. CF's testimony that she presented Grievant with a copy of Guideline No. 002 was more credible than Grievant's denial of receipt of the policy because Ms. CF recalled (1) the details of her discussion with Grievant, (2) the specific date (October 29, 2004) and time (morning) of their meeting, and (3) that Grievant did not attend the staff meeting on October 28, 2004, and (4) that Grievant was absent on October 28, 2004 because of a medical appointment. Moreover, Ms. CF expressed her conclusions with great certainty. She withstood thorough and detailed cross examination by Grievant's attorney. Ms. CF's testimony left little doubt that she presented Guideline No. 002 to Grievant on October 29, 2004. Evidence presented upon reconsideration shows that Ms. CF's original testimony was incorrect and that the certainty with which she expressed herself should not be relied upon.

Grievant has consistently denied receiving a copy of Guideline No. 002. The Agency contends Grievant had a discussion with Ms. CF in November 2004 regarding one of Grievant's co-workers. According to the Agency, Grievant expressed her concern that the co-worker was leaving the workplace thereby preventing Grievant from clocking out for lunch at 11 a.m. The Agency contends this shows Grievant knew of the policy prohibiting employees from leaving the workplace. Grievant testified that the meeting was because she had been asked to clock out at 11 a.m. for lunch but could not do so because her co-worker was taking breaks beginning at 10:40 a.m. but not returning until after 11 a.m. Assuming for the sake of argument that the Agency's version of the meeting is correct, no evidence was presented suggesting Grievant was

¹⁸ Reconsideration Grievant's Exhibit 1 shows Grievant's travel itinerary and flight boarding passes.

complaining that the co-worker was leaving the workplace without clocking out. The fact that Grievant may have objected to a co-worker failing to timely return from breaks does not show Grievant knew employees had to clock out when they left the grounds. Accordingly, the Hearing Officer finds that Grievant is the most credible witness regarding whether she received a copy of Team Support Guideline No. 002. She has established that she did not receive a copy of the policy and did not know of its contents until learning of it as part of the grievance process.¹⁹

Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. Grievant did not know of Team Support Guideline No. 002 and, thus, the disciplinary action must be mitigated. The Hearing Officer will mitigate the disciplinary action by reversing that disciplinary action and removal from employment.

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 she is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

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 her former position, or if occupied, to an objectively similar position. She is to be awarded full **back pay** from which any interim earning must be deducted. She is to be restored to full benefits and seniority. Grievant is further entitled to recover a reasonable **attorney's fee**, which cost shall be borne by the agency.²⁰

APPEAL RIGHTS

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

¹⁹ The Agency did not present any evidence showing that Grievant had signed a receipt establishing acceptance of the policy or that the policy was readily available in a collection of policies.

²⁰ Va. Code § 2.2-3005.1.A & B.

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8129-A

Addendum Issued: October 27, 2005

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.²¹ 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.²²

Grievant's petition includes a request for time prior to the qualification of the grievance for a hearing. Reasonable attorney's fees include only those fees necessary for the furtherance of the hearing. The Hearing Officer will not allow time prior to July 26, 2005 (3.2 hours).

Although time devoted to drafting a request for reconsideration is not usually allowed, since Grievant's request for reconsideration resulted in the taking of additional testimony that time is reasonable.

Grievant's petition includes a request for time relating to the request for attorney's fees and researching argument in support of a higher fee. A reasonable amount of time to prepare an attorney's fee petition should not exceed one half hour

²¹ Va. Code § 2.2-3005.1.A.

²² § 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.

and the Hearing Officer will allow only one half hour for attorney time incurred on October 12, 2005.

The Hearing Officer will allow time incurred by Grievant's attorney as follows:

July 26, 2005	1.80
August 1, 2005	0.40
August 2, 2005	1.90
August 3, 2005	5.20
August 4, 2005	1.30
August 9, 2005	2.90
August 10, 2005	3.90
August 20, 2005	0.30
August 22, 2005	0.10
August 24, 2005	1.20
September 8, 2005	0.30
September 12, 2005	0.20
September 13, 2005	0.30
September 16, 2005	0.10
September 23, 2005	1.60
September 29, 2005	2.70
September 30, 2005	0.90
October 3, 2005	0.20
October 4, 2005	0.10
October 6, 2005	0.10
October 12, 2005	0.50
Total:	26.00 hours

Grievant objects to the \$120 per hour limitation on the award of attorney's fees contained in Section VI(D) of the Rules for Conducting Grievance Hearings. Grievant alleges the limitation is beyond the authority of the Department of Employment Dispute Resolution and thus is ultra vires, contrary to the right to contract, and an infringement on the Grievant's statutory and constitutional right to counsel. Assuming for the sake of argument that each of Grievant's arguments is valid and represents the law of the Commonwealth of Virginia, the Hearing Officer lacks the authority to disregard the EDR Rules for Conducting Grievance Hearings. The Hearing Officer is duty bound to apply the Rules for Conducting Grievance Hearings regardless of their content or merit. Accordingly, Grievant's request for attorney's fees contrary to the Rules for Conducting Grievance Hearings is denied.

AWARD

The grievant is awarded attorneys' fees incurred from July 26, 2005 through October 12, 2005 in the amount of \$3,120.00. These fees are to be borne by the Agency.²³

APPEAL RIGHTS

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

Carl Wilson Schmidt, Esq.
Hearing Officer

²³ Grievant filed her grievance on April 29, 2005. She is entitled to attorney's fees at the hourly rate of \$120.