Issue: Group III Written Notice with termination (violation of the Conflict of Interest policy); Hearing Date: 03/16/06; Decision Issued: 03/24/06; Agency: DSS; AHO: Thomas P. Walk, Esq.; Case No. 8272; Outcome: Employee granted partial relief; Addendum Decision addressing attorney's fees issued 04/10/06; **Administrative Review: EDR Ruling Request on Fees Addendum received 04/20/06; EDR Ruling No. 2006-1336 issued 05/16/06; Outcome: Remanded to Hearing Officer; Second Fees Addendum issued 05/24/06**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION,
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

IN RE: DIVISION OF CHILD SUPPORT ENFORCEMENT,
DEPARTMENT OF SOCIAL SERVICES

DEDR CASE NO: 8272

HEARING DATE: March 16, 2006
DECISION ISSUED: March 24, 2006

PROCEDURAL BACKGROUND

The agency gave the grievant a Group III Written Notice on December 12, 2005 alleging that beginning May 17, 2005 and continuing at various times thereafter she violated the agency's Conflict of Interest guidelines. The agency terminated her employment. This grievance was filed on December 12, 2005. I was appointed as hearing officer on January 26, 2006. Pre-hearing telephone conference calls were conducted with the agency representative and counsel for the grievant on February 7, 2006 and February 10, 2006. The grievant was present in the office of her counsel for each of those conferences and listened by way of speaker phone. I entered a pre-hearing order on February 10, 2006. The order required an exchange of witness lists as well as all documents and exhibits to be introduced at the hearing. I further ordered that the agency provide to counsel for the grievant documents that I deemed to be material to a claim that

the agency had engaged in an inconsistent application of its policies. Due to anticipated delays in the agency being able to provide these documents and because of the unavailability of a witness deemed by the agency to be material the hearing was scheduled beyond the 30 day guideline. The hearing was held at the district office of the agency on March 16, 2006 and lasted 7.50 hours.

APPEARANCES

Agency: Representation was provided by an agency employee. The agency called 10 witnesses, including the grievant herself. Two of these witnesses testified by telephone.

Grievant: The grievant was represented by legal counsel. She called 7 witnesses including herself.

Exhibits: The agency presented 51 exhibits, numbered consecutively from 1-51. Exhibits 52 and 53 were offered but excluded as not being timely disclosed. The grievant presented 25 exhibits labeled in sequence A through Y.

ISSUES

1. Whether the grievant sought inappropriate and unauthorized changes to agency records pertaining to her child support case?

2. Whether the actions of the defendant in seeking these changes constituted a violation of the agency Conflict of Interest guidelines justifying the issuance of a Group

III written notice and termination?

FINDINGS OF FACT

The grievant and her then-husband (hereafter “former husband”) entered into a Separation and Property Settlement Agreement on July 12, 1994. Section 3 of that agreement was labeled “Child Support.” The section called for the former husband to make regular monthly payments of ongoing support to the grievant. It further provided that each parent would be “responsible for the payment of one-half of the reasonable college educational expenses” of the two children of the parties. As part of the final decree of divorce between the parties the Circuit Court ratified the agreement on January 22, 1995, changing only the amount of ongoing monthly child support.

On November 19, 2004, a Juvenile and Domestic Relations District Court made the child support payable to the agency on a “pass through” basis. At that time, the grievant was an agency employee in a district office. Her child support case was opened on November 23, 2004 as a Non-IV-D case. Generally speaking, those cases are child support cases not involving the repayment of public assistance benefits and for which the only authority the agency has is to receive, post, distribute and disburse income withholding payments from an employer to a payee. DCSE Program Manual,

Chapter 38. At no time after the case was opened did the grievant notify her supervisor of the existence of this case.

On February 17, 2005, counsel for the grievant filed a Notice of Arrears alleging that the former husband was delinquent in the payment of the educational expenses. The current husband of the grievant, a licensed Virginia attorney is employed as a special counsel for the agency through the Office of the Attorney General of Virginia, served as her counsel in that case in a private, and not official, capacity. A settlement was reached with the former husband and his counsel on April 6, 2005, which settlement was reflected in a order prepared by counsel for the grievant and entered by the Juvenile and Domestic Relations District Court on May 10, 2005. The order granted a judgment to the grievant in the amount of $7,228.41. A schedule of repayment of this judgment was set forth in the order. The order did not recite that interest was to be charged on the judgment.

At this time, the grievant held a position with the agency in the Case Initiation Unit. On May 17, 2005 a copy of the order dated May 10, 2005 was provided to another worker for the agency. This worker (hereinafter “co-worker #1") entered the order into the agency records for the grievance’s child support case. A credit in the amount of $100.00 was entered on the child support arrearages, despite the order stating that the former husband was not to be given credit for any payments not made through the agency. In April the former husband had made a payment directly to the grievant on the support arrearages and arrearages on medical expenses directly. The judgment was set up on the agency records as a non-child support Miscellaneous Account.

The grievant and her husband then began raising questions about why the

judgment was not shown as accruing interest. They contacted the home office of the agency and were advised on more than one occasion that the entry of the judgment into a non-interest bearing account was correct and that they would need to go back to court to seek any modification. The last call between the grievant or her husband to the home office occurred on September 26, 2005.

On September 28, 2005 the grievant spoke with another coworker (co-worker #2 hereafter) about the situation. The co-worker indicated that the entry was incorrect and made a change in the account to have the judgment accrue interest. This change was not directly requested by the grievant at that time. The grievant, however, allowed the change to be made. The agency is charged with the obligation of the collection of child support under various circumstances. In this case, the grievant merely requested the agency to serve as a conduit for the payment of child support. She was given the opportunity to file an application for more extensive collection services but declined to do so. All non-IV-D cases have their records maintained in the home office of the agency. The local or district offices are not authorized to receive or post payments, although adjustments to the records maintained on the computerized system (APECS) may be made from a district office.

ANALYSIS AND APPLICABLE LAW

This case arises under the Virginia Personnel Act, Va. Code Section 2.1-110 et seq. The Group III Written Notice given to the grievant and her termination pursuant thereto

were made pursuant to Standards of Conduct Policy No. 1.60 of the Department of Personnel and Training. In particular, the grievant was alleged to have violated the Conflict of Interest provisions set forth in the agency Program Manual as Section J of Chapter 2. The agency policy defines a Conflict of Interest as "a contradiction between the private interests and the public obligations of a person in an official position." The policy deems every agency employee as being in an official position. The policy requires that employees obey the letter and the spirit of conflict of interest avoidance requirements. The specific provisions for the avoidance of conflicts are then specified in detail.

The agency alleged that the grievant violated the guidelines in four ways. First, the agency claimed that she failed to disclose to her supervisor the existence of her support case. The remaining three allegations against the grievant are that she violated the Conflict of Interest guidelines, approached co-workers in the district office to take "inappropriate actions" on her child support case and that she knowingly used her position with the agency to "cause inaccurate and inappropriate actions" on her case for her personal benefit. I find that these separate allegations can be best viewed and analyzed as a single allegation of violating the Conflict of Interest guidelines.

The entry of the $100.00 credit on the child support arrearages on May 17, 2005 was made by co-worker #1 in direct violation of the order of the Juvenile and Domestic Relations Court. Co-worker #1 has received, and not grieved, a Group I Written Notice

for her actions. Asking or allowing a co-worker to knowingly violate a court order is clearly an inappropriate action under the Conflict of Interest guidelines. I find the seriousness of this incidence to be greatly reduced, however, by the simple fact that the action worked to the benefit of the former husband and did not benefit the grievant.

The evidence clearly established that the defendant involved, or attempted to involve, more than one co-worker in modifying the case records for her child support case. Both co-worker #1 and co-worker #2 received Group I Written Notices for their actions on behalf of the grievant. The grievant has argued that the actions taken by co-worker #1 (discussed above) and co-worker #2 were not inappropriate but legally justifiable. This argument misapprehends the purpose for the Conflict of Interest provisions.

The underlying argument of the grievant is that the judgment should have been reflected on the agency records as accruing interest. The grievant reasons that the judgment was for "child support" and, alternatively, that Virginia law imposes interest on all judgments unless otherwise provided. One cannot question that the payment of educational expenses is a means of providing support for a child. This case, however, presents the situation where support for a child is not necessarily the same as "child support" for some purposes. This is not a mere semantic quibble.

The computerized record keeping system of the agency, APECS, is set up for child support arrearages to accrue interest. Items shown in other miscellaneous accounts, such

as educational expenses and medical expenses, are not shown as accruing interest under APECS. The agency views "child support" as generally being that awarded under Section 20-108.2 of the Code of Virginia. Although logically payments for the support of a child could be lumped together with "traditional child support", the agency has a system which does not provide for that. The grievant and her former husband may both have viewed the educational expenses as "child support" but the agency has the right to establish and maintain its records as it sees fit, subject only to Federal and State Legislative or Regulatory oversight and constitutional restrictions.

The grievant has argued that the records needed to be amended to charge interest so that the records would be accurate. I find this argument to be something of a red herring. As a judgment, pursuant to Section 8.01-382 of the Code of Virginia the judgment accrued interest regardless of whether that interest was reflected on the records of the agency. Nothing that the agency could do would take away the right of the grievant to collect interest on the judgment. Other steps could have been taken by the grievant to create and maintain an accurate record. Also, the grievant could have easily notified the former husband of her position that interest was accruing on the judgment and reliance on the agency records could be had only for purposes of determining the original principal balance.

Instead, the grievant and her husband persisted in their efforts to have the agency modify its records in violation of its own record-keeping policies. I find that this pattern,

in particular the actions which the grievant allowed co-worker #2 to take to be sufficient to support the issuance of the Group III Written Notice.

The grievant further argues that the agency has ignored and violated the provision of the Conflict of Interest guidelines which states that all agency employees shall have the guidelines discussed with them on an annual basis. It is undisputed that the grievant received no training in the Conflict of Interest area between 1995 and the issuance of the Notice which serves as the basis for this proceeding. Evidence was further presented that other coworkers of the grievant in the local district office also received no annual or regular training in the guidelines. The agency director testified at length on the importance of the guidelines. He stated that the employees did not need to be reminded of the guidelines because they were largely obvious to a reasonable person. This argument is peculiar and flies in the face of the express language of the guidelines for annual training. If the guidelines are important enough for annual training to be conducted, then it is not asking too much for the agency to be expected to provide that training.

I find that the failure of the agency in the local district office to follow this portion of the guidelines to be some mitigation of the actions of the grievant. I believe that a reasonable possibility exists that this situation could have been avoided if the grievant had received more regular reminders of the conflict provisions. Evidence was presented by some agency witnesses of regular training in the guidelines at other offices throughout the

Commonwealth. The practice followed in those other offices of providing the reminder or training at annual performance reviews seems reasonable and establishes that it is not unduly burdensome for the agency, in all its offices, to follow its own procedures. An agency cannot be permitted to ignore its own policies and discipline with the most severe punishment an employee who violates another provision of that same policy.

DECISION

For the reasons stated above I uphold the issuance of the Group III Written Notice to the grievant on December 12, 2005. Based on the failure of the agency to follow its own procedures I reduce the sanctions. I order the reinstatement of the grievant to employment with the agency. I find that a 30 day suspension of the grievant from employment is appropriate and I hereby award full back pay and restoration of benefits, subject to a 30 day suspension.

APPEAL RIGHTS

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

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 court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code §17.1-405.

This decision issued this March 24, 2006.

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Thomas P. Walk, Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION,
DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

IN RE: DEDR CASE NO. 8272

HEARING DATE: MARCH 16, 2006

DECISION ISSUED: MARCH 24, 2006

ADDENDUM ISSUED: APRIL 10, 2006

APPLICABLE LAW AND PROCEDURE

Section 2.2-3005.1 of the Code of Virginia of 1950, as amended, provides that in a grievance hearing challenging a discharge the hearing officer shall award reasonable attorneys fees if the employee "has substantially prevailed on the merits of the grievance." The only exception is where special circumstances would make such an award unjust. Section 7.2 (E) of the Grievance Procedure Manual requires that for an employee to "substantially prevail" the decision of the hearing officer must reinstate the employee to his former or an objectively similar position. A verified petition for attorneys fees has been filed by the grievant on March 29, 2006. The agency submitted its response to the petition on April 4, 2006. Both filings were timely within the requirements of the Grievance Procedure.

DISCUSSION

My order entered on March 24, 2006 upheld the issuance of the Group III Written Notice to the grievant. Based on a mitigating factor, the noncompliance by the agency with its own relevant policies for the training of employees, I ordered that the grievant be reinstated. The grievant was awarded back pay and restoration of benefits, subject to a 30 day suspension. I cannot find that the grievant has substantially prevailed in this matter.

The Code of Virginia uses the phrase “prevailing party” in forty one places. The phrase “substantially prevailing” or similar language is found only in eight places. These phrases are hardly self-defining. The code further modifies “substantially prevailing” phrase in certain sections. In Section 2.2-4030 and Section 32.1-325.1 of the Virginia Code an award of attorneys fees can be made if the party substantially prevails on the merits of the case and the position of the agency was not substantially justified. Section 10.1-1435 of the Virginia Code limits an award of attorneys fees to a substantially prevailing party to instances where the other party has acted unreasonably. Various Federal statutes providing for an award of attorneys fees contain similar language to the “substantially prevailed” phrase. A review of cases decided under those statutes reveals that the precise wording of each is determinative and that the outcomes are extremely fact-specific.

Because I can find no controlling court or administrative precedent on this issue I am basing my ruling on what I find to be the most logical standard to apply. That test is whether the grievant substantially prevailed on the most significant issue or set of issues

in this matter. This standard is adopted from Section 7430 of Title 26 of the United States Code. In this matter the grievant was reinstated to employment. I believe that the requirement in the Grievance Procedure for reinstatement to be a necessary, but not sufficient condition for the award of attorneys fees. The grievant was unsuccessful in having the Written Notice rescended. Also, she was not restored to full benefits and back pay. Had the level of discipline been reduced or the length of suspension been less, the grievant would have a stronger claim that she substantially prevailed.

The agency has not raised a challenge to the award of fees on the question of whether the grievant "substantially prevailed." I find that the controlling statute establishes a jurisdictional prereqisite for the award of attorneys fees. Therefore, the waiver of this argument by the agency is not binding.

DECISION

For the reasons stated above, the petition by the grievant for an award of attorneys fees is denied.

APPEAL RIGHTS

Within 10 days of the issuance of this ruling either party may petition the Director of the Department of Employment Dispute Resolution for a decision addressed solely to whether this Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the Director issues a ruling on the propriety of this addendum, and if ordered by the Director, the hearing officer has issued a revised

fees addendum, the original decision becomes a final order as set forth in Section 7.2 (D) of the Grievance Procedure Manual and may be appealed to the Circuit Court in accordance with Section 7.3 (A). The fees addendum shall be considered to be part of the final decision. Final hearing decisions shall not be enforceable until the conclusion of any judicial appeals.

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Thomas P. Walk, Hearing Officer

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION,
DIVISION OF HEARINGS**

SECOND ADDENDUM TO DECISION OF HEARING OFFICER

IN RE: DEDR CASE NO. 8272

HEARING DATE: MARCH 16, 2006

DECISION ISSUED: MARCH 24, 2006

ADDENDUM ISSUED: APRIL 10, 2006

SECOND ADDENDUM ISSUED: MAY 24, 2006

APPLICABLE LAW AND PROCEDURE

Section 2.2-3005.1 of the Code of Virginia of 1950, as amended, provides that in a grievance hearing challenging a discharge the hearing officer shall award reasonable attorneys fees if the employee "has substantially prevailed on the merits of the grievance." The only exception is where special circumstances would make an award of fees unjust. In my addendum issued on April 10, 2006 I found that the grievant had not substantially prevailed in this matter, dispute her being reinstated to employment, because the level of discipline was upheld and she was given only a partial restoration of pay and benefits. By Administrative Review Ruling the Director of the Department of Employment Dispute Resolution ruled that I erroneously interpreted the applicable policy and should have awarded attorney fees in the absence of special circumstances. See Ruling Number 2005-1336. This addendum is issued pursuant to that Administrative

Review Ruling.

DISCUSSION

Counsel for the grievant has submitted a verified petition seeking attorneys fees. That petition reflects a total of 33.17 hours of work subsequent to the date that the matter was qualified for hearing. To the request I have made the following adjustments:

1. The time on January 31, 2006 for reviewing an email only is reduced to 0.10 hours. I find the time stated to be unreasonable.

2. The time on February 6, 2006 is reduced to 0.25 hours. I find the time listed to be unreasonable given the limited nature of the letter.

3. For the time listed on February 10, 2006 for the second conference call I am reducing to 0.50 hours which is in accordance with my notes and memory as to the length of the conference call. For the time stated on that same date for reviewing the pre-hearing order I am reducing that to 0.25 hours as I find the time listed to be unreasonable.

4. I am allowing no fees for the time shown on March 8 and March 9, 2006 for the copying, labeling, and re-labeling and organizing of three notebooks. I find that time to be more in the nature of administrative or secretarial time and non-recoverable under the policy.

Therefore, I am allowing compensation to counsel for the grievant for a total of 29.82 hours. I am awarding fees at the rate of $120.00 per hour as provided by the applicable policy. This results in a total award of attorneys fees to counsel for the

grievant in the amount of $3,578.40.

I express no opinion about whether "special circumstances" would make an award of attorneys fees unjust in this matter. The issue has not been raised by the agency.

To clarify my original order, the grievant is reinstated to her prior position. The Group III Written Notice is upheld. In accordance with the Standards of Conduct, I find that a 30 day suspension of the grievant to be appropriate. Therefore, grievant is entitled to have restored to her back pay and benefits, with the exception of those benefits and pay which would have accrued during a 30 day suspension. In other words, the grievant shall have those benefits and pay restored to her effective as of the thirty-first day following her termination from employment, which termination has now been rescinded.

Submitted this 24th day of May, 2006.

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Thomas P. Walk, Hearing Officer

TPW/sam