

Issue: Group II Written Notice with termination (internet abuse); Hearing Date: 09/01/06; Decision Issued: 09/05/06; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8403; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 09/21/06; Reconsideration Decision issued 09/21/06; Outcome: Original decision upheld; Addendum addressing attorney's fees issued 09/29/06.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8403**

Hearing Date: September 1, 2006  
Decision Issued: September 5, 2006

**PROCEDURAL HISTORY**

On May 9, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating Va. Code § 2.2-2827 and DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*. On June 6, 2006, 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 August 2, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 1, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **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 Virginia Department of Information Technologies employed Grievant as an Information Technology Specialist III. The purpose of his position was to "[m]aintain and develop District Software Systems and Servers and maintain systems which are part of 'District to District' and 'District to Central Office' operations."<sup>1</sup> Grievant had been employed by the Agency since July 2004 until his removal effective May 9, 2006. No evidence of prior active disciplinary action was introduced during the hearing.

In order to access the internet, Grievant must log into the Agency's computer network using a password only he is supposed to know. His computer is located in a work space with secured access. He works primarily at a Virginia Department of Transportation Facility and provides support to VDOT employees.

On October 18, 2005, Grievant logged into his computer and accessed the internet through the Agency's computer network. Grievant viewed a sports-related website. He accessed several photographs of women including several showing undressed women.

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

The Virginia Department of Transportation conducted an audit of VDOT and VITA employees using the internet. VDOT auditors concluded Grievant's internet usage required further review by VITA managers and referred the audit to VITA. Upon review of Grievant's internet usage, the Agency concluded that four pictures were sexually explicit content by which Grievant was prohibited from accessing. The Agency took disciplinary action against Grievant for accessing those images.<sup>2</sup>

Grievant had actual notice of DHRM Policy 1.75, *Use of the Internet and Electronic Communication Systems*. Each time he logged into his computer a screen displayed informing him of his obligation to comply with DHRM Policy 1.75 and with Va. Code § 2.2-2827.<sup>3</sup>

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>4</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:

- accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
- downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images; \*\*\*
- any other activities designated as prohibited by the agency.

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<sup>2</sup> The Agency's delay between the time it received the VDOT audit and the time it took disciplinary action was not unreasonable.

<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

*Va. Code § 2.2-2827(B)* provides:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700).

Sexually explicit content is defined by *Va. Code § 2.2-2827(A)* as:

(i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a **lewd exhibition of nudity**, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism. (Emphasis added).

*Va. Code § 18.2-390* defines nudity as:

a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any

portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Va. Code § 2.2-2827 does not define “lewd exhibition of nudity.” Va. Code § 18.2-374.1 uses the same phrase and that section has been interpreted by Virginia courts. In Pederson v. City of Richmond, 219 Va. 1061, 1065 (1979), the Virginia Supreme Court considered the meaning of the terms, “lewd, lascivious, or indecent” and held:

These words have meanings that are generally understood. We have defined ‘lascivious’ to mean ‘a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of incident sexual desire and appetite.’ ‘Lewd’ is a synonym of ‘lascivious’ and ‘incident.’ Webster’s Third New International Dictionary 1301 (1969).

In Frantz v. Commonwealth, 9 Va. App. 348, the defendant took pictures of nude children but there was no evidence that the children assumed erotic or provocative poses. The Virginia Court of Appeals concluded the pictures were not legally obscene. Id. at 353. “[N]udity alone is not enough to make material legally obscene.” Freeman v. Commonwealth, 223 Va. 301, 311 (1982). In Foster v. Commonwealth, 6 Va. App. 313, 329 (1988), the Virginia Court of Appeals held:

The photographing of exposed nipples, while within the literal definition of nudity under Code § 18.2-390, is not, without more, the *lewd* exhibition of nudity required under Code § 18.2-374.1 (1983).

In Asa v. Commonwealth, 17 Va. App. 714, the Virginia Court of Appeals distinguished between mere nudity and sexually explicit photographs. The Court held:

Asa’s photographs of the teenager in this case include photographs depicting her posing in a sexually provocative manner, with the camera’s eye focused on her genitalia. Included in the seized photographs are close-up photographs depicting the teenager’s genitalia as the primary object depicted in the photograph. “Patently offensive representations or descriptions of ... lewd exhibition of the genitals’ are among the ‘plain examples of what a state statute could define for regulation.’” Freeman v. Commonwealth, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982) (quoting Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973)). These photographs, which contain as their primary focus the close-up views of the teenager’s genitalia, depict the teenager sitting with her knees up to her breast and her legs widely spread to expose a frontal view of her genitalia. Those photographs are sexually explicit within the meaning of Code § 18.2-374.1.

Downloading pictures of nude women may justify some sort of disciplinary action depending on the facts of the case, but in order for an employee to be deemed to have violated DHRM Policy 1.75 regarding sexually explicit content, that employee must have

downloaded pictures constituting a “lewd exhibition of nudity.” Whether nudity is lewd depends on many factors including contemporary morals as well as the degree the depiction is intended to generate sexual interest. For example, the Great Seal of the Commonwealth of Virginia depicts a female with her left breast unclothed and

dressed as an Amazon, resting on a spear in her right hand, point downward, touching the earth; and holding in her left hand, a sheathed sword, or parazonium, pointing upward; her head erect and face upturned; her left foot on the form of Tyranny represented by the prostrate body of a man, with his head to her left, his fallen crown nearby, a broken chain in his left hand, and a scourge in his right.<sup>5</sup>

The Great Seal has been in use since 1776. This depiction of nudity would not be lewd given its acceptance by the people of Virginia.<sup>6</sup> In other words, if the pictures an employee downloads from the internet are not materially “worse” than the depiction of nudity expressed by the Great Seal, then the depiction cannot be a lewd exhibition of nudity.

Picture 399 shows an undressed young woman athlete with her left side towards the viewer. The picture shows the woman from her feet to her head. She is standing on what appears to be a diving board or platform with water underneath. She is bent over with her hands touching the board as if she is participating in a swimming race and is awaiting the sound of the firing pistol to begin the race. The side of her left breast with her nipple is visible.

Picture 399 is a depiction of nudity, but it is not a lewd depiction of nudity and, therefore, not contrary to Va. Code § 2827 and DHRM Policy 1.75. The fact that the woman is posed as if in an athletic competition does not render her picture lewd. Similarly, the woman in the Great Seal of Virginia is posed as an amazon warrior. Her pose does not render her picture lewd and her pose is not materially different from the athlete’s pose in picture 399.

Picture 551 shows an undressed young woman standing in a forest with her back to the viewer. The picture shows the woman’s body from just above her ankles to above her head. Her left hand is touching the trunk of a large tree to her left and her right hand is touching the truck of a large tree to her right. Her right leg and knee are angled towards the tree on the right. Her left leg is straight and also angled slightly towards the right. She appears as if she is walking between two large trees she is touching. Her bottom is in full view.

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<sup>5</sup> Va. Code § 1-500.

<sup>6</sup> Va. Code § 2.2-2827 defines sexually explicit content to include drawings as well as photographs. Even though the Great Seal is usually shown as a drawing, it is no different from photograph showing nudity with respect to violating Va. Code § 2.2-2827.

Picture 551 is a depiction of nudity, but it is not a lewd depiction of nudity. The fact that the woman is posed as if walking in the woods does not render her picture lewd. Picture 551 is not more sexually explicit than is the Great Seal of Virginia.

Picture 964 shows a young woman sitting in a chair. She is shown from her waistline to above her head. She is wearing a bikini bottom. Her midriff is unclothed. She is wearing a mesh top and a cowboy hat. Her right breast and nipple are visible through the mesh top. She has her left hand touching the rim of her hat and she is looking towards the viewer.

Picture 964 is a depiction of nudity, but it is not a lewd depiction of nudity. The woman's pose as a cowgirl does not render her picture lewd. Picture 964 is not more sexually explicit than is the Great Seal of Virginia.

Picture 967 shows the same woman who appeared in picture 964. In this picture, the woman's left side is shown. She is facing the back of the chair with her right knee on the seat of the chair and her left leg extended to the floor. The woman is shown from her knee to above her head. She is wearing a cowboy hat and a mesh top. Her left breast and nipple are plainly visible through the top.

Picture 967 is a depiction of nudity, but it is not a lewd depiction of nudity. Her pose as a cowgirl does not make the picture lewd. Picture 967 is not more sexually explicit than is the Great Seal of Virginia.

Based on the evidence presented, Grievant did not violate Va. Code § 2.2-2827 and did not act contrary to DHRM Policy 1.75. His behavior is subject to discipline, however.<sup>7</sup>

"Inadequate or unsatisfactory work performance" is a Group I offense. Although Grievant was permitted to use the internet for personal use, his personal use was inadequate work performance. Grievant should not have accessed pictures containing nudity. Pictures of nudity can easily form a basis for the creation of a hostile work environment.<sup>8</sup> In addition, pictures containing nudity often are offensive to co-workers who may see them. The Agency has presented sufficient evidence to support its issuance of a Group I offense.<sup>9</sup>

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<sup>7</sup> Grievant denies visiting the sport related website where the images were located. Based on the evidence presented, the Agency has clearly established by a preponderance of the evidence that Grievant accessed the four images. Grievant was at work on October 18, 2005. The Agency's firewall monitored the sites visited by Grievant's personal logon account. He could only access that account with a unique password known only to him. He worked in a secured office. No evidence was presented showing that any other employee had actually accessed Grievant's account.

<sup>8</sup> The Agency presented evidence of over 100 photographs of women that it considered inappropriate. It only disciplined Grievant for accessing four of those photographs.

<sup>9</sup> One could argue that if an employee sends a letter with the Great Seal of Virginia on the letter head, then he or she is transmitting a depiction of nudity thereby justifying the issuance of a Group I Written Notice. The difference between the Great Seal and other pictures of nude woman is that the



The Agency contends that Grievant should receive a Group III Written Notice because VITA should set an example for other State employees. Since VITA is responsible for overseeing information technology used by other agencies, VITA employees should be held to a higher standard, according to Agency managers. The Agency's argument fails. Although the Agency is free to set a separate standard for its employees by issuing an Agency policy consistent with DHRM Policy 1.75, VITA is not free to interpret DHRM Policy 1.75 to impose a more rigorous standard than expressly written in the policy. In other words, VITA may not discipline an employee for accessing nudity on the internet when DHRM Policy 1.75 requires more than mere nudity to establish a Group III offense.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."<sup>10</sup> 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. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

#### 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>11</sup> Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of the date of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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Commonwealth of Virginia has openly sanctioned the use of nudity as depicted in the Great Seal of Virginia. Other pictures of nude woman are not sanctioned by the Commonwealth and, thus, inappropriate in the workplace.

<sup>10</sup> *Va. Code § 2.2-3005.*

<sup>11</sup> The EDR Rules do not define when special circumstances exist.

## 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. The Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for annual and sick leave that the employee did not otherwise accrue.

## 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 all of your appeals to the other party and to the

EDR Director. 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>12</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</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: 8403-R**

Reconsideration Decision Issued: September 21, 2006

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request. The Agency seeks reconsideration of the Hearing Decision Number 8403.

The Agency argues the images are sexually explicit and in violation of State law and contrary to DHRM Policy 1.75. This is the same argument the Agency made during the hearing. The Agency has not identified an error of law or incorrectly applied policy.<sup>13</sup> The Agency simply re-states its arguments made during the hearing. The burden of proof in disciplinary actions is on the Agency and it has not met its burden.

The Agency argues the Hearing Officer should have considered a file folder<sup>14</sup> of over 100 images including the four images discussed in the Hearing Officer’s Decision. This argument is directly contrary to the evidence presented. One of the matters discussed during the hearing was which of the images on the Compact Disc submitted as Agency Exhibit 4 did the Agency contend was a basis for discipline. The IT Manager testified that only the four images formed a basis to discipline Grievant.<sup>15</sup> Because of

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<sup>13</sup> The Agency refers to several cases where sexually explicit content was found. Most of those cases involved pictures where the viewer’s attention was clearly drawn to an individual’s genitals. None of the four pictures in this case involved nudity of genitals.

<sup>14</sup> The Agency did not submit a file folder, instead it submitted a Compact Disc containing images.

<sup>15</sup> As part of the Agency’s exhibits, it submitted photocopies of the four images. It did not submit photocopies of image 99 or any other images on the CD. A number of the images on the CD did not contain nudity at all.

the IT Manager's testimony, the hearing focused on the four images and not the other images on the CD. The Hearing Officer will not now review the other images on the CD given the Agency's admission at the hearing that those other images did not form a basis for disciplinary action. To do so would deny Grievant of the opportunity to present testimony and argument with respect to those other images.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**.

### **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.

*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**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 8403**

Addendum Issued: September 29, 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>16</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>17</sup>

The Hearing Officer has received a petition from grievant's attorney dated September 14, 2006. The petition seeks fees for services rendered prior to the qualification of the grievance for hearing.<sup>18</sup> Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing. The Hearing Officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the Hearing Officer and other associated hearing expenses including grievant's attorneys' fees.<sup>19</sup> Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process.

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<sup>16</sup> Va. Code § 2.2-3005.1.A.

<sup>17</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>18</sup> Va. Code § 2.2-3004.A. See also §4, Qualification for a Hearing, Grievance Procedure Manual, August 30, 2004.

<sup>19</sup> Va. Code § 2.2-3005.1.B.

The petition includes costs. 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. The petition also includes a request for attorney travel time. When an attorney travels to a hearing, he or she is not providing legal advice and counsel. Accordingly, travel time may not be reimbursed. Grievant is awarded 4.0 hours of attorney's time at the hearing.

The petition seeks reimbursement in the amount of \$100 per hour. This amount is within the range permitted under the *Rules for Conducting Grievance Hearings*.

### **AWARD**

The grievant is awarded attorneys' fees for 13.10 hours at \$100 per hour for a total of \$1,310.00. The petition for costs, travel time, and services prior to qualification is denied.

### **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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer