

Issues: Group II Written Notice (unsatisfactory job performance), Group II Written Notice (failure to follow instructions), Arbitrary/Capricious Performance Evaluation, Harassment, and Discrimination (disability); Hearing Dates: 02/11/09, 02/13/09, 02/19/09; Decision Issued: 02/26/09; Agency: UMW; AHO: Jane E. Schroeder, Esq.; Case No. 9012, 9013, 9014, 9015; Outcome: No Relief – Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**  
**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of Cases Number 9012, 9013, 9014, 9015

Hearing Dates: February 11, 13, 19, 2009

Decision Issued: February 26, 2009

PROCEDURAL HISTORY

At the time these cases were initiated by the Grievant, the Grievant was employed by the agency as bookstore operations manager. On September 8, 2008, the agency issued two Group II Written Notices to the Grievant. One Written Notice was for unsatisfactory performance and the other was unsatisfactory performance and failure to follow instructions and/or policy. On September 29, 2008, the Grievant initiated a grievance challenging a Group II Written Notice (Case 9012). On the same date, the Grievant filed a second grievance alleging undue harassment by the agency (Case 9014). On October 7, 2008, the Grievant filed a third grievance challenging the second Group II Written Notice (Case 9013). On November 10, 2008, the Grievant filed a fourth grievance challenging a “below contributor” rating on a Employee Performance Evaluation (Case 9015). None of the grievances were resolved during the management resolution and the grievances were subsequently qualified for hearing. The agency requested that all four grievances be consolidated for a single hearing. On December 29, 2009, The Director of the Department of Employment Dispute Resolution issued a “Consolidation Ruling of Director” consolidating the grievances. On January 15, 2009, the Hearing Officer was assigned to hear the four cases.

Three telephonic pre-hearing conferences were held. The first telephonic pre-hearing conference was held on January 22, 2009. The hearing date was set for February 5, 2009. A second telephonic pre-hearing conference was held on January 29, 2009. At that time, newly retained counsel for the Grievant and the counsel for agency requested more time to prepare the documents needed for the hearing. This request was granted and the hearing was set for February 11 and 13, 2009. A third telephonic pre-hearing conference was held on February 5, 2009. At this time the Hearing Officer requested page numbering for the volume of documents received and the schedule for witness was established.

On February 5, the attorney for the Grievant informed the Hearing Officer that the Grievant was fired by the agency on February 3. The termination is not part of the grievances reviewed in this decision.

On February 9, 2009, the Grievant, by counsel, filed a Motion asking the Hearing Officer to consider the Grievant’s claim of discrimination due to absence of four months for surgery as part of the grievances cases. The agency, by counsel, filed a Response to Grievant’s Motion to Amend

Claim the same day. On the first day of the hearing, the Hearing Officer found that the claim of discrimination was referenced in the grievances, and granted the motion.

The hearing was held on February 11, 13, and 16. Nine witnesses testified. Hundreds of pages of exhibits were entered into evidence. Due to the consolidation of four cases, the volume of evidence and the third day required for testimony, the Hearing Officer requested an additional week to submit the decision.

### EXHIBITS

The following Agency Exhibits were accepted into evidence:

Agency # 1.	pp. 1-79	Grievance Form A and supporting documents	Case # 9012
Agency # 2.	pp. 80-98	Grievance Form A and supporting documents	Case # 9013
Agency # 3.	pp. 99-123	Grievance Form A and supporting documents	Case # 9014
Agency #4.	pp. 124-129	Grievance Form A and supporting documents	Case # 9015
Agency #5	pp. 130-136	Email communications, notes from 9/8/08 meeting	
Agency #6	pp. 137-148	Notes from witness interviews by administrators	
Agency #7		Policy 1.60 Standards of Conduct	
Agency #8		Dec. 2007 Performance Evaluation	

Grievant had 654 pages of Exhibits. The following pages were accepted into evidence:

Grievant pages: 82-86	Notice of Improvement Needed
96-101	Supervisor's Documentation 12/12/07
102-103	Supervisor's Follow up Counseling Memo
104-112, 114, 116-125	Grievant's Documents in support of 4/12/08 Response
192	Overnight Receipt 9/22/08
265	Events spreadsheet
349-350	Examples of SKUs to be deleted
432-436	Emails, spring scheduling memo
449-453, 455-456	Emails re: scheduling
564-572	Emails: August/September 2008
573-574	Grievant's sample personal time sheet
575	Email from Grievant to Supervisor re: posting journals
576-577	Posting journals
578-589	Emails from Grievant to Supervisor re: display budget and various topics
609-612	Short term disability documents
614-623	Scheduling changes
652-654	Work schedules generated by Grievant

### APPEARANCES

Grievant  
Counsel for Grievant  
Agency Representative  
Counsel for Agency  
Witnesses for Agency:  
Witnesses for Grievant:

## ISSUES

### Case #

- 9012: Whether the Group II Written Notice for unsatisfactory performance on September 8, 2008 should be affirmed or rescinded. The Agency alleges that the Grievant has failed to prepare and execute work schedules for employees in a timely and accurate manner.
- 9013: Whether the Group II Written Notice for unsatisfactory performance and failure to follow instructions on September 8, 2008 should be affirmed or rescinded. The Agency alleges that the Grievant did not productively and accurately manage the store inventory. Furthermore the Agency alleges that the Grievant did not follow instructions by the Supervisor to correct inventory errors.
- 9014: Whether there was undue harassment by the agency of the Grievant. The Grievant alleges that since the Grievant returned from short term disability leave, she was repeatedly verbally assaulted and harassed by her immediate Supervisor, causing a hostile and stressful work environment.
- 9015: Whether the “Below Contributor” performance evaluation rating given to the Grievant was warranted. The Grievant alleges that she was evaluate for an entire year for one-time incidences that occurred within that year, non-repeat offenses that have been taken out of context, or being falsely charged.

## FINDINGS OF FACT

The Grievant started working for the agency in August, 2006 as operations manager for the bookstore. Three managers (operations manager, textbook manager, and office manager) in the bookstore were supervised by the bookstore manager. From December, 2006 until August 2007, there was no bookstore manager. During that time, the three managers reported directly to the Agency’s vice-president for business services (“VP” herein).

According to the Employee Work Profile,

The store Operations Manager will be responsible for installing, implementing and maintaining the POS operating system of the Bookstore. The Store Operations Manager will also train and supervise other store employees in their functions in operation with the POS system, including ordering, data entry, receiving, running reports and inventory analysis. The Operations Manager will handle all scheduling needs for the [Agency] bookstore.<sup>1</sup>

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<sup>1</sup>Agency Exhibit 3, page 101

The VP testified that the Grievant had difficulties in fulfilling her job responsibilities. The Grievant was in charge of buying merchandise for the store. The VP testified that the Grievant overbought and the expenses were getting out of hand. The VP froze all purchasing until approved by the VP. Finally, in August, 2007, the buying duties were removed from the Grievant so she could concentrate on her duties of scheduling and inventory management, which included inventory control, reports, and analysis. Problems with the computerized Merchandise Control System (MCS), scheduling, and communication continued throughout her tenure. In November, 2006, the Grievant requested more training on the MCS and was sent for three days of MCS training in Missouri. The problems continued.

In spring, 2007, both the operations manager and the textbook manager applied for the bookstore manager position, and the textbook manager was given the job, and thus became the Grievant's Supervisor in August, 2007. The VP testified that the Grievant was angry and said, "I hope you know that I am out of here," and "I can work with her but I can't work for her."

Under the new Supervisor, the Grievant continued to have problems in scheduling, inventory management and communication. In October, 2007 the Grievant was given a Counseling Memo regarding proper product receiving. In December, 2007, and in April 2008, the Grievant was given Notices of Improvement Needed. In April, 2008, the Grievant had knee surgery and was on short term disability until August 11, 2008. In September 2008, the Grievant was given two Group II Written Notices for problems with scheduling and inventory management. A thirty day improvement plan was initiated.

### Inventory Management

In a Performance Evaluation dated October 12, 2007, the Grievant was notified of several areas that needed to improve in her core responsibilities including improved preparation for inventory, a clear understanding of the inventory process, required reports throughout the process, accurate follow up reports and analysis of those reports, communication of required information to business office and internal auditor, making sound decisions using monthly inventory turns for specific items or classes and monthly beginning inventory, purchases and ending inventory.

The Supervisor testified that in the meeting for the October 12, 2007 Performance Evaluation, she explained to the Grievant that the monthly reports regarding products in inventory there were many errors. When a product was delivered to the bookstore, it was the operations manager's job to match the invoice of the product delivered to the purchase order. Often the product would be entered into the computer tracking system by the bar code (Universal Product Code, "UPC," commonly called "SKU") on the carton of the product. For example, if three cartons of soup were received, the carton SKU would be scanned and the invoice would show that three soups were added to the bookstore inventory. However, each carton may contain 12 cans of soup, so the bookstore actually added 36 cans of soup to the inventory. Furthermore, the SKU on each can did not match the SKU on the box. When the can of soup was scanned at the register, the inventory would reflect the selling of a product not entered into the inventory. Another problem would arise when the product may come in different colors or flavors. For one order, pocket folders in six colors were ordered but were not entered into the tracking system under separate SKUs. Because of these problems, the inventory was inaccurate, often in great numbers. These problems resulted in "negative on-hands," in which reports showed that there was no product of a certain SKU in stock

when there may be many in stock

The operations manager needed to review inventory on hand reports, stock ledger history reports and posting journals and prepare a monthly report for her Supervisor. Furthermore, she was directed to analyze these reports to look for negative on-hands and other errors which could be corrected so that the inventory could be more accurate.

The Supervisor testified that the Grievant did not submit the monthly reports regularly as directed. Furthermore, the reports were not analyzed to find and correct errors. The Grievant testified that she prepared the reports which she placed in a binder on her desk, where the Supervisor could access them, if she chose. The Grievant said she was never asked for any analysis until September 2008. However, the evidence clearly shows that the Grievant was given notice in October, 2007 that the analysis of the monthly reports was required to find errors and correct them.<sup>2</sup>

### Annual Inventory

An annual count of all items for sale in the bookstore takes place on June 30<sup>th</sup>. The VP testified that the annual inventory needs to be accurate. The inventory reports are reviewed by auditors and, if there are too many inaccuracies, could affect the Agency's bond rating. Months of planning are involved. The Grievant was the operations manager during the 2007 annual inventory.

The Supervisor was concerned about the many errors in the system for that inventory. In June, 2007 the Supervisor encouraged the Grievant to read the inventory manual and prepare questions for the next inventory planned for June 2008. In October, and December 2007, the Supervisor listed action items for the Grievant to create an inventory plan and timeline and also reminded the Grievant to read the inventory section of the computer system manual. The Grievant testified that she was told in 2007 to read the inventory section of the computer system manual. Although there were approximately 20 pages in this section, the Grievant testified that she had not read it by March 2008.

In February, 2008, noting that the Grievant had not yet begun an annual inventory plan, the Supervisor requested an outline by February 22, 2008. In mid March, 2008, the Grievant informed her Supervisor that she would be leaving in mid April for knee surgery and would be on Short Term Disability leave for a few weeks. The Supervisor met with the Grievant at the end of March to review the preparation for the annual inventory. When asked what she had done to prepare for the year-end inventory, the Grievant replied, "Not a damn thing."<sup>3</sup> In fact, the Grievant had prepared some inventory instructions which she submitted to the Supervisor in March, 2008. However the instructions were inaccurate, listing personnel that were no longer employees, citing a counting system no longer used, and listing dates from 2006. The inventory was completed in June, 2008 while the Grievant was out on leave. In the process of completing the inventory, the Supervisor found many inventory errors in reports by the Grievant prior to her leave. These errors, mounting to tens of thousands of dollars should have been found and corrected by the Grievant when she analyzed monthly inventory reports in the months prior to her leave. The Grievant complained that the computer system itself was to blame. She said the computer system was out-of-date and the many errors were inherent to the system. The Supervisor testified that the problems were not in the

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<sup>2</sup>Agency Exhibit 8, page 6 of 10, C.c., E.

<sup>3</sup>Agency Exhibit 1, page 20: Email and notes from meeting

system, but in monitoring the system for errors. It was the Grievant's duty to monitor the system, and this she failed to do.

The Grievant returned from leave in mid August 2008. Because of the many inaccuracies found during the inventory, the Grievant was denied access to the inventory control system until a system to monitor her work could be set up. She was again given access to the system in mid September, 2008 after meeting with the Supervisor and the VP. At that meeting, the two Group II Written Notices were given to the Grievant, and a 30-day improvement plan was initiated. On October 21, 2008, a 90-day improvement plan for the Grievant was initiated. The results of that improvement plan were not in evidence for this hearing.

### Scheduling

The Grievant, as operations manager was in charge of scheduling the bookstore personnel, including full-time, part-time, and student employees. The Supervisor testified that the scheduling problems began in 2007. Employees were scheduled to work on their approved days off. Schedules made did offer employee coverage for the hours the bookstore was open. Repeated requests to correct the schedule were not complied with. In December, 2007, in Notice of Improvement Needed, the Grievant was directed to submit a proposed store schedule to the store manager by the 10<sup>th</sup> of each month for the following month so that schedule could be posted by the 15<sup>th</sup> of the month. This directive was followed by the Grievant in January, 2008, but not in February or March. In April, the Grievant was on leave until August. In September, the scheduling problems continued. The schedule did not reflect employees' time off previously scheduled. The Grievant did not submit the proposed schedule to the store manager by the 10<sup>th</sup> of the month. The Grievant testified that, in September 2008, she did not know that the schedule needed to be submitted to the Supervisor by the 10<sup>th</sup> of the month. The evidence dating back to December, 2007, clearly shows otherwise.

### Communications

In the October 2007 The Evaluation rated the Grievant as "Below Contributor" in the Performance Factors area of "Communications" for the use of unacceptable language in the workplace, needing improvement in respect for team members, as well as organization of written communications. On December 18, 2007, when the Supervisor met with the Grievant to review the Needs for Improvement, the Grievant told the Supervisor, this is "Bull %\$#%." When the Supervisor asked her not to use vulgar and abusive language, the Grievant said, This is f#%@ ridiculous." The Grievant then tossed the papers across the table at the Supervisor and left the room. The Grievant admitted in her testimony that this is what happened, but claims she was provoked by the Supervisor's demeanor, insinuations that the Grievant was incompetent, and the accusations of the Supervisor about the errors made by the Grievant. A Group One Written Notice was given to the Grievant at the time of the incident for obscene or abusive language and disruptive behavior. The Grievant also admitted using abusive language with her Supervisor on another occasion.

Appropriate communications problems continued. A Notice of Improvement Needed was given in April 2008, and the Grievant was rated Below Contributor for communications in the October 24, 2008 Performance Evaluation. While testifying the hearing, the Grievant referred to her Supervisor as "head poop." When questioned by the Hearing Officer about the appropriateness of the remark, the Grievant said that she meant no disrespect.

### Performance Evaluation

In a Performance Evaluation dated October 24, 2008 the Grievant was given an overall rating of Below Contributor. She was rated Below Contributor in the individual areas of Performance Management, Special Events and Merchandiser, Reports and Data Management, Interpersonal Relations, Communications, and Planning/Analytical Skills/ Decision Making. Even with the previous poor ratings, notices of needs to improve, and counseling, problems in all of these areas continued as described above.

### Claim of Harassment

The Grievant claimed that since she returned from leave in August, 2008, she was repeatedly verbally assaulted and harassed by my immediate Supervisor causing a hostile and stressful work environment. No credible evidence was introduced to support this claim. The Grievant gave no testimony of anything said by the Supervisor that was verbal assault or harassment. In fact, the Grievant admitted using inappropriate language with her supervisor on at least two occasions and gave no testimony as to inappropriate language on the part of the Supervisor. Fellow employees testified that they had witnessed no harassment, but that the atmosphere in the bookstore was tense, especially when the Supervisor was present. The employees testified that there was noticeable tension between the Grievant and the Supervisor.

The Grievant claimed that the Supervisor was treating her differently than other employees because she had knee problems. She was subject to more scrutiny, asked to do more tasks, and not given the days off she needed to work a second job. While these issues occurred during the time she had knee problems, no link was offered between the knee problems and the issues at work. The problems at work started long before the knee surgery leave in April, 2008. The Grievant was given the leave for her disability. The leave was extended when she had complications. She was given her same job when she returned to work. She was given the time off she needed for physical therapy appointments.

### APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate Supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for

the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

**Policy Number 1.60: Standards of Conduct.**

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Offenses are grouped by levels, from Group I to Group II.. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

The Supervisor issued a Group II Written Notice to the Grievant based the Grievant's unsatisfactory work performance and failure to follow Supervisor's instructions regarding scheduling and inventory management. The Supervisor testified that these problems had significant impact on the agency's operations. The evidence was clear that the Grievant violated the Standards of Conduct by her failures in inventory management and scheduling of employees.

**Policy Number 4.20: Family and Medical Leave**

Policy 4.2 provides eligible employees with up to 12 weeks of unpaid . . . medical leave . . . because the employee's own serious health condition makes him or her unable to do his or her job.

The Grievant was given the medical leave she requested for her knee surgery. When she had complications after the surgery, her leave was extended. When she returned, she returned to the same position she had left.

**Policy Number 2.05 Equal Employment Opportunity**

Policy Number 2.05 provides that all aspects of human resource management be conducted without regard to . . . disability in accordance with the Governor's Executive Order on Equal Opportunity and state and federal laws.

Disability is defined as follows: AAn individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

In this case, the Grievant had knee surgery and was out of work for four months. Upon her return, the Grievant had several appointments for physical therapy. The Grievant claims she was discriminated against due to her absence for knee replacement surgery. No evidence was presented that the Grievant had a impairment which substantially limits one or more of her major life activities. Being out on medical leave for four months did limit her ability to work for four months. Even if that were found to be substantial, the employer made reasonable accommodations for the employee by granting the medical leave and allowing the employee time once she returned to work for her

physical therapy appointments.

**Policy 2.30: Workplace Harassment**

Under Policy 2.30 the Commonwealth strictly forbids harassment of any employee, . . . on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability. The Grievant claimed that the Supervisor harassed her because of her knee problems. No evidence supporting this claim was presented.

DECISION

Case #

- 9012: Whether the Group II Written Notice for unsatisfactory performance on September 8, 2008 should be affirmed or rescinded. This Hearing Officer finds that the Grievant did fail to prepare and execute work schedules in a timely and accurate manner. The agency has proven by a preponderance of the evidence that the Group II Written Notice for unsatisfactory performance was warranted and appropriate under the circumstances. This Hearing Officer further finds that the agency's discipline is consistent with law and policy. This Group II Written Notice issued on September 8, 2008 is **affirmed**.
- 9013: Whether the Group II Written Notice for unsatisfactory performance and failure to follow instructions on September 8, 2008 should be affirmed or rescinded. This Hearing Officer finds that the Grievant did not productively and accurately manage the store inventory and that the Grievant did not follow instructions by the Supervisor to correct inventory errors. The agency has proven by a preponderance of the evidence that the Group II Written Notice for unsatisfactory performance and failure to follow instructions was warranted and appropriate under the circumstances. This Hearing Officer further finds that the agency's discipline is consistent with law and policy. This Group II Written Notice issued on September 8, 2008 is **affirmed**.
- 9014: Whether there was undue harassment by the agency of the Grievant. This Hearing Officer finds that since the Grievant returned from short term disability leave, she was not repeatedly verbally assaulted and harassed by her immediate Supervisor, causing a hostile and stressful work environment. There is no credible evidence that the Grievant was unduly harassed by her Supervisor. There is no credible evidence that the Grievant was given unfair treatment due to her disability regarding her knee surgery. The Hearing Officer finds that the agency's actions were free of unlawful discrimination. The claim of undue harassment is **denied**.
- 9015: Whether the "Below Contributor" performance evaluation rating given to the Grievant was warranted. This Hearing Officer finds the Grievant had a long history of problems in many areas of her workplace responsibilities. The Grievant was not falsely charged. The Grievant had many opportunities to correct the problems outlined. The problems were not corrected. This Hearing Officer finds that the performance evaluation by the agency was not arbitrary or capricious. The "Below Contributor" performance evaluation rating given to the Grievant in the October, 2008 performance evaluation is **affirmed**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject 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** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 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, Main Street Centre, 600 East Main, Suite 301, 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**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Jane E. Schroeder, Esq.  
Hearing Officer