Issue: Group III Written Notice with Termination (failure to follow policy and falsifying documents); Hearing Date: 01/11/16; Decision Issued: 03/01/16; Agency: VDACS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10717; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 03/14/16; EDR Ruling No. 2016-4321 issued 04/08/16; Outcome: Remanded to AHO; Remand Decision issued 04/12/16; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 03/14/16; DHRM Ruling issued 05/12/16; Outcome: AHO's decision affirmed; Attorney's Fee Addendum issued 05/31/16 awarding $2,227.00.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10717

Hearing Date: January 11, 2016
Decision Issued: March 1, 2016

PROCEDURAL HISTORY

On October 22, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy and falsifying records.

On October 26, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 16, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Representative
Witnesses

ISSUES

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 Agriculture and Consumer Services employed Grievant as a Program Support Technician Senior. She had been employed by the Agency for approximately nine years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was assigned a unique badge number for which she was required to use ("swipe") when she drove her personal vehicle into an assigned parking lot and when she entered the Agency's building.

Grievant's scheduled work hours were from 7 a.m. to 4:30 p.m. on Mondays, Tuesdays, Wednesdays, and Fridays. On Thursdays, she worked from 7 a.m. until 11 a.m. She had a 30 minute lunch break. Grievant was a non-Exempt employee under the Fair Labor Standards Act. The Agency was obligated to pay her overtime if she worked more than 40 hours per week.

Grievant typically worked during her lunch break. If she experienced unforeseen delays such as traffic congestion, she would work later than her scheduled shift to "make up the time."

Grievant was a non-exempt employee under the Fair Labor Standards Act. She was entitled to be compensated for working in excess of 40 hours per week. The Agency required her to complete a timesheet using the Time, Attendance, and Leave System (TAL). This system is an online database. Employees use their computers to

enter information into TAL. Exempt employees were not required to complete timesheets because they would not be compensated for working in excess of 40 hours per week.

The Former Supervisor instructed Grievant to complete her timesheet by entering her scheduled hours. Grievant understood this instruction to mean she should enter on the timesheet the time she was scheduled to work regardless of when she actually arrived at work.

Grievant typically completed her timesheet by writing the date and number of hours worked in the day. In the comments section she usually wrote "7 a.m. – 4:30 p.m. (30 min lunch)." She submitted her timesheets to the Former Supervisor who approved them routinely and without objection or comment.

Grievant sometimes left her office and went to the Laboratory located several miles away. She would sometimes go to the Laboratory before beginning her work shift, during her work shift, and at the end of her work shift.

Grievant's Former Supervisor allowed Grievant to work from her home on occasion even though Grievant did not complete a telecommuting agreement. Her actions were not contrary and do not form a basis for discipline. An employee may work away from his or her office on occasion when given permission to do so by his or her supervisor.

Grievant reported to the Former Supervisor for several years. She began reporting to the Division Director in June 2015. He observed Grievant reporting to work at 7:30 a.m. on July 27, 2015. When Grievant submitted her timesheet for the week including July 27, 2015, Grievant wrote 7:00 a.m. in the comments section. Because the Division Director knew Grievant had reported at 7:30 a.m. and not 7:00 a.m. he initiated an investigation.

The Agency compared the dates and times Grievant swiped her badge with the times she wrote on her timesheet. The Agency interpreted Grievant's comment "7 a.m. – 4:30 p.m. (30 minute lunch)" to mean that Grievant was claiming she reported to the worksite at 7 a.m. and left at 4:30 p.m. after taking a 30 minute lunch. The Agency reviewed Grievant's timesheets from November 1, 2014 through January 31, 2015 and June 20, 2015 through August 12, 2015. Based on this review, the Agency concluded there "were a total of 140 hours and 7 minutes of falsified work hours …."[1]

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

[1] Agency Exhibit 1.

disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[F]alsification of records" is a Group III offense.[3] Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

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

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

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

An agency can prove falsification by showing an employee (1) knew or (2) should have known that what he or she was writing was false. The Agency has not established that Grievant intended to falsify her time sheets.

(1) Actual Intent to Falsify. If an employee writes something he or she knows to be false, that employee has falsified a document. In this case, the basis for the Agency's disciplinary action rests on the assumption that Grievant's timesheets were the equivalent of "clock in/clock out" records. In other words, the Agency concluded that when Grievant wrote "7 a.m. – 4:30 p.m. (30 min lunch)" in the comments section of her timesheet, Grievant represented to the Agency that she "clocked in" at 7 a.m. and began working, took a 30 minute lunch break, and then "clocked out" at 4:30 p.m. The Agency measured the times Grievant was located at her office/worksite. The Agency noted discrepancies between the times she was at the office and the beginning and ending of her shift as reflected on her timesheets. The Agency concluded Grievant wrote false information on her timesheets and knew what she was writing was false.

The Agency's claim that Grievant falsified her timesheets fails because the times Grievant wrote on her timesheets were not intended by Grievant to reflect her "clock in/clock out" times. The Former Supervisor instructed Grievant to record her scheduled work hours on her time sheets. He did not instruct her to record the times she began

[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[3] See, Attachment A, DHRM Policy 1.60.

working and stopped working.[4] When Grievant completed her timesheets, she intended to record the number of hours she was scheduled to work during the day and account for any leave taken. In other words, she intended to write that she had worked 9 hours on Mondays, Tuesdays, Wednesdays and Fridays. She wrote in the "Comment" section of the timesheet "7:00 a.m. – 4:30 p.m. (30 min lunch)." She intended to write that she worked 4 hours on Thursdays. She wrote in the "Comment" section of the timesheet "7:00 a.m. – 11:00 a.m." Grievant did not use the timesheets to record her "clock in/clock out" times.

(2) Should Have Known Written Information was False. An agency can prove falsification by showing that an employee should have known that the information he or she was writing was false. For example, if a policy prescribes how information should be written or a supervisor instructs an employee how information should be written, an agency can show that an employee should have known what he or she was writing was false.

In this case, the Former Supervisor instructed Grievant to enter her scheduled hours on the timesheet. This instruction is not sufficient to show that Grievant was instructed to enter the specific time she began and ended work.

Exempt employees do not have to complete timesheets. Non-exempt employees are required to submit timesheets using the TAL system. The purpose of completing timesheets is so that non-exempt employee can account for their hours worked and leave taken. If an employee works more than 40 hours per week, he or she may be entitled to overtime pay under the Fair Labor Standards Act. The focus of a timesheet is to account for hours worked in a day and week. The focus is not to account for clock in/clock out times. For example, if a non-exempt employee reported to work 30 minutes late but worked eight hours on a Monday and listed his hours worked as eight, he would not have necessarily falsified a timesheet simply because he entered his customary start time.

Policies governing timesheets did not inform Grievant that her timesheets were to be used to record the minute she began and ended her work shift. The Agency's Employee Handbook provides:

> Timesheets and leave requests are considered official State documents. Failure to accurately report work hours or use leave appropriately may result in disciplinary actions.

Reporting work hours is not the same as reporting the moment Grievant began and ended her shift.

[4] It would be unusual for Agency employees to begin their shifts at precisely 7 a.m. every day for many months. If the Former Supervisor expected Grievant to record on her timesheet the exact time she began working at her desk, surely he would have recognized that Grievant was not recording exact times and would have mentioned his expectation to Grievant.

Agency Policy 5.10 addresses Record Keeping & TAL:

> Timesheets: All non-exempt employees must complete a weekly TAL Timesheet and must enter their start and end time and amount of time that was taken for their meal break in the comment section. If they consistently worked the same schedule the entire week they only need to enter this information on the first workday of the week unless otherwise instructed by their supervisor. Supervisors must not approve any timesheet that is missing this information. If leave use varies from an approved leave request they must enter an explanation in the comment section to explain the variance.

Agency Policy 5.10 does not specify that an employee must record the precise minute he or she began and ended working on a particular day. Indeed, by permitting employees to enter information on the first workday of the week if the employee worked the same schedule for the entire week is consistent with permitting employees to include estimates of time on their timesheets. This is not consistent with the Agency's interpretation of Grievant's timesheets as a clock in/out record of time.

Agency Policy 5.10 gives examples of timesheets. Examples for ten weeks are shown for an employee whose work schedule began at 7 a.m. On every day of the ten weeks, the employee wrote 7 a.m. in the comments section. If the policy anticipated an employee recording his or her precise time of arrival and departure, the examples would have shown some variance in time because it would be unusual for an employee to begin and end his or her work day at the same time every day.[5]

The Agency also argued that Grievant she falsified her timesheets by reporting that she worked on days and for hours she did not work. The Agency argued that because Grievant could not account for her whereabouts on certain days or hours at a time, she must have falsely reported working when she was not working. This argument is not persuasive. The Agency has the burden of showing Grievant was not working on days she reported hours worked. Grievant's Former Supervisor permitted Grievant to work from home on occasion and required her to perform duties away from her customary work site. She was not required to record where she was working or what she was doing on these days. Expecting Grievant to account for her activities on particular dates occurring nine to ten months earlier is unreasonable.

The Agency has not presented sufficient evidence to show that Grievant knew or should have known that she was falsifying her timesheet when she wrote her scheduled

[5] To be fair, some of the language of the Agency's implementation policy for the TAL system refers to an employee entering start and end times in to the TAL system. These entries, however, would be made into the "comments" section because TAL does not have a query box asking at what time an employee began or ended his or her shift.

beginning and ending times. The Group III Written Notice with removal must be reversed.

Group II Failure to Follow Policy

DHRM Policy 1.25 provides:

> Except with prior approval lunch breaks should not be adjusted to compensate for employees' late arrival or early departure, or to cover time off for other purposes.

Agency Policy 5.10 addresses non-exempt employees and provides:

> Employees who take it upon themselves to work overtime without approval may be subject to disciplinary action. This includes working through the meal break and before or after the normal assigned work schedule.

The Agency presented evidence that Grievant sometimes reported to work late and left early. Grievant often worked through her lunch period. It appears that on several occasions she worked through lunch to "cover for" late arrivals or early departures. This practice was contrary to policy thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Because the Agency removed, Grievant the Hearing Officer concludes that the Agency would have issued a ten workday suspension if it had issued only a Group II Written Notice in this case.

Mitigation

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 Human Resource Management …."[6] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

[6] Va. Code § 2.2-3005.

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 reinstated. 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

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 II Written Notice with a ten workday suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. 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 leave and seniority that the employee did not otherwise accrue. The Agency may reduce the back pay award by a ten work day suspension.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[7]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

[7] Agencies must request and receive prior approval from 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: 10717-R

Reconsideration Decision Issued: April 12, 2016

SUBSTITUTED RECONSIDERATION DECISION

On April 8, 2016, the Office of Employment Dispute Resolution issued Ruling 2016-4321 remanding the grievance to the Hearing Officer:

> However, EDR is unable to determine whether the hearing officer considered and addressed some of the evidence in the record relating to the actual number of hours the grievant worked during the June through August 2015 time period. The stated grounds for the hearing officer's conclusion that the agency had not met its burden on this issue appear to relate to the November 2014 to January 2015 time period, rather than this later period. The agency's record of the grievant's swipes in and out between June and August 2015 indicates that the grievant left the agency's office location between one and three hours before the end of her scheduled work shift on multiple days. The grievant no longer reported to the Former Supervisor at that time, and there is a greater degree of temporal proximity between those dates and the investigation that resulted in the grievant's termination. These discrepancies in the grievant's swipes in and out between June and August 2015, and how they compare with the number of work hours the grievant reported on her timesheets, are not addressed clearly in the hearing decision. It may be that the hearing officer did not discuss the evidence relating to the number of hours the grievant reported on her timesheets during this time period because he did not find that it was sufficient to demonstrate the grievant had engaged in falsification. However, EDR cannot determine whether the hearing officer considered the evidence in the record relating to that time period in making his decision. Accordingly, the hearing decision must be remanded to the hearing officer for further consideration and explanation of the evidence in the record relating to the grievant's reporting of her work hours

between June 20 and August 12, 2015, including the agency's allegations regarding July 27, 2015. (footnotes omitted).

In the Original Decision, the Hearing Officer wrote:

> The Agency reviewed Grievant's timesheets from November 1, 2014 through January 31, 2015 and June 20, 2015 through August 12, 2015. Based on this review, the Agency concluded there "were a total of 140 hours and 7 minutes of falsified work hours …."[8]

The Hearing Officer considered all of the Agency's evidence and the conclusions arising from consideration of the Agency's evidence for the period of November 1, 2014 through January 31, 2015 are no different from the conclusions arising from consideration of the Agency's evidence for the period of June 20, 2015 through August 12, 2015. Grievant did not intend to falsify her timesheets because she intended to comply with the Former Supervisor's instructions to write her scheduled times, not her actual times at work. When Grievant's Former Supervisor left the Agency, Grievant continued to follow the Former Supervisor's instruction because she had not received a new instruction from any manager with the Agency. Grievant's practice was reasonable.

The Agency's evidence regarding June 20, 2015 through August 12 2015 shows that Grievant was not always at her desk within the set work schedule. The evidence showed that she may have been running errands for the Agency or made up time for working through lunch. To the extent Grievant may not have been doing these work-related activities, the Agency's evidence can be interpreted as showing that Grievant was tardy, abused State time, or left work without permission. Tardiness is a Group I offense. Abuse of State time is a Group I offense. Leaving the work place without permission is a Group II offense. The Hearing Officer reduced the Agency's disciplinary action to a Group II Written Notice with a ten work day suspension because Grievant failed to comply with written policy. If the Hearing Officer were to conclude that Grievant was tardy, abused State time, or left work without permission, the Agency's disciplinary action must be reduced to a Group II Written Notice. Given that the Hearing Officer issued a Group II Written Notice for failure to follow policy, having another reason to uphold a Group II Written Notice does not change the outcome of this case.

The Agency asserted that Grievant knew that on July 27, 2015 her arrival time was false and she then attempted to cover her dishonest answer. On July 27, 2015 the Division Director observed Grievant arriving in the parking lot at 7:30 a.m.[9] Grievant submitted her timesheet showing her regular work schedule with a start time of 7 a.m. as instructed by her Former Supervisor. Nine days later, the Division Director sent

[8] Agency Exhibit 1.

[9] Grievant left the parking gate at 4:30 p.m.

Grievant an email saying, "I noticed that your start time on Monday July 27, was 7:00 a.m. …. Is that the correct time?" Grievant said "Yes it is!" Fourteen minutes later the Division Director asked Grievant, "Did you come in the building at 7:00?" Grievant replied, "No". Grievant added, "I contacted [another employee] via my cell phone to let her know that I had left my medicine and would have to go back home and get it." This interaction between Grievant and the Division Director does not show she falsified any documents. The Division Director asked Grievant about her "start time on her timesheet." Grievant's start time on her timesheet was 7 a.m. as it had always been scheduled. When the Division Director asked a more specific question of "Did you come into the building at 7:00?", Grievant was truthful and said "No." Admitting she did not come in at 7:00 a.m. is hardly a cover up.

The Hearing Officer has no basis to change the Original Decision.

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 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 Human Resource Management

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10717-A

Addendum Issued: May 31, 2016

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.[10] 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.[11]

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Counsel submitted a petition showing she devoted 17 hours to representing Grievant. Based on a rate of $131 per hour, Grievant is entitled to reimbursement in the amount of $2,227.00.

AWARD

Grievant is awarded attorneys' fees in the amount of $2,227.00.

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[10] Va. Code § 2.2-3005.1(A).

[11] § 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.

APPEAL RIGHTS

If neither party petitions the DHRM 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 DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, 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