Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 06/04/15; Decision Issued: 06/15/15; Agency: VDOT; AHO: William S. Davidson, Esq.; Case No. 10605; Outcome: Full Relief; **Administrative Review: DHRM Ruling Request received 06/25/15; DHRM Ruling issued 07/24/15; AHO's decision affirmed; Attorney's Fee Addendum issued 08/07/15 awarding $5,816.40.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10605

Hearing Date: June 4, 2015
Decision Issued: June 15, 2015

PROCEDURAL HISTORY

On March 31, 2015, the Grievant was issued a Group III Written Notice for failure to report and conduct an investigation into two separate workplace violence incidents. [1]

On April 1, 2015, pursuant to this Written Notice, the Grievant was terminated. [2] On April 23, 2015, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On May 6, 2015, this appeal was assigned to a Hearing Officer. On June 4, 2015, a hearing was held at the Agency's location.

APPEARANCES

Advocate for Agency
Agency Party
Attorney for Grievant
Grievant
Witness

ISSUES

1. Did the Grievant violate Agency Policy SP #1-005?

2. Did Grievant violate DHRM Violence in Workplace Policy 1.80?

3. Did Grievant violate DHRM Standards of Conduct Policy 1.60?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-

[1] Agency Exhibit 1, Tab 5, Page 1
[2] Agency Exhibit 1, Tab 5, Page 2
[3] Agency Exhibit 1, Tab 4, Page 1

3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 14 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing 26 tabs and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

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[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Agency Policy SP #1-005, Section 6.3.2(3), states as follows:

> Any manager...who becomes aware of an act of violence or threat thereof shall immediately **evaluate** the act or threat and report the threat to their manager. their Local Human Resource Manager and their local security staff... [8] (Emphasis added)

The primary issue before me in this matter is whether or not the Grievant, in his capacity as a manager for the Agency, properly complied with the language of this Policy Section. There was no allegation or evidence that the Grievant committed an act of violence or threatened anyone.

I heard testimony regarding two separate incidents wherein the Agency deems that the Grievant failed to comply with this Policy. The first such incident took place on or about February 13, 2015. On that date, the Grievant convened a meeting of several of his staff members to discuss safety issues. At the conclusion of that meeting, the Grievant asked if anyone had any ideas that they wished to share. Employee A, after everyone was in the process of leaving, stated that he had an idea but that he would discuss it with the Grievant at a later time. Employee D took issue with this and, depending on whose version of the story one believes, used profane language regarding Employee A and pointed out that Employee A always wanted to discuss matters with the Grievant behind closed doors. I heard testimony that the Grievant told the parties to "knock it off." The meeting adjourned and Employee D left the room and walked into a general bay where large equipment was stored. Employee A followed Employee D into the bay area calling Employee D's name several times. At this point, again depending on who one believes, a confrontation took place that included profane language. All parties agree that no touching or physical violence was threatened. All parties agree that the Grievant was not present when the altercation took place.

On March 9th and 10th of 2015, two employees of the Agency interviewed several witnesses regarding this incident. One of the interviewers was the Human Resource Manager and she testified before me. A summary of their findings was introduced into evidence at Agency Exhibit 1, Tab 7, Pages 3-6.

The credibility of all who were actually present and involved in the two incidents and who witnessed these incidents is challenged. In their summary of findings, the Agency set forth brief snapshots of interviews with six people. The first acknowledged that Employee D was cursing a lot. The second, while listed as a witness by Employee A, stated that he was not in the shop at the time, thereby contradicting Employee A. The third stated that he caught the tail end of the confrontation and did not hear cursing. This witness further testified that what he did hear, he thought was joking. The fourth stated that he did hear Employee D "cursing up a storm" and that Employee A is favored. The fifth, Employee D, stated that "it eats at me and everyone that Employee A is a teacher's pet." The sixth, Employee A, indicated that the statement he provided is accurate. [9]

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[8] Agency Exhibit 1, Tab 12, Page 10

[9] Agency Exhibit 1, Tab 7, Page 3

Of some interest, the summary of findings states that [Employee A] reported this incident to immediate supervisor [Supervisor X] by phone call on the afternoon of the incident. It further states that Supervisor X told Employee A to write a statement explaining specifically what was said and to turn it in Monday morning. [10]

Employee A, in his written statement, stated in part as follows:

> Now the incident was eating away at me so I went and informed [Grievant] what had happened. He told me "Document what happened, what all was said, and who was around and we'll take care of it." [11]

Clearly the summary finding of the investigators, wherein they state that Employee A made this report to Supervisor X and Supervisor X told him to put it in writing, conflicts with Employee A's own statement that he went to the Grievant and the Grievant told him to put it in writing.

I believe the correct interpretation is that Employee A made his report to the Grievant and that the Grievant instructed him to put it into writing. [12] The following Monday, February 16, 2015, the Grievant again asked Employee A for his written statement. Employee A told the Grievant that he did not want to produce a statement because he feared it would impair his chances of promotion and that **he did not think his witnesses would back him**. [13] The Grievant told him that was not accurate and that he still needed the written statement. Employee A testified before me that the first person to whom he turned in his written statement was the Residency Administrator, not the Grievant. Employee A testified that he gave his statement to the Grievant the day after he gave it to the Residency Administrator.

The second incident took place on or about February 21, 2015. The crux of this incident was a battery charger that was being recalcitrant. Supervisor X was having a hard time getting it started. He either asked or demanded that Employee C try to cause the battery charger to work. Employee C was successful after Supervisor X had been unsuccessful. Supervisor X and Employee C began to scream at one another and there is an allegation that Supervisor X struck Employee C in the chest. No witness to this incident testified before me. The Agency's summary of findings for this incident was created with interviews taking place on March 9th and 10th of 2015. [14]

One witness who was interviewed but did not testify before me stated that Supervisor X and Employee C had words; Supervisor X grabbed Employee C's jacket; and Supervisor X hit Employee C in the chest and shoved him against the paint closet. A second interviewed witness stated that he heard Employee C say, "don't you ever put your hands on me again." This witness further indicated that he saw Supervisor X shake Employee C's hand and say he was sorry and

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[10] Agency Exhibit 1, Tab 7, Page 4
[11] Agency Exhibit 1, Tab 7, Page 7
[12] Agency Exhibit 1, Tab 7, Page 11
[13] Agency Exhibit 1, Tab 7, Page 11

[14] Agency Exhibit 1, Tab 8, Pages 1-3

that he saw no punches or shoving. None of the other people interviewed added anything further regarding touching. [15]

On February 26, 2015, Employee C, the theoretical victim in the second incident in this matter, gave the Agency interviewers a written statement. In that statement, Employee C states in part as follows:

> ...Few more words was [sic] said but it was more in a joking way the way we always do and then he apologized [be]cause he thought he might have offended me. I accepted it and told him that I knew he was joking like I was. We shook hands and it was over. [16]

On February 26, 2015, Supervisor X provided a statement regarding the incident. In this statement, he stated in part as follows:

> ...During this time a heated argument ensued with tempers flaring and yelling loudly. [Employee E] stepped between me and [Employee C]. I immediately apologized to Employee C and walked outside. After the incident, I apologized to Employee C and he advised me it did not mean anything to him. I notified [Grievant] My supervisor who also spoke to Employee C. [17]

In its summery of findings, the Agency investigators state in part as follows:

> ...The perpetrator and victim shook hands and made up that day. [Grievant] was aware of the incident and talked with them. Neither mentioned any physical contact... [18]

On March 2, 2015, the Human Resource Manager interviewed Employee C in her office. Employee C stated in part as follows:

> [Supervisor X] did not lay a hand on me. He stated that there was some pretty loud yelling and cursing. [19]

The Human Resource Manager specifically asked Employee C if he yelled, "Don't ever put your hands on me again." Employee C stated that he did not say that. Employee C further stated that he thought they were joking around like they always do. [20]

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[15] Agency Exhibit 1, Tab 8, Page 1
[16] Agency Exhibit 1, Tab 8, Page 4
[17] Agency Exhibit 1, Tab 8, Page 8
[18] Agency Exhibit, Tab 8, Page 2

[19] Agency Exhibit 1, Tab 8, Page 8
[20] Agency Exhibit 1, Tab 8, Page 8

During the course of the various investigations, it appears that the investigative members of the Agency recommended that Supervisor X receive a Group III Written Notice for coercion to convince employees to falsify required written statements in order to protect his job. [21] They recommended that Employee C receive a Group II Written Notice for failure to cooperate with an investigation of workplace violence. [22] They recommended that Employee D receive a Group II Written Notice for violation of Agency Policy and DHRM Standards of Conduct.

During the course of her testimony, the Human Resource Manager stated that the Agency had come to simply not believe the statements of Supervisor X and Employee C.

Finally, Employee E is the one employee who was interviewed whom the Agency feels I should trust. On March 1, 2015, Employee E memorialized a phone call he received from Employee A, the complainant in the first incident. Employee E stated that, during this phone call, "[Employee A] told me to remember to say nothing on February 21." He further stated that "[Supervisor X] texted [me] and instructed [me] not to say anything." [23] It would appear that Employee A was a participant in the cabal trying to control what was said, by whom and when. Employee A was one party to the first incident. He testified before me. I do not place great credibility in that testimony.

I have had to spend significant time talking about the two incidents for the sole purpose of trying to determine whether or not they entailed acts of violence or threat. There was a stipulation that in the first incident, there was no act of violence. There was no stipulation regarding the second incident, as the Agency believes a physical touching took place. To reach this conclusion, the Agency has to disbelieve the two parties to the incident itself and the Agency further asks me to disbelieve the written statements of those parties.

For the sake of this Decision, I will assume that something took place at the time of the first and second incident. There is a stipulation that it was not an act of violence in the first incident, and I have no credible evidence that an act of violence took place in the second incident. I have written statements from the two parties to the second incident that deny an act of violence; I have a written statement from a third party who states that there was a touching that took place; and I heard no direct oral testimony from anyone who was present at the second incident to witness what actually took place. Based on the totality of the written statements of the parties involved and the third party who was interviewed, I find, as a matter of fact, that no act of violence took place. Accordingly, SP #1-005, Section 6.3.2, should now be read as follows:

> Any manager...who becomes aware of a threat...shall immediately **evaluate** the threat and report the threat to their manager, their Local Human Resource Manager and their local security staff. (Emphasis added)

[21] Agency Exhibit 1, Tab 8, Page 2
[22] Agency Exhibit 1, Tab 7, Page 4
[23] Agency Exhibit 1, Tab 7, Page 12

The Agency deems profane language to be the threat. It arrives at this position by SP #1-005 Section 6.2.1, wherein it states in part as follows:

> ...Verbal - Voiced threats of violence towards persons or property, making statements reflecting the intent or desire to injure or to kill oneself or any other person, the use of vulgar or profane language towards others, derogatory comments or slurs...intimidation, bullying, excessive criticism or name calling... [24]

In his testimony before me, the Resident Administrator clearly indicated that any report to a manager of any threat needed to be immediately reported. When asked if the reported threat was so minor as one employee being threatened by the color by another employee's tie, the Resident Administrator testified that threat needed to be immediately reported. However, the Human Resource Manager stated that it was incumbent upon the manager to evaluate the threat and that something as minor as a badly colored tie would not warrant nor require the full implementation of the reporting requirements of Section 6.3.2(3).

Miriam Webster Dictionary defines "evaluate" as: to determine the significance, worth, or condition of usually by careful appraisal and study. It cites as an example, a trained assistant to evaluate the needs of the patients waiting to see the doctor. When reading Section 6.3.2(3), the clear meaning of the words is that the manager is to evaluate the threat and, if after evaluation he or she determines that there really is a threat, then to make the appropriate notifications. This is the interpretation that the Human Resource Manager assigned to this Section. Regarding the second incident, there is no dispute regarding the fact that both involved parties told the Grievant that there was no act of violence; that they were joking with one another; and there was no threat, actual or implied.

While an Agency may wish that their employees never use vulgar or profane language towards others, the simple use of profanity clearly cannot be deemed always a threat. It may be crude and it may be impolite and it may not be permissible in church, but many people use profanity in their day-to-day language. Indeed, some people use profanity to compliment others. Based on the written statements introduced by the Agency and based on the Agency's findings of what was told to the Grievant and when it was told to him, I cannot find that the Grievant has done anything other than to make a reasonable evaluation; determine that there was no threat; and determine that there was no need to make a report.

The facts regarding the first incident are more difficult. The Grievant acknowledged that Employee A came to him and stated that he felt threatened and that he had been cursed at during the altercation. Again, there is no evidence of an act of violence in the first incident. The Grievant testified that he instructed Employee A to provide a written statement of what happened and to provide him with a list of witnesses. That would appear to be a reasonable first step in an investigation. Employee A chose to voluntarily not provide such a statement or a list of witnesses. Employee A seemed to think that it would hurt his promotion chances and the Grievant quite correctly pointed out to him that that was inaccurate. Employee A continued to refuse to provide a list of witnesses and finally stated that he was concerned that his witnesses

[24] Agency Exhibit 1, Tab 12, Page 5

would not support his position. This, of course, raises a credibility issue with all of Employee A's statements, both written and those made before me.

Faced with Employee A's refusal to reduce to writing his allegation and his admitted concern as to whether anyone would support what he said, the Grievant went no further with this matter. It was clear that there was no act of violence and, while there well may have been the use of profane language, the evidence seems to be that both parties were cursing. Again, cursing is not a preferred means of doing business, but cursing does not always mean a threat. I find that, based on the facts that were known to him and when they were known to him, the Grievant made a reasonable evaluation of the first incident and did not report that incident, as contemplated by the language of Section 6.3.2(B), and as understood by the Human Resource Manager.

The Agency, in its Notice of Due Process, dated March 25, 2015, spoke about a "zero tolerance policy" when it comes to threats or acts of violence. The inanity of that statement simply defies understanding. A "zero tolerance" to a threat means that, when an employee arrives with a tooth pick in his mouth and another complains that he is threatened by the toothpick, then reporting must commence. A "zero tolerance" equates to "zero evaluation." The Agency has the ability to remove "evaluate" from Section 6.3.2(B). Until it does, I must interpret that language as it is written, not as the Agency hopes.

Having determined that the Grievant has not violated SP 1-005, Section 6.3.2(B), it is clear there is no violation of DHRM Policy 1.60 or 1.80. The Grievant was charged with a failure to report. He can only be guilty of a failure to report if the correct interpretation of policy is that managers have no duty or need to evaluate. Said another way, if it is a subjective test (what the Residency Administration believes), rather than an objective test (what the Human Resource Manager believes), then there was a failure to report. My finding is that the Human Resource Manager is correct. Evaluate clearly indicates that this is an objective standard. I find that the Grievant's evaluation, based on what he was told, not told, when and by whom, was reasonable.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

Because of my finding that the Grievant made a reasonable evaluation and had no reason to report either the first or second incidents, I do not need to address mitigation, pursuant to such evaluation.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter. I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that he have a restoration of full benefits and seniority. I further award attorney's fees for the Grievant. Should counsel for the Grievant desire to recover attorney's fees, he must, within fifteen (15) days of the date of this Decision, file a petition for such fees with this Hearing Officer.

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. 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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[25] 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.[26]

[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]

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William S. Davidson
Hearing Officer

[25] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[26] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 10605

Issued: August 7, 2015

PROCEDURAL HISTORY

A hearing was held in this matter on June 4, 2015, and a Decision was issued by me on June 15, 2015. Grievant's counsel, filed a Petition for Attorney's Fees with me on June 29, 2015 and filed a Supplemental Petition for Attorney's Fees on August 6, 2015. Grievant's counsel certified that, on June 29, 2015, a copy of the Petition was mailed to Scott Woodrum and on August 6, 2015, a copy of the Supplemental Petition was emailed to Scott Woodrum, the Agency's representative.

GOVERNING LAW

Virginia Code Section 2.2-305.1(A) provides in part as follows:

> ...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 attorney's fees...All award relief **including attorney's fees** by a hearing officer must be in accordance with rules established by the Department of Human Resource Management ("DHRM")... (Emphasis added)

Attorney's fees are dealt with at VI(E) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging his discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to his former (or an equivalent) position. My Decision ordered that the Grievant be reinstated to the same position or an equivalent position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency, as is required by the Rules.

OPINION

In his Petition and Supplemental Petition for Attorney's Fees, counsel requested attorney's fees of $17,538. He arrived at this figure by charging $395.00 per hour for 44.40 hours. Counsel filed a Brief with me arguing that the $132.00 per hour rate for attorney's fees set forth by DHRM does not rise to the level of "reasonable attorney's fees" as set forth in Section 2.2-3005.1(A). I will assume that counsel inadvertently misstates DHRM Policy when he states that it allows for compensation in the amount of $132.00 per hour, when in fact it allows for compensation in the amount of $131.00 per hour. Further, pursuant to the language of Section 2.2-3005.1(A), with regards to attorney's fees, I am bound by the rules established by DHRM. Counsel was aware or should have been aware of this rate prior to becoming counsel for Grievant.

I have carefully considered the Petition and the Supplemental Petition for Attorney's Fees and accordingly, will allow counsel for the Grievant to collect attorney's fees of $131.00 per hour for 44.40 hours, for a total award of $5,816.40.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition EDR for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EDR issues a ruling on the propriety of the Fee Addendum, and if ordered by EDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

William S. Davidson
Hearing Officer