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August 18, 2010

Ariya McGrew, Esq.
Agency Representative
U.S. Equal Employment Opportunity Commission
Office of General Counsel
131 M. Street NE, 5th Floor
Washington, D.C. 20507

Neil Bonney, Esq.
Bonney, Allenberg & O'Reilly, P.C.
4854 Haygood Road, Suite 200
Virginia Beach, Virginia 23455

Re: FMCS Case No.: 07-58991
Arbitration of Amy Garber

Dear Ms. McGrew and Mr. Bonney:

I hope you are both doing well. Enclosed herewith, please find my opinion and award regarding the above captioned matter. My fee for services rendered is as follows:

Review of pre-hearing documents and briefs	1 day	$1000.00
April 21 and April 22, 2010 hearings	2 days	$2000.00
April 20, 2010 travel day	1 day	$1000.00
Review of documentation, cases, transcript, preparation of opinion and award	4 days	$4000.00
Travel and lodging expenses		$ 970.40
	Total	$8970.40

Payable by Agency	$4485.20
Payable by Union	$4485.20

Thank you for your consideration regarding this matter. With kindest personal regards, I remain.

Sincerely,

William J. Miller, Jr.
Arbitrator
Fed. ID. 25-1587732

WJM/lk

VOLUNTARY ARBITRATION PROCEEDINGS
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration	(Opinion and Award
	(
Between	(FMCS Case No.: 07-58991
	(
	(Grievant: Amy Garber
United States Equal Employment Opportunity Commission	(
	(
	(Date of Hearing: April 21, 2010
And	(
	(
American Federation of Government Employees, Local 3614	(Record Closed: July 8, 2010
	(
	(Date of Award: August 18, 2010

Representing the Agency:

Ariya McGrew, Esq.
Attorney

John Sherlock, Esq.
Attorney

Representing the Union:

Neil Bonney, Esq.
Attorney

Regina Andrew, Esq.
Attorney

William J. Miller, Jr.
Arbitrator

I. THE GRIEVANCE

Amy Garber, the grievant herein, a Senior Trial Attorney at the Norfolk, Virginia office of the Equal Employment Opportunity Commission (hereafter referred to as the "Agency") was issued a Notice of Proposed Removal. The Notice of proposed removal, issued by the Agency on June 13, 2007, stated the following:

This memorandum is a proposal to remove you from Service and your position as Senior Trail Attorney, GS-905-14, in the Norfolk Local Office of the Equal Employment Opportunity Commission. This proposed action will be effective no earlier than 30 calendar days from the date you receive this notice. This action is proposed because your performance is unacceptable in two of your critical job elements: Quality of Work and Individual Accountability. This action is proposed in accordance with Article 40.0 of the Collective Bargaining Agreement (CBA) and Part 432 of the Office of Personnel Management Regulations.

For FY 2006 you received an Unsatisfactory rating in the two Critical Elements under your Performance Appraisal System plan (hereafter "PAS") (Attachment 1, Garber 2006 PAS) Consequently you were placed on a Performance Improvement Plan (PIP) beginning on January 25, 2007 and ending on April 25, 2007 (Attachment 2, Garber 1/25/07 PIP) The PIP identified specific areas of needed improvement. The PIP also provided specific performance improvements that you were required to demonstrate in order to establish that your performance met the "Proficient" level of performance. The required performance improvements were consistent with the "Proficient" performance standards of the two Critical Elements under the PAS. During the PIP period we regularly met and discussed your performance, at which time you were provided with guidance and feedback. You acknowledged that you understood the guidance and feedback.

You continued to perform at an unacceptable level throughout the PIP period. You exhibited serious deficiencies in the conduct of your litigation. In this regard, your prosecution of cases continued to be inadequate and demonstrated poor analytical skills. You continued to fail to adhere to office protocol in the litigation of your cases. You consistently required close supervision and case management guidance, which reflected poorly on your time management skills and your ability to prioritize your workload. Despite ongoing counseling and guidance as to all of the above during the 90-day opportunity to improve, you have failed to raise your performance to a Proficient level. In support of the proposed recommendation, a review was conducted of your performance up to and including the year preceding the date of this memorandum. Your performance during the period of June 2006 to June 2007 demonstrated unsatisfactory performance.

Critical Element I: Quality of Work

The major activities of Critical Element I are:

Conducts litigation, including preparation of pleadings, motions, briefs, and other court papers; negotiates and drafts settlement agreements; prepares/conducts written discovery and other methods of obtaining factual information; prepares responses to discovery; plans litigation, prepares discovery plans and identifies the need for expert services were appropriate; conducts and defends depositions; conducts trial preparation activities and conducts the trial; and engages in appropriate post trial activities. Provides legal advice and assistance to enforcement including reviews of activities. Provides legal advice and assistance to enforcement including reviews of cause recommendations; prepares determinations on petitions to revoke or modify subpoenas, formal and informal legal opinions on casde processing, represents Commission employees called to testify in third party litigation; provides assistance on subpoenas and file disclosure requests. Prepares Memoranda for the Regional Attorney, Office of the General Counsel or the Commission such as Presentation Memoranda, Settlement Justifications and Recommendations on Appeal. Communicates through the appropriate medium with Commission staff and others.

Proficient Performance Standard:

This is the level of good sound performance. The quality of the employee's work under this element is that of a fully competent employee. The employee typically performs as follows:

The Commission's litigation is conducted in an appropriate and effective manner; cases are actively litigated to attain and retain prosecutorial initiative. Cases are litigated in a manner consistent with the goals of the National and Local Enforcement Plans. Employs advocacy skills effectively. Demonstrates sound judgment with respect to litigation planning and development. Case settlements provide appropriate relief for affected individuals and eliminate unlawful employment practices. Provides appropriate and effective assistance and advice in support of Enforcement case processing as prescribed by the National and Local Enforcement Plans. Work reflects an understanding of the legal and factual issues involved as well as knowledge and correct application of all relevant rules, regulations, statutory and case authority, and published Commission guidance. Work products candidly present the factual and legal strengths and weaknesses of the case; are well organized, clear, and concise; conform to applicable directives as to require format and content; and discuss coordination with the National and Local Enforcement Plans. Employee's communications are clear, concise, well organized and well suited for the purpose and subject matter. Employee's technical skills are applied effectively to individual work prepared.

Performance Deficiencies:

The quality of your work from June 2006 to present, reflects serious performance

deficiencies. While at times you have demonstrated Proficient performance on certain tasks, you have been unable to consistently sustain your performance at the Proficient level. The following is a summary of your performance wherein you have failed to fully meet the requirements of the Proficiency standard for a GS-14 Senior Trial Attorney as reflected in the PAS. The areas of deficiency include, but are not limited to, preparation of pleadings, motions, briefs; negotiating and drafting settlement agreements; preparing, responding and conducting discovery; litigation strategy and planning; and preparing and providing analytically sound legal advice and assistance to enforcement.

a. Litigation

The prosecution of your cases did not meet the Proficient level under your PAS or the PIP, and is below the expected standards for a GS-14 Senior Trial Attorney. You did not consistently conduct your litigation in an effective manner which consequently placed the Commission at a prosecutorial disadvantage. Your litigation required constant oversight by legal management. Moreover, your written work required more input and editing from the Supervisory Trial Attorneys (STAs) and Regional Attorney than should be necessary at your grade level. Your analytical skills lacked clarity, succinctness, persuasiveness and demonstrated a questionable understanding of the legal issue involved in your cases. Your writing was plagued with typographical, structural and analytical deficiencies. You made representations in your cases which were not supported by the record. Once presented with evidentiary discrepancies, you failed to recognize the legal and ethical import that such discrepancies presented. Examples of your performance deficiencies in litigation are described below.

During the period June 2006 to June 2007, you were responsible for litigating five cases; Maersk, Days Inn, Burlington Medical, Carolina Steel & Stone, and Wholly Guacamole. Additionally, you had assigned to you one potential contempt action, Community Services of Virginia, Inc. These cases did not present novel or complex subject matters.

Maersk was filed at the conclusion of fiscal year 2005. The lawsuit alleged that Charging Party, who is Arab-American, was terminated from his position as a Seaman and not rehired in retaliation for his complaints of national origin harassment. You engaged in inappropriate and ineffective litigation of this matter. Specifically, you provided your draft discovery responses to me for review and I returned the draft to you with my comments and revisions (Attachment 4, Spicer 5/26 fax) You did not revise the discovery responses in accordance with my comments and instructions. (Attachment 5, 6/23 Discovery Responses.) In contraventation of legal unit procedures, while I was on vacation you served discovery responses to Defendant's First Request for Production of Documents which had not been approved by legal management. (Id) You also served EEOC's Request for Admissions and a second set of Interrogatories and Request for Production of Documents while I was on vacation, which had not been discussed with, review by or approved by legal management. (Attachment 6, July 7 discovery requests). The response to Defendant's discovery request that you produced on June 23, 2006

created discovery disputes which could have been avoided or minimized had you not identified witnesses who possessed inconsequential information to the issue of EEOC's damage claim (discussed further below). Initially you offered performance rating, you proffered that you had never been required to provide discovery for legal management review in advance of service on Defendant. (Attachment 7, Garber PAS response) Your representation is in direct conflict with the Regional Attorney's Deadline Protocol which was issued in February 2006 and discussed with you soon thereafter. (Attachment 8, 2/16/06 Deadline chart) Notably, I had just recently reviewed the objections for the discovery, which had been served during the previous month. When we met in July 2006 to discuss your performance deficiencies, you were instructed to follow Legal Unit protocols.

In Maersk you failed to promptly notify legal management of a subpoena served on a Charging Party. (Attachment 9, 6/14 Subpoena to Charging Party) The subpoena required Charging Party to produce photographs, arrest and conviction records, passports and medical records (Id) During our discussions regarding Charging Party's sudden failure to cooperate with the EEOC in the litigation, you never mentioned that he had been subpoenaed. Thereafter, in my absence, you advised STA Burnside that you were having difficulty scheduling Charging Party's deposition because he was upset by the subpoena requests. Notwithstanding, you were not alarmed about the subpoena request. You had to be given explicit instructions on how to proceed. (Attachment 10, 6/22 e-mails) Although the subpoena on its face raised significant issues of relevancy, your justification for not opposing the subpoena was that you believed that Charging Party did not currently have any responsive documents in his possession. You were reminded that Federal Rule of Civil Procedure 45 requires the person to whom the subpoena is directed to produce documents not only in the person's possession but also in their custody or control. Moreover, this litigation a strategy did not recognize the need for the EEOC to seek to quash the subpoena because it sought, in part, irrelevant and harassing information from the Charging Party. Although you engaged in detailed discussions with STA Burnside about what should be the EEOC's written response, your draft brief did not directly address the factual and legal matters at issue. Moreover, the draft brief contained no supporting case law. (Attachment 11, Garber draft Motion to Quash) STA Burnside and the Regional Attorney finalized the brief for filing.

You also prepared a draft brief to quash the subpoena served on one of the Charging Party's doctors, Dr. Kaza. The brief was not appropriately modified to address the issues presented by the subpoena served on Dr. Kaza. According to your email transmitting the brief, you merely substituted Dr. Kaza's name for Charging Party's name as it appeared in an earlier prepared brief without modifying the brief to directly address the factual and legal issues raised by the Kaza subpoena. (Attachment 12, Garber email and draft Motion to Quash Kaza Subpoena). You failed to recognize the issues raised by the Kaza subpoena as being significantly different from those raised by Charging Party's subpoena. When discussing your draft motion to quash the Kaza subpoena with legal management, you presented conflicting justifications for your actions (Incorporating by reference Garber August 4 Memo, Attachment 13)

When Defendant sought an independent medical examination (IME) of Charging Party, you initially attempted to facilitate Defendant's request that Charging Party submit to an IME under Fed. R. Civ. P. 35 by asking his attorney whether he would do so. (Attachment 10) You did not recognize the Commission's disfavor of IMEs where there are claims of "garden variety" emotional distress. You did not recognize the case law that exists to protect a plaintiff from IMEs in "garden variety" emotional distress cases. You also did not recognize the need to file the motion even if there was a possibility that the court would not agree with the Commission's position. After Legal Unit management directed you to oppose the request, you written opposition memorandum required significant input and revision by legal management. (Attachment 14, Maersk draft Rule 35 Opposition) in sum, you failed to be a strong advocate for the Commission and the Charging Party in Maersk with respect to the subpoena and IME.

You also caused an unnecessary expenditure of time and energy by yourself, legal management and possibly the Charging Party, in the matter related to Charging Party's criminal conviction. Information that you provided in your early analysis of the significance of Charging Party's criminal conviction later became inconsequential. In dealing with this issue, you expended and caused legal management to expend, an inordinate amount of time on something that should have been a non-issue for the Commission (Attachment 15, Garber 6/13 emails)

While Maersk ultimately resolved for $20,000, it did so only after much effort and significant input from and revision by me and the Regional Attorney. Moreover, during the Maersk settlement discussions with Legal Unit management, you were willing to accept any offer made by Defendant, which is contrary to effective advocacy (Attachment 16, Garber 9/12 email)

Days Inn was filed at the conclusion of fiscal year 2006. The suit alleged that the two Charging Parties were subjected to a sexually hostile work environment by their General Manager. You did not litigate this case consistent with your discovery and work plans. (Attachment 17, Days Inn draft Discovery Plan and 10/23 Case Conference Report) You prepared Initial Disclosures which I reviewed and we discussed during my November 2006 visit to your office. (Attachment, 18, Days Inn draft initial disclosures). You identified potential witnesses whom you had not interviewed and/or whom had not provided a statement indicating the facts known to the witness. I explained to you the strategic pitfalls of identifying witnesses to Defendant whom you do not know what relevant testimony they can offer, if any. Specifically I informed you that you needed to remove (the name of these witnesses) and supplement later, if it proved relevant, so that we did not have a repeat of the discovery concerns which arose in Maersk.

On November 21, 2006, you sent me EEOC's first set of discovery requests that you had drafted. I was on travel and did not receive the documents until the next day. You had asked that I review and return the requests on November 22, the day before Thanksgiving. (Attachment 19, Days Inn draft discovery) I responded that I needed more than a day to review the documents, but that I would likely review and return the documents on November 27. (Attachment 20, Spicer 11/22 email) On November 27, I

forwarded to you my comments and revisions. However, you did not serve the discovery requests until January 8, 2007. When you were questioned by the Regional Attorney during your January 11, 2007 case conference regarding what had been the delay, you offered no explanation.

During your January 11, 2007 case conference, you also indicated that the Charging Parties depositions, held on January 8 and 9, had not gone well. You indicated that the Charging Parties had provided testimony that was different from what you had expected. The Regional Attorney probed further, advising that you had told her something similar in Kempsville, Maersk and now again in Days Inn, that is thee Charging Party(ies) had provided testimony that was a surprise to you. The Regional Attorney indicated that she was concerned about his repeated revelation from you because it indicated that you may not be properly preparing Charging Parties for their depositions. You responded that you generally did not prepare Charging Parties for depositions, beyond explaining what the deposition proceeding was about. You indicated that it was your general practice to speak with Charging Parties on the morning of their deposition and counsel them on the logistics of a deposition. The Regional Attorney and I informed you of the inadequacy of this practice, the vital nature of deposition preparation, and how failure to prepare Charging Parties their depositions had resulted in these "surprises" during their depositions. In essence, you had not been adequately and thoroughly preparing your Charging Parties for their depositions resulting in the Charging Parties providing testimony that damaged EEOC's litigation.

On January 8, 2007, you also sent out a 30(b)(6) deposition notice which was not submitted to me or any other legal manager for review. (Attachment 21, 30(b)(6) Notice to Days Inn) You had previously been cautioned in Maersk not to serve discovery which had not been discussed, reviewed and/or approved by a manager. Some of the information requested in the notice was irrelevant to the litigation. Apparently responding in kind, Defendant served upon the EEOC on January 12, a 30(b)(6) deposition notice which also included requests for testimony that was irrelevant to the litigation. (Attachment 22, 30(b)(6) from Days Inn) Because EEOC had served irrelevant discovery requests, we were put into a difficult position of having to object to Defendant's irrelevant requests. It is important to note that the cross deposition notices was not known or disclosed to legal unit management until January 24, 2007, nearly two weeks after service of Defendant's 30(b)(6) notice on EEOC. On that date (January 24), you sought guidance regarding who to designate for the 30(b) deposition which was scheduled for six days later, on January 30. You were again cautioned against serving discovery which had not been reviewed by your supervisor or another legal unit manager, and you were again instructed that it was your responsibility to timely call to management's attention all matters which required a substantive response from the Commission. (Attachment 23, Barnes 1/24 email) The Regional Attorney and I provided you with specific guidance regarding how to address and respond to Defendant on this matter.

Notably, during your interactions with defense counsel on this matter, defense counsel represented that the EEOC Investigator who investigated the charge had made a

biased comment which Defendant claimed tainted the Commission's investigation and prosecution of this litigation. You were willing to accept Defendant's representations, by arguing with me about the importance of same, without as much as discussing the allegation with the Investigator to determine what had transpired. Moreover, I had to explain to you why, even assuming arguendo that the accusation was true, it was of no consequence because the litigation is de novo. Despite our discussion on how to address this matter in a responsive letter to defense counsel, your draft responsive letter to the 30(b)(6) notice did not directly respond to the issues raised. STA Burnside worked with you, in my absence, on an appropriate responsive letter (Attachment 24, 1/29 letter)

On January 24, 2007, you were served with Defendant's Motion for Summary Judgment and supporting Brief. The responsive brief was due to be filed on February 6, 2007. Since I was going to be in training the week of January 29, you were to work with STA Burnside on the opposition brief. On January 25, when STA Burnside and I inquired about your opposition strategy, you indicated that you had not yet read Defendant's Brief, but were pulling the case cited therein, i.e., without first having read and understood the arguments being made by Defendant in the brief. Notwithstanding, you were provided with appropriate guidance on how to proceed. I emphasized that you should outline the arguments that you intended to make in EEOC's responsive brief. We agreed that you would provide a draft response on the evening of Thursday, February 1 (Attachment 25, Days Inn 2/1 draft Opposition) In your cover email submitting the draft response you indicated that the argument section was incomplete. The Charlotte District Office where STA Burnside is stationed, was closed on February 1, 2007 due to inclement weather, and I was in training. Consequently, the draft was not reviewed until Friday, February 2. At that time, STA Burnside sent to you written comments and revisions. The three of us converted about the draft and you were proviced with page by page instructions on how to improve the accuracy and persuasiveness of the brief. It was agreed that you would provide the revised draft on the afternoon of Monday, February 5. The brief still needed to be reviewed and approved by the Regional Attorney. The February 5, 2007 draft did not address and remedy the deficiencies outlined in the February 2 email from STA Burnside and discussions between you, me and STA Burnside. (Attachment 26, Days Inn 2/5 draft Opposition) Consequently, on February 5, the day before EEOC's opposition brief was due for filing, STA Burnside and I personally reviewed the brief. This revision by me and STA Burnside on the eve of the filing deadline was occasioned by your failure to revise the brief in accordance with the instructions given to you previously by the STAs. This last minute revision by the STAs had the added effect of causing me to have to delay the start of Richmond's case management meetings for which I had traveled to Richmond. Moreover, the Regional Attorney had inadequate time to review and approve the brief.

Additionally, as appeared in your original draft, the final brief referenced affidavits from the Charging Parties, which while requested, were never provided to legal management prior to filing. On February 9, 2007 after reviewing the affidavits (post filing), the Regional Attorney and I discussed with you the technical and substantive deficiencies within the affidavits. Namely, the form was not that of an affidavit (although the document was entitled "affidavit"), but rather was the form of a declaration and the

affidavits added little if any, substantive value to the fact section they were intended to supplement. Finally, the brief cited to incorrect paragraphs in the affidavits, a task for which you were responsible (Attachment 27, Days Inn affidavits).

Defendant filed a Motion in Limine to exclude certain categories of Charging Parties' testimony and seeking a declaratory order that the EEOC stood in the shoes of the Charging Party. The EEOC's opposition brief was due to be filed on March 5, 2007. You advised that you would have a draft to me on March 1. I did not receive a draft until March 4, the day before the deadline for filing. Because of your tardiness in providing me the draft for review, I had to delay travel scheduled for March 5 to the Richmond Local Office, in order to have time to review and return your draft brief for finalizing. Most significantly, while the revised brief was returned to you for filing on March 5, before the filing deadline, you did not file the EEOC's opposition brief on this date. Rather, you filed it the next morning. Moreover, you failed to notify me or the Regional Attorney of your failure to timely file EEOC's opposition brief. In fact, legal management did not learn of this grave matter until March 9, 2007, four days after you missed the filing deadline. Between March 5 and March 9, you and I had been in regular contract by phone and in person.

On March 9, 2007, you informed me that the opposition brief had not been timely filed as you and I were preparing to depart for the courthouse for a hearing on Defendant's Motion for Summary Judgment. I inquired if Defendant had filed a Motion to Strike. You responded that Defendant had and that you were served with the Motion to Strike on March 7, 2007. You offered no explanation as to why the brief had not been timely filed or why you had not immediately advised legal unit management of these developments. Additionally, while we agreed that the Opposition to the Motion to Strike needed to be filed in advance of the Final Pretrial Conference when the Motion to Strike would be addressed by the court, you did not file it until the morning of the Final Pretrial conference.

Your failure to timely file EEOC's brief in opposition to Defendant's Motion in Limine put the EEOC's litigation in jeopardy. First, Magistrate Miller ruled that he would strike the Commission's opposition to Defendant's Motion in Limine because it was untimely filed and the Magistrate noted from the bench that this was not the first time that the Commission had filed a brief or discovery late. When I later asked you about Magistrate Miller's comment, initially you responded that you did not know what matter he was referring to. I asked if Judge Miller could have been referring to GA Hoffler (Attachment 13), a lawsuit you handled in which the court dismissed the Commission's claim based on your failure to provide the court with information requested by the court. You responded that you did not believe Judge Miller was referencing GA Hoffler. You said that Judge Miller had not presided over the GA Hoffler matter. I told you that you should not be surprised by the fact that Judges confer about cases and counsel. Later you stated that Judge Miller must have been referring to the Motion to Compel filed against the Commission in Kempsville Building Materials, which resulted from your failure to timely respond to Defendant's discovery requests. In that matter, the court had sua sponte threatened EEOC with sanctions. (Attachment 13).

As we discussed on April 4, your actions in missing the filing deadline and failing to inform legal unit management not only demonstrated unacceptable performance, but also poor judgment. (Attachment 28, 4/3 memo).

Defense counsel for Days Inn approached you about possible settlement in January 2007. On February 15 you forwarded a draft Consent Decree to me for review. You were en route to a deposition and asked that I review and fax my comments/final version to Defendant's office. My review of the draft revealed that you had not accurately modified the Consent Decree model. (Attachment 29, Days Inn 2/15 draft Consent Decree) After your deposition, I explained that the draft contained numerous errors which I returned to you for correction. During subsequent settlement negotiations you advised me of Defendant's position, without making any recommendations. In essence, you simply sought my guidance as to how to negotiate the case. I provided you with instructions on how to proceed during the negotiations. A mediation was held in Days Inn, on March 19, 2007, which I attended with you. You were asked to provide an opening statement advising Defendant why it should settle. You did not provide a thorough response. The Court's mediation conference adjourned and the parties met in EEOC's office to engage in continued mediation discussions. Defendant advocated a number of revisions to the Commission's draft consent decree which I advised were unacceptable. During the discussions at the conference held after the mediation you took it upon yourself to begin to explain to me opposing counsel's position, so as to lend support to it. I immediately advised you that I clearly understood opposing counsel's position, however, the Commission was not in agreement. Your role as advocate for the Commission is to competently present the settlement guidelines and policies of the agency. It is not your responsibility to act as a conduit for Defendant's settlement agenda. As co-counsel, sound judgment would have directed you to respectfully ask to speak to me in private if you believed that I was taking a position which was inconsistent with Commission policy or was not in the best interest of the agency. However, neither of these were the case. As we discussed on April 3, your actions not only demonstrated unacceptable performance but poor advocacy. (Attachment 28)

You drafted a press release announcing the settlement of Days Inn. You failed to have the press release reviewed by a manager before you forwarded it to the Office of Communications and Legislative Affairs (OCLA). When I asked you why you had not sent the press release to the Regional Attorney, you offered no explanation. My review of the press release draft (post submission to OCLA) showed that you had me listed as the contact person, when the Regional Attorney is the contact on all litigation related press releases. This is not new information to you in that you have prepared press releases in the past. Moreover, OCLA questioned the reference to Maersk in the draft, since the case at issue was Days Inn. I advised OCLA that it was a typo. I instructed you to remove the reference to Maersk and to list the Regional Attorney as the press contact (Attachment 30, Lisser 3/30 email and Spicer response).

Burlington Medical was transferred to you in October 2006 for litigation. The suit alleged that Charging Party and a class of female employees had been subjected to sexual harassment by the company's owner and a manager. You did not prosecute this

case as set forth in your discovery and work plans. (Attachment 31, Burlington draft Discovery Plan and Case Conference Report) Discovery issues arose which could have been avoided and or minimized through effective litigation planning and management. Namely, we worked on the initial pretrial disclosures during my December 2006 visit to your office. After I left your office and traveled to the Richmond Local Office, you sent an email to me advising that you needed to file objections to Defendant's discovery responses that next day. You stated that you had forgotten to mention this during my visit. (Attachment 32, 12/13 email) Proper litigation planning would have alerted you that the EEOC's objections to defendant's discovery responses needed to be served prior to the day that they were actually due to go out. Again, my scheduled visit to the Richmond Local Office was interrupted due to the need created by your last minute submission of work to me for review. I reviewed the objections and returned them to you during while participating in Richmond's case management meetings (Attachment 33, 12/14 fax) You prepared discovery requests which I reviewed and returned to you on December 28, 2006. You did not serve the discovery until January 8, 2007. You offered no explanation during your January 11, 2007 case conference for the delay.

The need to quickly identify class members in the Burlington Medical case was discussed with you by the Regional Attorney and me during your October 23, 2006 case conference. It was explained that the need was critical due to the existence of EEOC's pattern and practice harassment claim. Additionally, you outlined the need for class identification in your discovery plan. (Attachment 31) However, during your January 11, 2007 case conference with the Regional Attorney, it was discovered that you had made no real effort to identify potential class members. Specifically, on January 3, 2007, Defendant objected to having to go through you (as a representative of the EEOC) to make contact with potential class members. This issue was discussed during the January 11, case conference and it was determined that you had not taken steps to identify the class members. You were therefore provided with direction and guidance on how to respond to Defendant's objection. The draft letter responding to Defendant's objection was finalized on January 12, 2007. (Attachment 34, Spicer 1/12 email) As part of that instruction, the Regional Attorney and I again discussed the need for you to identify the class members immediately in order to establish a relationship that EEOC could argue was protected by the attorney-client or common interest privileges. You indicated that you would be working on identifying the class. (Attachment 35, Garber 1/12 email) Despite your assurances during case conferences and on your discovery plan that you would diligently work to identify class members, you failed to do so until specifically instructed to do so as the result of another issue raised in the litigation near the close of discovery (See below).

Further discovery discrepancies occurred during the arrangement and preparation for Charging Party's and the two identified claimants' depositions. You had agreed to deposition dates for the Charging Party and the two identified claimants for the week of February 12, 2007. As of February 8, 2007, you had not worked cooperatively with the Norfolk Legal Technician to make adequate travel arrangements. The witnesses had not been prepared for their depositions, and there were no prep sessions scheduled between February 8 and February 12. You were instructed to reschedule the depositions to allow

you ample time to make travel arrangements, obtain travel authorizations and prepare the witnesses for their depositions. Prior to this incident you had previously been cautioned in Maersk and Days Inn about not following established procurement requirements. Notwithstanding, there were irregularities with the procurement documents. It was discovered that you were taking depositions without an approved purchase order. When the Regional Attorney inquired how this had occurred you blamed me by stating that I was responsible for working with the Legal Technician to ensure that the purchase order was in place prior to you taking the depositions in question. You failed to acknowledge that I was only working damage control on February 15 with the Legal Technician (trying to get the appropriate purchase order in place) because you had failed to provide adequate information for the documents to be prepared in a timely manner. As to the responsibility for ensuring that you had a purchase order in place prior to taking the depositions, you failed to do so. I had advised you on the afternoon of February 15 of the status of my work with the Legal Technician on procurement of the purchase order, and what still needed to be done because February 16 was my scheduled day off.

You contacted me on February 16, 2007 to inquire whether I could prepare Charging Party for her deposition. You were to participate by phone. I arranged to meet Charging Party in the Baltimore Field Office on February 20. You did not participate in the full preparation session. After Charging Party left the session, I expressed to you my concern with her prep session and advised you that Charging Party was not familiar with the relevant facts of the case. Charging Party had advised me that she had only had limited communications with you, which you agreed was true. This failure to communicate with the Charging Party was in direct contravention of instructions that I had given you previously. Specifically, you and I had discussed, during the litigation of Days Inn, that you needed to make contact with Charging Parties early and often to get them comfortable talking about the alleged discrimination.

Significantly, after Charging Party's deposition on February 22, 2007, you indicated that Charging Party had provided conflicting testimony and that the one claimant, who had testified to date, had not described incidents that rose to the level of actionable sexual harassment. When I inquired, you informed me that there were no other claimants. You convincingly expressed to me that it was your belief that based on these depositions, EEOC should withdraw from the case. I advised you that I would set up a teleconference with the Regional Attorney to discuss your recommendation. I also told you to continue to actively prosecute the case.

After the second claimant's deposition on February 26, 2007, we spoke with the Regional Attorney about the case. The Regional Attorney expressed grave concern regarding how the facts developed during the litigation from our Charging Party and claimants, were almost wholly inconsistent with those set forth in the Notice of Intent (NOI) submitted to the Office of General Counsel (OGC) for litigation authority for the case. Upon questioning, you provided conflicting responses regarding your litigation efforts in this case. It turned out that the credibility issues you raised were not germane to the burdens of proof in this case. Moreover, the claimants provided more evidence of a sexually hostile work environment than you had initially represented. You had also

stated that there were no other claimants. Further discussion revealed that you had not undertaken any additional efforts to locate potential claimants or to interview the potential claimants identified in the NOI, despite the instructions to you by me and the Regional Attorney during case conferences in October 2006 and January 2007. With just two weeks left before discovery closed, we had to pull together resources to contact potential claimants. I worked with you and two Paralegals to identify potential claimants.

On March 12, 2007, you were served with Defendant's Motion for Summary Judgment. The opposition brief was due to be filed on March 26. It was agreed that you would have the draft to me on March 22. I received the draft on the afternoon of March 23 and the declarations that evening. (Attachment 36, Burlington draft Opposition and declarations) Your draft needed major restructuring and revision. On March 24, I provided you with comments and revisions. To assist in getting the brief to the Regional Attorney in adequate time for her to review, I revised the legal section. Since you had scheduled yourself to be in depositions on the day the brief was to be filed, the task of final editing fell on me. At the summary judgment hearing on this matter, which I attended, you did not make a clear and persuasive argument. On three occasions you lost your train of thought.

Carolina Steel and Stone was approved for litigation on the Notice of Intent submitted by another Trial Attorney and assigned to you for litigation on March 9, 2007. The complaint and other initiating documents were prepared and forwarded to you for filing. You were instructed to file the lawsuit no later than March 15, 2007. I followed up with you on March 28 regarding the delay and instructed you that the filing had to be done before the end of the second quarter, March 31, 2007. Eventually you admitted that you could not locate the filing documents which had been forwarded to you earlier in the month. I sent the documents to you again. (Attachment 37, Garber 3/28 emails) Thereafter, you realized that you could not file on March 28 because you had not completed the electronic case filing requirements for the district court that the case was to be filed in. You stated that the Regional Attorney had not instructed Virginia Attorneys to register in the Western District of North Carolina. (Attachment 37) Consequently, the suit was filed on March 29, 2007. Effective litigation planning could have avoided these delays. Finally, to date you have not prepared a discovery plan in accordance with the requirements of your PIP and case conference report.

On March 12, 2007, you were advised that the Wholly Guacamole suit had been authorized for filing. Due to competing deadlines in Days Inn, you were instructed by the Regional Attorney to advise her on March 14, 2007, when you expected to file the lawsuit. (Attachment 38, Barnes 3/12 email) I advised you that the Regional Attorney wanted the case filed by the end of the quarter, that being by March 31, 2007. Upon receiving no response from you, the Regional Attorney again inquired on March 30, 2007, about when the suit would be filed. You were reminded that it was expected that litigation be filed within 30 days of suit authorization. Since you never specified a date when you intended to file the Wholly Guacamole suit, the Regional Attorney requested that the draft complaint be submitted to her by April 13, 2007. (Attachment 39, Barnes 3/30 email) You submitted the draft filing documents and press release to me on April 2,

advising that they were ready for filing. (Attachment 40, Garber 4/2 email) The drafts needed revising. In order to meet the Regional Attorney's deadline I proofread and edited the complaint and press release and forwarded those documents to the Regional Attorney myself. On April 10, 2007, the final complaint to be filed was returned and you were instructed to file the complaint on April 11. You were unable to file the complaint until April 12, 2007. Upon filing the lawsuit you forgot to inform the Regional Attorney of the filing, as she had instructed you, so that she could simultaneously issue the press release at the time of filing, which you know to be the district's practice. Moreover, you did not meet the filing requirements of the court in that you failed to file a civil cover sheet, which I learned of when I received electronic notification of the deficiency. (Attachment 41, Wholly Guacamole 4/13 notice) When I asked you the following week, about whether you had corrected this error you said "yes and no" because while you had forwarded the civil cover sheet, it had not yet been electronically filed. Since the answer was actually "no" I directed you to correct this omission immediately. Finally, as with Carolina Steel and Stone to date you have not prepared a discovery plan for Wholly Guacamole, in accordance with the requirements of your PIP and case conference report.

In Community Services of Virginia you were advised that Defendant had not complied with the non-monetary components of the Consent Decree. You were instructed to take action on this matter, specifically to file a motion for contempt before the term of the Decree expired. However, the Decree which you had previously drafted did not contain a expiration term provision. (Attachment 42, CSV Decree) Notwithstanding you were instructed to take action based on the obligation of the Defendant under the Decree. On October 26, 2006, you sent defense counsel a letter advising him that if Defendant did not comply with the provisions of the Decree that the Commission would seek redress in court (Attachment 44, approved draft of 10/26 letter) To date, contempt proceeding has not been initiated and Defendant has not met the requirements under the Decree.

As set forth in your position description and PAS, you should be able to exercise independent responsibility over the significant components of your litigation and exercise sound legal judgment. You have failed to consistently demonstrate this ability. Only with constant and deliberate supervision in your cases were litigation matters handled appropriately and thoroughly. As a GS-14 Senior Trial Attorney, you are expected to take the initiative in your cases and advise legal management of your anticipated litigation plan and strategies, rather you seeking continual guidance on the next course of action to undertake. While you sought and regularly received guidance, this guidance is not consistently incorporated into your litigation practice.

b. Legal advice and assistance

You often failed to meet the established time frames set for moving enforcement files through your inventory. Moreover, significant input and revisions are required on your administrative assignments. Your work requires close review by me, including review of such mundane information as the charge number, office and manager, issues and basis, and prima facie elements. You often failed to correctly set these forth.

Examples of your performance deficiencies in providing legal advice and assistance are described below.

Litigation Determinations that you prepared required material rewriting in order to produce a written work product that was factually and analytically sound. Moreover, the time required for you to complete the litigation determinations was often significantly beyond the deadline given for the assignment. For example, Days Inn failed conciliation during the first quarter of fiscal year 2006, however, the Notice of Intent (NOI) proposing litigation was not finalized until the last quarter of FY 2006. The initial NOI draft which you prepared recommending litigation, was not submitted until the end of second quarter or start of the third quarter of FY 2006. The draft did not set forth a concise and persuasive factual and legal analysis. The NOI required substantial input and revision by legal management in order to produce an acceptable written work product.

You were assigned the Wholly Guacamole file to prepare a NOI on October 4, 2006, with a deadline for submission to OGC after review and approval by me and the Regional Attorney, of November 4. You submitted your initial draft to me on November 6, 2006. (Attachment 45, Garber 11/6 email) I reviewed and provided comments the following week. I inquired about the status of your revised version on November 16, but did not receive a response (Attachment 46, 11/16 email) Your revised draft was forwarded to me on November 20. We worked on the revisions and the draft was forwarded to the Regional Attorney on December 29, 2006. The Regional Attorney emailed you her comments and revisions on January 9, 2007 for you to use to make the changes. (Attachment 47, Barnes 1/9 email) On January 16, 2007, you informed me that you could not locate the email and requested that I forward it to you again. (Attachment 48, Spicer 1/16 email) You forwarded the revised NOI to the Regional Attorney later that evening. On January 22, 2007, the Regional Attorney advised that she had reviewed the revised NOI but noted that you had not made the required corrections in accordance with her January 9, 2007 comments. The Regional Attorney and I met with you on February 9, discussed the NOI and provided instructions for completion. As late as February 22, 2007, you still had not finalized the NOI so I instructed you to submit the revised Notice the following day. You forwarded the NOI to the Regional Attorney on February 23. The Regional Attorney finalized the NOI.

You also prepared three Negative Litigation recommendations in Cavalier Marine, Ennstone and McLex which were plagued with the same technical and analytical deficiencies as contained in other written work products. In Cavalier Marine you were assigned the file for litigation determination on March 30, 2006 with a due date of April 30, 2006. The Regional Attorney provided you with her comments and revisions on a written draft which she discussed with you during our July 2006 visit to your office. I later found the draft with the Regional Attorneys notes in the conference room during my August 2006 visit. You indicated that you had been unable to locate the draft. You resubmitted this to me on October 5, even though you had been working directly with the Regional Attorney on this matter. I advised you to forward directly to the Regional Attorney. (Attachment 49, 10/5 emails) You sent the Regional Attorney the revised memo on October 6, 2006, seven months after it was assigned to you. (Attachment 50,

10/6)

Ennstone failed conciliation on August 26, 2005 and was assigned to you at that time for a litigation determination. You did not submit your draft negative litigation determination until September 13, 2006, over a year later. I advised you to prepare a negative litigation recommendation memo but you advised the Regional Attorney that I instructed you to prepare an A2 form (predetermination negative litigation recommendation). You were instructed by the Regional Attorney to prepare the correct document, that being the negative litigation recommendation memo. You provided the negative litigation recommendation memo on October 4, 2006. Despite numerous discussions with me and the Regional Attorney your analysis in the memo did not address the major discussions with me and the Regional Attorney your analysis in the memo did not address the major problems with the investigation, namely: (1) whether the Charging Party was covered by the ADA; (2) assuming so, whether Charging Party's disability was known to Respondent, (3) Charging Party's self serving forms offered in support of his claim; and (4) the minimal monetary relief available. (Attachment 51, Garber draft). McLex was assigned to you on July 19, 2006, with a due date of August 31, 2006. You submitted the draft negative litigation memo on September 22, 2006. The Regional Attorney sent her comments and revisions back to you on October 14, 2006. While you timely revised the draft, the revised draft was not completed as instructed.

Additionally, the cause reviews you prepared in L&W (7/27/06) Regenesis Community Health Center (9/20/06), Hanger Prosthetics (9/12/06), Remarque Manufacturing Corporation of VA (9/28/06), Pike (12/5/06), Nissan of Statesville (12/18/06), Maersk (12/28/06) and Cheescake Factory (3/8/07) also required substantial input, guidance and/or revision in order to produce legal advice which was factually and analytically sound. (Attachment 52, Gerber draft memos)

Critical Element II: Individual Accountability

The major activities of Critical Element II are:

This identifies the activities or results that need to be accomplished in support of the critical element of Individual Accountability.

Plans and manages work. Interacts and coordinates with members of the general public, staff from other government agencies and co-workers. Adheres to administrative and operational procedures. Participates in case conferences. Deals with co-workers, supervisors, members of the bar and the general public; conducts training or participates in informational seminars; and participates in outreach activities consistent with the National and Local Enforcement Plans.

Proficient Performance Standards

The quality of the employee's work under this element is that of a fully competent employee. The employee typically performs as follows:

Work planning is realistic and results in completion of work by established deadlines. Routine problems associated with completing assignments are resolved with a minimum of supervision. Pleadings and litigation documents are timely filed in accordance with the Federal and Local Rules of the Court. The supervisor and Regional Attorney are notified of all litigation developments with sufficient notice to implement or adapt litigation plans and management of resources. The employee is well-prepared and timely asserts the Commission's position. Follows required administrative and operational procedures in an accurate and timely manner. Statements for expert witnesses are prepared in accordance with instructions and time frames. Participation in quarterly case conferences conducted by the Supervisory or Regional Attorney, demonstrates thorough and complete working knowledge of merits and status of cases. Case files are well organized and easily accessible to supervisors. Expert witness work is properly monitored for progress and expenditures. The employee's dealings with members of the general public, other government agencies and co-workers are effective. The employees interpersonal skills promote attainment of work objectives. Consistently handles problems with tact and sound judgment. Timely responds to formal and informal standards within the agency or by the public. Complies with applicable enforcement plans, assists in the identical support of Nation and Local investigation and possible litigation. Participates in informational or outreach program activities to the extent that such opportunities are made available to the incumbent. Foster mutual respect between legal and enforcement staff.

Performance Deficiencies:

The following summary, while not exhaustive, exhibits your inability to meet the Proficient standards for the above referenced critical element. In regard to your Individual Accountability, it has been my observation that you exhibit deficiencies in this area which demonstrate unsatisfactory and inconsistent performance. The areas of deficiency include your inability to engage in effective planning and management; your inordinate use of management resources; you inability to follow required legal unit administrative and operational procedures in an appropriate and timely manner; and your ineffective dealings with staff and the public.

During the past year, you had a light case load and were responsible for litigating a total of only five cases, none of which involved complex matters. From June 2006 until late September 2006 Maersk was your only case in litigation. The Decree in Maersk was entered by the Court on October 3, 2006. You filed Days Inn on September 30, 2006 and Burlington Medical was transferred to you in October 2006. You were assigned Carolina Steel and Stone and obtained authorization to file Wholly Guacamole just as Days Inn was settling in March 2007. The Decree in Days Inn was entered by the Court on April 3, 2007. On April 18, 2007, Burlington Medical was stayed pending the Court's ruling on Summary Judgment.

You were unable to effectively manage your litigation without concentrated guidance and feedback from legal management. At times you developed information

relationships with opposing counsel which in fact disadvantaged the EEOC. For example, you engaged in informal discovery with defense counsel in Maersk. (See attachment 13) In Burlington Medical you agreed to Defendant's requested deposition schedule even though it required you to be in depositions during the same period when you were required to respond to Defendant's summary judgment motion and work on trial preparation for Days Inn, thereby significantly restricting your ability to adequately and thoroughly prepare for any of these projects. During the settlement discussions in Days Inn you advocated Defendant's settlement position, in defense counsel's presence, rather than that of the Commission (Attachment 28).

Moreover, you did not consistently meet internal deadlines which have been established and communicated to you for the submission of work (Attachment 8) Your failure to meet deadlines left insufficient time for management review and often necessitated inordinate amounts of managerial effort, in the eleventh hour, to modify your work product to an acceptable level. Your failure to adequately organize your factual and legal arguments, write in complete sentences and proofread for grammatical and typographic errors repeatedly resulted in numerous revisions of your written work product. A considerable amount of effort has been spent interacting and conducting damage control with enforcement and administrative staff on your assignments. I, STA Burnside and the Regional Attorney have been very involved in explaining to you the proper litigation strategies and applicable legal arguments; revising your legal briefs; and directing you with respect to your interactions with Charging Parties.

Guidance and instruction was often given which was either ignored or forgotten. Revisions and/or comments were often misplaced, exacerbating the time needed to complete assignments. Additionally you failed to return administrative files and/or completed assignments to enforcement upon your completion. Although you had been instructed on more than one occasion to verify the Interrogatory responses you prepared on behalf of the Commission, you admitted that your failure to verify Interrogatory responses as required by the Federal Rules of Civil Procedure and the Commission's RA Deskbook "was not careless, but rather deliberate." (Attachment 53, Garber 10/31 PAS Input)

Your dealings with members of the public and co-workers are not effective. Additionally you did not keep management timely informed of significant developments in the cases assigned to you, such as the subpoena served on Charging Party in Maersk, the development of potentially fatal evidence in Maersk. In Days Inn, you did not timely file EEOC's Opposition to Defendant's Motion in Limine. You did not immediately inform me of the Regional Attorney of this situation, as discussed above. You also failed to communicate effectively with the court during the Burlington Medical summary judgment hearing. You failed to adequately communicate with the Legal Technician and other Legal Unit support personnel to facilitate timely Freedom of Informal Act (FOIA) responses, and effective and timely preparation of travel and procurement documents.

As the only Trial Attorney in the Norfolk Local Office, your poor time management skills negatively impacted the district and local office's internal goals. I

often had to make myself available to offer counsel to Enforcement due to your unavailability. As a sign of your poor judgment, despite your procrastination on matters which put you and the Commission in a bind, you expect your co-workers and supervisors to immediately address and redress your litigation, administrative and procedural needs and self-created emergencies. The above summary, while not exhaustive, briefly documents your inability to meet the Proficient standard for the above listed critical element.

Summary:

Notwithstanding the assistance, guidance and feedback that you have been provided, you have been unable to meet expectations and demonstrate acceptable performance at the GS-14 Senior Trial Attorney level. Despite, the PIP period of 90 days, you have been unable to sustain your performance at an acceptable competency level. Consequently, as a result of your inability to effectively litigate cases, manifest persuasive, accurate, and thorough oral and written advocacy, meet deadlines, perform duties independently and with minimal management oversight, submit accurate travel, budget and procurement documents, follow established office protocols, demonstrate effective dealings with members of the general public, management and co-workers, I have no choice but to recommend your removal from your position.

Rights:

You may answer this notice in person and/or in writing to Lynette Barnes, Regional Attorney, Charlotte District Office, 129 West Trade Street, Suite 400, Charlotte, North Carolina 28202, telephone number (724)344-6876. You have a right to review the material relied on to support this proposed action and will be given the opportunity to do so if you make a request to that effect to me. You may furnish affidavits or documentary evidence in support of your reply. You will be allowed eight (8) hours of official time to review the material relied upon in support of this proposed action, to secure affidavits and documentary evidence and to prepare your reply. Your request for official time must be made to me.

You may be represented by the Union or another representative of your choice in making your reply. Before representative may act on your behalf on this matter, however, that person must be designated by you, in writing, to the designated deciding official on this proposed action.

You will be given ten (10) days from your receipt of this notice to make any reply orally and/or in writing. Consideration will be given to extending the ten (10) calendars day period if you submit a request in writing to the deciding official, Lynette Barnes, setting forth the reason for your request.

A final decision has not been made concerning this proposal. You will be notified of the final decision after your reply has been considered, or after the time allowed for a reply has expired if you choose not to answer. During the thirty-day (30) advance notice

period, you will be carried in an active duty status at your present position, grade level, and salary.

If you require additional information, you may contact Human Resources Specialist Corlise Wright at 202-663-4389.

On September 11, 2007, the Employer issued a decision on the proposed removal, which stated the following:

By memorandum, dated June 13, 2007, Tracy Spicer, Supervisory Trial Attorney, proposed to remove you from your position as a Trial Attorney, GS-0905-14, with the Norfolk Local Office, Charlotte District Office, U.S. Equal Employment Opportunity Commission (hereafter referred to as the "proposal"). The reason for proposing your removal was your unacceptable performance in Critical Element I (Quality of Work) and Critical Element II (Individual Accountability), of your performance plan for FY 2006.

In the proposal, you were advised of your right to respond orally and/or in writing to the charges contained in the proposal. You provided a written reply to the charges dated July 18, 2007. You also requested the opportunity to orally respond. However, by email from your counsel on July 25, 2007, you withdrew your request for an oral response.

In making my decision, I have carefully considered the information of record and your written reply. For the reasons noted herein, I find that the proposed action is supported by the evidence, and is for such cause as will promote the efficiency of the Federal service. I have explained, in part, the basis for my decision below.

You were placed on a Performance Improvement Plan (PIP) by your direct supervisor, Supervisory Trial Attorney Tracy Spicer ("STA Spicer") on January 25, 2007. Your PIP ended April 25, 2007. The proposed removal notice explained what actions you should have taken during the PIP period to improve your performance, but failed to take. Thus, STA Spicer recommended your removal from Federal Service.

In your reply, you erroneously indicate that in proposing and considering your removal, the agency can rely only on events that occurred during the PIP period. (Reply, p.6). In accordance with Section 40.05 of the Collective Bargaining Agreement (CBA), your removal was proposed based on your performance during the period June 2006 through June 2007. Thus, my review of the record of your performance for the purpose of this determination is limited to June 2006 through June 2007 (hereafter sometimes "the relevant period"). References in your reply to events that occurred outside of the relevant period were disregarded for purposes of this decision.

Your reply further states that I applied a standard of review to your work that was not applied to "a black male subordinate, who was similarly situated, leaving no other

conclusion but that (my) conduct was discriminatory." (Reply, p.4). Such allegation will not be addressed herein as no facts were alleged to support this allegation.

Your reply erroneously identifies me as the acting official in nearly all of the matters that are the basis of STA Spicer's proposal for removal. You are fully aware that I had no involvement in, nor was I the acting official for, certain matters that you attribute to me. Some specific references are noted below:

(a) reference to notations on discovery that were made by STA Spicer. You submitted the discovery directly to STA Spicer for review and received it back from her with her handwritten revisions on it (Reply, p.6);

(b) reference to the Maersk discovery responses being "served while Ms. Barnes was vacationing...," when as you know, STA Spicer worked on the responses with you and was the person who was on vacation when you served the responses. (Reply, p.7);

(c) reference to me criticizing you "for not 'promptly' notifying (me) about a subpoena served on the Charging Party..." (Reply, p.8). The criticism for this failure was made by STA Tina Burnside who was working with you on a related project in STA Spicer's absence, at which time it came to STA Burnside's attention. The same criticism was later made in discussions concerning your performance, by STA Spicer.

(d) Reference to me faulting you "for filing a 30(b)(6) motion while (your) supervisor was out of the office." (Reply, p.10). As you know, this issue was addressed directly with you by STA Spicer both verbally and in the proposal for removal;

(e) Reference to me complaining about how you handled the defendant's motion for summary judgment in Days Inn. (Reply, p.10). As you know, STA Spicer and STA Burnside worked with you on EEOC's opposition to that motion, and the concern about your handling thereof was made to you by your direct supervisor STA Spicer;

(f) Reference to me criticizing your handling of a situation involving a statement allegedly made by an EEOC Investigator. (Reply, p.10). Your conversations and dealings concerning that matters were directly with STA Spicer, not with me;

(g) Reference to my alleged involvement in the motion in limine that you filed untimely, and the resulting comments made by Magistrate Miller in open court. (Reply, p.11). As you know, I had no involvement in the drafting, review or filing of the motion in limine. Likewise I did not appear with you before Magistrate Miller, nor have we ever had a conversation about this event. Despite this knowledge, your reply states: "When Ms. Barnes

asked Ms. Garber what (Magistrate Miller) was referring to, Ms. Garber... (Ms. Barnes) then jumped to the erroneous conclusion that... When it was pointed out that (Ms. Barnes) speculation was incorrect, Ms. Barnes continues (sic) with her speculation suggesting that perhaps the judges had conferred about another case." (Reply, p.11-12). As you know, STA Spicer attended with you, the pretrial conference wherein the Magistrate made these comments. It was STA Spicer who heard and questioned you about Magistrate Miller's comments;

(h) Reference to my alleged participation in, and comments to you concerning, a settlement conference in Days Inn: "After the conference, Ms. Garber began to discuss the defendant's position which Ms. Barnes immediately took as an affront being the all-powerful and omniscient being she is. She then falsely accused Ms. Garber of being a 'conduit for Defendant's settlement agenda,' when in fact Ms. Barnes was jeopardizing the successful negotiation of a settlement." (Reply, p.12). You are aware that STA Spicer attended and participated in the settlement conference with you, and that this criticism of your actions was given directly to you by STA Spicer.

After supervising some of your Trial Attorney activities prior to June 2006, STA Spicer became your direct supervisor in June 2006. Throughout the relevant period, STA Spicer was your supervisor and you reported directly to her.

During the relevant period, STA Spicer worked closely with you on your litigation and administrative assignments, traveling approximately once per month to your office and communicating by phone and email almost daily throughout the relevant period. During the PIP period, STA Spicer met with you at regular intervals to discuss your performance, at which time she provided you with guidance and feedback. You acknowledged that you understood the guidance and feedback, and did not state to STA Spicer or to me, that you were in need of any additional resources, guidance or feedback in order to successfully perform your job duties.

A. Quality of Work

Despite the significant amount of support offered to you by STA Spicer, the record shows that the quality of your work does not meet the standard set forth in your performance plan.

The record shows that you litigated cases in such a manner as to disadvantage the Commission's position and which often caused legal unit management to have to intervene to assist you in correcting problems created by actions you had taken. For example, you do not deny that you failed to timely file EEOC's response to Defendant's motion in limine in the Days Inn case. To date, you have offered no explanation for why you did not timely file this document. Likewise, you do not deny that the Magistrate Judge in the case specifically cited your failure to timely file the document as the basis

for his decision to strike EEOC's reply. EEOC's position in litigation was harmed by this action.

The record establishes that you failed to prepare Charging Parties and class members (sometimes hereafter "claimants") for their deposition testimony, which caused or contributed to these claimants giving testimony that was harmful to EEOC's litigation. During a routine quarterly case conference, you admitted to me and STA Spicer that you had not been preparing claimants for depositions beyond explaining what the deposition proceeding was about. You indicated that it was your general practice to speak with claimants on the morning of their depositions and counsel them only on the logistics of a deposition. STA Spicer and I informed you of the inadequacy of this practice, the vital nature of deposition preparation, and how failure to prepare claimants for their depositions had resulted in harmful testimony being given by Charging Parties and class members in several of your cases. Because you did not prepare claimants for depositions, you scheduled depositions without allowing preparation time, a practice that led to STA Spicer instructing you to cancel depositions you had scheduled for the Charging Party and class members in your Burlington Medical case. You had scheduled the depositions without allowing yourself time to prepare the claimants to testify.

Even after your failure to adequately prepare claimants for depositions was discussed with you by me and STA Spicer, you failed to follow instructions given to you to ensure that claimants were prepared for their depositions. For example, in your Burlington Medical case, the Charging Party informed STA Spicer that you had little contact with her prior to her deposition preparation which STA Spicer conducted because you had not allowed sufficient time on your schedule for the preparation. Charging Party was therefore unfamiliar with the relevant facts of the case. STA Spicer had previously instructed you to make contact with claimants throughout the litigation to get them comfortable with their testimony so they appear as good, credible witnesses. Nonetheless, you failed to do so.

The record further shows that you failed to recognize the significance of identifying class members in Burlington Medical, a class action suit that alleged a pattern or practice of discrimination. You did not understand the Commission's position that in a pattern or practice action, victims of the discrimination who would otherwise be "untimely," can be included as class members so long as they were affected by the discrimination during the period in which the pattern or practice existed. After this was explained to you by me and STA Spicer during your case conference on October 23, 2006, you were instructed to identify class members quickly. However, during your January 11, 2007 case conference, I learned that you had made no real effort to identify potential class members. You failed to take appropriate steps to identify class members until the end of February 2007, when you were specifically instructed to do so with just two weeks left in the discovery period. Because we were required to identify class members prior to the close of discovery, STA Spicer had to gather resources for an "emergency" project to locate class members immediately.

The record further shows that your litigation strategy was ineffective and often

resulted in unnecessary discovery disputes. For example, you served discovery responses in Maersk that created an unnecessary discovery dispute (a subpoena served by Defendant and a motion to quash served by EEOC). Specifically, you identified a urologist, Dr. Kaza, who treated Charging Party for a medical condition that was in no way relevant to the claims in the lawsuit. You stated that you identified Dr. Kaza because he had written Charging Party out of work, which would be relevant to Charging Party's back pay claim. Yet, when Defendant sought to obtain Charging Party's medical records from Dr. Kaza via subpoena, you indicated that you did not intend to produce the records related to the treatment because they were irrelevant. Because of those contradictory positions, you were instructed to contact Charging Party for more information to aid legal management in understanding the relevancy of Dr. Kaza's medical records, if any. After talking to Charging Party twice, you notified legal management that your earlier statement that formed the basis of your decision to identify Dr. Kaza in the discovery responses – that he wrote Charging party out of work – was in fact wrong. The Commission had to move to quash the subpoena for medical records from a doctor who had no relevant information but was identified by you based on incorrect information. Notably, as demonstrated once you were instructed by legal management to contact Charging Party about this issue, the correct information was easily obtainable from the Charging Party.

The record further shows that you failed to properly identify and/or brief legal issues that arose in your litigation, requiring legal management to intervene and guide you in making appropriate legal arguments or in some instances, rewrite your briefs altogether. For example, in Maersk a subpoena was served on the Charging Party requiring Charging Party to produce photographs, arrest and conviction records, passports and medical records. You did not recognize the subpoena as arguably being harassing and requesting information that was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, the standard subpoena, and legal management learned of it as a result of a comment you made to STA Burnside related to the scheduling of Charging Party's deposition. You had to be given explicit instructions on how to proceed with respect to the subpoena. Moreover, you stated that you did not oppose the subpoena because you thought that Charging party did not currently have any responsive documents in his possession. You failed to recognize the requirements of F.R.C.P. 45 which would have required Charging Party to obtain and produce the documents if they were within his control. More significantly, although you engaged in detailed discussions with STA Burnside about what should be included in the EEOC's written response to the subpoena, your brief did not directly address the factual and legal issues raised by the subpoena, and cited no case law. Because of the numerous inadequacies in your responsive brief, STA Burnside and I finalized the brief for filing.

As further example, in Days Inn, your brief in response to Defendant's Motion for Summary Judgment was submitted to STA Burnside for review in STA Spicer's absence, and returned to you with STA Burnside's written comments and revisions. Thereafter, STA Spicer, STA Burnside and you discussed your brief and you were provided with page by page instructions on how to revise the brief to be more persuasive. When you submitted a revised brief to the STAs for review, the revised brief did not address and

remedy the deficiencies that had been pointed out by STA Burnside and in discussions between you, STA Spicer and STA Burnside. Consequently, on the day before EEOC's opposition brief was due for filing, STA Spicer and STA Burnside personally revised the brief.

Your brief addressing the subpoena served on Dr. Kaza failed to identify and analyze the correct issues. Rather than analyze and address the issues raised by the subpoena you simply "modified" a brief previously filed in the Maersk case by substituting Dr. Kaza's name for Charging Party's name as it appeared in the earlier brief. You did not modify the brief to directly address the factual and legal issues raised by the Kaza subpoena. You failed to recognize the issues raised by the Kaza subpoena as being significantly different from those raised by Charging Party's subpoena.

In Burlington Medical, Defendant sent a letter to you objecting to having to contact potential class members through the EEOC. During your January 11, 2007 case conference, you were therefore provided with direction and guidance on how to respond to Defendant's objection as you were unable to articulate the arguments that should be made in response to the letter.

B. Individual Accountability

Despite the significant amount of support offered to you by STA Spicer, the record shows that you have not met the standard set forth in your performance plan for Individual Accountability. For example, you have failed to work independently or with minimal supervisory oversight, and you have failed to follow agency and legal unit administrative and operational procedures, among other things.

As noted in the discussion of several items above and as more fully set forth in the proposal, you failed to notify STA Spicer and me of litigation developments with sufficient notice to implement and adapt litigation plans and management of resources. You also failed to make revisions to documents, conduct appropriate legal analysis in many of your written submission, resulting in legal management redrafting documents that you had submitted.

The record shows that you failed to follow required legal unit administrative and operational procedures and failed to provide support staff with information necessary for completion of budget and travel related documents. For example, in Days Inn, you failed to follow known procurement requirements. Specifically, you took several depositions without an approved purchase order. Additionally, you failed to ensure that the Legal Technician working on the travel arrangements for the Charging party and class members to attend their depositions, had adequate information to complete the travel. Consequently, the depositions had to be rescheduled to allow EEOC time to prepare travel documents, and as noted in Section A. above, to allow time for the claimants to be prepared for their depositions.

The record shows that you routinely failed to meet established deadlines. Your

failure to meet deadlines often required STA Spicer, STA Burnside and/or me to work in the eleventh hour, to get your work reviewed and/or finalized. For example on March 12, 2007, you were served with Defendant's Motion for Summary Judgment in Burlington Medical. The opposition brief was due on March 26, 2007. You agreed with STA Spicer to provide EEOC's opposition brief to her on March 22, but provided it in two parts, on the afternoon and evening of March 23. The brief needed major revisions, thus in order to complete it in time for my review prior to filing STA Spicer was required to revise the analysis section of the brief while you worked on other sections.

You were assigned the Wholly Guacamole file to prepare a Notice of Intent ("NOI") on October 4, 2006, with a deadline for submission to the Office of General Counsel (OGC) after review and approval by me and STA Spicer on November 4, 2006. You submitted the NOI to STA Spicer on November 6, 2006. STA Spicer returned the NOI with her comments to you the following week, however, you did not make the revisions and return the documents to STA Spicer until November 20, 2006. Ultimately, I finalized the NOI after receiving it from you on February 23, 2007. Because of the significant delays in your drafting and revision the NOI, the NOI was submitted to OGC over three (3) months after the established deadline.

It took you over six (6) months to complete a negative litigation recommendation in Cavalier Marine, an assignment with a thirty (30) day deadline. You did not submit a negative litigation recommendation in Ennstone for over a year, despite the thirty (30) day deadline.

The litigation in Carolina Steel and Stone was assigned to you on March 9, 2007. The complaint and other initiating documents had already been prepared and were forwarded to you. I instructed you to file the lawsuit no later than March 15, 2007. You misplaced the filing documents, and ultimately, after receipt of them again from STA Spicer, you filed the case on March 29, 2007, two weeks after the deadline given to you to file documents that had already been prepared.

The record shows that you failed to prepare and submit to your supervisor documents related to your litigation. For example, you failed to prepare a discovery plan in accordance with the requirements of your PIP and your case conference report in both the Carolina Steel and Stone case and the Wholly Guacamole case. The record also shows that you failed to timely take action on another litigation matter, the Community Services of Virginia contempt action. This contempt action was assigned to you in the fall of 2006. On October 26, 2006, you notified Defendant that if it did not comply with the provisions of a Consent Decree, EEOC would file a contempt action. As of today, Defendant has not responded and you still have not initiated a contempt action.

The record shows that you failed to effectively manage your litigation without concentrated guidance and feedback from legal management. For example, in Burlington Medical you agreed to Defendant's requested deposition schedule even though it required you to be in depositions during the same period when you were required to respond to Defendant's summary judgment motion and work on trial preparation in another case,

Days Inn. Thus, your ability to adequately and thoroughly prepare for any of these projects was significantly restricted, requiring STA Spicer to assist in various ways.

The record shows that you have continually failed to follow legal unit procedures and protocols established by OGC and/or Regional Attorney for the Charlotte District Office. For example, in Maersk, you served EEOC's response to Defendant's First Request for Production of Documents which had not been approved by legal management. You also served EEOC's Request for Admission and a second set of Interrogatories and Requests for Production of Moreover, when you served EEOC's interrogatory responses, you did not revise them in accordance with your STA's comments and instructions. You have not denied taking these actions although you were fully aware beginning as early as February 2006, of the requirement that discovery responses and EEOC's discovery to defendants be reviewed and approved by your supervisor prior to service.

Summary

In your reply you do not deny the accuracy of the events related to your litigation described in the proposal. Further, you do not deny that you were on a performance plan and you were aware of the requirements of your performance plan. Your reply focuses on whether the amount of supervision provided to you by the Legal Unit management was necessary and/or excessive. Your position that you performed proficiently under both critical elements of your performance plan, and that the Legal Unit management's supervision of you was the cause of your performance deficiencies, is not supported by the evidence of record.

I find that the record supports a conclusion that you failed to perform Critical Element I (Quality of Work) and Critical Element II (Individual Accountability) at the Proficient level before, during and following the PIP.

Accordingly, I find that the record substantiates the specifics of unacceptable performance outlined in the proposed removal. It is therefore my decision to remove you from your position, pursuant to the provisions of Part 432 of the Office of Personnel Management (OPM) regulations and Article 40.00 of the CBA. Your removal will be effective September 14, 2007, however your last day in the Norfolk Local Office will be September 12, 2007. You will be placed on paid administrative leave for September 13-14, 2007.

RIGHTS

You have the right to either appeal this action to the Merit System Protection Board (MSPB) or to grieve the action under the CBA, but not both.

If you elect to appeal to the MSPB, your appeal should be sent to:

U.S.Merit System Protection Board

Washington Regional Office
1800 Diagonal Road
Alexandria, VA 22314

In order for your appeal to be considered by the MSPB, it must: (a) be in writing; (b) give your reasons for contesting this determination, and include such proof and pertinent documents as you are able to submit; and (c) be submitted no later than thirty (30) calendar days after the effective date of your removal. Attached is a copy of the MSPB appeal form.

If you elect to file a grievance, you must do so in accordance with Section 41.06, Expedited Procedure, of the CBA. A grievance under Section 41.06 of the CBA must be filed within 30 calendar days after the effective date of the removal action to the Chair, EEOC, 1801 L. Street, N.W., Washington, D.C. 20507.

If you require further explanation of your appeal rights, you may contact Corlise Wright, Office of Human Resources, on (202) 663-4389.

Attachment – MSPB appeal form.

Local 3614, National Council of EEOC Locals No. 216 AFGE, AFL-CIO (hereafter referred to as the "Union") filed two grievances on behalf of the grievant. The grievance, contesting the removal of the grievant was filed on October 12, 2007 in accordance with the collective bargaining agreement between National Council of EEOC Local, No. 216 affiliated with The American Federation of Government Employees, AFL-CIO and United States Equal Employment Opportunity Commission (hereafter referred to as the "Agreement") stated the following:

This is an appeal from a performance-based removal from the federal service for alleged unacceptable performance under 5 U.S.C & 4303. Grievant Amy Garber ("Grievant") is a former Trial Attorney, GS-14, with the United States Equal Employment Opportunity Commission (the "Agency") in its Norfolk Local Office. Grievant worked under the authority of the Regional Attorney of the Charlotte District Office, Lynette Barnes ("Barnes"). During the relevant time period Grievant's immediate supervisor in Norfolk was supervisory Trial Attorney Tracy Spicer, who was the proposing official, and Barnes, who was the deciding official.

This Expedited Grievance is being timely filed by Local 3614, National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO (the "Union") on behalf of the Grievant pursuant to Article 41, Section 41.06 of the Collective Bargaining Agreement ("CBA") between the Union and the Agency. For the

reasons discussed below, the removal decision is not and cannot be supported with substantial evidence and thus must be rescinded. Barnes' actions have been retaliatory, arbitrary and capricious, contrary to law, a violation of due process, and constitute harmful error.

I. VIOLATIONS

Violations include, but are not necessarily limited to violations of Federal Law, regulations EEOC Orders, and the CBA: Articles 5.00, Section 5.01, 5.02, and 5.10; Article 18; Article 21.00; Article 22; Article 38; Article 39; Article 40; Article 41; Title 717 of Title VII of the Civil Rights Act of 1964, as amended; 5 U.S.C. Chapter 23, including but not limited to, 5 U.S.C. & 2301-2302; 5 U.S.C.. Chapter 43; and corresponding federal regulations.

II. EXPLANATION OF VIOLATIONS

A. The Decision to Remove Grievant is Not Supported By Substantial Evidence.

To support a removal action under Chapter 43 of Title 5 of the United States Code, the Agency must show by substantial evidence that: (1) Grievant was evaluated under an Office of Personnel Management (OPM) approved performance appraisal system; (2) it communicated the written performance standards and critical elements of Grievant's position to Grievant at the beginning of the appraisal period; (3) it warned Grievant of inadequacies in her performance and of the critical elements during the appraisal period (4) counseled Grievant and afforded her an opportunity for improvement; and (5) Grievant failed to meet the minimally acceptable level of performance in at least one critical element during the performance improvement period warranting remedial action to be taken by the agency. 5 U.S.C. & 4302(b)(6), 4303(a) and (b), Martin v Federal Aviation Administration, 795 F.2d 995, 997 (Fed. Cir. 1986); Diprizio v Department of Transportation, 88 M.S.P.R. 73 (2001). In the instant case, the Agency cannot prove that the performance standards are valid or that it provided Grievant notice regarding the performance required by the Critical Elements, notice of alleged performance deficiencies, and a reasonable opportunity to improved those performance deficiencies.

Grievant had two critical job elements; (1) Quality of Work and (2) Individual Accountability. The performance standards for both elements are invalid and cannot be used to sustain Grievant's removal. The Agency must prove that the performance standards meet the statutory requirements of 5 U.S.C. & 4302(b)(1), and do not constitute an abuse of discretion. See, Shuman v Department of the Treasury, 23 M.S.P.R. 620, 626 (1984). The performance standards in the instant case were vague and did not provide the Grievant with adequate notice of the manner in which she was supposed to perform the duties of her position. Performance standards that are vague are void and any action taken in reliance of such standards will not be sustained. See, Smith v Department of Energy, 49 M.S.P.R. 110, 116(1991)(standard against which the agency measured the

appellant's performance was so vague as to render the written standard invalid).

Furthermore, performance standards must permit the accurate evaluation of job performance on the basis of objective criteria to the maximum extent possible. 5 U.S.C. & 4302(b)(1). Performance standards must be reasonable, realistic, and attainable. See Johnson v Department of the Army, 44 M.S.P.R 464, 466-67 (1990); Thompson v DON, 89 M.S.P.R. 188 (2000).

The Agency's failure to communicate to Grievant the performance standards and critical elements before placing her on a Performance Improvement Plan ("PIP") were not cured after placing her on a PIP. Grievant was placed on a PIP on January 25, 2007. The PIP was not a bona fide PIP because it lacked basic information as to what Grievant needed to do to achieve proficient performance. There was no valid discussion in the PIP as to what Grievant should to improve her performance. The Agency failed to provide any meaningful clarification to the Proficient standard during the PIP.

1. Notice of Proposed Removal

Tracy Spicer, Supervisory Trial Attorney issued Notice of Proposed Removal ("Notice"), dated June 13, 2007. The Notice cited an unknown number of alleged performance deficiencies under Critical Element I (Quality of Work) and an unknown number of alleged performance deficiencies under Critical Element II (Individual Accountability). Consequently, the Notice lacked the requisite specificity. Several of the charges raised in the Notice were never raised in Grievant's PIP at and never discussed prior to the issuance of the Notice. Finally, the allegations in the Notice are vague, in part, because they are based on subjective rather than objective standards.

2. Decision to Remove

Deciding Official, Barnes issued the decision to terminate Grievant on or about September 11, 2007. Barnes failed to follow the procedural standards established by statute, regulations, and by the CBA. These errors caused substantial harm or prejudice to the Grievant. As discussed above and in Grievant's written reply to the Notice, Charlotte Legal Unit Managers failed to follow the proper procedures in the PIP by not advising the Grievant of concrete goals and expectations. This deprived Grievant of notice of the Agency's expectations and a benchmark to define successful performance. Furthermore, Charlotte Legal Unit managers' use of inconsistent charges in the Notice and in the Decision deprived the Grievant of notice and an opportunity to fully respond. By revising its former charges, the Charlotte Legal Unit Managers impaired the Grievant's ability to defend. Gordon v Dept of Navy, 34 MSPR 322, 324 (1987). Lacking specific and timely notice of the charges is also harmful error. Brown v UPS, 47 MSPR 50, 59 (1981). In her removal decision, Barnes' reliance on untimely and stale observations and charges is procedural error and constitutes a fatal defect. Moreover, Barnes' failure and inability to impartially and independently review the case had a harmful effect on the outcome. Barnes failed to consider relevant evidence – the most glaring of which is that Barnes completely ignored the quality of the work done by

Grievant.

3. The Standard

The Agency fails to adequately define or describe its standard for unacceptable. The Agency states Grievant's performance was unacceptable but without knowing what is or is not unacceptable, the grievant is substantially prejudiced in her performance evaluation. To the degree that the standard is defined, it is subjective, adding additional uncertainty and vagueness to the Agency's claim that Grievant's performance was unacceptable.

4. Barnes' Failure to Recuse Herself

In Grievant's July 5, 2007 letter to Barnes, Grievant outlined legitimate reasons for Barnes recusal. Barnes failed to recuse herself although she could not objectively review and decide the proposed removal. Despite Barnes' emphatic claim of non-involvement, she was in fact intimately involved in the proposed action against Grievant, and had already decided to remove Grievant prior to receiving Grievant's reply.

b. Disparate Treatment

The grievant has been subjected to disparate treatment in violation of the CBA and violation of Merit System Principles set forth in 5 U.S.C & 2301 and 2302; and in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 200 et. Seq. The grievant's performance was overly scrutinized as compared to similarly situated employees outside of her protected classes. Barnes micro-managed Grievant and constantly harassed her with unreasonable and unwarranted requests, thereby impending and interfering with Grievant's work. Grievant had for years been successful and only after coming under Barnes' supervision was there a claim of unacceptable performance. Barnes failed to consider that Grievant's work was actually substantially better than her coworkers.

Under 5 U.S.C & 7116(a)(1) and Article 5, Section 2, of the CBA, employees shall have the right to form, join or assist any labor organization freely and without fear of reprisal. The grievant was subjected to disparate treatment in retaliation for her prior grievance.

The remedy requested was as follows:

The Union and Grievant seek the following relief:

1. Reinstatement of the Grievant to the position of Senior Trial Attorney, GS-14, at the Norfolk Area Office;
2. All lost wages, back pay, interest and damages;
3. Complete rescission of the proposal and decision to remove and

destruction of any and all records, including drafts, with refer, relate, or concern the proposal and decision to remove;

4. Issuance of a year-end performance appraisal for 2006 with an overall rating of Outstanding;
5. Grievant no longer be supervised by Barnes or any of her subordinate supervisors;
6. Charlotte Legal management receive EEO training.
7. In all future instances, at a minimum, Grievant and all bargaining unit employees be afforded their rights under the CBA without reprisal;
8. Attorneys' fees and costs.

On November 13, 2007, the Employer responded to the grievance as follows:

This decision is issued in response to the expedited grievance filed by the Union on behalf of Amy Garber (hereafter referred to as the Grievant), a GS-14 Trial Attorney with the Equal Employment Opportunity Commission (EEOC), Charlotte District Office, Norfolk Local Office on October 12, 2007. The grievance was filed pursuant to Article 41.00, Negotiated Grievance Procedures, of the Collective Bargaining Agreement (CBA) between the EEOC and the National Council of EEOC Locals No. 216, American Federation of Government Employees (AFGE), AFL-CIO.

The Union alleges that Management violated Articles 5.00, 18.00, 21.00, 22.00, 38.00, 39.00, 40.00 and 41.00 of the CBA, Title 717 of Title VII of the Civil Rights Act of 1964, as amended, 5 u.s.c. Chapters 23 and 43 and EEOC Orders, when it made the decision to remove the Grievant based on unacceptable performance. As remedies, the Union requests the reinstatement of the Grievant to the position of GS-14 Trial Attorney in the Norfolk Local Office; payment of all lost wages, back pay, interest and damages; complete rescission of the proposal and decision to remove the Grievant, and destruction of any and all records related to the proposal and decision to remove the Grievant; issuance of a year-end performance appraisal for 2006 with an overall rating of Outstanding; Grievant no longer be supervised by the Regional Attorney, Lynette Barnes, or any of her subordinate supervisors; Charlotte Legal Management receive EEO training; in all future instances, at a minimum, the Grievant and all bargaining unit employees be afforded their rights under the CBA without reprisal; and Attorney's fees and costs.

A review of the record reveals that the Grievant's supervisor proposed the Grievant's removal on June 13, 2007 based on her unacceptable performance. The grievant's supervisor proposed the Grievant's removal after she determined that the Grievant failed a Performance Improvement Plan (PIP) on April 25, 2007. The basis of the PIP was the Grievant's unacceptable performance in the critical performance elements Quality of Work and Individual Accountability. During the PIP period, the Grievant's supervisor invested a substantial amount of time in assisting the Grievant to improve her performance, including on-going counseling and guidance. Despite these efforts, the Grievant failed to raise her performance to the Proficient level.

The Proficient performance standard for Quality of Work describes a proficiently performing Trial Attorney as one who conducts litigation in an appropriate and effective manner; work rarely requires major revisions; employs advocacy skills effectively; understands legal and factual issues as well as adheres to procedures and format requirements; written and oral communications are clear; concise, well organized and well suited for the purpose of the subject matter, and discuss coordination with the National and Local Enforcement Plans; and technical skills are applied effectively to specific tasks. Examples of the Grievant's performance deficiencies that were included in the PIP and notice of proposed removal show that the Grievant did not conduct litigation in an effective manner, her written work required major editing, she did not meet the established timeframes for moving enforcement files through her inventory, and her analytical skills lacked clarity, succinctness, persuasiveness and demonstrated a questionable understanding of the legal issues involved in her cases.

With regard to the Proficient performance standard for Individual Accountability, this standard describes a proficiently performing Trial Attorney as one whose work is completed by established deadlines; resolves routing problems with minimum supervision; case files are well organized and easily accessible to supervisors; files pleadings and litigation documents in a timely manner and in accordance with Federal and Local rules of the court; notifies supervisor and/or Regional Attorney of all litigation developments with sufficient notice to implement or adapt litigation plans and management of resources; handles problems with tact and sound judgment; dealings with the general public, other Government agencies and co-workers are effective, and participates in informational or outreach program activities. The documented deficiencies of the Grievant's work show that the grievant failed to meet deadlines in serving discovery requests and completing administrative assignments; she did not inform her superiors about critical events occurring with regard to assigned cases; her factual and legal arguments were not adequately organized; her planning strategies were counterintuitive to office goals and objectives; she did not engage in appropriate interactions with members of the public and coworkers; and she did not handle problems with tact or sound judgment. The supervisor and the Regional Attorney had to constantly oversee the Grievant's work, such as directing her litigation, prioritizing assignments, explaining arguments, revising briefs and directing her to interact with Charging Parties.

The Union asserts that the Trial Attorney performance standards for the critical elements, Quality of Work and Individual Accountability are invalid, and cannot be used to sustain the Grievant's removal. However, the Union was involved in the substantive development of these critical elements and performance standards, and its involvement was not limited to impact and implementation matters. On July 10, 1995, the Performance Management System Development Working Group (the Performance Group) was convened to develop a new performance appraisal system for the Agency's non-Senior Executive Service (SES) employees. The Performance Group was composed of representatives from the Union, Management and employees. The new performance appraisal system was to specifically address the concerns from previous systems that were perceived as unfair and lacking employee buy-in. The Performance Group not only recommended the specific design for a new performance appraisal system, but it also

included recommendations on how the new system should be implemented. After the new appraisal system was approved, the Performance Group was divided up into sub-groups with each being assigned to work on a specific performance plan for the Agency's mainstream positions. The sub-group developing the performance plan for the Trial Attorneys included the Union, supervisors and bargaining unit Trial Attorneys. Through consensus, each sub-group made decisions on the contents of the performance plans.

The sub-group for the Trial Attorney performance plan determined that the duties under Quality of work would include conducting litigation, providing legal advice and assistance to enforcement, preparing memoranda for the Regional Attorney, Office of General Counsel or the Commission, and communicating with Commission staff and others. These duties are consistent with the major duties described in the classified position description for a GS-14 Trial Attorney.

Clearly, the Union's involvement in the development of the Agency's performance appraisal system was not limited to only impact and implementation matters. The Union was allowed to negotiate critical elements and performance standards, which is typically a management right and non-negotiable. In fact, the Federal Labor Relations Authority (FLRA) has held that Management has the right to determine the content of critical elements and performance standards. Notwithstanding that this is a Management right, the Union was allowed to participate in the development of the critical elements and performance standards for the Agency's position, including the Trial Attorney position. The Union and Management jointly developed this system. Without the Union, Management and employees working cooperatively and collaboratively, the Agency's performance appraisal system would not have been accomplished. The Union helped to create this system, and consequently is now estopped from challenging the very system it helped to create.

The Union further alleges that Management failed to communicate the critical elements and performance standards to the Grievant before placing her on a PIP. A review of the Grievant's FY 2006 performance appraisal show that on May 2, 2006, the Grievant acknowledged that the performance plan for her position was communicated to her by signing the Certification of Communication and Review of Performance Plan section of this appraisal. The Grievant was placed on a PIP in January 2007, approximately seven months after the date she certified the communication of her performance plan. The performance plan describes the critical elements and performance standards of the Grievant's position. Therefore, the Grievant was aware of the critical elements and performance standards of her position prior to her being placed on a PIP.

The Union also alleges that Management's documentation in support of the Grievant's removal was rife with procedural errors and lacking in specificity and concreteness, thus depriving the Grievant of proper notice and opportunity to fully respond. The Union contends that Management failed to follow proper procedures in the PIP by not advising the Grievant of concrete goals and expectations. A review of the PIP reflects that the supervisor clearly identified the critical elements the Grievant was deficient in, and described what was required to be Proficient in these elements.

Moreover, the Grievant was given a reasonable period of time (90 days) to improve her performance. In addition, the PIP gave numerous examples of specific instances of performance deficiencies, as well as what the Grievant needed to do to improve her performance. However, as detailed in the notice of proposal, the Grievant continued to exhibit deficient performance throughout her opportunity period.

The Union claims that the Regional Attorney should have recused herself from being the deciding official for the Grievant's proposed removal because she was intimately involved in the proposed action. As the major of the Grievant, the Regional Attorney was involved in some review of the Grievant's work. Although the Regional Attorney had some involvement in the Grievant's work, she was not involved in the day-to-day supervision of the Grievant's work. The Grievant's supervisor had direct knowledge of the Grievant's work performance. As such, the Grievant's supervisor was the sole person to propose the Grievant's removal. The Regional Attorney had no involvement in proposing the Grievant's removal.

Finally, the Union alleges that the Grievant was subjected to disparate treatment in that her performance was overly scrutinized as compared to similarly situated employees outside of her protected class. In support of its allegation, the Union states that the Regional Attorney micro-managed and constantly harassed the Grievant with unreasonable and unwarranted requests. However, the Union did not provide any specific examples where the Grievant was micro-managed or harassed by the Regional Attorney, nor did it identify the Grievant's protected class. Thus, there is no evidence that the Grievant was subjected to disparate treatment.

Based on the foregoing, I find that the Grievant's removal to be fully warranted, and there is no violation of the CBA, the Civil Rights Act of 1964, as amended, Federal regulations or EEOC Orders. Therefore, the grievance and the requested remedies are denied. If you are not satisfied with this decision, you may appeal it in accordance with the CBA.

The grievance remained unresolved and was appealed to arbitration. This arbitrator was selected through the offices of the Federal Mediation and Conciliation Service, to hear and decide the issue. Accordingly, hearings were held in Norfolk, Virginia on May 5, May 6, May 7, September 10, September 11, September 12, November 13 and November 14, 2008. During the hearings, the parties were given the opportunity to present evidence, both oral and written, to examine and cross-examine the witnesses who were sworn and sequestered, and to argue their respective positions. In lieu of oral closing arguments, the parties decided to file post hearing briefs, including

numerous citations, which have been carefully reviewed and considered. Upon receipt of the parties briefs on January 20, 2008, and the Agency's resolution of procurement issues on April 21, 2009, the record was considered closed.

On May 13, 2009 the following award was issued:

> The Agency did not have a basis for issuing an unacceptable performance appraisal to the grievant. The Agency did not have just cause for removing the grievant. The grievant is to be returned to work and be made whole for all loses she incurred. The unacceptable performance rating she received is to be considered null and void. I will retain jurisdiction of this matter to resolve any disputes that may arise between the parties during the implementation of this award, which could include the parties making written submissions and/or oral arguments related to a determination of damages.

The parties attempted to implement the May 13, 2009 award, but were unable to reach agreement on all outstanding issues. Numerous written arguments were submitted by the parties to the arbitrator, but issues still remained unresolved. Accordingly, hearings were scheduled on April 21 and April 22, 2010 so the parties could present their positions related to the unresolved issues. On April 21, 2010, in Norfolk, Virginia, the parties put forth evidence and testimony in support of their respective positions. Additionally, post-hearing briefs were filed with the arbitrator, which have been carefully reviewed and considered. The record was closed on July 8, 2010.

II. BACKGROUND

Martin Jefferson Euchler, attorney, stated he has been in practice since 1991, with his practice of law concentrating pretty much entirely in Federal Sector employment. Specifically, he advised this would include Federal Sector administrative, arbitration, EUC, MSPD, possibly title 38 matters, hearings before the FRLA, and some appellate work usually in the federal circuit. He pointed out he is admitted to the United States

Court of Appeals for the Federal Circuit, Fourth Circuit, D.C. Circuit, U.S. Supreme Court and the Court of Veterans Benefits. He noted he has represented labor unions, specifically the National Association of Government Employees, IBEW, American Federation of Government Employees, the local at Fort Brigg, seven VA Medical Centers and a couple of DOD facilities that hire him on an as needed, ongoing retainer. Mr. Fuchler said he usually does two or three hearings per month in forums involving MSPB, EEOC or arbitration.

He said he and the grievant have been dating for twelve years. He stated he is familiar with the attorneys practicing the federal employment law in the Tidewater area. He contended Mr. Neil Bonney does more federal employment law than any other lawyer in the Tidewater area, and has been more successful than anyone else. He testified he would very rarely accept a case on a contingent basis, and when he does he looks to how he likes the client, how he likes the case, how time consuming the case will be, and what would the reward be in the event of a successful case. He pointed out his hourly rate is $350 per hour and it has been approved by arbitrators, EUC, MSPB and has almost never been a subject of dispute. He submitted a copy of the Laffey Matrix for D.C., which he said shows the hourly rate for an attorney with 20 years experience was $465 per hour. He contended if he needed to seek an attorney outside the Tidewater area there are a few other attorneys who he would consider. He testified that Attorney Bonney has a very good reputation for representing federal employees, both locally and nationally. Mr. Euchler said he is familiar with the fact that the Bonney and Allenberg firm represent various local unions. He said he did not take this case because he thought it would be a terrible idea to have a relationship with someone whom you are also trying to represent.

He stated he recommended the grievant see Mr. Bonney. He noted that this case involved a performance based action, and these type actions are always going to be time consuming and document intensive, the higher up the grade level you go. He claimed these cases are very difficult, take a lot of time and effort. He testified fees can be adjusted upward, and attorneys have received an enhancement.

During cross-examination, Mr. Euchler stated he has been practicing for approximately 19 years and the majority of his practice has related to federal sector employment matters. He said Mr. Bonney is the only attorney that he knows, off the cuff, who has received an enhancement. Mr. Euchler said he does not typically seek enhancement himself, because he does not regard this as consistent with the way he is involved in cases. He said he knows of many cases going for $700 per hour, but he could not identify anybody in the Tidewater area. He said Mr. Bonney would probably need to learn what an attorney in EEO practice does, because he does not walk around being an expert in private sector law that EEOC attorneys would be dealing with.

The grievant testified she is a senior trial attorney for the Equal Opportunity Commission in Norfolk's local office, and is a GS 14. She said she was available for work every single day from September 15, 2007 when she was let go until June 21, 2009 when she was returned to work. She contended there was not a single day when she was not available for work, she had no physical reason why she couldn't work, and no need to stay at home with children she adopted. The grievant stated she needs to work because she has a mortgage and bills to pay. She noted she is not independently wealthy. She pointed out when she received a letter from Mr. Sherlock making an offer of reinstatement, she accepted the position without delay. She noted she filed for

unemployment, which was initially denied, and she did not follow through on that. The grievant provided testimony related to her constantly seeking employment during the period of time she was unemployed. She noted she applied for a position with the EEOC as an administrative law judge, but she said she was rejected for the position.

The grievant testified further when she was terminated she was not able to afford to hire a competent attorney at normal hourly rates because she had no income. She said in this case she has not paid any money to Bonney, Allenberg and O'Reilly, and they have advanced costs on her behalf. She testified her fee arrangement is a contingency agreement. During cross-examination, the grievant said she worked for the law offices of William Boyle Jr., and also as a solo practitioner towards the end of 1995 through September 27, 1999. She said she never kept track of the employers who she sent applications to, nor did she provide information when her applications were made. She stated further, with respect to unemployment compensation, after her claim was denied, she did not reapply, as even if she was successful, and she was successful in her claim for wages, she would have had to pay back the unemployment compensation. The grievant explained she used her savings, and had help from her family and friends while she was off work. She said during her period of unemployment she did know if it was true or that there was a period of time four or more weeks when she did not submit an application for work. The grievant said she did not know if she had submitted an application for work during each specific month when she was not employed. The grievant noted in seeking work she focused on government positions, and while she was out of work she won a scrabble tournament, paid more attention to her son, kept doctor and dentist appointments, and volunteered for legal aid. She stated at no time did she stop looking

for employment opportunities.

Elvira Sisolak, Economist for the Equal Employment Opportunity Commission, stated she performed analyses of various sorts, including the liability portion of cases in litigation, where she reviews employer data, to draw conclusions as to whether or not there appears to be a statistical problem with the hiring situation in a particular company, and she completes analyses of back pay and front pay in the remedy phase, in both classes, and she testifies for the government. She pointed out in this case she was asked to review information related to the grievant, to testify as to her back pay, with a particular emphasis on her attempts to find work during the potential back pay period. She contended in making her analysis she reviewed pleadings from both sides dealing with the back pay issue, and also a number of other kinds of documents from the Bureau of Labor statistics from the state of Virginia, and statistical things. She testified the nationwide unemployment rate for attorneys was low in 2007, 2008 and 2009. She said she reviewed information produced by the office of personnel management related to federal hiring in the state of Virginia and the D.C. Metropolitan area, and determined the hiring rate for attorneys was high. She asserted that upon reviewing the data, she concluded that the unemployment rate for attorneys is low, that there are jobs available for attorneys, even in the federal government alone, and in her opinion, there were available jobs for the grievant.

While being cross-examined, Ms. Sisolak said when she does a back pay analysis she routinely evaluates the claimant's attempts to find jobs. In this case, she said she only knows what the grievant said about what jobs she applied for. She stated that she could not identify any single job that came open during the time of grievant's absence

from work, in the Tidewater area that she could have received.

III. UNION POSITION

It is the position of the Union there is not duty to mitigate, as this matter falls under the Back Pay Act, and there is no duty to mitigate damages by finding interim employment under the Back Pay Act. The Union contends 5 U.S.C. Section 5596 requires only that an award of back pay be offset by amounts actually earned by the employee through other employment during the period at issue. It is also the position of the Union there have been 40 years of legal precedent holding that an improperly discharged employee is not required to seek other employment while appellate administrative proceedings are in progress and the employee is endeavoring to obtain reinstatement.

It is argued further by the Union even if the grievant had a duty to mitigate, the agency did not prove she did not mitigate her damages or removed herself from the workforce. It is clear, according to the Union, the testimony of the grievant specially established she has been looking for employment and has applied for various positions. Furthermore, the Union asserts the grievant reiterated her position at the recent hearing that there were not many legal jobs which matched her experience and background which came open in the Tidewater area based on her almost daily scans of various job resources. She also states she needed to work, and at all times was ready and able to do so. It is clear, according to the Union, she returned to work immediately upon receiving the Agency's letter to return to duty. It is also the position of the Union, the testimony provided by the Agency witness failed to prove there was a single attorney job in

Tidewater area which was available during the grievant's termination. The Union asserts nationwide statistics of "Professionals and related occupations," the source from where the Agency's witness testified, is worthless information. In this case, the Union argues the unrebutted evidence does not establish the grievant failed to use reasonable care or diligence in seeking a suitable position, nor does the evidence establish there was any position she could have discovered and received. Furthermore, the Union asserts the agency provided no evidence that there were "suitable positions" which were available, and the grievant specifically disavowed that she was aware of even a single position in the Tidewater area.

It is the position of the Union that it is entitled to an award of attorney fees. The Union would point out the Agency has conceded there would be some period of back pay, thereby destroying the Agency argument that fees could not be awarded because no back pay was warranted. With respect to the contention of the Agency that Mr. Allenberg's time on June 21, 2007 was not compensable as it was duplicative of Mr. Bonney's time, the Union contends this time was appropriate, as the need for such additional counsel was justified. Regarding the Agency objections related to time spent on defenses or arguments which are not successful, fees are appropriate, as previously held by applicable precedent. The Union contends fees are warranted in the interest of justice. The Union contends, in order to award fees under the Back Pay Act, the arbitrator must find that the grievant was affected by an unjustified or unwarranted personnel action, that results in the withdrawal or reduction of the grievant's pay, allowances or differentials. When this occurs, the legal standards upon which an arbitrator can render an award, need to be considered; that is, fees must have been

incurred for services of an attorney, fees must be sought only by the prevailing party, the award of fees must be warranted in the interest of justice, and the amount claimed for attorney fees must be reasonable. The Union contends fees were incurred, and the Union was the prevailing party. In this case, the Union contends attorney fees are warranted under at least three of the criteria specified in the Allen V. U.S. Postal Service case, that is (1) the Agency's action was clearly without merit or wholly unfounded (2) the employee was substantially innocent of the charges and (3) the Agency knew or should have known that it would not prevail.

It is the position of the Union that attorney fees need to be awarded at the contractual rate of $700 per hour. This is based on the evidence which established that it would have been impossible for the grievant to find competent counsel willing to accept an extremely difficult performance case without a unique fee agreement. The Union contends the supreme court in Perdue v. Kenny issued a decision which said that a fee determined by the lodestar method may be enhanced, and while there is a presumption that the lodestar figure is reasonable, this presumption may be overcome in certain circumstances in which the lodestar does not adequately take into account a factor that may be properly considered in determining a reasonable fee. In this case, the market value for qualified attorneys is more aligned to the Washington, D.C./Northern Virginia area, and even without a contingency fee arrangement, the rate for an attorney in that area pursuant to the Laffey Matrix would have been $465 per hour. Here, the contract rate is reasonable, and the Union requests that such fees be paid.

IV. AGENCY POSITION

It is the position of the Agency the grievant should not be awarded back pay because she removed herself from the workforce. The Agency contends in calculating a back pay award "an agency may not include any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action. The Agency argues the evidence shows the grievant was unavailable for work because she removed herself from the workforce by not applying for jobs during the two years of her unemployment. The Agency asserts the grievant had a duty to make a reasonable effort to mitigate damages by seeking other employment, this rule being particularly applicable where the back pay compensation provisions specifically require a deduction of interim earnings. In this case, the grievant did not make herself available for work, nor did she apply for unemployment compensation. The Agency contends the grievant did not document how many applications she submitted, and she did not regularly apply for positions during the two years of her unemployment because she speculated she would not be hired. The Agency contends even though the grievant was terminated, she could have applied for positions, and in the view of the Agency's expert witness, the grievant would have found work during the two year period.

The Agency argues further whatever the grievant did to actively assist her attorney did not require full time effort for two years. In fact, there is no evidence that the grievant was actively assisting her attorney during the period of her unemployment. The Agency argues section 550.805©(2) of title 5 of the code of federal regulations, a provision of the back pay act regulations, precludes payment for periods during which the

employee was unavailable for work. There is simply no evidence that grievant was looking for work other than three or four applications which she submitted over the course of two years. Grievant has not shown that she was available for work because she only sporadically applied for jobs during the two years before her reinstatement. The Agency should not be required to compensate her for this period.

It is the position of the Agency the grievant's attorney is not entitled to enhanced attorney's fees and certain costs. The Agency contends these fees and costs are not allowed by law. According to the Agency, the evidence, including that sponsored by the grievant, and her attorney is that a reasonable hourly rate for grievants attorney is $350 per hour. The grievant agreed to pay her attorney $700 per hour on a purely contingency basis. The supreme court has repeatedly rejected the enhancement of attorneys' fees made on this basis. It is also the position of the Agency the presented evidence by the grievant which suggests that the enhancement requested is based on the difficulty of the case, the superior work of her attorney, and the difficulty of obtaining an attorney to represent her, does not provide the basis to provide enhanced attorneys' fees. The supreme court has held in Perdue v Winn ex rel. Kenny A. that "the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors presumably are fully reflected in the number of billable hours recorded by counsel." Also, the case held that the "quality of an attorney's performance generally should not be used to adjust the lodestar because these considerations are reflected in the reasonable hourly rate. Because of the strong presumption that the lodestar figure is reasonable, any adjustment to that figure based on an attorney's superior performance or complexity of the case must be based on specific evidence that supports an enhancement.

The Agency asserts there was no specific evidence to support an enhancement based on such grounds. Furthermore, the Supreme Court's recent decision in Perdue held that the few circumstances where the quality of an attorney's performance would provide a basis for an enhancement "are indeed rare and exceptional and require specific evidence that the lodestar fee would not have been adequate to attract competent counsel." Based on the evidence provided, the grievant's lodestar fee is $350 per hour, that is all he can recover, and the grievant cannot recover a rate of $700 per hour for her attorney, as this fee is precluded as a matter of law.

It is the position of the Agency the grievant is not entitled to recover certain costs her attorney incurred. Specifically, her attorney's claim for the cost of the hearing transcripts, and travel for himself and Regina Andrew, Union President, are not recoverable costs. The Agency contends costs are not recoverable under law or the collective bargaining Agreement. Also, the Agreement does not allow for the recovery of travel expenses incurred for the grievant's attorney and for the Union President to attend the hearings in this matter, as provided in paragraph 42.04 (e) of the Agreement.

VI. OPINION

I have carefully reviewed the evidence, the labor agreement, the arguments of the parties and the numerous decisions submitted. The first issue to be decided is whether or not the grievant is entitled to back pay. The Agency contends the grievant should not be awarded back pay because she removed herself from the workforce. It is also argued by the Agency the grievant did not seek unemployment compensation, and this is further support to its position that the grievant removed herself from the workforce. The Union

asserts the grievant had no duty to mitigate damages by finding interim employment under the Back Pay Act, but even if the grievant had a duty to mitigate, the Agency did not prove she did not mitigate her damages or remove herself from the workforce.

Upon reviewing the evidence submitted by the parties, in conjunction with the extensive case law which has been provided, it becomes readily apparent that the grievant did attempt to seek employment during the period of her absence from the Agency. The unrefuted testimony of the grievant was that she was in fact available for work throughout the entire period of her absence. The relevant testimony and evidence did show that the grievant attempted to find work within her skill set, and she continued to look for opportunities. The Agency has contended there were many opportunities for attorneys in the area, but in my considered opinion, there was no specific showing by the Agency that there were opportunities for which the grievant was qualified, in the area that she was seeking employment. The grievant made the determination to seek employment in the Tidewater area in her specific specialty, but she was unable unable to find the kind of position she was seeking. In my opinion, this is understandable, given the nature of the kind of specific position being sought by the grievant, in the area she was seeking employment. It is also clear, according to the information presented by the Agency, there was no showing by the Agency that there were the kind of opportunities being sought by the grievant. What is important, and necessary in this circumstance, is that the grievant did make herself available for work at all times during her absence, and she did make an attempt to obtain other employment.

The Agency has also contended the grievant did not attempt to receive unemployment compensation, and had she done so, she would have had to more actively

seek employment. The record evidence shows the grievant did apply for unemployment compensation but was declared to be ineligible. After being declared to be ineligible, she made the decision not to again seek unemployment compensation, but to live off of her savings and with the assistance of her friends. This was the grievant's choice, but in making such choice, she did not, in my considered opinion, make herself unavailable to perform work. Even though the grievant made the decision to forgo an opportunity to receive an entitlement, she did not remove herself from the workforce. Upon carefully considering the entire record, and arguments of the parties, it is my determination the grievant attempted to mitigate her damages and did not remove herself from the workforce, and she is entitled to receive back pay.

Regarding, the request for attorney fees, the record evidence substantiates a reasonable attorney fee in this circumstance would be $350 per hour. The Union has requested the attorney fees be enhanced to $700 per hour, and be awarded in this instance. The Agency contends there is no basis for enhanced attorney fees, because the established evidence does not support such a finding. I have carefully reviewed the evidence, arguments of parties and applicable case law concerning the issue of attorney fees. Based upon such review, it is my opinion the Union has established, in this circumstance, that attorney fees are justified pursuant to the established criteria. However, it is my considered opinion, based upon the evidence submitted in this case, there is no legitimate basis for providing an enhanced fee. The grievant and her attorney chose to make an agreement on the basis of a contingency agreement, but this understanding, in and of itself, does not provide the basis for providing an enhanced attorney fee. Furthermore, the evidence does not reflect that there are other reasons

which would justify an enhanced attorney fee. Undoubtedly, the grievant's attorney is very competent in every regard, but such competence does not provide the basis for an enhanced fee. In my considered opinion, a attorney fee of $350 per hour is reasonable. With respect to costs, the applicable Agreement provides that the parties are each responsible for their share of costs incurred. Accordingly, the Union's request that costs be paid by the Agency is denied.

AWARD

The grievant is entitled to receive back pay from the time of her termination until she is returned to work. Attorney fees in the amount of $350 per hour, for all hours documented in the Union's exhibit is allowed. The Union's request for costs is denied.

William J. Miller, Jr.
Arbitrator
August 18, 2010