VOLUNTARY ARBITRATION PROCEEDINGS
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration	(	Opinion and Award
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Between	(	FMCS Case No.: 07-58991
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	(	Grievant: Amy Garber
United States Equal Employment Opportunity Commission	(	
	(	
	(	Date of Hearing: May 5, 2008
And	(	May 6, 2008
	(	May 7, 2008
American Federation	(	September 10, 2008
Of Government	(	September 11, 2008
Employees, Local 3614	(	September 12, 2008
	(	November 13, 2008
	(	November 14, 2008
	(	
	(	Record Closed: April 21, 2009
	(	
	(	Date of Award: May 13, 2009

Representing the Agency:

Theodore E. Revas, Esq.
Attorney

Joseph Popiden, 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

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

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

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

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.

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.

II. BACKGROUND

Thomas Lucas testified he does labor employment defense work for Willcox and Savage in Norfolk, Virginia. He discussed his educational background and prior work history. He said his firm does corporate employment discrimination work. He stated the grievant had cases with members of his firm. He pointed out he had occasion to work with the grievant who was the lead counsel appointed by the Equal Employment Opportunity Commission (EEOC). He contended the relationship he had with the grievant was good and her conduct was professional and appropriate.

Mr. Lucas stated he was lead defense counsel on a Maersk, Inc. case. He said the issue of the case related to a retaliation claim and noted the original claim was active and intentional discrimination based upon national origin. He explained the grievant opposed a subpoena related to a discovery request of Mr. Saleh. He contended a number of items and the subpoena were upheld by the judge and had to be produced but noted the picture was not one of those items. He said if he would have found out Mr. Saleh had a criminal record it would have been significant to the case. He explained after the court ruled information had to be produced, he was armed with compromising information about Mr. Saleh, which was inconsistent with his employment application in his Department of Defense security form. Mr. Lucas testified he had an associate working with him on the case. He pointed out the contact to settle the case was the grievant. He said the EEOC

was represented in a competent and professional manner by the grievant. He stated the EEOC received a settlement in the matter. He pointed out he did not register complaints with the EEOC regarding the grievant. Mr. Lucas contended he provided lectures at the request of the EEOC. He explained the grievant said the EEOC's position is the EEOC was not personal counsel for Mr. Saleh or any other charging party, rather the EEOC is a party in the proceeding.

While being cross-examined, Mr. Lucas testified he is not aware of case law prohibiting a certain amount of medical disclosures for a "garden-variety" type of emotional distress claim. He said the court granted the motion to quash with respect to photographs, arrest convictions and citations and permitted his firm to go forward and secure the information. He contended court rules indicate what is relevant and should be produced. He recalled having informal documents with the grievant related to photos. He stated the grievant informed him there were no photos. He contended he became aware of the conviction records of Mr. Saleh through the testimony of Mr. Abdellatif. He explained his experience with the EEOC was that the Area Director or head of the office had some authority over a settlement and the Regional Attorney needed to pass it.

Deborah Lawrence testified she is the Supervisory Trial Attorney at the Baltimore field office for the EEOC. She pointed out she supervised the grievant when the Baltimore office was the district office from 2002 to December 31, 2005. She said Tracy Spicer supervised the grievant prior to 2002. She contended Ms. Spicer told her the grievant worked incredibly hard. She pointed out she prepared the grievant's performance appraisal, dated October 27, 2002 and noted her as outstanding.

Ms. Lawrence contended the grievant first chaired the Bon Secours case, which

had a fairly substantial verdict in the millions above the cap. She explained the grievant filed suit for this case she developed, and she conducted all the discovery and went to trial. Ms. Lawrence testified she provided the grievant with a lot of input, read the depositions and worked with her on the opening and closing. She said she provides support to Trial Attorneys under her supervision. She contended the verdict in this case was the highest verdict she knew of as a Supervisory Trial Attorney. She said the grievant conducted depositions and noted they were fine. She testified the overall appraisal she gave the grievant for the period of October 1, 2002 to September 30, 2003 was outstanding in the critical elements of accountability and quality of work.

Ms. Lawrence testified around June 15, 2003 may have been the time she recommended the grievant be promoted from a GS-13 to a GS-14 grade. She said she made the recommendation for the grievant to be promoted because she was performing the work of a 14. She stated she appraised the grievant as outstanding in both critical elements from October 1, 2004 to September 30, 2005. She said she did not know if she was asked to give input about the grievant's performance for October, November and December 2005. She pointed out the grievant is a good attorney and knew how to do her job and get along with management in the Norfolk office. Ms. Lawrence contended in her experience as a Supervisory Trial Attorney working for the EEOC, she never received a verdict the size of what the grievant's team received in the Bon Secours case. She explained a seven figure verdict in this jurisdiction is unusual because there are not the most generous jurors.

Ms. Lawrence stated the Baltimore office was downsized to a field office and she had no supervisory responsibilities over the Norfolk office. She said Ms. Spicer became

the grievant's supervisor. She contended she spoke with Lynette Barnes, the Regional Attorney in Charolette about her favorable impressions of the lawyers in Norfolk and Richmond. She said she shared her positive experience about the grievant with Ms. Barnes and mentioned the grievant had personally taken on quite a load. She pointed out she told Ms. Barnes the grievant encountered two troubled kids and decided she was going to become their adoptive mom. She stated she gave this information to Ms. Barnes because it was a remarkable thing about the grievant, and she wanted to share the information.

Ms. Lawrence explained she did not review much of the writing the grievant made within the office, but she was more concerned with what was going to get filed in the court and confined her review to summary judgment documents. She stated she reviewed notices of intent to sue. She contended she did not have to do substantial reviews of the grievant's work product. She explained she never required the grievant to submit written discovery questions or have written deposition questions reviewed. She said Trial Attorneys look at their own work before they send it, but noted it is not required to be reviewed by her. Ms. Lawrence stated she never required the grievant to sign responses under oath. Ms. Lawrence pointed out as a supervisor Trial Attorney, she withdrew from the Chesapeake Golf Company case because a charging party lied about a criminal conviction.

Ms. Lawrence explained a motion to compel was filed against her and a magisterial judge forced medical records to be disclosed. Ms. Lawrence testified she does not have any responsibility for any Trial Attorneys in the Charlotte district office. She explained she assisted lawyers in other offices when they got close to trial when she

was invited by headquarters.

During cross-examination, Ms. Lawrence stated she probably sent a copy of the performance plan to the grievant in October 2005. She explained performance standards are sent around the same time signatures are collected on the evaluation from the previous year. She pointed out the attorneys from Richmond were not reporting to her, but she had a fairly good sense of them. She said she had high regard for Stacey Caldwell and was most impressed with her writing. She testified she did not tell Ms. Barnes she had to "keep her eye" on the grievant because she trusted the grievant. She said the grievant took on two children up to a year before the repositioning. She contended she did not review the grievant's discovery, go to depositions with her, check her deposition questions or require her to do verifications. She pointed out every office has a different way of addressing verifications.

Ms. Lawrence explained in the case with the large verdict, she prepared the cross of witnesses known to be called and those that had a deposition transcript. She said the grievant took direct testimony. She stated Hendrickson e-mailed someone to congratulate the grievant and/or Ken and attributed this great victory to the training he was provided in a trial practice training. She pointed out the trial did not begin well because of an adverse witness and the charging party's husband. She said she helped the grievant explore the mechanics of how to reign in a different witness. She stated she did not recall any feedback from the grievant concerning the Hoffler Case. She testified she allows the attorney to work depending upon the level of comfort and her assessment of his or her level of skills. She pointed out the grievant would e-mail drafts or submissions to her and she would put the grievant on the speaker phone and would spend time together jointly

editing. She stated she presumed the grievant made changes she was instructed to make. She said she did not know if she required the grievant to send a finalized version. Ms. Lawrence contended she did not supervise Suzanne Nyfler, except on a temporary basis.

Herbert Brown, Office Director, testified he is responsible for the day to day operation of the office, administrative duties, and makes sure investigations and reports are carried out. He said four investigators, a secretary, an IT person, a Supervisor of Intake, and a support person are under his supervision. He pointed out the staff attorney works out of his office. He explained the staff attorney is responsible for litigation, and noted he, the investigators, and the staff attorney work together to produce results. He pointed out Norfolk previously had two staff attorneys, but now has one. He contended he met the grievant prior to coming to Norfolk when she was being interviewed for the job. He explained this was the time when there were two attorneys in the office, and he noted later the grievant became the sole attorney in the office. He pointed out the Norfolk office has a caseload of approximately 800 and about 100 cases are closed out per year. He stated his working relationship with the grievant was positive and their business relationship was that of processing cases, to discuss possible litigation vehicles, and to have interchange between the staff, himself and the grievant on those cases. He said the grievant was polite and pleasant with the staff and people who came in contact with her. He explained he had no problem with the manner in which the grievant conducted her business. Mr. Brown said he did not keep track of when the grievant took lunch and he did not know if she had a positive leave balance.

While being cross-examined, Mr. Brown said the grievant spent more time away from the office after she began raising children than before such time. He stated part

of the grievant's role was to have an attorney in a local area office to be there and be accessible for investigators to use to consult. He contended on occasion he received phone calls from the Charlotte office wondering where the grievant was located. Mr. Brown explained he had several people in his office who were not direct reports, but reported to the District. He contended he only signs their cards and leaves slips, but he does not question where they are going because it is not his responsibility. He testified he is not directly responsible for the reason a person is out or taking leave. He pointed out the grievant was out of the office a lot, but he did not keep a record whether or not she took leave. He said if he signed a leave slip, the grievant was out of the office. Mr. Brown explained if an employee was going to be out of the office he needed to know. He stated at one point the District may have required everyone to sign in and out, but he did not track the time. Mr. Brown contended on one occasion, the grievant was not at an A-1 tracking meeting. He stated he was not required to sign the log for the grievant for lunch.

Michael Johnson testified he has been a Federal Investigator with the EEOC in the Norfolk office for 19 ½ years. He explained he met the grievant when she was initially plaintiff's counsel on a case years prior to coming to the EEOC. He pointed out his working relationship with the grievant was cordial and he never had any problems with her.

Tracy Spicer testified she is a Supervisory Trial Attorney in the Washington field office. She said she has been a GS-14 since 1995 or 1996. She contended her duties are to oversee litigation, participate in outreach, litigate and provide training. She testified she supervises Suzanne Nyfler in Richmond, Kerith Cohen in Norfolk and Zoe Mahood in Raleigh. She said the last time she was in court on one of her cases was in December

2006. Ms. Spicer explained she started with the EEOC in 1990, worked in the Baltimore office until 2006 and then was under the Charlotte office. She stated in 1991 she was a Trial Attorney and became a Supervisory Trial Attorney in 2001. Ms. Spicer stated she began working with the grievant at the end of May 2006. She pointed out when she switched to the Charlotte office, Lynette Barnes was her supervisor. She said Ms. Lawrence did not provide her with any feedback about the grievant's performance when she was placed under her supervision.

Ms. Spicer contended while she was in the Baltimore office her performance reviews were outstanding, but under Ms. Barne's supervision they went down to highly effective. She contended she supervised the grievant from the end of May 2005 through September 30, 2005 and noted the grievant was previously supervised by Ms. Barnes and was also supervised by Ms. Lawrence. Ms. Spicer explained a supervisory employee is required to seek and obtain the previous supervisor's input if it is directly related to the work. She contended there are copies of documents in possession of the Charlotte district and noted she reviewed them. She pointed out Ms. Barnes said Ms. Lawrence indicated if anyone needed to be watched in Virginia it was the grievant. She testified she did not speak to any of the grievant's co-workers or charging parties in preparation of the unsatisfactory performance appraisal. She stated she considered the grievant's interactions with co-workers and talked with Mr. Brown. She noted Mr. Brown did not provide positive feedback about the grievant's interpersonal relationships with employees in the office. She explained Mr. Brown had a concern the grievant was selective in guidance to the investigators and the type of cases she was interested in, and about her availability, and he noted the grievant had a tendency to disappear.

Ms. Spicer said she indicated the grievant participated in six cases as lead Counsel. She stated the reinforcement agreement is part of the work plan, and noted this type of document is a standard operating procedure for the Charlotte office. She pointed out there are approximately 700 to 800 charges in Norfolk each year. Ms. Spicer contended the grievant was the only attorney working in Norfolk when she supervised her prior to repositioning. She explained how the attorneys in Baltimore reviewed charges.

Ms. Spicer testified the selective procedures for the Virginia office were under the Charlotte office. She explained the charges the attorneys in Virginia were responsible for reviewing and assessing did not include state and local charges. She contended the grievant had five cases that formed the substance of her unsatisfactory performance. She stated these cases probably settled for $15,000.00 or more. Ms. Spicer testified when she wrote up the unsatisfactory performance appraisal about GA Hoffler she had no involvement in the case, but she had access to the documents. She said the case also involved Ms. Lawrence and Ms. Barnes. She pointed out the information she received to prepare the unsatisfactory performance appraisal came from Ms. Barnes and the pleadings. She stated she did not talk to Ms. Barnes about the case. She testified the grievant did not provide sufficient service of proof in the case, did not follow up on service of proof and noted once the dismissal occurred, she did not provide an immediate explanation to her supervisor. She said the grievant arranged with Ms. Lawrence to get a default judgment. Ms. Spicer stated in the pleadings the grievant failed to communicate with the court. She testified she did not have any conversations with the clerk's office before she wrote the performance evaluation. She explained the court dismissed the case

without prejudice, but she never asked the grievant to refile the case and noted the case was not refiled.

Ms. Spicer testified further she did not supervise the grievant when the Kempsville Building case was litigated. She said Ms. Lawrence would have supervised the grievant and Ms. Barnes would have taken the case over as the grievant's supervisor. She stated she was the grievant's supervisor during the Maersk case. She pointed out there were issues with the other cases that happened with Ms. Barnes. She said she criticized the grievant for preparing the opposing motion to dismiss in the Maersk case. She stated this issue was discussed when they met in July when Ms. Barnes raised concern regarding the grievant's performance. She explained Ms. Barnes was successful in defeating the motion to dismiss. She pointed out the case was ultimately resolved for $20,000.00. She said the grievant did the oral argument in court. Ms. Spicer contended the grievant sent out the discovery without making changes and for items still being questioned. She explained the grievant served responses that were reviewed and discussed, but she did not make changes, and she also served discovery which no one saw.

Ms. Spicer stated there was another claim when the grievant failed to properly notify management of the subpoena of the charging party while she was the grievant's supervisor. She explained she wrote about the grievant's failure to quash a subpoena, and this possibly stems from her mistaken perception regarding the EEO's position. She pointed out the grievant changed the name and sent the same order in a motion to quash a subpoena for medical records. She explained for a doctor to be listed it depends on what information the doctor has relevant to the case. She stated she reviewed the motion to

quash for this case after the fact. She contended she was the grievant's supervisor in July and talked to Tina, Ms. Barnes and the grievant about what transpired. She stated the grievant presented conflicting justifications for her actions. She explained the grievant worked with the charging party's counsel and said the grievant contacted the individual's private counsel. She contended the grievant was written up for facilitating the IME, not for calling the person's attorney. She explained the grievant contacted the charging party's attorney when she got the IME request and did not do anything else.

Ms. Spicer stated in the Days Inn case she had no responsibility for reviewing the Notice of Intent. She said she had knowledge of the case, the drafts and comments made. She contended during this same period the grievant drafted seven memorandums, and that each memorandum required substantial revisions. Ms. Spicer said she did not participate in the review of the Cavelier Marine Memo because it was before she became supervisor.

Ms. Spicer testified negative litigation recommendations go to the Director and the file is closed after a notice is sent. She pointed out she never met with the charging party in the Ennstone case. She stated she talked to the grievant about the individuals information related to the case. She said the problem with the Regenesis Community Health Center case related to an incomplete form. She noted she was responsible for reviewing the memorandum. Ms. Spicer contended she did not review the Remark memo and she said that Ms. Burnside reviewed it. She testified Ms. Burnside and Ms. Barnes told her there were problems with analysis of this case. Ms. Spicer pointed out Ms. Barnes told the grievant in the Hanger Prosthetics case she disagreed with her analysis. She said she reviewed the memo and noted A-2 negative litigation recommendations go

to Ms. Barnes. She stated the grievant prepared A-2 forms in the Drantley Construction and Radio Shack cases, which had to be revised because of errors. Ms. Spicer explained she looked at the documents and saw they did not include specific analysis that was being requested. She said the documents had significant comments on them about a Regional Attorney and corrections that needed to be made but were not timely made because the grievant was untimely on the documents.

Ms. Spicer contended it is the Trial Attorney's responsibility to send newly received decisions to the Regional Attorney's office, but noted the responsibility could be delegated to a Legal Technician. She said the grievant sent out the decision related to the GA Hoffer case. She explained when a case is dismissed, the supervisor is to be immediately told. She stated there is no rule to tell the supervisor about the decisions, but said it is common sense. She pointed out the grievant did not receive written instructions on how to handle a motion to compel in the Kempsville Building matter, and noted she was under Ms. Barnes' supervision at the time. Ms. Spicer testified she handles motions to compel and consults with her supervisor about issues. She said her supervisor would tell her how to handle the motion to compel if she had questions. She explained when a motion is sent out representing the agency the chain of command is informed of the motion. She stated it depends on the competency of the attorney, whether it could be handled by that person.

Ms. Spicer contended Ms. Barnes told the grievant the rules changed. She pointed out the grievant told her she had discussions with Ms. Barnes early on. She said the grievant told her she appreciated talking with her about the cases. She testified an employee cannot be held responsible for something the employee did not know about

regarding policies, procedures and rules. Ms. Spicer stated Ms. Barnes issued a chart in February. She explained the attorneys in Virginia were told there was no way they could comply with the dates and it would be revised to comply with local rules. She contended related to the Maersk case, the grievant said she had discussions with Tom Lucas about the charging party's arrest record or criminal record. She said the grievant was cautioned about having the informal discussions without anything in writing. She explained this was not a discovery dispute. She pointed out there was not a specific request or question about the convictions, but noted the grievant disclosed this information to opposing counsel. Ms. Spicer testified the informal discovery process became a dispute, and noted it became an issue regarding how the grievant should proceed with the case and the strength of the EEOC's case. She explained the grievant said the person perjured himself, that later sent an e-mail saying "oh, sorry, big mistake. It's not as big a deal as I thought it was." Ms. Spicer stated not every Federal Agency has a security clearance form because it depends on the level of security needed for the job. She pointed out she asked the grievant about the form and how it related to the case. She said when she asked the grievant how the person perjured himself, the grievant was non-responsive. Ms. Spicer explained the EEOC was disadvantaged because a lot of time was spent on issues that could have been avoided and minimized if it had been in a more formal process. She pointed out the grievant, when asked, said she told him about the person's convictions so the attorney would not be blindsided. She stated the grievant was not a strong advocate for the charging party in Maersk because she was not looking out for the best interest of the case or for the charging party's interest. She explained the grievant lost when she went to court and asked for an IME. She pointed out the grievant said the person had not

given her complete information. She contended she asked the grievant to find out about the arrest. She said the questionnaire may have related to the person's credibility if he misrepresented it at some earlier time depending on whether or not the EEOC was successful on the motion or could have been relevant as the after acquired evidence doctrine with respect to cutting off damages. She stated she asked the grievant to explore the effect, and noted she did not because she was non-responsive.

Ms. Spicer said she went to trial for three cases in eight years in the Eastern District of Virginia and pointed out she supervised cases that went to trial and prepared cases that did not go to trial. She contended most of the cases settle. She testified she has been aware of the EEOC withdrawing from a case because the charging party misrepresented facts. She pointed out the person in the Maersk case did not lie about the criminal conviction because he told the grievant about it. She said the grievant overreacted about the case. She stated the grievant needed to be more receptive of the input of her supervisors in dealing with the Maersk case.

Ms. Spicer contended no one helped her write the performance appraisal document. She said she asked Ms. Barnes to review the document for accuracy. She pointed out she reviewed the documents Ms. Barnes had in Charlotte. She stated Ms. Barnes provided input when she had questions, but not on the form. She explained she asked Ms. Barnes to see the documents when she was in Charlotte for a meeting. She contended the PIP is designated to help a person improve to get to a proficient level. She said the grievant was not sent to any training courses during the PIP. She stated she reviewed the grievant's performance standards with the grievant. She testified the grievant was put on a PIP because of an unsatisfactory performance evaluation, and she

did not meet the proficiency standard. Ms. Spicer explained the new performance system is called Employee Performance Evaluation System (EPES), but noted the grievant was not on the system. Ms. Spicer testified she wrote the notice of proposed removal. She said she received input from Human Resources and asked Ms. Barnes for documents she did not have, but did not consult with her about different cases because she had the information. Ms. Spicer contended she sent the PIP to the grievant, told her to read it, and they discussed it the next day.

Ms. Spicer pointed out when the issue has come up about the inarogatories, she and the person she supervises have been successful with them. She said she told the grievant she had not made a decision on the removal, but she tried to determine if there were alternatives to the removal. She stated she told the grievant to inquire about an alternate position, but such position was not available. Ms. Spicer contended she would have taken other options into consideration. Ms. Spicer said the vacancies she was looking at for the grievant were something in employment or in the hearing unit as administrative judge. She stated the grievant was previously an administrative judge on a part time basis.

Ms. Spicer testified she gave the grievant examples of poor performance that occurred that led to the PIP. She contended GA Hoffler preceded the PIP. She said Kempsville Building was the reason for the PIP because of poor performance. She stated the cases during the 90 day period were Days Inn, Burlington Medical, Carolina Steel and Stone, Wholly Guacamole and the Community Services of Virginia. Ms. Spicer testified in the Days Inn case, the grievant provided initial disclosure with names on it, but she did not know what the people would say. She explained as a GS-14, it is an employee's

responsibility to be independent and come with a recommendation on how to do a case. She said an employee is told the consequences if the employee does not successfully perform during the PIP. She stated employees should check with their supervisor, but noted there are certain levels of responsibility expected from a Trial Attorney who is a GS-14. She said the grievant paid no attention to detail. She contended the grievant said the names of individuals she submitted appeared in the investigative file. She testified as a GS-14 the grievant should have come with the recommendation instead of seeking guidance on how to proceed. Ms. Spicer explained the grievant had a tendency to do everything last minute, and noted the problem with a quick turn around was it could not be done because the items needed additional work. She said she recalled reviewing discovery requests and making comments. She contended the grievant did not prepare people for a set of depositions in the Days Inn case except to explain the deposition process. She noted Ms. Barnes stated the grievant said similarly in other cases she was surprised at depositions. She contended there were problems with the 30(b)(6) and said the grievant did not tell anyone about it or send it to anyone. She testified before something is sent out it is supposed to be reviewed. She stated the grievant included appropriate and inappropriate items in the 30(b)(6). Ms. Spicer testified she proposed the grievant's removal because of poor performance. She said one of the issues listed was the fact the grievant did not provide a timely disclosure of information. She stated the grievant's specific charges related to her poor performance. She explained there were discussions on the phone regarding the 30(b)(6) motion and the grievant was guided on what to say. She pointed out the grievant was directed how to respond in correspondence. She explained the grievant was willing to accept what it was the

defendant said about the investigator without asking the investigator. She pointed out the Days Inn case resulted in the settlement for the EEOC. She explained the brief to respond to the defendant's motion for summary judgment was incomplete and contained grammatical errors, typographical errors and analytical errors. She said there were several rewrites to the document by her, Ms. Burnside, and Ms. Barnes.

Ms. Spicer contended Magistrate Miller made comments related to the grievant's accountability because a brief was not timely filed. She explained the grievant appeared to be advocating for the defendant in the Days Inn case. Ms. Spicer said when the grievant sent drafts for the supervisor to review, the drafts should not have been in rough draft form. She pointed out one of the grievant's opening statements related to a mediation was not persuasive. She explained a press release the grievant prepared referenced the wrong case and the incorrect contact person.

Ms. Spicer contended the grievant did not complete the notice of intent in the Burlington Medical case. She pointed out the grievant prepared a discovery plan how she was going to approach the case, but she did not follow the plan. She said the grievant did not call the individuals to identify potential class members. She stated as a result of various efforts to determine class members, few people were added to the class. Ms. Spicer explained the case settled and relief was provided for six or seven women. She contended in the case, travel arrangements were not made appropriately, and depositions were taken without the procurement documents that needed to be in place. She said the grievant was reminded these functions were her responsibility, and she was told the Legal Technician could not prepare 1, 2, 3's without basic information. She explained the Legal Technician prepares a document based on the information the Trial Attorney

provides. She stated the grievant was not communicating effectively with the Legal Technician as to what services were needed.

Ms. Spicer testified the grievant asked her to prepare the charging party for the Days Inn case and she was partially able to complete this task. She stated the charging party told her the grievant had no real contact with her over the months and never talked with her about the case. She pointed out the grievant called her and said the charging party did not do well at the deposition and provided conflicting testimony. She contended the concern in this case was that the grievant did not adequately identify class members. She said the grievant had to be provided with directions and guidance on how to respond to the defendant's objections. Ms. Spicer stated the grievant misrepresented the facts because she told her she had looked for people and there was no one else. She explained the class members had not been identified by the grievant.

Ms. Spicer said the preparation for the Burlington case needed considerable revisions. She stated the motion for summary judgment was filed in time. She noted the grievant was going through depositions in another case at the same time. She contended there was a delay in the filing of the Carolina Steel and Stone case. She said the filings needed to coincide with the release of the press information. She testified the grievant was told to file the case by the end of the quarter. She pointed out the documents for the case were all prepared and the grievant only needed to read it.

Ms. Spicer said the grievant sent out a press release without such release being reviewed by Ms. Barnes. She said the grievant did not complete the notice of intent for the Burlington Medical case and it was reassigned.

Ms. Spicer explained when an employee starts to prepare a case, individuals who

make up a class are identified as the investigation starts and continues through the litigation. She contended when she asked the grievant if she called individuals, she said no. She pointed out it took a while for the EEOC to get discovery out, to obtain information and to follow up. She stated the individuals received relief. Ms. Spicer testified Kanota Reid was the Investigator, but did not know if she had any performance issues with the grievant. She contended the grievant found the individuals who were additional class members and noted they were untimely. She pointed out the grievant was reminded of her responsibilities. She said the grievant does not fill out documents, but provides information to the Legal Technician to have documents prepared. She stated part of the problem was that the grievant was not communicating effectively with Elizabeth Broome, Legal Technician, as to what services were needed.

Ms. Spicer said the grievant asked her to prepare the charging party for a case. She stated she was able to partially prep the individual. She pointed out the individual stated she had no contact with the grievant. She explained the individuals provided information to the investigator to prepare the Notice of Intent. She contended she said the witness elaborated. Ms. Spicer testified when the grievant was questioned about the witnesses' credibility it was not as bad as the grievant represented. She pointed out the charge against the grievant in this instance was that she did not know how to respond and needed specific guidelines how to respond. She explained the grievant was making assurances saying she was doing things she was not and was misrepresenting what she was doing. Ms. Spicer contended the grievant looked for other people and told her there was no one else.

Ms. Spicer testified the preparation for Burlington case needed considerable

revisions. She said the brief was filed on time. Ms. Spicer stated there was a delay in filing the Carolina Steel and Stone case. She pointed out in the Wholly Guacamole case the EEOC had 30 days to file a suit and it was filed on the 29th day. She said the problem was the grievant did not effectively plan for it and delays could have been avoided.

Ms. Spicer explained the problem with the Wholly Guacamole case was that the grievant was supposed to advise the Regional Attorney she planned to file it. She said the grievant was not responsible and stated the case was filed within 30 days. She pointed out the case was delayed and the grievant was non-responsive. She contended she talked to the grievant about making sure the case was done and the need to meet deadlines. She testified the Regional Attorney contacted the grievant, sent e-mails but the grievant was non-responsive. Ms. Spicer said she received notification from the court the civil cover sheet was not filed. She pointed out the grievant corrected the problem and sent the cover sheet to the lawsuit.

Ms. Spicer testified in the Community Services of Virginia suit, she told the grievant she needed to file a contempt motion and noted the grievant was also instructed by the Regional Attorney to file a contempt motion. She contended the grievant should have filed a contempt action. She explained when the grievant was asked to file the case an issue came up and the grievant was assigned a follow up. She pointed out once it was determined not to go forward with the case, an explanation needed to be provided to the Office Director as to why the decision was being made.

Ms. Spicer contended technical and analytical deficiencies were contained in Cavelier Marine, Ennstone and McLex matters. She said the grievant knew what the deficiencies were because she received the comments. She pointed out the grievant

received the documents and was present during the meetings when the events were discussed. She explained in Ennstone the grievant was assigned to do a litigation determination and submitted a negative litigation determination considerably later. She said the negative litigation recommendation was accepted by the Regional Attorney. She explained the impact of submitting the case at a later time. She pointed out the charging party did not have a notice of right to sue, but could have requested it. She said the party received a letter of determination saying the EEOC was reviewing the matter for possible litigation. She testified the case was not litigated, and this determination could have been sent in 30 or 45 days. Ms. Spicer contended the negative litigation recommendation occurred under the unsatisfactory performance evaluation. She stated the charge against the grievant in the L&W Regenesis, Community Health Center, Hanger Prosthetics, Remarque, Manufacturing Corporation, Nissan Statesville, Maersk and Cheesecake Factory was the initial drafts needed substantial input, guidance and/or revisions to produce legal advice that was factually analytically sound.

Ms. Spicer testified the problem in the L&W case was in providing substantial input to make sure the work product was factually and logically sound. She pointed out she currently supervises three other GS-14's. She said she needs to provide the grievant with more substantive input than she had to do with anyone else she has supervised. She stated Herbert Brown indicated in early July 2006 the grievant was not sensitive to race issues. She pointed out she told the grievant she needed to be attentive to all cases and each and every Investigator in the office. Ms. Spicer said the grievant did not finish the Cheesecake Factory case and she completed it. She explained the Investigator did the conciliation in the Cheesecake Factory case. She stated the grievant was assigned to

prepare a cause review on this case, but she did not. Ms. Spicer contended she finished the review because it was easier.

Ms. Spicer explained she forwarded the proposed removal to the grievant and the Office of Human Resources (OHR) and noted it was up to the grievant to deal with the decision. She contended when new assignments are made, the supervisor reviews the workload and assigns the person who could handle the case. She said the supervisor is required to provide more assistance during the PIP process. She stated the grievant did not call more often or ask for more input when she was on the PIP.

While being cross-examined, Ms. Spicer stated the Legal Technician was not in charge of supervising the grievant. She said the EEOC had no choice but to let the contempt motion go because it was not favorable to be filed a year after receiving notification the person was not in compliance. She said the grievant did not incorporate all of the changes into the plaintiffs EEOC answers for Maersk. Ms. Spicer explained what she found wrong with the document. Ms. Spicer pointed out she had a case pending on summary judgment and was working on the LA Weight Loss when the grievant was going through the PIP. She explained when she traveled between Baltimore to North Carolina to Norfolk she helped the employees. She discussed the grievant's document that was unpersuasive and noted she asked the grievant to organize the argument so it sounded more persuasive. She stated the grievant did not lose any of the cases on summary judgment. She pointed out she tried to help the grievant reorganize the argument she had to make because she had to make it sound more persuasive. She contended the grievant told her the Maersk case only involved garden variety damages. She testified the grievant said the person involved in the Maersk case perjured himself

because he lied on the security application.

Ms. Spicer contended she cautioned the grievant to include people the EEOC knew had relevant information in the Days Inn case. She defined last minute to mean the last business day before a document needs filed. She pointed out she rarely received last minute pleadings from other attorneys she supervised except for the grievant. Ms. Spicer said she tried cases in the Eastern District of Virginia when she started as a Trial Attorney with the EEOC. She contended she and the grievant negotiated the time when she would turn documents in to be reviewed which was three to four days before a document was due. Ms. Spicer pointed out the problem with the grievant was if a document was due on a certain day, the grievant would send it a day or two later. Ms. Spicer contended although she worked an alternate schedule to being off every other Friday she was always accessible to the grievant.

Ms. Spicer testified the grievant did not tell her she was preparing a 30 (b)(6) notice in the Days Inn case. She noted these motions are to be sent to the supervisor for review. She pointed out in the 30(b)(6) prepared by the grievant for Days Inn, she was asking for unnecessary items. Ms. Spicer explained although she did not have a fax machine or e-mail at home, if the grievant needed to send her something, she would pick it up at the office. Ms. Spicer contended she made the grievant's document more persuasive. She said the purpose of the PIP was as a supervisor to assist the employee become better and a satisfactory employee. She stated time was scheduled on Wednesday to assist the grievant in the PIP, but noted she worked around the grievant's schedule. She testified she spent more time than just Wednesdays assisting the grievant. She contended on almost a daily basis there was some communication with the grievant,

whether by phone, fax or in person. She said before the PIP she was not talking with the grievant specifically about helping her prioritize the work. Ms. Spicer explained the problem with a consent decree the grievant e-mailed to her for review. She pointed out the draft required additional work and some information the grievant had. She stated she sent the consent decree back to the grievant to complete. She agreed the grievant cannot do anything substantive in a case without her supervisor reviewing it. Ms. Spicer contended she also had outreach responsibility supervising other employees and other administrative assignments besides assisting the grievant. She said the duties with the grievant took up most of her time. Ms. Spicer explained the Burlington Medical case was originally assigned to the grievant, but it was reassigned to another attorney to prepare the notice, because the employee did not get it done. She discussed the problems with the case of individuals not being identified who could be part of a class. Ms. Spicer stated she kept a document when the PIP would be over and used it to track the things going on in different cases. She stated she always asked the grievant if she needed help or had a problem meeting a deadline. She said in the Days Inn case there was an agreement in principal between the EEOC and defendant. She alleged she files cases under Ms. Barnes, but noted she was not given a specific time frame to serve. She pointed out she did not supervise the grievant during her entire ten years with the EEOC. She stated the grievant had the same caseload of four cases under the Charlotte office. She testified the only other individual who had the same number of cases or one less than the grievant was Corbett Anderson who was working on a nationwide class case.

Ms. Spicer testified further she sent a fax to the grievant on the Maersk discovery on May 26, 2006 before she was officially her supervisor. She pointed out the grievant

did not adjust the responses to incorporate the corrections or comments. She said the grievant knew she had to get her discovery responses reviewed by a supervisor. She contended the grievant needed to know what doctors were going to say before being identified. She stated the grievant did not consistently use A-2 forms when she needed them. She pointed out the grievant's brief in Maersk was not persuasive. She said the grievant sent her an e-mail indicating the EEOC needed to get out of the case because the charging party perjured himself, but noted she never saw a document showing the person had a criminal record. She contended she discussed Rule 26 disclosures with the grievant before the Days Inn case. She testified she criticized the grievant for not being a strong advocate for the charging party in Maersk, because she was willing to get out of the case without arguing for the EEOC's position. She pointed out the grievant was willing to let the person go for an IME without even a motion having been filed for an IME. She stated the grievant did not think it was necessary to try to quash the subpoena.

Ms. Spicer said the grievant did not contact the people on the initial disclosure list for the Days Inn case. She pointed out the grievant had discovery requests she wanted to be sent out the next day. Ms. Spicer said when an attorney submits something for her to review she expects it to be near ready to be filed. She testified the work product sent by the grievant was not a good work product. Ms. Spicer contended the grievant took a while to inform supervision of the 30(b)(6) notice. She explained it is reasonable for supervision to find out within a reasonable period after service instead of just before service someone needs designated. She said the grievant's draft of her summary judgment opposition in the Days Inn case had organizational problems and grammatical problems, was not persuasive, and took a lot of time to rework. She pointed out she and

Ms. Burnside talked to the grievant related to how she needed to change it, but the grievant did not incorporate all the changes discussed. She noted she and Ms. Burnside needed to finish it. She alleged the grievant was supposed to run affidavits by her or Ms. Burnside to get reviewed, but she did not complete this review. She pointed out there were problems with the affidavits. Ms. Spicer testified the grievant did not file the motion in limine on Monday for the Days Inn case, and she did not mention this fact until they were on the way to the summary judgment hearing on Friday. She said the grievant did not provide any reason why the motion was not filed on time. She contended although the opposition motion was filed by the grievant before walking into the court room, the judge struck the motion, but let the grievant argue it. She stated the judge said this was not the first time the EEOC was late in filing discovery matters or motions. She explained it does not bode well for the EEOC's reputation if the judge strikes a pleading because it is untimely. She pointed out she asked the grievant what the judge referred to when he said it was not the first time, and the grievant told her it must have referred to the Kempsville case she prosecuted. Ms. Spicer discussed as the grievant was on her way to a deposition in Days Inn, she asked her to review the draft consent decree. She noted she reviewed the draft and sent it back to the grievant to make changes. Ms. Spicer testified the Days Inn case was settled by a court ordered mediation.

Ms. Spicer pointed out the grievant was not being an advocate for the EEOC because when there was a disagreement over the language to be in the decree, the grievant was advocating why the language should be included. She pointed out the defendant's attorney wanted special language about how to go through the administrative process if there was not agreement with the EEOC as to the remedy.

Ms. Spicer contended a press release should be drafted and sent to the Regional Attorney for every resolution. She said the press release the grievant drafted for the Days Inn case included being sent to the Office of General Counsel (OGC) without being reviewed, contained the wrong contact information and cited the wrong case. She testified she found out about the press release from an e-mail she received from the Office of Communications and Legislative Affairs.

She stated the grievant was assigned to the Burlington Medical case in October of 2006. Ms. Spicer pointed out she received an e-mail from the grievant indicating she forgot to mention the discovery responses were due. She explained the defendant sent a letter to the grievant in which she was upset because the grievant had not identified the potential claimants. She said when the first case conference was held, the grievant stated she was going to immediately identify the class, but she did not. She pointed out the grievant initially said no additional claims existed, but under further probing she revealed she did not look for any additional claimants.

Ms. Spicer contended during the PIP process she made sure she had continuous contact with the grievant by phone, fax or e-mail, worked with her on prioritizing her work assignments and gave her assignments. She said she had contact with the grievant almost daily during the PIP. She stated her contact with the grievant increased during the PIP period. She explained she had weekly conversations with other attorneys under her supervision. She pointed out during the PIP she made sure she helped the grievant prioritize her work to make sure she was getting the products done and determining if she needed any assistance. She testified a GS-14 attorney is expected to act independently. She stated the grievant did not meet the expectations of a GS-14. She contended the

grievant did not come with a plan of attack or recommendations. Ms. Spicer said the grievant was always looking for assistance for someone to tell her what to do and noted she did not always follow the instructions. She alleged during the PIP period the grievant was instructed to postpone depositions in the Days Inn case.

Ms. Spicer explained she found out after the charging party's deposition in the Burlington Medical case the grievant admitted she had not made any effort to contact additional claimants. She said Stacey Caldwell prepared the notice of intent in the Burlington Medical case and identified some of the claimants. Ms. Spicer stated the grievant said she would get the draft of the opposition brief in the Burlington Medical case to her earlier.

Ms. Spicer pointed out when she reviewed the grievant's work product she made hand written notes and faxed it back to her or sent e-mails with questions or called her. She contended the grievant would send the corrections back to her unless she was instructed otherwise. Ms. Spicer explained what she did with versions of corrections.

Ms. Spicer stated the combined opposition to summary judgment in Burlington Medical was over the 30 page limit. She testified the grievant did not work on reducing the number of pages of the brief because she was at a deposition. She explained when the grievant told her what her schedule would be she told her she should not agree to dates because there would be conflicts. She stated the complaint in Burlington Medical was never served because the defendant answered before it was served. Ms. Spicer contended Kara in the Charlotte office prepared the documents in Carolina Steel and Stone. She pointed out the grievant was assigned to this case and it needed to be electronically filed. She testified since it was the first time the grievant practiced in the Western District in

North Carolina she needed to register an ECF registration to file electronically. She said the grievant filed the case later than when she was instructed to file it. Ms. Spicer testified the grievant prepared the notice of intent in Wholly Guacamole. She explained the grievant kept asking for the latest version so she could make changes. Ms. Spicer stated the grievant did not always make changes she sent to her. She pointed out Ms. Barnes sent an e-mail to the grievant to identify when she planned to file the case. She said the draft of the complaint the grievant prepared for Wholly Guacamole contained typographical errors.

Ms. Spicer alleged in the Community Services of Virginia case the grievant needed to follow up with the defendant to determine if there would be voluntary compliance or if not to file a complaint. She testified the grievant was not being loaded with cases during her PIP period. She explained the grievant was given the Carolina Steel and Stone and Wholly Guacamole cases at a time when her litigation docket was relatively low compared to everyone else. She contended the grievant did not need to prepare for trial in Burlington Medical because the case was stayed pending a summary judgment decision. Ms. Spicer testified when the grievant first reported to the Charlotte office she had four cases. She stated the grievant did not have a larger caseload than the other attorneys in Charlotte. She said she understood she was supposed to help the grievant perform at a proficient level during the PIP. She contended to perform at a proficient level, an employee should carry a caseload expected of a senior Trial Attorney. She testified she did not have different expectations for the quality of the grievant's work when she supervised her in Baltimore or in Charlotte. Ms. Spicer stated she had no incentive to propose to remove an attorney who was thought to perform satisfactorily,

because if the person is performing satisfactorily the employee should be kept because there is no guarantee the employee can be replaced.

Ms. Spicer contended the grievant had a failure of conciliation assignment which was Ennstone. She said after discussions with the grievant, it was determined she needed to prepare a negative litigation recommendation. She explained in the Witt versus Hanger case the grievant prepared an A2 form on the case and noted Ms. Barnes did not agree and gave her instructions on how to change it to a cause review memo. She said Mr. Brown thought it was a strong case and conciliated it for $75,000.00. Ms. Spicer pointed out she gathered copies of the 53 documents which pertained to the grievant's proposal to remove. She said if the grievant needed documents for clarification she could have called her. She explained pleading files are kept in both Charlotte and Norfolk. She contended the grievant never asked for documents. She testified when she talked to the grievant about the draft for the opposition of summary judgment in Maersk, she told the grievant to self edit the document and she would review it when she came in the office. Ms. Spicer testified after she reviewed it the grievant worked on the fact section but she did not have it ready when she arrived in Charlotte. She said she and Ms. Barnes worked on it to get it filed. Ms. Spicer testified other attorneys who submitted drafts or briefs to her did not submit last minute, but noted the grievant's submissions were always last minute. She contended she reviewed the grievant's motions for Maersk, Days Inn and Burlington from June 2006 to June 2007. She stated the grievant did not incorporate all of the changes in the Days Inn case. She explained she received the grievant's draft for Burlington the Friday before the Monday it was due to be filed and she worked on it all weekend.

Ms. Spicer pointed out she gave the grievant a memo on March 3, 2007 regarding two performance issues in Days Inn because it was important to memorialize what occurred, and this demonstrated unacceptable performance. She contended the grievant did not prepare an internal discovery plan for Carolina Steel and Stone because it was not submitted or in the file when the case was transferred. Ms. Spicer said the attorneys who were assigned the Wholly Guacamole and Carolina Steel and Stone cases called to ask for a discovery plan because one was not contained in the file. She stated the discovery plan is usually done within the first few weeks of filing the complaint. She said the grievant did not do any discovery on the Wholly Guacamole case.

Ms. Spicer explained the Legal Technician in Norfolk is available to provide assistance and legal support. She said she supervised the Legal Technician. She noted she never received complaints from the grievant about the Legal Technician. She pointed out she received complaints from the Legal Technician about information the grievant provided for the 1, 2 3's. She discussed an incident when the grievant went to the Legal Technician the day before a deposition and said a court reporter was needed. She stated the grievant was not adhering to the sign in, sign out sheets and was disappearing from the office and coming back. Ms. Spicer testified Trial Attorneys could work on weekends and get other time off.

Lynette Barnes testified she has been the Regional Attorney for the Charlotte District Office of the EEOC since November 2005 and noted she was acting in the position for two years. She explained her educational background and previous work history. She stated she started with the EEOC in March 1995 and pointed out she is licensed in Texas and North Carolina. She testified she took over the responsibility for

the Norfolk Field Office January 1, 2006. She said as of January 1, 2006, seven Field Officers reported to her which included supervising eight Trial Attorneys and two Supervisory Trial Attorneys since June 2006. She contended she conducted performance appraisals for Ms. Burnside and Ms. Spicer.

Ms. Barnes pointed out she distributed a document on February 16, 2006 to give her staff deadlines and propose deadlines for submission of work for review. She said she had a conference call with new attorneys who jointed the District in January or February to explain the procedure and deadlines. She stated she explained when an employee is served with a motion and a brief to respond to, a copy needed to be immediately sent to her and a discussion would occur when the drafted response needs sent. She pointed out she did not negotiate the time schedule with the Union, but noted she discussed the out of unit dates with the Director in the Charlotte office. Ms. Barnes explained because of special time frames within Virginia, the lawyers had been notified they needed to contact her to work out when documents would come to her for review. She said she was designated the responsibility by OHR to be the deciding official in the grievant's removal case. She contended she provided input into the grievant's unacceptable performance evaluation. She explained the entire period covered by the proposal to remove was the time when Ms. Spicer was the grievant's direct supervisor. She pointed out she would review all the performance appraisals for her District as a second level reviewer before they were issued.

Ms. Barnes testified since she has been a supervisory person she has done two unsatisfactory performance appraisals, and she noted the grievant was the only one for a Trial Attorney. She contended she gave Ms. Spicer information for input, and she

reviewed the document before it was issued to the grievant. She stated she agreed with the grievant's unsatisfactory performance document. She said Ms. Spicer asked for her to provide documents. She testified she did not make a rating of the grievant's performance based on her review of her work during the time she supervised her. She pointed out Ms. Spicer came to the conclusion the grievant's performance was unacceptable. She contended she did not participate in the Notice of Proposed Removal. She said the first time she saw the Notice of Removal was when it was sent to OHR. She stated prior to becoming a Regional Attorney, no one trained her, but said she attended management training offered by the EEOC. Ms. Barnes testified she relied on OHR in regards to rights of employees.

Ms. Barnes contended the grievant requested to present in person her reply. She said she offered several times for the grievant to present either by phone or come to Charlotte. She pointed out the EEOC would not fund her travel to Norfolk to receive an oral reply in person. She stated she did not ask anyone in her supervisory chain of command if she could have funding to go to Norfolk, but she did discuss the issue with Corlise Wright. Ms. Barnes explained the grievant could have submitted an oral reply by telephone, or could have went to Charlotte. She pointed out the grievant decided not to go to Charlotte and did not give the reply by telephone. Ms. Barnes contended at various times she had problems with the way the grievant drafted pleadings. She said she did not have any other attorneys who had as many corrections to their papers as did the grievant. Ms. Barnes explained some time mark ups are an issue depending on the reason for the mark ups. She said at any given time, she gives input and feedback on 25 to 30 cases and litigations. She pointed out Corbett Anderson is assigned to the legal unit of the

Charlotte District, but is on detail. She discussed the grievant's performance appraisal. She stated she had conversations with Ms. Spicer about the grievant prior to the time Ms. Spicer did the grievant's performance appraisal. She contended her issue was not about being happy with the grievant's performance, but making sure the work was done competently. Ms. Barnes testified she made clear to Ms. Spicer she had concern about the grievant's performance based on her direct supervision of her from January until Ms. Spicer started to supervise officially in June 2006. She explained Ms. Spicer worked with the grievant on some projects prior to June 2006. She pointed out Ms. Lawrence told her of the three attorneys in Virginia, the grievant was the weakest and Ms. Caldwell was the best. She said she did not direct Ms. Spicer to remove the grievant. She stated she discussed with Ms. Spicer other positions the grievant may have been able to go to in case she was not successful in her job in order to salvage her career with the EEOC. She said she did not go outside of the Notice of Proposed Removal when she made the decision to remove the grievant.

Ms. Barnes explained she supervised the grievant for a period of time, and the information related to her supervising her was made available to Ms. Spicer in writing the performance evaluation and the PIP. Ms. Barnes testified the problem with the grievant's performance in the GA Hoffler case was that the grievant did not identify the case and the report of pending litigation, and she learned about the case from Jerry Scanlan. She pointed out the grievant did not give her complete information about the procedural history of the case. She said the grievant did not provide her with a complete and accurate briefing on the procedural history of the case and she made a recommendation based on deficient information. She contended the court entered an order dismissing

the case, and noted the grievant did not notify her of the dismissal in time for the EEOC to take action had it chosen to protect its interest in this case. She pointed out the action the EEOC was seeking was not a dismissal. She stated she provided the grievant at least one memo that referenced concerns about the grievant's performance. She said Ms. Spicer's knowledge of GA Hoffler came from her. She contended she also provided information for Kempsville Building. She explained as she reviewed the work of the Trial Attorneys, she kept information in a folder for performance appraisals. Ms. Barnes stated she does not carry a caseload, but supervised several trials. She pointed out she directly supervised GA Hoffler and Kempsville.

Ms. Barnes testified she worked directly with the grievant. She said she would send a memo or e-mail explaining deficiencies. She stated the first problem of the Days Inn case, according to the grievant's supervisor, was that she did not submit the deposition notice for supervisory review. She noted the second problem was once her supervisor learned the document had been served, there were significant substantive errors in the document. She explained the supervisors have discretion based on their knowledge and competencies of their Trial Attorneys whether or not the Trial Attorney runs the 30(b)(6) by the supervisor. She pointed out in the Regional Attorney's manual distributed by the Office of General Counsel, it is suggested for supervisors to review all written work and litigation done by Trial Attorneys. She said she recalled when Ms. Spicer learned the grievant was served with a 30(b)(6) notice for the EEOC and had not notified anyone of it for two weeks, she talked to Ms. Spicer about her concerns. Ms. Barnes pointed out there were numerous problems the grievant encountered in the Burlington Medical case. She said the grievant did not do anything when she requested

for her to do a class search. She contended the grievant was instructed to do the search early and instructed to do it several times, but did not. She explained the defendant put the EEOC in a box and a class had to be immediately identified by a five day blitz. Ms. Barnes stated she made handwritten corrections to the Days Inn case. She explained if one of the Supervisory Trial Attorneys saw the document before her, she would be correcting the grievant's work that had already been through one revision. She said some documents could have come from the grievant directly to her or through a supervisor. She pointed out the Days Inn document came directly from the grievant to her. She testified the grievant's removal was based on an array of chronic, repeated problems. She explained her supervisors improve work and do not make it worse. She said if she received a document that still needed improvement, the supervisors would indicate to her it was not at all acceptable when they received it. She stated on some documents she knew she was reviewing what the grievant and the supervisor wrote and other documents she did not know. She contended she reviewed any documents the grievant submitted directly to her. Ms. Barnes said she, Ms. Burnside and Ms. Spicer are African Americans. Ms. Barnes contended she was involved in the selection process for Kara Haden, a white female, as a supervisor with Mindy Weinscein. She explained she and Ms. Weinscein interviewed the individuals separate or together and made a joint selection decision. She said she hired Mary Ryerse, a white female without involvement from anyone a few months before repositioning.

Ms. Barnes stated initially she did not know the grievant gave information to opposing counsel in Maersk. She said she worked with Ms. Spicer over Labor Day weekend on the summary judgment response. She pointed out she sent an e-mail to the

grievant on Friday, September 15 at 2:00 p.m. explaining how the consent decree was to be filed. She explained the grievant contacted her at 8:30 a.m. on Monday saying the document could not be filed that way. Ms. Barnes contended the grievant was not in the office Friday afternoon. She stated she never saw documentation on the criminal history of the charging party in Maersk.

Ms. Barnes discussed an exchange of e-mails relating to the consent decree for Kempsville. She explained the grievant said she did not have this kind of supervision under Baltimore, but ultimately indicated "there is much that is positive about the increased level of involvement. It's nice to feel a little less alone." Ms. Barnes pointed out if any Trial Attorney presents a proposed consent decree she reviews the document responds back to the Trial Attorney, then the Trial Attorney has the responsibility to get the document to the defense counsel. She stated she expects the Trial Attorney to tell about his or her recommendation and to support it based on the charging party's testimony or other evidence. Before going to a ball game, Ms. Barnes said the grievant told her the EEOC was served with a motion to compel the day before she sent her the consent decree. She pointed out this fact caused her to question the grievant's honesty and be concerned she was not giving her complete information about developments in her case. She testified the grievant told her she could offer several explanations, none of which were relevant or sufficient. She contended when she asked the grievant why she had not responded to requests for production and interrogatories in over 60 days when she had a 30 day time frame to respond, she explained she was having difficulty with the children she adopted. Ms. Barnes testified she is a single mother of an adopted special needs child who has ADD and significant behavioral issues.

Ms. Barnes contended she received an e-mail from Scott Kezman, the attorney in the Maersk matter indicating he requested from the grievant, at the end of January, a consent decree, and since she had not responded back to him, the money offered in the settlement would be lower. She explained the circumstances leading up to the settlement. She said she took over the settlement negotiations because the charging party was not happy with the way the settlement was going. She stated the grievant was not pressed for time to respond to the discovery. She pointed out Mr. Kezman indicated he filed a motion because the grievant was non-responsive to his calls and his associate's calls. Ms. Barnes contended she never had experience with other attorneys where the judge threatened sanctions. She testified in Maresk she was unhappy with the grievant's dealings with the charging party and not informing him about the settlement and the judge's threat to sanction the EEOC for the grievant's failure to respond to the discovery. She explained it was very significant the judge felt compelled to threaten the EEOC with sanctions on his own when defense counsel was not asking for sanctions.

Ms. Barnes testified in Days Inn, the grievant failed to timely respond to motions. She said when she filed a response a day later, she did not let her or Ms. Spicer know she missed the deadline for responding. She explained when Ms. Spicer appeared at a hearing on a motion or pre-trial conference, the judge stated he was not going to accept the late filing because the EEOC failed to timely respond in the past. Ms. Barnes contended she went to the Office of General Counsel (OGC) with both of these failures. She discussed Mr. Scanlan's involvement in the Kempsville case. She said the Kempsville case settled for less money than would have been received had the EEOC engaged in settlement in January when requested. She stated the settlement agreement

was used in this case instead of a consent decree. She pointed out the grievant said the charging party wanted a lot of money in the case. She contended the grievant recommended to dismiss the case. She explained the grievant came to her after going to her supervisor about dismissing cases on three occasions.

Ms. Barnes pointed out she had quarterly case conferences with the grievant as required by the OGC and noted Ms. Spicer was also on the phone. She explained the grievant said she never conducted significant preparation for a deposition and noted a plan was devised for Ms. Spicer to do a few with the grievant so she would become aware of how to prepare a witness for a deposition. She pointed out she contacted the grievant about the Days Inn case and asked to find out how it was moving. She discussed the significance of the notice of intent document in the case. She explained the document produced in the case would have been considered for Ms. Burnside's evaluation, and she noted Ms. Spicer would have considered it for the grievant's evaluation.

Ms. Barnes testified further she directly reviewed the complaint in the Days Inn matter and noted the grievant made errors. She said it was not unreasonable to expect the grievant at her level to draft a better complaint. She pointed out the OGC holds the Regional Attorney ultimately responsible for the quality of notices of intent. She explained the grievant initially proposed naming all three entities identified in the Days Inn complaint. Ms. Barnes contended the grievant sent her the motion to quash Dr. Kaza's subpoena on the day it was to go out. She said the problem was there were different arguments to be made with respect to the subpoena served on Dr. Kaza but not served on the charging party and noted the grievant's brief was contradictory. She pointed out the grievant was informed her discovery documents had to be reviewed

before being issued. She contended she required the grievant to submit directly to her for review while she was supervising her. She stated when Ms. Spicer took over supervising the grievant, she did not change the policy about what the grievant was to submit for review. Ms. Barnes testified there is no excuse for a last minute submission to a supervisor of discovery documents since the documents can be served at any time within the discovery period. She explained the three Paralegals are utilized and available to all Trial Attorneys in the District. She pointed out the grievant was expected to meet administrative deadlines. She said administrative deadlines were routinely adjusted, but the litigation document deadlines were expected to be met. She testified the grievant did not meet deadlines, and in most instances she did not request extensions.

Ms. Barnes testified Ms. Lawrence gave close supervision to GS-11's or GS-12's. Ms. Barnes stated she gives whatever level of supervision is required for an employee since she is ultimately responsible for the work product. She explained she reviewed the Trial Attorneys, including the grievant, because she did not know until they proved they did not need a close review of their work. She stated the grievant never proved she did not need a close review of her work. She said the grievant talked to her about how she was supervised in Baltimore. She explained the grievant told her she was happy to receive certain forms and to have the kind of feedback she was giving at the time. Ms. Barnes discussed problems with the file guy, Lee. She pointed out she sent an e-mail back to the grievant because of the wrong charging party and the wrong defendant were identified. She contended the grievant sent back the file as a negative litigation recommendation, but noted when she contacted the Trial Attorney who worked with the investigation, some of the facts stated in the document were incorrect. She stated a

lawsuit was ultimately filed.

Ms. Barnes testified Ennstone was a negative litigation recommendation that came directly to her from the grievant. She explained the grievant did not submit her case conference reports by the April 6 deadline and sent the information right before the case conference started. She pointed out Witt versus Hanger went to the grievant for review and the grievant indicated the case should not be litigated. She said she disagreed with the grievant. Ms. Barnes contended the District Director settled Witt versus Hanger for $75,000.00. She explained Ms. Spicer and Ms. Burnside were allowed to write shorter cause reviews because they would meet and discuss the evidence since they were trying to move the cases out of the unit. She said she was confident enough in their competence and review of evidence to allow a shorter document. She pointed out for the Pike Electric cause review, Ms. Spicer informed her the grievant included some information in her original cause review.

Ms. Barnes pointed out she sent an e-mail to the grievant to forward to her a second time a form that she previously forwarded to all of the attorneys for case conferences. She said she also sent an e-mail to the grievant following her failure to insure that procurement documents were in place prior to taking depositions. She contended she sent an e-mail to the Administrative Officer explaining the situation about the grievant not receiving justification for the budget document. She explained the Legal Technician asked the grievant for certain budget documents two times before she had to personally call the grievant to get the vendors paid. Ms. Barnes testified she sent an e-mail to all Trial Attorneys on May 17 to remind them of the requirements for time and attendance. She pointed out she sent an email dated May 24, where she indicated the

grievant arrived at 1:00 p.m. and did not notify her or anyone in legal management. Ms. Barnes contended she sent another e-mail to the grievant concerning discrepancy in her time records and talked to her on July 26 about the same discrepancy. She testified she told the grievant she needed to be accurate on the federal records. She pointed out she sent the grievant another e-mail telling her to follow the time and attendance requirements for her office and the Unit. Ms. Barnes contended she came to the conclusion the grievant was in and out of the office at times that were not accurately reflected on her time records and did not truly establish her time in the office. Ms. Barnes stated it was her responsibility to certify the accuracy of the grievant's time for her to be paid. She said the procedure to certify time for the EEOC relies on accurate time records from the employee, including for the office as sign in, sign out sheet and the submission of forms.

Ms. Barnes said related to Rule 26 disclosure, she understood the grievant's practice would be to identify witnesses from the investigative files whose names might have been brought up by other witnesses. She explained the grievant failed to do the discovery in the Maersk case. She said before she made a decision to remove the grievant, she reviewed the recommendation for removal and related documents which was prepared by Ms. Spicer, reviewed all of the submissions from the grievant's counsel, and spoke with OHR about whether there was a possibility of a lesser penalty or lesser position. She stated the grievant was removed because she felt she could not trust her to follow the orders of the court, to inform her supervisors about significant developments in her cases, and was not in the office when she was supposed to be in the office doing work. She pointed out the grievant's legal analysis and writing were not up to standard

and those reasons supported her removal.

Ms. Barnes contended in the course of work some of the documents came directly to her as the Regional Attorney from all the Trial Attorneys which included the grievant's documents. She said there was some tension between the grievant and Liz Broome which was work related. She stated Ms. Broome needed information from the grievant to do 1, 2, 3 requisitions and complained the grievant gave her wrong information, untimely information and would change information. She contended she did not receive a response from the grievant related to the Days Inn case, indicating her changes were not accurate. She testified when Ms. Spicer came to Charlotte her LA Weight Loss trial concluded. She pointed out Ms. Spicer has another set trial in the spring and has taken over litigation from Corbett Anderson and brought that litigation to conclusion.

Ms. Barnes testified she read and considered the grievant's written reply to the proposal to remove before she made her decision. She explained she talked to Rubin Daniels about positions that might be available that could be offered to the grievant. She said she also talked to the office of Human Resources about whether she had the option of giving the grievant a lesser penalty because she had not had a situation before where removal was recommended. She stated when she found out this was an option she talked to Mr. Daniels about placing the grievant in a mediator position, but none was available. She contended she also talked to Mr. Daniels about the grievant becoming an Administrative Judge, but he was concerned if her writing and analytical skills were not strong she would not be a good match. She pointed out she talked to Ms. Spicer about the grievant going into a supervisory investigative position, but noted the Norfolk office did not support this position. She said it is essential for an employee working in a

satellite office to work with minimum supervision. She contended an employee working in an office without a supervisor must be competent, organized, be able to take and follow directions given by supervision and must exercise good judgment in giving information to management, providing documents and noting when to involve legal management in certain aspects of cases. Ms. Barnes testified she did not trust what the grievant told her. She pointed out she had a concern which was expressed to the grievant on several occasions she was not being trustworthy with her time records. She said the grievant's sign in sheet did not match her leave documents on several occasions. She explained the situation when the grievant wanted a consent decree right away for the Kempsville case. She stated the grievant did not possess the requirements which were essential for a Trial Attorney in a satellite office. She discussed why she could not trust the grievant and said she had concerns with the grievant's legal analysis and her writing. She pointed out because of concerns about the FOIA's being lost and other legal documents being lost in the grievant's office she came to Norfolk and worked directly with the grievant and the Legal Technician to develop a system for organizing documents in the grievant's office. She contended the grievant did not have the organizational skills to be alone in an office. Ms. Barnes testified a Supervisory Trial Attorney was not present in Norfolk at any time she worked at the EEOC. She contended she verbally gave the grievant feedback and would talk about the work product and what was submitted directly for review during the period she supervised the grievant. She said after Ms. Spicer became the grievant's supervisor she would talk to the grievant directly about the document if she had questions. She alleged she also provided feedback by e-mail, memo, phone and two times in person. She pointed out she met with the grievant in

Norfolk after Ms. Spicer became her direct supervisor in the summer of 2006 and also gave her feedback on March 29, 2006. She explained supervisors are required to give midyear reviews to employees under their supervision. She said the grievant received this type of review twice. She stated when she wrote the progress review she was concerned the grievant was not keeping her informed of significant developments in her cases. She contended the grievant did not identify GA Hoffler as one of her cases. She testified the grievant meeting deadlines in the Kempsville case was a major issue.

Ms. Barnes discussed the PAS review for the period October 1, 2005 through December 1, 2006, which included a write up that supports the unsatisfactory or unacceptable performance rating given to the grievant by Ms. Spicer on December 1, 2006. She stated as a result the grievant was placed on a PIP. She discussed why it took until January 27, 2007 to put the grievant on a PIP. Ms. Barnes pointed out she issued a memo to the grievant on August 4, 2006, which mostly related to concerns about the Maersk case and was based on a meeting held July 26, 2006. She said she discussed all of what was included in the memo with the grievant in July. She stated she had numerous conversations with the grievant either with a Senior Trial Attorney present or alone. She pointed out after Ms. Burnside came to talk to her about the grievant's performance and level of knowledge on certain issues, she asked Ms. Burnside to put her concerns in writing. She said Ms. Spicer began supervising the grievant in June 2006. She contended Ms. Burnside was involved in the Maresk case with the grievant. Ms. Barnes explained why the grievant did not comply with the court's order to supply the service proof in the GA Hoffler case. She pointed out it is unacceptable not to look at documents within a 30 day time frame. She stated the Trial Attorney is responsible to

make sure the supervisor knows about a pleading. She testified ultimately the Trial Attorney is responsible to insure any documents that had significance were sent to her or the supervisor. She explained what she would have expected the grievant to do if she knew within a few days about the decision in GA Hoffler.

Ms. Barnes pointed out the grievant's workload during the three months of the PIP consisted of two active cases at any given time. She contended the Burlington Medical case had 5 victims which the grievant did not have much contact with, and the Days Inn case had two victims. She stated near the end of March the grievant filed Carolina Steel and Stone which had the potential for approximately 3 to 5 members as a charging party. She explained Kara Haden had 5 cases with 12 victims, Zoe Mahood had 5 cases with 11 victims, Kerith Cohen had 6 cases with 10 victims, Mary Ryerse had 5 cases with 7 or 8 victims, Corbett Anderson had 2 cases with 3 victims, but was assigned to a nationwide case, Suzanne Nyfeler had 3 cases with 4 victims and had 1 case on the rocket docket and Stacey Caldwell had 2 cases. She pointed out the number of cases assigned to a Trial Attorney depends on a number of factors including rocket docket, number of victims, size of the case, the complexity of the case, whether the case involves a lot of travel, etc. She said the OGC rule is to file a lawsuit within 30 days after approval.

Ms. Barnes testified the Community Services of Virginia case was an assignment that never became a case after it was discovered the employer was not in compliance with a consent decree. She contended she assigned the matter to the grievant in 2006 for follow up. She explained when the grievant left, this assignment was a pending matter that was eventually let go. She explained the process the grievant and Mr. Brown used to

look at charges. She said charges were reviewed differently by the offices.

Ms. Barnes contended she drafted an SOP to inform the Virginia offices how the administrative leave legal unit was to run. She stated she and Ms. Spicer specifically ensured they did not give the grievant to much work during the PIP. She explained she was always aware of the grievant's pending assignments. She alleged the grievant was given enough work to fill her week, but was not overburdened. She said the grievant should have determined if the class members were going to be part of the litigation in the Carolina Steel and Stone case. She stated the grievant did not do the notice of intent in the Carolina Steel and Stone case. She contended originally she did not ask the grievant to register in the Western District of North Carolina.

Ms. Barnes pointed out she assigned the Wholly Guacamole case to the grievant for litigation in late April 2007. She said when a brief is submitted to her by a GS-14 Attorney, she expects it to be ready to file unless she specifically asks for something less. She testified she did not receive this type of work from the grievant. She stated the deadlines that related to administrative assignments applied to everyone. Ms. Barnes stated when she directly supervised the grievant, she routinely failed to meet deadlines and failed to inform her prior to the expiration of the deadline she would not meet it. She pointed out the deadlines for administrative assignments were given and assigned in IMS when the file was assigned to the Trial Attorney. She contended the GS-14 Attorney should know the deadline for litigation. She said the Trial Attorney was responsible to notify her she had a document that required a response she was to review. She testified the quality of briefs sent to her for review differed based on the attorneys under her. She explained she usually expected to receive documents for review at least three days before

being due. She pointed out some attorneys were better writers than others, so getting a document with less time to review was not problematic. She noted the grievant's writing was not that good and she knew she needed a significant period of time to revise and get the documents ready for filing. She contended she needed the grievant's work far in advance to make required revisions. She said she told all the Virginia attorneys in January 2006 during a conference call her expectations about submissions of documents to her. Ms. Barnes stated the chart she sent made it clear to ensure timely litigation filing.

Ms. Barnes testified when she was directly supervising the grievant she would tell her "okay, this is what you need to do" and have the document reworked and sent back to her. She pointed out she would make simple revisions herself. She stated she sent the grievant an e-mail on February 26, 2006 returning the Maersk brief and gave her instructions to the steps she needed to take. She contended her biggest concern about the grievant's brief was the arguments she made were wrong. She stated by June 2006 Ms. Spicer was assigned as the grievant's supervisor. Ms. Barnes said once Ms. Spicer was under her she continued second level reviews of the grievant's work. She pointed out the grievant did not know the EEOC's general position on IME's. Ms. Barnes testified she is compelled as a registered attorney to follow the procedures given by the Office of General Counsel and headquarters. She contended the OGC has a document which discusses IME's. She testified the OGC put out a directive in the relationship between the EEOC attorneys and charging parties and class members. She stated the directive is on the internal website Incite. She explained related to the Maersk case, the existence of a criminal background in and of itself is not a reason to dismiss the case. She said as far as she knew the person did not perjure himself. She pointed out a favorable resolution

gave the person some relief for the discrimination. She contended by the time the EEOC was dealing with the Maersk matters she had concerns about the grievant's judgment based on earlier litigation activity and she wanted someone to work directly with the grievant. She stated she asked Ms. Burnside to work directly with the grievant because she had a concern the grievant was not advancing the EEOC position and not protecting the litigation of the charging party.

During cross-examination, Ms. Barnes testified she adopted one child. She stated she is being truthful, while the grievant is being untruthful. She alleged the grievant sent her an e-mail advising when she would get the Kempsville documents to her. She pointed out she first received information Kempsville wanted to settle the case on the Friday when she was leaving for the ball game.

Ms. Barnes testified the Legal Technician in Norfolk supported the grievant. Ms. Barnes said she previously supervised the Legal Technician and she was supervised by Ms. Spicer. She contended the Legal Technician did other duties in the Norfolk office with the enforcement unit. She testified when the grievant was the only Trial Attorney in the legal unit, the Legal Technician had the responsibility to ensure the legal unit matters were handled first. She said the grievant tracked down the bankruptcy trustee in GA Hoffler. She pointed out Paralegal Sara Bryant was responsible for sending out notices of non-compliance. Ms. Barnes contended the grievant could send out correspondence and anything that was not specifically identified to the grievant either verbally or on the deadline sheet as needing Supervisory Trial Attorney or Regional Attorney approval. She stated this included transmittal correspondence. She pointed out the grievant could not send out a 30(b)(6) motion, but could send a letter to counsel indicating "you're in

noncompliance." Ms. Barnes alleged she did not know the Paralegal's grade, but stated she is the reviewing officer who reviews the performance appraisal of her subordinate. She stated she is a second level supervisor for three Paralegals. She testified the EEOC never negotiated with the Union any of the changes she implemented when she became the grievant's supervisor.

Ms. Barnes contended when Ms. Spicer became the grievant's supervisor some of the documents she reviewed went through Ms. Spicer prior to going to her. She pointed out complaints, press releases and case conference reports could be reviewed by the Supervisory Trial Attorney. She testified she was the grievant's direct supervisor part of the time for Maersk and noted Ms. Spicer also supervised her during that time. She contended the subpoena in the Maersk matter that was served on Dr. Kaza went directly from her to the grievant. She stated the legal analysis was wrong on the document. She said all of the documents that went through a Supervisory Trial Attorney were seen by the Supervisory Trial Attorney prior to coming to her. Ms. Barnes testified she did not write up any of the Supervisory Trial Attorneys for letting inferior documents come to her from the grievant. She pointed out the Supervisory Trial Attorneys received satisfactory performance appraisals. She said Ms. Spicer had a caseload and was lead counsel on a case. Ms. Barnes testified she did not carry a caseload. She contended she did not know if Ms. Lawrence carried a caseload. She pointed out she expected documents three days prior to their due date depending on the document. Ms. Barnes said she sometimes works at home on average one day a week, depending on the work. She alleged deadlines are established, but modified as necessary.

Ms. Barnes pointed out she does outreach as part of her duties and had only one

outreach activity last fiscal year. She stated during the PIP, a schedule was set to discuss the grievant's performance weekly, but noted Ms. Spicer talked to the grievant daily. She said the EEOC generally contests IME's unless there is a legitimate basis, as a requirement of the federal rules of civil procedure having been met. She discussed the situation when her office opposed an IME in the middle district of North Carolina. She contended the charging party was not subjected to an IME in Maersk. She pointed out she follows the guidance of the OGC. She explained the charging party could refuse to participate in the deposition and the OGC will determine whether to move forward with the lawsuit. She testified a charging party could be subpoenaed to testify for injunctive relief.

Ms. Barnes stated she discussed with Mr. Kezman in the Kempsville case the fact he requested settlement documents in January from the grievant and did not receive anything. Ms. Barnes testified she learned the grievant was deemed to be an outstanding employee and received numerous awards before she became her supervisor. She pointed out, according to Mr. Kezman, his client spent an additional $15,000.00 in legal fees between January and March because the grievant did not give him a settlement demand. She said she supervised a trial at the time in Richmond. She explained it was not her decision to limit the number of defendants in Days Inn and discussed the matter with the OGC. She stated the grievant realized she had a problem after participating in the charging party's deposition and learned much of the sexual harassment occurred under the predecessor entity in the Days Inn case. She pointed out a common occurrence with the grievant was when something bad was learned, she said the witness told her something earlier. Ms. Barnes contended as second level supervisor she does not require

any Trial Attorneys to submit discovery documents to her. She testified as of January 1, 2006, all of the attorneys who were new to her were required to submit their written discovery documents to her. She pointed out attorneys who did not submit their written discovery documents to her submitted a discovery plan and were also competent and good legal writers. She stated this group of attorneys included Kara Haden, Zoe Mahood, and Kerith Cohen. She contended employees who were required to submit the work product included Corbett Anderson, Suzanne Nyfeler, Stacey Caldwell and the grievant. She testified the Legal Technician, Ms. Broome would have prepared financial documents for the court reporters.

Ms. Barnes testified she gave Joann Riggs all of the factual information related to the grievant's situation and her request to be recused. She said she hired Ms. Burnside and noted there was competition for her position. She pointed out although white employees applied for the job, none had more experience than Ms. Burnside. She stated white employees who work for her applied for the position. She pointed out the white applicant came to the EEOC seven years before the position was available and was there for fewer years than Ms. Burnside. Ms. Barnes testified she met with Ms. Broome and Agnes, the Legal Technician in Norfolk and went over budget documents. She said Ms. Broome was trained to handle the 1, 2, 3 requisitions. Ms. Barnes contended she is part of a training team for negotiation skills the OGC put together. She stated she did not give the training seminar on how to document to get rid of employees. She contended she never made the statement of words to the effect Ms. Caldwell thinks she is too white.

Ms. Barnes testified at the time of repositioning she acquired four attorneys, the grievant who is a white female, Suzanne Nyfler, a white female, Ms. Caldwell, an

African American female and Corbett Anderson, an African American male. She said prior to the repositioning she supervised all white female Trial Attorneys which included Zoe Mahood in Raleigh, Kerith Kohen in Norfolk, Kara Haden, who was in Charlotte and Mary Ryerse, a white female she hired a few months before repositioning who was also in Charlotte. She pointed out since that time she had hired three Trial Attorneys, two black males and one male who was either Native American or white.

Jerome Scanlan testified he is employed by the EEOC headquarters in Washington and is the Assistant General Counsel in the office of General Counsel. He said he oversees field litigation work, reviews suit proposals, proposals to file suit and settlement proposals. He stated his office drafts the Regional Attorney's appraisals, does guidance work and provides training programs once or twice a year. Mr. Scanlan explained he worked for the EEOC a number of years and has been in his present job since 1992. He stated he has a lot of involvement with the Charlotte office legal unit. He pointed out the main reason he was involved with the Charlotte office was because it did not have a Supervisory Trial Attorney. He explained his main work in the other offices related to reviewing summary judgment responses. Mr. Scanlan contended he only dealt with the grievant on a set of discoveries with responses to interrogatories and in responding to a summary judgment motion in the Kempsville case. He pointed out the grievant needed to include Ms. Barnes' changes. He explained the situation was unique because a settlement was reached with a defendant, but the charging party did not want to accept the settlement. He said the case resolved before the EEOC needed to respond. He stated the responses were filed on time, but at the last minute. He contended confusion existed as to what was due on the date. He contended the EEOC supervisory staff wants

all substantive materials reviewed by a supervisor which is the Office of General Counsel's policy. He explained with more than one person reading the work it can be improved. He pointed out Ms. Barnes talked to him about the G.A. Hoffler case and told him the case was dismissed, but she did not hear this from the grievant. He said the grievant told him in her practice she did not verify the responses. Mr. Scanlan explained the reason for placing attorneys in the office was to have a lawyer closer to investigators to provide hands on advice on a daily basis. He said regarding the litigation function, a responsible, competent lawyer with good judgment is desired. He stated the EEOC wants to know what is occurring in the office. He pointed out nothing should be filed in an untimely manner. He explained in rare situations the EEOC may have to tell a non-represented person to take something they do not want to accept. He said as a Trial Attorney he did not expect the supervisor and/or the Regional Attorney to rewrite a brief the last day it was due.

While being cross-examined, Mr. Scanlan stated interrogatories should be signed under oath by someone in the EEOC. He said when a person signs the oath he could be deposed because he made the declaration, but noted the person is not produced to voluntarily testify. He pointed out Regional Attorneys litigate cases once in a while. He contended the EEOC prefers for the managers to manage rather than litigate. He explained in some offices there are not a lot of Trial Attorneys to supervise so there is more justification for the attorneys to litigate. He said one Supervisory Trial Attorney is preferred for every four to six lawyers. Mr. Scanlan testified two to three drafts per summary judgment motion would be average.

Mr. Scanlan said the Kempsville case was in the posture to be resolved and a

consent agreement was being worked out and the problem was that the charging party had to decide whether or not it was the right thing to do. He pointed out the person called 5:00 Monday afternoon and said he would take the money and Ms. Barnes informed him it was resolved. He contended he is seldom involved with the Trial Attorneys. He stated employees had been sanctioned, but not removed from their positions. He explained the situations when the EEOC is concerned about the Regional Attorney's performance, negative litigation decisions have not been reviewed. He said Ms. Barnes as Regional Attorney would be the last person to review a negative litigation decision. He contended he has never been involved in a negative litigation memo with the grievant's work. He said he had conversations with offices and managers about cases. He stated if an order is not complied with there could be sanctions.

The grievant testified she was first employed by the EEOC in the Norfolk local office from September 27, 1999 as a Trial Attorney at grade 13. She said she first reported to Arlean Shadoan, then Tracy Hudson Spicer, Gerald Kiel, Ms. Spicer, Steven O'Rourke, Deborah Lawrence, Chet Kleinman and Ms. Lawrence. She stated her reviews under Ms. Lawrence were consistently outstanding. She explained Ms. Lawrence fully intended for her to do all of her work herself and noted she was available to answer her questions. She pointed out when she worked for Ms. Spicer and Ms. Barnes nothing she did was right. She said when she worked for Ms. Spicer under Baltimore she was supportive. She contended Ms. Spicer is different under the Charlotte office. She pointed out she received positive feedback under the Baltimore office from Ms. Lawrence. The grievant stated she did not previously receive a document entitled "Deadlines for Work Due Out of the Legal Unit, Administrative and Pre-litigation." She

pointed out this document was not negotiated with the Union. She said she had concerns about the content of the document. She explained a revision to this document came around November 22, 2006. The grievant testified sometimes the Charlotte office viewed deadlines as important and sometimes not important. She pointed out holdups occurred with Ms. Barnes. The grievant explained the process used to settle cases in Baltimore. She said for the Kempsville case she had to use a model which Ms. Barnes had which was the most onerous, strict, restricted template for a consent decree she had ever seen. She pointed out she filled it out and Ms. Barnes sent it back to her with many corrections and questions about the case and she could not respond in a timely manner. She said it would have been more advantageous to use the normal format. She pointed out Ms. Barnes did not want to settle before she had a very specific calculation of back pay. The grievant stated Ms. Barnes obtained a $15,000.00 settlement and the defense attorney persuaded her the dismissal order and settlement agreement should be in separate documents. She said when Kempsville concluded she asked Ms. Barnes if she was happy with the work product that she was turning in and she said "yeah, yeah, I'm still making a little bit of corrections, but nothing out of the ordinary, you know. Everything's fine right now."

The grievant contended Ms. Burnside was not her Supervisory Attorney, but noted she worked with her on a few specific projects. She explained when she was working in the Norfolk office the positions were constantly being depleted. She pointed out her role was to interact with investigators on cases that have litigation potential, suggest Investigation, try to make sure they did not forget about the case and advocate for the legal priority. She said Mr. Brown was the Director of the office, but was not her

Supervisor. She contended she had an excellent relationship with Mr. Brown. She stated she had a positive relationship with most people in the office. The grievant testified she always had outstanding performance reviews. She said under the Charlotte office her supervisor did not go over the performance criteria. She pointed out no one reviewed the change in performance criteria interpretation from Baltimore to Charlotte. She explained about December 14 Ms. Spicer gave her the performance review that said she was unsatisfactory. She said she started to ask Ms. Spicer what she meant by each portion and Ms. Spicer was unresponsive. The grievant contended in the GA Hoffler case she filed the appropriate pleadings seeking judgment for the EEOC. She explained issues that arose. She stated she never had any communication with the court prior to the hearing. She discussed the status of GA Hoffler as a business. She pointed out she had several conversations with Ms. Barnes about the case and Ms. Barnes was not happy with the situation.

The grievant said she did not know whether or not she compromised the results of the Kempsville Building case. She stated Ms. Barnes negotiated settlement terms of the case. She contended if she was given authority to reach a settlement in the case she would have. She explained the "rocket docket" in the Eastern District of Virginia. The grievant discussed the Maersk case and said a man's personal attorney filed the case untimely. She said the letter of determination was redrafted because it contained errors. She said the brief she wrote was adequate and noted she did not have any objection to it being rewritten. The grievant explained the facts of the case. She pointed out there was a complaint about disclosing Dr. Kaza in the discovery. The grievant said the guidance she received came from Insight. She stated it was not true she tried to help the defendants get

an IME. She discussed the argument she was to pursue for the EEOC. She testified she did the actual settlement in the Maersk case, but needed to obtain authority to settle. She said supervision was only involved in the settlement to the extent of giving her authority to settle.

The grievant stated she had a call with the charging party and was told there were no issues of concern. She contended later she found out the person had a weapons offense. She explained if a person did not divulge a past criminal record the damages could potentially be cut. She pointed out she reviewed the file to determine what documents she had related to the same issue. She testified the document in the person's file was sworn to under penalty of perjury and noted there was the specific admonition in the certification that a willful false statement on the form could be punished by fine or imprisonment or both. She said the person explained he filled out documents in an inaccurate manner. She stated she was concerned and notified Ms. Spicer who initiated contact with Ms. Barnes. She pointed out Ms. Barnes' view was the after acquired evidence did not have much bearing. The grievant contended Ms. Barnes had no concerns about the person's criminal record. She explained Ms. Burnside and Ms. Barnes directed her to argue the information the person used to get the job was not relevant to the EEOC's case. She testified her concern was for the EEOC to do the right thing and take the withdrawal because of the problematic information about the charging party.

The grievant pointed out when she initially recommended litigation in the Days Inn case her recommendation was not initially accepted. She contended she was not part of the decision making process in this case and noted the decision was conveyed to her by

Ms. Barnes. She stated the Regional Attorney has the responsibility for determining what suits are filed. The grievant testified she produced the same sort of work products she produced on notice of intents. She explained the change in ownership of the entity was a factor in the relief decision. The grievant pointed out in the Hanger Prosthetics case she recommended it not be litigated and said there was a strong affirmative defense. She contended Ms. Barnes did not argue with her and said she was to write it up as a cause. The grievant stated she let her supervisor know what was going on in the GA Hoffler case. The grievant stated she was slow to return some calls to the opposing counsel in the Kempsville Building case because of the combination of factors. She pointed out she did not put herself or the EEOC at a disadvantage in the Maersk case because she did not say anything that was meaningful and did not give any information to opposing counsel.

She said she tried to get Ms. Spicer to go over her review line by line, but noted Ms. Spicer stopped answering questions. She contended she did not create an unnecessary expenditure of time and energy in the Maersk case. She pointed out a lot of the Maersk material, the GA Hoffler material and possibly the GA Hoffler references came from an August 4 memo Ms. Barnes wrote to her. The grievant testified if she worked independently she was reprimanded. The grievant explained why documents could have been requested by a certain day and due to intervening assignments, the documents were completed some other time. She said litigation always comes first and the next item of importance was assisting Investigators. She stated the documents did not say to return revisions within a certain time, and she noted she did not intentionally neglect revisions once she received them. She pointed out Ms. Barnes and Ms. Spicer sometimes delayed getting revisions back to her. She testified litigation is always a

priority. The grievant explained while under Baltimore a memo indicated an intent to file litigation or not to file litigation was seldom put in the file. She stated under Ms. Barnes a few sentences would be put in the file if the case was not to be litigated. She contended a change occurred because she spent half of her time writing memoranda for the file. She said this memoranda was not critical for litigating cases for the EEOC. The grievant stated she talked to Ms. Spicer about the concerns Ms. Barnes had and Ms. Spicer indicated she would be her second pair of eyes.

The grievant contended on or about December 14 when she received the document from Ms. Spicer she was told "it speaks for itself" and noted Ms. Spicer referred to Ms. Barnes August 4th memo. She pointed out Ms. Spicer was either not her supervisor or not assigned to work with her on the majority of items that were identified. The grievant testified she did everything she was asked to do. She said she was never reprimanded about being inconsistent with the way she treated the public, charging parties or co-workers and she was not disciplined in regards to this issue. The grievant stated she had a substantial amount of leave, and she was never reprimanded for attendance issues. She explained under Ms. Lawrence, she did not sign in and out and noted when Ms. Barnes started she did not sign in and out. She testified no one had a problem signing off on her leave slip and never questioned her about leave. She pointed out the system changed and she was asked to consistently sign in and out. She said she was reminded that she forgot to sign in and out when the system changed. She explained a time when she had car trouble, discussed the situation with Ms. Barnes and noted she was documented for not calling Ms. Barnes to say she was not coming to work, even though she contacted others in the office. The grievant testified about an issue with a

court reporter and a purchase order and noted she did not receive a message to hold a deposition until afterwards. She explained she did everything to set up the purchase order as it had been done in the past. She testified she never did purchase orders.

The grievant testified a Performance Improvement Plan was given to her after her performance was deemed unsatisfactory around January 25, 2007. She pointed out she had little familiarity with the PIP, but understood it to be given at a time when an employee receives additional assistance and support from management to make the employee successful. She stated she did not receive additional assistance and help. She explained her interaction with her immediate supervisor, Ms. Spicer, was the normal interaction she had to accomplish tasks. She contended the dates and requirements contained in the PIP were more rigid than what she understood was generally applicable. She pointed out during this time she was given more suits to file than she had at any point during her employment. She said Ms. Spicer would come down if she had a hearing or settlement conference, but she did not know if this assistance was helpful. She explained what occurred during the settlement conference when Ms. Spicer was present. She stated when supervisors worked on her briefs, it was part of the normal part of producing a brief. The grievant testified she did not have weekly counseling sessions regarding her performance and only had ordinary interaction with Ms. Spicer about cases. She stated the only time she met with Ms. Spicer was when she came down for a settlement conferences or other matters. The grievant contended she was not given an opportunity for additional training. She noted she had additional work during this time frame. The grievant discussed the areas she was told to improve for performance deficiencies. She said when she attempted to exercise independence and appropriate discretion, fault was

found. She pointed out when she asked for guidance she was told she needed to seek independent judgment. She explained the process she used to draft discovery. She said during the period of the PIP the primary discovery she did related to depositions which were scheduled earlier. She pointed out she recommended for the Days Inn case to sue, but she was told the EEOC could not sue. She contended ultimately Ms. Barnes made the decision on what parties to sue. She stated by not following her recommendation, it gave her less of a chance to be successful. The grievant discussed Rule 26 and noted later Ms. Spicer thought she should not identify everyone that was relevant to be in the investigative file, but instead talked to each person and made another judgment as to whether the person was sufficiently relevant to identify. She stated the one complaint she received about depositions was that she took them too soon in the Burlington case. She discussed the issues with scheduling cases.

The grievant contended she received the notice of proposed removal around June 13, 2007 from Ms. Spicer. She pointed out she did not have an involvement in the investigation of the Carolina Steel and Stone case. She said she was sent the file and some documents and was told she needed to file the case. She explained the case was in the Western District of North Carolina, and she noted she never asked to become certified there. She stated she did what was necessary to file in the District. She contended this was a new case added to her workload during the PIP. The grievant testified she did most of the filings herself and noted the Legal Technician did not report to her. She pointed out she completed the discovery plan for this case. The grievant discussed the Wholly Guacamole case she had while she was under the PIP. She explained one of the main problems with the case was locating the chief charging party. She pointed out this case

was forwarded to her from North Carolina during the PIP. She said the primary delay occurred with filing the suit that because she was responding to a summary judgment motion and from doing depositions. She contended this was the first case she filed electronically in the District and she had problems with the civil cover sheet. She explained no help was available to her when she had problems filing the cover sheet. She stated the only training she received was online training from the court. She said she prepared a discovery plan for Wholly Guacamole and noted if she failed to forward it to anyone, it was an oversight. The grievant pointed out the Community Services of Virginia case settled. The grievant explained she entered into a consent decree to settle the matter. She noted when she was part of Baltimore she was not required to personally follow up and make sure other provisions were met with compliance. The grievant said Ms. Spicer suggested she bring an action to enforce other provisions of the consent decree and she asked Ms. Spicer for a sample. She stated she made several attempts to contact the other attorney.

The grievant contended the statement in the PIP that indicated she often failed to meet established time frames set for the moving enforcement through the inventory did not tell what cases the statement referred to. The grievant explained at the time of the Days Inn case she was still involved more in Norfolk and noted cases were not moving around. She stated when Ms. Barnes came and the employees were transferred to North Carolina, some cases were backed up. She pointed out two attorneys were allocated for Norfolk, but she was the only attorney. She said the Days Inn case was assigned to her in March 2006. She explained the draft for the case went through multiple revisions. She testified she never spent more than a few hours writing a letter of intent and noted this

was the first one she did in the Charlotte District. She pointed out a lawsuit was eventually filed in the case.

The grievant explained the notice of interest document is strictly an internal document. She said the revisions for the draft on Wholly Guacamole could not have been with Ms. Spicer from November 20 to December 29. She pointed out it was a recurring theme she turned in something to Ms. Spicer who made a lot of revisions, she forwarded it to Ms. Barnes who sent it back to her to fix Ms. Spicer's revisions. She contended she would often need a copy of what Ms. Spicer sent to Ms. Barnes because she was not copied. She testified a negative litigation memo she prepared in Baltimore was very brief. She explained under Charlotte her requirements were a formal memo fully reciting the facts, law and conclusion. She stated in Baltimore she would write up a few sentences and put in the file no one would review it. She pointed out she turned her documents in on a timely manner, but they were not discussed with her until later. She explained the process used for writing the negative litigation memo. She noted the Investigator had to write a memo that described the evidence received and the recommendation when the case was considered. The grievant said Ms. Spicer's job title was Supervisory Trial Attorney. She explained the basic facts of Cavalier Marine and the Ennstone case. She contended she was overridden in the Ennstone case and told the person was not credible and the EEOC would not continue to investigate the case. She pointed out she thought the case was good until she found out the person could not be doing his job. She stated the case failed at litigation when she was still under Baltimore. She said the charging party was covered by the ADA because he was on kidney dialysis and contended there was good evidence the charging party's disability was known to the

respondent. She pointed out she did not recall initial disagreement with this case, but noted disagreement occurred later.

The grievant testified the McLex case was assigned to her July 19, 2006 when she took vacation. She said she did not know what the PIP meant about the revised draft not being completed as instructed. The grievant claimed the part of the PIP that said on cause reviews she required substantial input guidance and revision in order to produce legal advice which was factually and analytically sound, said no particular problems were identified. She stated items went through multiple revisions and noted she recalled Pike. She pointed out she recommended it was not ready for litigation, but was told by Ms. Spicer to take out the recommendations and write it up as being ready for litigation. She explained information on the document was taken out and added back into the document which was a common pattern with Ms. Spicer. She discussed problems she had with the computer leaving large space at the bottom and said she tried to resolve the issue. The grievant stated the problem with the Witt versus Hanger case. The grievant contended when Ms. Barnes found issues with the strategy, she adjusted the memo. She testified it was difficult to get in touch with the charging party in this case and the case was problematic. She pointed out the PIP indicated she only addressed one prong of the affirmative defense. She contended no problem was established in the document for Panholzer versus Remarque . The grievant explained the Khalil Elkassas versus Nissan Statesville case was a racial harassment case transferred to her from North Carolina to review. She stated she had no involvement in the investigation, but suggested for the case to stay on the litigation track. She said she recommended the Pike case to be returned to enforcement for additional investigation because it was not ready to proceed

to litigation. She contended the problem the EEOC alleged with her work was not clear from the documents. She testified in the Palos versus Cheesecake Factory case she probably stated on the document she needed additional information she did not have, but noted there was no indication in the notice of proposed removal what was wrong with the document. She contended nothing was included in the document showing mistakes or information she did not provide.

It was the testimony of the grievant once it was clear to her there was an issue with internal deadlines, she made sure she was having everything turned in within that time frame. The grievant pointed out she did not advocate the defendant's position in the Days Inn case. The grievant explained in her seven or eight years with the EEOC she never personally verified or made an oath her interrogatory responses were correct. The grievant stated she had an extremely good working relations with people in her office, with counsel and disagreed with the statement "your dealings with the general public and co-workers were not effective." The grievant alleged she was told the PIP process would last 90 days. She said Ms. Barnes was the person who was to hear the case. She stated a letter was addressed to Ms. Barnes stating why it would be appropriate for Ms. Barnes to recuse herself. She pointed out Ms. Barnes was her immediate supervisor for a significant part of the performance period and she frequently was the first line to review her work even after Ms. Spicer was inserted as a Supervisory Trial Attorney. She said she did not feel Ms. Barnes could be objective in hearing her response. The grievant testified Ms. Barnes consistently denied the request to recuse herself. She explained a lot of the documents did not contain criticisms of her work.

The grievant explained she made multiple requests to meet with Ms. Barnes

because she was the decision maker. The grievant said she wanted to have her attorney present, but her request was consistently denied. She stated it was her understanding this was a statutory right. She testified she was not given the opportunity to meet with Ms. Barnes face to face in Norfolk with her attorney. She said if she was to meet with Ms. Barnes, she needed to go to Charlotte with her attorney. She contended Ms. Barnes was not willing to travel to Norfolk to receive a response. The grievant stated she could not incur expenses for her and her attorney to travel to North Carolina.

The grievant contended the information on her alleged, unacceptable performance was provided to her. She explained much of the information contained in the July 18 response was responding to criticisms Ms. Barnes had of her work. The grievant testified she did not agree with the decision. The grievant pointed out the performance appraisal plan she was under was in effect between October 1, 2006 and September 30, 2007 and she and Ms. Spicer both signed it October 17, 2006. She contended it was not the performance appraisal used to remove her. She said Ms. Barnes sent a letter to her counsel, Neil Bonney indicating there were no documents supporting her removal other than the documents that were provided. She alleged Ms. Barnes refused to recuse herself.

The grievant discussed interrogatory guidance available to EEOC attorneys. She said this guidance makes a point where a charging party has private counsel the EEOC needs to work with counsel in dealing with Rule 35 issues. The grievant explained she contacts the private counsel of the charging party. She stated this action was consistent with the guidance provided. The grievant testified she received a document from Ms. Barnes regarding how to interact with enforcement. She pointed out Ms. Spicer asserted attorneys in the office would only review cases assessed by an Investigator. She stated

this document said the attorneys were to review all the cases including A, B and C. She pointed out Ms. Barnes sent a memo regarding internal memoranda which attempted to define a cause review. She explained to her knowledge changes in policy were not negotiated with the Union.

The grievant pointed out Ms. Burnside, made changes to the draft of the Days Inn case. She explained Ms. Burnside disagreed with some of her recommendations and extensive changes were done. She stated Ms. Barnes later made further extensive changes. She discussed the Burlington brief and noted it needed condensed from 36 to 30 pages and had to be filed by 5:00 p.m. She stated the document was one page over the limit and she decided to withhold the last page because she did not want to risk it not being accepted. The grievant pointed out this was one of the issues she was critiqued for failing to make an argument regarding damages. She stated she received an unsatisfactory rating because she was faulted for not making the argument that was later sanctioned by the court.

The grievant pointed out her concern in the Maersk case was if the person told the truth he would have to admit to having committed a crime. She explained this case was settled and the EEOC obtained damages for the charging party, who had problems lying about his criminal record on his security clearance application. The grievant said she wrote a cause review and had to write a ten or less page internal memorandum for the case of Adam Panholzer versus Remarque. She stated no one acknowledged receiving the document. She said when the Supervisory Trial Attorney wrote a short one page document, Ms. Barnes approved it. The grievant testified this tactic was unacceptable when some people did it, but it was not something the attorneys were permitted to do.

She explained Ms. Spicer forwarded the cause review to Ms. Barnes that she had approved. The grievant discussed the litigation recommendation from September 2006 she submitted directly to Ms. Barnes. She stated this document showed Ms. Barnes correcting marks submitted to her by Ms. Spicer. She said the document showed Ms. Spicer correcting Ms. Barne's corrections. She testified in the L&W case there was no indication any problems existed with the draft. The grievant contended in the Pike Electric case she made a number of recommendations Ms. Spicer took out. She pointed out Ms. Barnes corrected the product that resulted from Ms. Spicer's correction of her original draft. She explained when she had a phone conversation with Ms. Barnes and Ms. Spicer, items were raised and Ms. Spicer acknowledged "to Amy's credit, she did recommend that material be you know, obtained." She discussed the situation when Supervisor Attorney Deborah Lawrence was moved to get out of the case when she discovered the charging party was lying about his criminal record.

While being cross-examined, the grievant testified she told Ms. Lawrence in the GA Hoffer case the clerk advised if she did not amend the motion the judgment would direct payment to the EEOC and not the charging party. She explained the judge was not a party to the conversation she had with the clerk. She contended the motion sought default judgment for the EEOC. She pointed out the clerk laid out options she conveyed to her supervisor. She said her supervisor knew the consequences. She stated when Ms. Barnes took over and she was assigned to the Charlotte office, she did not inform Ms. Barnes about the situation and her discussion with the clerk. She explained the opportunity to make a decision of whether or not to amend the motion for default passed by the time Ms. Barnes took over. She pointed out she knew Ms. Barnes wanted

the dismissal undone.

The grievant contended in the Kempsville case she had a verbal agreement with counsel that they would defer responding to one another's discovery because it was anticipated the case would settle. She said she was not able to give Mr. Kezman a consent decree. She noted Ms. Barnes wanted a calculation of back pay. She contended she tried to communicate what was going on with Ms. Barnes. She said it was not her practice to let time objections pass.

The grievant stated Ms. Barnes reviewed her draft of the motion to dismiss. She pointed out she did not have the notice of deposition reviewed by a supervisor. She testified she did not immediately send the subpoena for the Maersk case to her supervisor. She explained she mentioned the subpoena to Ms. Burnside and the conversation she had with her. She stated she did not see any reason to oppose an IME because the charging party's private counsel did not object.

She said neither Ms. Barnes nor Ms. Burnside mentioned the guidance of the General Counsel's office to its attorneys to her. She pointed out in July 2006 she never personally made a garden variety argument, but probably had some awareness about it. She contended she did what she was told by Ms. Barnes when she was instructed to oppose the IME. She testified she raised the common interest theory with Mr. Lucas. She pointed out the person perjured himself in a second deposition and admitted to the felony. She said afterwards he admitted he had a drug related felony conviction. The grievant contended she settled the Maersk case. The grievant explained she did not initially see things as Ms. Barnes did in the case, but certainly did her best to do everything Ms. Barnes asked of her. She stated she sent a draft of opposition to summary

judgment in Maersk in response to a subpoena to Ms. Barnes the day it was due because it was already approved once. She explained the process used to make revisions included Ms. Barnes and Ms. Spicer editing the document and returning them to her. She stated the changes could not have been made by a clerk. The grievant discussed an e-mail she sent to Ms. Spicer on a weekday the office was closed due to flooding. She explained the process used to finish the briefs. She pointed out a full brief was timely filed. She contended signatures from different locations need to be coordinated for the documents. The grievant discussed an e-mail she received from Ms. Barnes around the time of the Kempsville consent decree. She stated she let Ms. Barnes know she was happy to have more interaction than she had under Baltimore and noted it was nice to be part of the team.

The grievant said in the Days Inn case she made sure the letter of determination which came out of enforcement included each of the entities she thought could potentially be subjected to suit. She pointed out she made sure all the entities named on the letter of determination were appropriately served and she received an invitation to conciliate. She testified she was not sure if she received the discovery in the Days Inn case before she sent it out. She said she was a grade 14 Attorney who needed to exercise independent judgment to do her job. She explained Jim Lee, who is now the Deputy General Counsel, told her "never ask permission. Ask forgiveness."

The grievant contended the declaration is a sworn statement. She said she thought her supervisor saw the affidavit when the final copy was distributed to everyone. She stated the feedback she received concerning the press release she sent to headquarters regarding Days Inn was they no longer wanted her to communicate directly with the

office that issued press releases. She explained the practice regarding press releases. She testified the Legal Technician had the responsibility to maintain the file and make sure everything in the file went to Charlotte so they were aware of what was going on in the case. She pointed out the Legal Technician would make arrangements for the court reporter. She said on one occasion there was a problem with the approval. She explained in Baltimore a general purchase order was put in to take depositions, but in Charlotte money had to be requested for each individual deposition. She stated this responsibility primarily belonged to the Legal Technician and she noted she did not know how the timing worked. She contended all deposition notices would have been forwarded to the supervisors as part of the file. The grievant pointed out it was the Legal Technicians responsibility to forward all documents in the file to Charlotte.

She contended in the Days Inn case a motion in limine was filed late. She said the brief was technically struck but the Magistrate Judge allowed her to speak and she covered everything in the brief. She pointed out a court reporter took down her argument. She testified the documents in Carolina Steel and Stone were already prepared when they were sent to her. She stated once she learned of the problem with the case, it took 24 hours for her to correct it and file. She stated she was instructed on March 12, 2007 to let Ms. Barnes know by March 14, 2007 when she was able to file the Wholly Guacamole case. The grievant contended in Community Services of Virginia there was a consent decree and she made three to five attempts to phone opposing counsel.

The grievant said the PIP period was from the end of January to the beginning of April. She stated in February the summary judgment motion in the Days Inn matter was in place, she was finishing up discovery on Days Inn and had depositions in Days Inn and

Burlington. She said the discovery closed for the plaintiff for the Burlington case on March 27, 2007. She pointed out both Carolina Steel and Stone and Wholly Guacamole were in North Carolina, and noted she had no familiarity with North Carolina. She testified in addition to working on the summary judgment brief toward the end of March the settlement conference in the Days Inn case was occurring. She mentioned she had the same opposing counsel in both cases. She explained what occurred with the Burlington case. The grievant stated she received a performance plan at the beginning of fiscal year 2006 while she was in Baltimore. She pointed out Ms. Spicer e-mailed the performance plan to her. She stated the plan stated she was under the old plan. She explained she had no trials while she reported to Charlotte.

The grievant pointed out she is not currently employed, but filed some applications. She contended when she first arrived at the EEOC, a certain format for case conference reports were used. She said on April 10, 2006, Ms. Barnes sent a form she wanted to be used for case conference reports. She testified she used the Baltimore form a couple of times. She explained she never initiated the confirmation of services form, but the Legal Technician would tell her to sign it. She stated she told the Legal Technician what was needed for court reporters to be paid.

The grievant testified she did a lot of A2 forms for cases where enforcement found cause, but it was not an A1 track to be reviewed as a cause review. She pointed out she always talked to Ms. Spicer once a week, and she noted she did not have more contact with her during the PIP period than before the PIP period. She contended Ms. Spicer never refused to talk to her. The grievant explained she never talked to an individual before making a Rule 26 disclosure to identify someone, but Ms. Spicer

suggested for her to talk to that person. The grievant discussed being accused of not verifying interrogatory responses under oath. She explained she had issues with this direction because she felt it put her in a difficult position.

The grievant said she created a discovery plan for the Carolina Steel and Stone case and the Wholly Guacamole case. She stated she considered negative litigation memos to be of lesser priority than all interactions with the court. She pointed out it is routine for charging parties and their attorneys to check the status of the case. She contended she does not make the final decision whether or not a case is going to be litigated. She stated in Charlotte the Regional Attorney makes the decision.

The grievant alleged when changes were made by the supervisors they were faxed to her and she had the option to retain them in the files. She noted aside from the Days Inn case she had very little contact with Ms. Burnside. She contended at the end of September the District Director wanted to get as many cases out by the end of the fiscal year as possible. She said there is no requirement for a cause review to be done by the EEOC, but noted it was required by management in Charlotte. She pointed out Ms. Barnes reached a different conclusion than she did in the Witt versus Hanger case. She stated she understood from the attorney she had a right to personally offer an oral reply to the proposal to remove.

The grievant testified she was placed under the PIP entitled Employee Performance Evaluation System. She said she did not know why she was given one plan and placed under the old plan. She explained she tried to go over the unacceptable performance appraisal with Ms. Spicer, and was told by Ms. Spicer she was not going over the document with her line by line. She stated she wanted to go over the plan to be

sure she understood what it meant. She said she is not aware of the particular criteria under either performance system. She pointed out on various occasions Ms. Barnes told her revisions were to be expected. The grievant said some documents she turned directly in to Ms. Barnes and other documents went to the Supervisory Trial Attorney first. She contended if the Supervisory Trial Attorney reviewed the documents first and the documents were then submitted to Ms. Barnes who would make changes and return them directly to her. The grievant testified she had to go back to the Supervisory Trial Attorney and find out what was turned in to Ms. Barnes so changes could be made. The grievant explained she had no authority to enter a consent decree in the Kempsville case. She pointed out during her entire career with the EEOC she did consent decrees. She contended discovery was not the key priority in the case because the defendant was highly motivated to settle. The grievant said Ms. Barnes has a consent decree model that has a number of items she was not accustomed to putting in and she noticed she had not seen anything like this at the EEOC. The grievant stated she had not considered back pay to be a big issue in this case.

The grievant contended her motion to dismiss at the end of the Maersk case was successful. She said she had done deposition notices by herself. She pointed out a person made a statement to the respondent and later to the defendant that the person admitted a criminal history. She contended she was accused in her removal of helping the defense by talking about such fact when she was asked about criminal record documents. The grievant testified the highest caseload she had occurred during the PIP period. The grievant stated Ms. Barnes would not tell her if she would accept money for a consent decree or the amount of money for back pay in the Kempsville case. She said a

consent decree saves work in having to respond to discovery. She pointed out Ms. Barnes and Ms. Spicer wanted to curtail every possibility of ordinary communication with the defense attorney in the Maersk case.

Stacey Caldwell testified she currently works for the United States Department of Defense, and has been employed there since May 2007. She said she does personnel litigation, represents the agency in litigation that employees bring before the EEOC and Administrative Judges when they make claims of discrimination. She pointed out she also represents the agency in defending the agency's position on adverse actions before the MSPB. She explained her educational background and former employment. She said after a working clerkship she began to work for the EEOC reporting to the Baltimore office. She pointed out a Regional Attorney she reported to was Jerald Kiel and she received outstanding ratings the entire time she was in Baltimore. She stated in January 2006 restructuring occurred and the Richmond office changed its designation, and was going to be under the Charlotte District office. She contended for four to seven months she reported to Ms. Barnes and noted Ms. Spicer came on as her first level Supervisory Trial Attorney under Charlotte. She said while Ms. Spicer was her supervisor in Baltimore, she received outstanding performance appraisals. She explained in Baltimore she and Ms. Spicer sometimes had personality differences, but no problems existed with the work performance. She contended when she worked under Ms. Barnes in Charlotte the processes were dramatically different. Ms. Caldwell explained Ms. Barnes had a certain way to do things and expected the attorneys who came under Baltimore to already know.

Ms. Caldwell testified Ms. Barnes was a micromanager and wanted to see

everything done by the attorneys. She described Ms. Barnes as having a formal procedure for everything and a time line that applied district wide. She pointed out the time line charts were not realistic when applied to the Eastern District of Virginia because of being in the rocket docket, items move more quickly than in the North Carolina jurisdictions. Ms. Caldwell stated some of the time lines were unreasonable and impacted the ability for her to do her job. She explained the changes were more stylistic changes in Charlotte than under Baltimore. She contended Ms. Spicer would micromanage because she wanted to see everything and noted if the Regional Attorney reviewed a document he did not make a lot of changes. She said when she worked under Ms. Barnes she received a lot of changes back that were wholly stylistic. She testified when Ms. Spicer was the supervisor, she tried to explain Ms. Barnes wanted the documents done a certain way and noted she received conflicting instructions from Ms. Spicer and Ms. Barnes and noted it was a very frustrating. She pointed out Ms. Barnes as her supervisor was more critical of her work. Ms. Caldwell alleged the situations made her feel she was not able to perform as an attorney who thought things through, analyzed evidence and wrote arguments. She explained with Ms. Barnes everything seemed of equal importance.

Ms. Caldwell discussed the process she would use to respond on behalf of the EEOC to discoveries by defense counsel. She pointed out a motion to compel was filed in one of her cases and the judge cautioned her the EEOC needed to find a different way to verify responses. She said under Ms. Barnes if she needed extra time to complete assignments she was told to ask Ms. Spicer as her immediate supervisor. She contended Ms. Spicer would tell her no because things needed turned around in a certain amount of

time. She testified Ms. Spicer would tell her no because she was getting pressure from Ms. Barnes to get things done on time. Ms. Caldwell said she would get criticized for not managing her cases. She explained she was not able to manage her own docket of cases because her input was usually negated. She stated her appraisal under Charlotte from January 2006 through September 2006 "met expectations are acceptable" and noted it went down. She pointed out her mid year appraisal was down from usual. She contended she did not usually receive negative comments but she did in 2007 before she left. She testified she started in Baltimore in July 1999 and in 2006 she received an evaluation under Charlotte. She said she thought she did a credible job and gave her input. She said her appraisal in Charlotte was rated "neat" with no comment. She explained in mid year she received negative comments she thought were unwarranted. She stated she never received negative comments in the past.

Ms. Caldwell contended on occasion she had to discuss discovery items with opposing counsel. She said federal rules of the court require an attorney to discuss and try to resolve discovery disputes. She explained the discussions related to whatever issues were particular to a case and noted a lot of times it avoided motions. She stated she never received any specific training from the EEOC on prepping witnesses. She said she asked for a copy on how to prepare someone for an EEOC litigation. She testified she may have on occasion agreed to put discovery on hold with opposing counsel to facilitate a settlement agreement. Ms. Caldwell alleged a Legal Technician would prepare the purchase order before it was sent to Charlotte. She stated she did not do purchase orders. She explained the Legal Technician or someone in Charlotte would send a notice when a purchase order was signed. Ms. Caldwell testified she never

received a chart which indicated within how many days she had to submit something to the supervisor. She said she did not recall if the Union was contacted about the chart. She pointed out she had concerns about whether or not the chart was reasonable. She stated it was her understanding it was her responsibility to make sure she had authority before she expended money regarding taking depositions and expending EEOC dollars.

While being cross-examined, Ms. Caldwell discussed the verification at issue. She stated the magistrate cautioned her about being called in as a witness. She said the magistrate told her the attorney should not be the one verifying the responses and not the attorney representing the Commission in the litigation. She pointed out the magistrate did not suggest for the responses not to be verified.

Ms. Caldwell did not recall taking a deposition when she reported to Charlotte where there was no purchase order authorization. She contended she followed discovery rules. She stated she received a motion to compel discovery, but it was not related to responding on an untimely basis. She said she never let a formal request for discovery go beyond the time limits for which objectives were required. She pointed out she had some motions for summary judgment filed against the EEOC. She recalled Ms. Barnes revised the chart on the time frames more than once. She pointed out she discussed issues with Ms. Spicer and Ms. Barnes at times that the time limits were unreasonable because she needed time to do a reasonable job. She discussed the situation when a judge set a trial date when she was to be on a pre-planned vacation and the judge indicated she would work with counsel if deadlines needed moved. She said she discussed in a phone conversation with Ms. Barnes and Ms. Spicer a proposed plan she had to work around meeting the deadlines. She pointed out Ms. Barnes sent her an e-mail to talk to Ms.

Spicer noting Ms. Spicer was not receptive to what she was proposing. Ms. Caldwell contended she broke down in court when the judge said the deadlines could not be adjusted. She stated the judge recalled the previous conversation about the pre-planned vacation and continued the trial. Ms. Caldwell testified she felt very frustrated because she was trying to manage her caseload and was not allowed. She said she went on vacation because the judge accommodated her.

Ms. Caldwell discussed the case where she started to work on the draft responses when she received a motion for summary judgment. She stated Ms. Spicer may have seen the draft the final day. She contended Ms. Barnes did not see the finished product before it was filed. She explained often she asked for deadlines, but was flatly told no. She pointed out she did several A-2 forms under Ms. Barnes but did not know how long it took to get them out. She explained the situation when a judge said he should not have threatened to sanction her and was going to withdrawal the motion and was not going to assess cost. She stated many conference calls were held under Charlotte. She discussed the procedure she used to prepare witnesses.

It was Ms. Caldwell's testimony she was criticized by Ms. Barnes for leaving out elements of a charge of discrimination from her analysis and not discussing members of a particular class. She contended the difference occurred from how things were reviewed under Baltimore versus under Charlotte. She said the focus on every precise detail was not how everything was done in Baltimore. Ms. Caldwell stated she was warned to adapt, but contended she did not feel she was given the chance to learn Ms. Barnes way. She testified she did not feel Ms. Barnes respected her contribution as a good Trial Attorney with the Charlotte office. She pointed out she felt Ms. Spicer had respected her

for her work ethic because when she gave her a written negative mid year review, Ms. Spicer said positive things to her. She explained the dynamic changed with Ms. Spicer. She contended if she went to Ms. Barnes to explain the problem with Ms. Spicer she did not think she would be receptive. She said she wanted to go some place where she felt she could thrive as a professional. She testified a judge never dismissed a complaint or criticized her for not following instructions or struck an opposition to a motion because she filed it untimely. She pointed out it was rare for her to have a conference call with Ms. Barnes and Ms. Spicer.

Tina Burnside testified she has worked in the Charlotte District office as a Supervisory Trial Attorney since June 2006. She said she was previously a Senior Trial Attorney in Minneapolis for six years. She pointed out in 1997 she started in the New Orleans District office as a Trial Attorney before being transferred to Minneapolis. She contended she supervises a team of five attorneys, Trial Attorneys, a paralegal and a Legal Technician. She explained as a Supervisory Trial Attorney she reviews the administrative work and also supervises and oversees and reviews their work and litigation. She pointed out she attends mediations with the Trial Attorneys. She said she never directly supervised the grievant, but worked with her on the Maersk litigation and the Days Inn case.

Ms. Burnside explained the memorandum she wrote to Ms. Barnes working with the grievant in the Maersk case. She stated she raised concerns regarding the subpoena that was served on the charging party and the grievant's response. She contended the subpoena sought relevant information, but the request was for overbroad and appeared to be harassing. She said she had a concern for asking for photographs of the party with

automatic weapons or weapontry and asked the grievant for the request. Ms. Burnside pointed out the grievant did not think the subpoena with respect to the photos was a serious issue that should be objected to. She said the grievant did not find anything wrong with the request regarding criminal records. She explained the medical records request was overbroad and not relevant. She contended the grievant did not see anything wrong with submitting the charging party to an IME. She stated she would expect an employee at a GS-14 level with seven to eight years trial experience to know an IME needed requested by motion because this information is clearly stated in the federal rules of civil procedure and contained in the Regional Attorney's handbook. She noted information on medical records requests and IME's is contained on Insight. Ms. Burnside testified she wrote an e-mail to the grievant to give instructions on how the EEOC was to proceed on the subpoena in Maersk. She said she does not typically send this type of e-mail to other GS-14 Trial Attorneys because they know how to respond to the issue. She pointed out she told the grievant to inform the defendant's counsel the EEOC was going to object to the IME and they had to make a formal request and file a motion. She testified the grievant did not tell her the charging party was examined by a medical expert. She pointed out the grievant did not see anything wrong with the request for criminal records, and she noted the grievant was resistant when she told her the things that should be objected to and the reasons why rejection should be made. Ms. Burnside contended she was involved in drafting the motions which required substantial revision because the first draft was only a skeletal outline.

Ms. Burnside pointed out she was only involved with the grievant on Days Inn for drafting the notice and working with Ms. Spicer and the grievant on the summary

judgment motion. She said she received the first draft from the grievant for the notice of intent in the Days Inn case, made some revisions and sent it back. She contended she needed to make revisions on the second draft because there was still work that needed done. She testified Ms. Barnes wanted documents given to headquarters to be in good quality. She stated Ms. Barnes reviews the notices and all documents filed in court. She pointed out she was trying to assist the grievant in her interactions with her.

During cross-examination Ms. Burnside testified her first legal job began with the EEOC in 1997. She said when she was lead counsel she did not prevail a trial in the two cases she tried. She pointed out most of the cases settle. She stated two trials in front of a jury is the representative amount of what most attorneys have in the EEOC. She stated she was hired in the supervisory position by Ms. Barnes. Ms. Burnside contended she is of the black race. She pointed out the last time she tried a case was in 2007 and prior to that was in 1998. She said she was admitted to the Wisconsin Court, but is not admitted to practice in the Eastern District of Virginia and does not supervise attorneys in Virginia. She explained she supervises attorneys in North Carolina and South Carolina and Ms. Spicer supervises the attorneys in Virginia and they work as a team.

Ms. Burnside contended she is familiar with the rules in federal court. She pointed out she did not work with the grievant on the entire Maresk case. She said she drafted a memo to the grievant to document what occurred with the subpoena since she was not working on the case. She said she did not know why she did not send the memo to the grievant. She explained she sent the memo to Ms. Barnes because she is the Regional Attorney for the Charlotte District office and noted she copied Ms. Spicer who is the grievant's District Supervisor. She pointed out if problems arise with the case the

Regional Attorney should be informed since she is ultimately responsible for what happens in litigation. She said she revised the draft of the motion to quash to federal court the grievant sent to her. She testified she did not recall the grievant telling her there were no photographs. She said there was no motion to produce or to request the IME. Ms. Burnside explained the only issue she dealt with in the Maresk case was the subpoena. She contended the grievant did not raise any objections to the IME. She explained she was not the grievant's supervisor, but a supervisor in the Charlotte District office. She explained the grievant had conversations with the defendant's counsel relating to the Maresk issue. She pointed out although the defendant's counsel asked for certain things, no formal discovery requests were made. She contended she told the grievant "do not conduct informal verbal discovery." She stated the grievant specifically engaged in informal discovery with the defense counsel relating to the issues with the pictures about the medical records, the arrest and the passport. Ms. Burnside said just because a person makes a claim for compensatory damages does not mean they must submit to the IME. She pointed out the grievant only asked her about the issue of the subpoena in the Maersk case. Ms. Burnside explained it was a common practice to print off a document, make changes and fax it back. She said she did not make changes just for changes sake. She pointed out the Regional Attorney reviews all documents filed in court and the notices and the presentation memorandum are sent to headquarters. She stated when she was in Minnesota her notices to take a deposition were not reviewed. She contended when she was practicing in Minnesota a 30(b)(6) did not need reviewed by her Regional Attorney or Supervisory Attorney. She said she is not aware of Corbett Anderson receiving disciplinary action.

Joanne Riggs testified she is the Assistant Director for the Office of Human Resources. She said she is responsible for Labor and Employee Relations, Workers Compensation and Reasonable Accommodation. She stated she supervises Corlise Wright. She contended the issue about who would be the deciding official in the proposal to remove the grievant was referred to her office and she noted she discussed the issue with Ms. Wright. She explained after she evaluated the facts and reviewed the procedures, she determined Ms. Spicer had been a supervisor long enough to make a determination as to whether or not she should be the proposing official. She contended she reviewed the rules the Regional Attorneys utilized with their subordinates, and she determined it was appropriate for Ms. Barnes to be the deciding official and Ms. Spicer to be the proposing official. She said normally the deciding official in a proposal to remove a Trial Attorney is the Regional Attorney. She stated her office reviewed the proposal before a decision to remove was made. She pointed out her department discussed the grievant's request to have Ms. Barnes go to Norfolk to hear the grievant's oral reply. She stated the policy of the EEOC is to have the employee travel to the site of the deciding official if he or she elects to do an oral reply to the proposal. She explained her office reviews actions for consistency and is versed in employment discrimination work.

Ms. Riggs stated in 1996 the OPM approved the performance appraisal system that was developed by the Agency for employees. She said she is familiar with the specific performance standards applying to the grievant's performance evaluation, PIP and removal. She explained a decision was made to permit employees to remain under the old system until a determination was made as to whether or not they were performing at the acceptable level of competence. She pointed out if the employees passed the PIP

they would migrate to the new performance appraisal system or if they failed during the PIP, the decision would be made pursuant to the old performance appraisal system. Ms. Riggs explained why the decision was made. She discussed how the system worked and the levels of participation and talked about documents that were developed. Ms. Riggs said she was hired in 1998 as the Attorney Adviser and worked solely in Labor Relations before migrating to employee relations matters. She stated prior to working for the EEOC she worked for the National Association for the Advancement of Colored People for two years and the prior ten years with the American Federation of Government Employees in Labor Relations. Ms. Riggs testified the degree of supervisory oversight in each legal unit is not the same because the Regional Attorneys have their particular style of management. She said employees are expected to follow instructions of their superiors. She pointed out the failure to negotiate before implementation was not raised in either grievance. Ms. Riggs explained Article 8 which deals with labor relations matters, was raised in the grievance and needed to be addressed.

While being cross-examined, Ms. Riggs said her office handles national negotiations and not local negotiations. She explained if a particular form was used in Charlotte, separate negotiations would need to occur with the local union. She stated she was aware Ms. Barnes was the grievant's first level supervisor during the portion of time for which she was removed. She contended Ms. Barnes was the individual that had written and advised the proposing official as to the deficiencies found in the grievant's performance. She said Ms. Barnes would be a disinterested party in the case. She explained she felt Ms. Spicer had been a supervisor of the grievant long enough to make an independent assessment. She stated even though Ms. Barnes was a Regional Attorney

and aware of the grievant's deficiencies, she could still be an independent party. She testified the grievant, during her PIP, was under the old system. She stated the EPES system was communicated to the grievant. She explained if the grievant's PIP had not started or it was not communicated to her that she was unacceptable, then she would be following the Agency's policy and be given the opportunity to improve under the old system. Ms. Riggs pointed out the Office of General Counsel, the Office of Human Resources and her department discussed with the Union the process that was going to be used that was fair to employees. She stated there is written guidance, but it was not signed off by the Union and she noted the Union does not sign off on every guidance sent out. She pointed out the guidance provides how to deal with employees who were unacceptable under the old system. Ms. Riggs contended either the President or Chief Negotiator of the Union agreed to the document.

Ms. Riggs stated a Supervisor from another District has supervised another employee in another District with the EEOC. She said the practice at the time of the grievant's action was for the employee to travel to the site of the deciding official. She contended no one to her knowledge has challenged this issue. She explained the Director of Personnel told her the policy of the Agency has been to make the employee go to the supervisor. She testified the idea of the employee being required to go to the supervisor's office was never an issue prior to being raised in the grievant's appeal. She pointed out the policy does not reflect the limitation on how the employee would have to travel to the supervisor. She contended she never tried MSPB cases at the EEOC. She said she was not aware the grievant and her attorney requested for Ms. Barnes to be disqualified and brought an EEO claim against Ms. Barnes. She contended if she had this information,

she would not have viewed Ms. Barnes as a disinterested party to make a decision on the grievant's case. Ms. Riggs said she did not see Article 8 listed on the grievance. She contended the action went to the Chair.

Regina Andrew testified she has been employed by the EEOC as a Trial Attorney since August 1990. She said she is the elected President of AFGE, Local 3614 and has been performing the duties of President since 2002. She stated a Virginia attorney has not always been in the Norfolk office, and prior to 1999 the Baltimore Attorneys were responsible for litigation in the Eastern District. She explained in 1993 she was before Judge Miller on a motion to compel. She pointed out there was confusion as to whether or not written discovery could take place prior to a Rule 26 discovery conference. She said Judge Miller disagreed with the EEOC's position, and ordered her to produce EEOC's deliberative process because she waived or untimely filed objections to the discovery. She pointed out her supervisor instructed her not to produce deliberative process or work product and noted the US District Court later undid what Judge Miller ordered.

Ms. Andrew contended Ms. Broome is in her bargaining unit and has not been the only person who complained about changes that took place as a result of the transition from Baltimore to Charlotte. She said Ms. Broome specifically complained about new duties she never had before and did not know how to do 1, 2, 3's because they were always done by paralegals. She pointed out Ms. Broome was frustrated. She noted Ms. Barnes never sat down with the Union and negotiated changes. She contended the EEOC breached the contract in its duty to negotiate with the Union the number of changes implemented by Ms. Barnes. She pointed out the EEOC is required to give notice before

changes are made. She contended at the time of the transition, she met with Ms. Barnes and the District Director to discuss the transition. She testified after the discussions, the EEOC, made changes without notifying the Union. She said when the Union made demands to the EEOC no responses were provided. She stated she was surprised by some changes Ms. Barnes made without sending the Union prior notice.

While being cross-examined, Ms. Andrews testified attorneys said there was a new chart with the time lines for submitting for review and asked if the Union negotiated the chart. She stated there were never lengthy discussions with management about negotiating changes for the procedures intake. She contended attorneys in the bargaining unit questioned the change. She pointed out she should have heard about the chart from management before the employees were subjected to the chart. She stated she did not know the timing of the chart.

III. AGENCY POSITION

It is the position of the Agency that there are no due process violations concerning the decision to remove the grievant. The Agency contends the grievant's performance was unacceptable and is reflected in the numerous incidences of her failure to follow supervisors' instructions, her failure to meet litigation time frames established in the federal rules and those of her supervisors, her lack of understanding of Agency policy and guidelines, her weakness in the ability to correctly analyze legal issues and to write well and persuasively, her failure to keep her supervisors informed of important activity in her litigation, and her consistent pattern of hiding problems from her supervisors to the potential detriment of the Charlotte litigation program.

The Agency contends an arbitration involving the removal of a Federal employee is subject to legal framework not ordinarily applicable to arbitrations in the private sector. That is, arbitrators deciding adverse actions in the Federal sector must adhere to the Civil Service Reform Act and follow MSPB law. It is argued by the Agency that the grievant did not, and cannot prove that the alleged procedural errors, if in fact there were errors, had a harmful effect on the removal decision. The Agency contends the relevant period for consideration of removal evidence is one year prior to the issuance of the proposal to remove. The allegations of the grievant that only instances occurring during the PIP period may be considered is not accurate.

The Agency contends the record is replete with evidence of grievant's failure to perform as a competent Agency attorney, and her failure to act in a manner sufficient to enable legal management to ensure that the legal representation from the Norfolk office was acceptable to the Agency. The Agency alludes to the fact the grievant failed to file timely opposition to the motion in limine in the Days Inn case resulting in criticism from the bench, her prior judicial criticism for her failure to follow the court's direction in GA Hoffler and the court's Sua Sponte threat of sanctions after her failure to timely respond in Kempsville provide sufficient basis to remove the grievant. Furthermore, the Agency argues the grievant's attempts to hide problems arising from her mistakes compounds the risk that litigation of Agency cases will be compromised, particularly where the grievant's supervisor is located almost 200 miles away. Furthermore, the grievant's ignorance of, or indifference to, requirements of the federal rules of civil procedure and legal positions contained in guidance from Agency's legal management resulted in substantial risk of inadequate representation from Norfolk. Finally, the grievant's

repeated failure to follow instructions from management to timely submit documents for review and keep supervisors informed of significant developments that impacted her cases made her a "loose cannon", an unreliable attorney and employee.

It is the position of the Agency the grievant's performance during the period October 1, 2005 to June 13, 2006 was unacceptable, based on her actions demonstrating that she could not be trusted to follow orders from the court, instructions from her supervisors and time frames imposed by the Federal Rules of Civil procedure, timely inform her immediate supervisor or the Regional Attorney when something was wrong or pressing in her cases or of significant development that impacted the Agency's cases, remain in the office to do the work necessary to meet deadlines imposed by litigation procedures, and in time for supervisors to review her work, failing to attend to necessary procedures such as procurement requirements, accurate time and attendance records, timely reports to her supervisors, and not having legal judgment and writing ability. The Agency argues the procedures to remove grievant were consistent with the requirements of the United States Merit Systems Protection Board and existing case law, and there was no evidence to show the removal was motivated by discrimination, race or caregiver status, or retaliation for filing a grievance or complaint of discrimination.

The Agency was concerned with the grievant's deficient performance related to the GA Hoffler, Kempsville and Maersk cases during the first three months of 2006, citing her failure to inform her supervisor of significant developments, her failure to communicate with the court and opposing counsel to the detriment of the Agency's position in cases, and grievant's failure to meet deadlines for discovery and serving initial discovery. It is pointed out by the Agency that in the Hoffler case the grievant filed a

motion for default judgment on August 9, 2005 in favor of the charging party but had the motion requested a default in favor of plaintiff, the Agency, the court would have entered a judgment of default in favor of the Agency. The Agency asserts the court advised the grievant to amend her motion accordingly, but the grievant did not follow that advice in scheduling a hearing for November 14, 2005. The court advised grievant to bring proof of delivery of notice of the hearing to defendant, but grievant informed the court she had not received notice of delivery, and the evidence shows the grievant did not produce proof of service of notice to defendant of the November 15 hearing. The Agency contends Ms. Barnes had asked the grievant during January, 2006 for a list of cases, but the grievant failed to inform her about the existence of the pending Hoffler case. Ms. Barnes instructed the grievant to ask the court for the default, which the grievant filed on January 23, 2006. Had Ms. Barnes known the facts from the grievant before filing the January 23 motion, an alternative motion could have been filed. Instead, the court dismissed the case without prejudice on January 31, 2006 because grievant had failed to produce proof of notice of the earlier hearing as the court instructed her to do. Furthermore, the grievant did not inform Ms. Barnes about the dismissal in Hoffler until February 28 or March 1, 2006 after the time had run for the filing of a motion for reconsideration. Because of what occurred in this situation, it became obvious that the grievant could not be trusted by Ms. Barnes to inform her about the existence of a case in litigation, the nature of a judge's instructions in a case, and the existence of an order of the court dismissing the case.

It is the position of the Agency that in the Kempsville case, another case under the direct supervision of Ms. Barnes, the grievant failed to actively litigate. According to the

Agency, defendant's counsel, Scott Kezman, requested a settlement proposal from grievant by January 27, and she agreed to send him one, but she failed to respond to Mr. Kezman's numerous requests for a proposal. Mr. Kezman, on March 16, 2006 filed a motion to compel answers to discover and he requested attorneys fees because the grievant had neither responded to his discovery nor submitted a draft consent decree/settlement agreement. The next day, just before Ms. Barnes was leaving for an exhibition baseball game in Atlanta, grievant urgently recommended to Ms. Barnes that a settlement proposal be immediately sent to Mr. Kezman, because she had delayed so long in sending a proposal to him. While the grievant had failed to inform Ms. Barnes about the motion to compel filed the day before, and she claimed she had an informal agreement with Mr. Kezman to forego her discovery responses while they explored settlement, on March 29, the magistrate judge ordered the Agency to respond to defendant's discovery by March 31 and to defendant's motion to compel no later than April 3, and the judge threatened to consider sanctions if discovery responses were not submitted by March 31. Although the grievant contends she could not draft a consent decree from the time depositions were held in January to March 16, because Ms. Barnes would not let her do it, Ms. Barnes testified she did not recall being informed about the request for settlement until she was about to go to a baseball game in Atlanta. Because of the grievant's earlier inaction, it was necessary for her to complete responses to interrogatories and requests for documents by March 31 and respond to a motion to compel and for attorney fees by April 3. Additionally, the grievant needed to file an opposition to defendant's motion for summary judgment, and Rule 26(a)(3) disclosures were due the following Tuesday if a settlement Agreement could not be reached. The

end result, according to the Agency, was a weak settlement, caused by the grievant's inaction in the case.

It is the position of the Agency that Ms. Barnes expected the grievant and the other new attorneys under her supervision to notify her immediately upon receipt of a document to be answered, and call her to discuss when it could be reviewed. The Agency asserts the grievant did not follow those instructions. The Agency would point out that an opposition to dismiss was needed in Maersk, and Ms. Barnes did substantial rewriting of grievant's draft during the weekend. Additionally, the Agency contends in late May, 2006 Tracy Spicer began assisting Ms. Barnes by reviewing grievant's draft discovery responses in Maersk, but the grievant failed to follow supervisory instructions by failing to revise all of the responses pursuant to Ms. Spicer's comments and instructions before grievant sent them to opposing counsel. The Agency contends the grievant served discovery requests in Maersk without prior supervisory review on July 7, 2006, and in the Agency's view, amounted to insubordination. The record reflects, according to the Agency, that the grievant failed to immediately notify supervision when she received a subpoena on June 14 directed to the charging party in Maersk. Furthermore, according to the testimony of Supervisory Trial Attorney Tina Burnside, grievant did not wish to oppose the subpoena to Mr. Saleh, the charging party in Maersk. Also, grievant did not recognize the need to move to quash the request for photos, medical records, passport and criminal records, contending Mr. Saleh told her none existed or because it did not make a difference in litigation. It is also the contention of the Agency that the informal discussions that occurred between the grievant and opposing counsel prior to receipt of a formal request is not considered by the Agency to be proper litigation procedure, as there

is no record of the informal exchange, making it subject to dispute at a later time. Furthermore, the grievant improperly reacted to the request for a subpoena in Maersk because she improperly believed Mr. Saleh was not her client. The Agency alleges the grievant did not understand the concept that charging parties and the EEOC have a "common interest" in the Commission's cases resulting in something like an attorney client privilege. The Agency also contends the grievant's draft motion to quash lacked discussion of necessary factual and legal matters at issue and contained no supporting case law, which required Ms. Burnside and Ms. Barnes to finalize the brief for filing. Finally, with respect to grievant's draft motion to quash a subpoena served on Dr. Kaza and the grievant, such motion was not appropriately modified to discuss the factual and legal issues specific to Dr. Kaza, and it was necessary for Ms. Barnes to review and rewrite the motion. The Agency asserts there were a number of other issues with the grievant's performance relating to the Maersk subpoenas such as her representations in the draft concerning whether or not she sought and received medical records and how she failed to obtain factual information before making decisions. The Agency also contends the defendant sought to submit Mr. Saleh to an independent medical examination, but grievant inappropriately named the psychologist, rather than objecting to an interrogatory request requesting the disclosure of all medical providers. Also, the Agency asserts the grievant attempted to facilitate the independent medical examination, without advising her supervisors as to her course of action. When the opposition to summary judgment had to be written in Maersk, and was due the day after Labor Day weekend, the grievant submitted an incomplete draft to Ms. Spicer on Friday, September 1, and Ms. Spicer had to work on this draft over the weekend.

Regarding the Days Inn case, the Agency alleges the grievant delayed submitting a first draft of the notice of intent, which was far beyond the time limit given for the assignment, but the grievant still submitted an unacceptable product. Specifically, the notice of intent, which is the document proposing that the case be litigated, was not finalized until the last quarter of the fiscal year, even though conciliation failed during the first quarter of the fiscal year. The Agency argues an issue arose regarding the complaint filed in Days Inn by the grievant because the complaint lacked sufficient facts to establish a prima facie case of sexual harassment discrimination, because the grievant did not include the gender of the victims, who the harasser was, and that he was in the charging parties direct line of supervision. The Agency contends on or about November 13, 2006, the grievant submitted her draft of Rule 26 disclosures for review in Days Inn, and the document identified persons as witnesses she had not interviewed, nor did she have witness statements from them. In doing what she did, the grievant was not following her discovery plan, and she was attempting to disclose the identities of potential witnesses without knowing what relevant knowledge they had. With respect to depositions taken on January 8 and January 9, 2007, the Agency determined the grievant had not been properly preparing witnesses prior to depositions to the detriment of Agency litigation. It is also contended by the Agency the grievant sent out a discovery document in Days Inn without submitting it for supervisory review, and it was later determined the requested information was not relevant to the case. Also, the grievant received a discovery document from the defendant, but did not disclose such notice to her supervisor until a later date. In failing to send these notices to her supervisor, the grievant clearly failed to follow her supervisor's instructions.

It is the position of the Agency the grievant needed assistance in drafting a letter to oppose who complained about improper conduct by the Agency Investigator in the case, and she needed to have special treatment by Ms. Barnes and Ms. Spicer, as they assisted the grievant in preparing her brief regarding a motion for summary judgment filed in the Days Inn case. Also, affidavits included in the opposition had not been submitted to the supervisors for their review. It is also alleged by the Agency that defendant filed a motion in limine which required the Agency to file an opposition brief by March 5, 2007, but the grievant did not submit the draft brief to Ms. Spicer until March 4, and the motion was filed the morning after it was due, which resulted in criticism of the Agency by Magistrate Miller. The Agency contends the grievant did not properly prepare a consent decree, and when the grievant and Ms. Spicer met with opposing counsel in Days Inn, Ms. Spicer believed the grievant advocated the defendant's position, which is inappropriate. Finally, in the Days Inn case, the grievant sent an incorrect press release to headquarters, without obtaining the required review. In the press release she cited the wrong case and identified the wrong contract person.

In Burlington, although the grievant created a discovery plan and case conference report, she did not follow it. The Agency would point out the grievant did not attempt to locate class members. The Agency claims the grievant was late serving discovery requests, she had agreed to depositions of the charging party and two other claimants for the week of February 12, 2007, but it was necessary to postpone the depositions because the grievant had not supplied the necessary information to the Norfolk Legal Technician for her to make travel arrangements and obtain travel authorizations for the witnesses. It was determined by the Agency that the grievant had not properly prepared the witnesses

and had decided to do things her own way. It is also alleged during an oral argument on the summary judgment motion in the Burlington case, the grievant's argument was not clear or persuasive, and she lost her train of thought three times. It is contended by the Agency the grievant was to file a complaint and other initiating documents by March 15, 2007, but she did not file the documents until March 29, 2007. The Agency contends the grievant was late in drafting the notice of intent in Wholly Guacamole, and also was late in filing the lawsuit, and shows the grievant was late in meeting time frames and following instructions.

In Community Services of Virginia, the defendant had not complied with the no monetary components of the consent decree, she was instructed to file a motion for contempt before the term of the decree expired, and she sent a letter to defense counsel advising him the Agency would seek redress in court if the defendant did not comply with the provisions of the consent decree. She failed to follow the instructions of her supervisor in failing to file a motion for contempt. The Agency also argues the grievant did not meet time frames for moving enforcement files. It is asserted by the Agency the grievant was untimely in virtually all of her cause reviews and negative litigation recommendations. It is also the position of the Agency the grievant continually failed to comply with administrative procedures such as time and attendance records, leave slips, failing to seek procurement authorization, using wrong forms for case conferences, and her failure to confirm receipt of deposition transcripts.

Regarding procedural issues, it is the contention of the Agency that the grievance has produced no evidence to carry its burden of supporting a claim of harmful error in the Agency's use of procedures in this case. It is the position of the Agency the performance

standards were no different under Charlotte than she experienced under Baltimore, only that her work was more closely scrutinized under Charlotte. Ms. Spicer and Ms. Barnes reasonably expected grievant to function as a GS-14 attorney. While the grievant has improperly questioned the legal judgment of her supervisor and the Regional Attorney, management's judgment regarding proper litigation procedures and writing style is normally not reviewable by the arbitrator.

It is the position of the Agency that its failure to negotiate the deadlines in the chart with the Union is not a basis for the grievant claiming she was subjected to irrational deadlines. The deadlines in the chart were not contested by the Union, either initially or during the processing of the second grievance involving the removal, and the time frames found in the chart, especially related to litigation documents, were not intended to be absolute and were not adhered to by the supervisors. It is the position of the Agency the grievant could not show issuance of the chart constituted harmful error in the decision to remove her. It is also readily apparent, according to the Agency, that in many instances, the time the grievant left for review of documents by her supervisors was the day before, the day they were due, or in the case of discovery documents, not submitted for review at all.

It is contended by the Agency there was no prohibition from Ms. Barnes being the decision maker in this case, and there was no basis for the Union argument that she should have recused herself. The applicable MSPB case law and Agency practice permit Ms. Barnes, grievant's second level supervisor during the relevant period, to act as the deciding official, even though she was familiar with some incidents included in the proposed removal. Furthermore, the Agency contended there was no evidence presented

to indicate Ms. Barnes was biased, held any personal animus toward grievant, or that Ms. Barnes did not fairly consider all of the facts presented in the proposed removal and reply by grievant in reaching her decision. It is also the position of the Agency that there was no requirement for the grievant to present an oral reply in the physical presence of the decision maker. While the grievant had a right to present an oral reply, there is no support for the proposition that the Agency is required to arrange for an oral reply to be in the physical presence of the decision maker or that the decision maker, was required to travel to the employee's office to receive her oral reply. In this case, the grievant was given the opportunity to make an oral reply, but she chose not to do so.

The Agency would note that it used the old performance plan rather than the newly instituted plan for the removal of the grievant. However, the grievant failed to perform satisfactorily under the performance improvement plan, even though she had a reasonable opportunity to do so. The Agency contends Ms. Spicer had continuous contact with the grievant by phone, fax and mail, and she worked with the grievant, prioritizing her work assignments, and assisted her in the completion of her assignments. It is also noted by the Agency the grievant had same number of cases assigned to her during her PIP period that she had when she was assigned to Charlotte, four, and no attorney had a lighter caseload than the grievant. The Agency would also assert there was sufficient information available to the grievant so she would know why her removal occurred. Furthermore, the Agency argues the performance standards which were used in this case were valid.

The Agency asserts the contention of the Union that the grievant had a valid discrimination claim based upon race is without basis, and there is insufficient evidence

that grievant was treated differently than similarly situated African-Americans. Also, there was no evidence of discrimination based upon grievant's status as a caregiver. For all of the foregoing reasons, the Agency respectfully requests a decision be made in favor of the Agency regarding both grievances involved in this arbitration.

IV. UNION POSITION

It is the position of the Union that Ms. Barnes denied the grievant a right to an oral reply. For the grievant and her attorney to have been required to travel to Charlotte, North Carolina would have caused the grievant a substantial financial hardship, particularly at the time she was facing removal. The Union contends the employee has a statutory right to both a written and oral reply to an adverse action notice, and the denial of such right to respond must reverse the action because such action violates constitutional rights to due process and the requirements of a meaningful opportunity to respond. The Union also alleges the grievant was entitled to an oral and written reply as specified under Section 39.04 (b) of the Agreement. The Union asserts the right to respond and have that response considered is a statutory right designed to provide due process, and such right would be totally abrogated if the Agency can ignore the rights and proceed with the separation and then claim the statute requiring a written and oral reply would have made no difference.

The Union argues Ms. Barnes was not a disinterested person, and in her role as deciding official, it was assured that the grievant's rights to an impartial decision maker were denied. It is the position of the Union the deciding official was so involved in the action that she could not be an unbiased decision maker. The Union alleges it would be

unreasonable to believe Ms. Barnes could impartially determine to credit the grievant's explanations and versions over the opposing version where the opposing version was her own. It is argued by the Union that Ms. Barnes, the key witness involved in the entire process, and the Agency's sole witness on several allegations, was not disinterested and not a neutral party. The Union contends this was confirmed by an Agency representative, Ms. Riggs, who said she would not have considered Mr. Barnes to be a disinterested person and would not have permitted her to serve as a disinterested person had she had the information that the grievant had a pending EEO compliant against Ms. Barnes. In this case, according to the Union, Ms. Barnes was fully aware of the EEO complaint the grievant filed against her, and there was no basis for Ms. Barnes being the deciding official. The Union therefore alleges the removal action was tainted and must be reversed.

The Union alludes to the fact that the Agency failed to meet its burden to articulate performance standards. The Union asserts more than three weeks after concluding the year for which the grievant would ultimately be rated unsatisfactory, the grievant was presented with a new performance plan. The Agency then attempted to use the former plan to evaluate the grievant, and in the view of the Union, this approach was simply erroneous. It is contended further by the Union the Agency established two levels for its critical elements, with one being proficient and the other being outstanding, but the Agency failed to establish what constitutes unacceptable performance, and this is fatal to the Agency's case. Also, the Agreement, at Article 21.00 states the performance appraisal evaluation procedures shall provide to the maximum extent possible, an accurate and objective evaluation of job performance. In this case, there was no guidance

for what constitutes an error or the number of errors an employee can have before he/she is determined to be unsatisfactory. It is also the position of the Union the Agency's attempt to claim the grievant as being incompetent and unable to reach even a minimal level of competency is belied by her previous successful performance appraisals before coming under Ms. Barnes supervision, her awards and promotion, and her having received the highest employment related verdict ever recorded by an attorney in Virginia. It is also readily apparent, even under the most difficult circumstances, the grievant was able to obtain settlements of her cases, rather than having such cases dismissed. What occurred in this case was the grievant was hounded by management because her drafts required revisions, but having one or more revisions is not abnormal, and this does not establish a particular standard of performance.

The Union argues the Agency's proposal to remove the grievant lacked the specificity necessary to provide her notice of the charge. While the Agency put the grievant on notice in some cases what the grievant did wrong, in other cases the Agency provided no substantive information as to what the grievant did incorrectly. Clearly, the proposed removal cites a number of cases which may or may not be part of the charges against the grievant. It is necessary that specificity be put forth, according to the Union, so the grievant will have an opportunity to defend herself, and provide a response to the allegations in a meaningful way. The Union asserts in this case the grievant did not have the opportunity to provide meaningful responses.

It is the position of the Union the Agency cannot prove its claim against the grievant. Regarding the cases cited by the Agency, the evidence establishes in the GA Hoffler case, the court dismissed such case without prejudice, a benign disposition

depriving the Agency of nothing. While the allegation was that the Agency wanted to appeal but was not able to appeal because the grievant did not notify Ms. Barnes, the fact of the matter is the law that prevented appeal of this matter because the case was dismissed without prejudice, could have been refiled. With respect to the Kempsville case, such case was filed prior to the transition to Charlotte, and from early on the defendant indicated he wanted to settle the case, and as a result, both parties put settlement on hold so that a settlement could be achieved. The Union asserts the grievant never had authority to settle the case, and it was Ms. Barnes who refused to review a draft decree before a difficult and inconsequential back pay calculation was completed. The Union also contends the grievant had many conversations with Ms. Barnes prior to March 17, and when Ms. Barnes took over and negotiated the matter herself, she failed to include routine provisions in the settlement, and in this case, the grievant cannot be faulted for what she was never given authority to do.

In the Maersk case, the Agency complains as to the grievant's handling of the issues, but the Union stands by every action taken by the grievant. Regarding the Agency complaint that the grievant failed to notify legal management of a subpoena being served on the charging party, there is nothing in the grievant's experience or training that would suggest her supervisor would have an interest in such a subpoena, much less that it should be opposed. When she used language to quash a subpoena, she used the precise language already approved to quash a subpoena for medical records to the charging party, and such subpoena should have been appropriate. The Agency had a complaint with the grievant failing to understand the relationship between the EEOC and the charging party, and it is clear the grievant understood that the charging party is not the client of the grievant.

With respect to the contention of the Agency that the grievant failed to protest an independent medical examination, the evidence shows the charging party had a medical diagnosis of depression and post traumatic stress, and the pleading did not limit the commission to "garden variety" damages. Furthermore, when the grievant contacted private counsel of the charging party, this was consistent with official EEOC guidance, and a review of grievant's draft opposition to defendant's motion for summary judgment is routine. It is the position of the Union that the foregoing matters, and every single position taken by the grievant, was based on a proper understanding of facts and law.

In the Days Inn case, it was the contention of the Agency that it took too much review, but when the Agency reviews the grievant's work, it becomes a joint product with the reviewer, and others become involved in the review.

The Union argues the Agency offered no information to support its contentions that the grievant did not meet critical element 2, individual accountability, and such contentions are vague. The Union contends the Agency failed to submit evidence to justify the unsatisfactory rating given the grievant. The Union contends the Agency improperly relied upon working drafts to support the unacceptable performance rating and removal of the grievant. Clearly, it is not unusual to have a number of drafts before a final product is prepared.

The Union contends the grievant was discriminated against based on her race. The grievant has demonstrated a prima facie case of race discrimination. The Union contends she is a member of a protected group based on her race, she has engaged in prior protected EEO activity which was known to management, and she was treated differently and more harshly than persons not in her protected group. The Union

contends the Agency has failed to articulate a legitimate, non discriminatory reason for its employment decisions. In this case, the Union argues the evidence fully supports a disparity in treatment based on race between the grievant and Ms. Spicer. The grievant's work products were forwarded to Ms. Spicer for review and revision, who then made additions, corrections and revisions, which were then made and forwarded to Ms. Barnes for review, who then made revisions of Ms. Spicer's work product. While the Agency contends the grievant's work product was unacceptable, apparently there was no problem with Ms. Spicer. The Union therefore concludes Ms. Barnes created double standards and discriminated against the grievant.

The Union contends the grievant was not given a meaningful opportunity to improve, and she was given no help to succeed. Finally, the Union argues the Agency failed to negotiate with the Union concerning changes which affected the bargaining unit, with respect to the time limits for attorneys to get their work done.

The Union requests that the performance appraisal of unacceptable for the grievant be canceled and the grievant be given a satisfactory rating, the Agency's removal action be canceled and grievant be reinstated with all back pay and benefits, the Agency be found to have discriminated against the grievant and a separate hearing be scheduled to determine her damages, that the arbitrator retain jurisdiction over this matter to receive a motion for attorney fees from the Union pursuant to the back pay act within 30 days of the decision, the grievant be provided with interim relief pursuant to 5 USC section 7701(6)(2)(a) and the Union and the grievant receive any and all other relief available under the law which the arbitrator seems just.

V. RELEVANT CONTRACTUAL PROVISION

Article 39.00 Adverse Action

Section 39.01 The Employer may take adverse actions to address misconduct. Adverse actions include the following; suspensions, reductions in pay or grade, removals and furloughs of 30 calendar days or less. Such actions should be taken in accordance with Federal regulations and this Agreement.

This Article shall not apply to temporary or probationary employees, employees serving trial periods, nonpreference eligible excepted service employees who have not completed two (2) years of current continuous service in the same or similar positions or preference eligible excepted service employees who have not completed one (1) year of continuous service in the same or similar positions or employees in the competitive service who have not completed one (1) year of current continuous employment under an appointment other than a temporary appointment limited to one (1) year or less.

Section 39.02 If the Union is designated by an employee in an adverse action proceeding, the employee and/or Union shall provide the Employer with the name and address of the designated Representative in writing, pursuant to Article 10.00 of this Agreement. All correspondence addressed to the employee shall be simultaneously provided to the Union representative.

Section 39.03 Upon request, all written documents (including portions of investigative reports, if applicable) which contain any evidence relied upon by the Employer to form the basis for any adverse action shall be made available to the employee or designated Representative.

Section 39.04 Employees against whom an adverse action is proposed shall receive at least 15 calendar days advance written notice of a decision proposing to suspend for 14 days or less and shall receive at least 30 calendar days advance written notice for proposed suspension in excess of 14 days, reduction in grade or pay, removal or furlough for less than 30 days. If there is reason to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, the Agency may provide the minimum notice required by law or regulation. The notice of proposed action shall contain the following:

(a) a statement of the specific reason for the proposed adverse action;
(b) a statement of the right to respond orally and in writing to the proposed action, the right to submit affidavits or documentary evidence in support of the answer and to be represented by the Union or another representative of the employee's choice.
(c) A statement of the time period allowed for the employee to answer orally and in writing. The statement shall provide that from receipt of the notice,

the employee has seven (7) calendar days to answer if the proposed action is a suspension of 14 days or less, or 15 calendar days to answer if the proposed action is a more severe adverse action. The notice shall also state that a request for an extension of time may be granted if made in writing to the Deciding Official, setting forth the reason(s) for the extension.

(d) A statement that upon request, the employee shall be granted a reasonable amount of duty time to prepare an answer to the proposed adverse action. Normally, this time shall not exceed four (4) hours for a suspension of 14 days or less and eight (8) hours for a more severe adverse action. Granting a reasonable period of duty time to prepare a response does not extend the time allowed to answer, and

(e) A statement informing the employee that a final decision has been made and that the employee will be notified of the final decision after his/her answer has been considered or after the time allowed for an answer, if none is received.

Section 39.05 If the employee responds to the proposal, the response (oral and/or written) will be received and considered by the Deciding Official or his/her designee. The employee's answer will be given full consideration before a final decision is reached.

Section 39.06 an adverse action file shall be established which contains; the notice of proposed adverse action, the employee's written answer and a summary of the oral answer, if any, related correspondence and/or other evidence relied upon to support the reasons for the proposed action. This may include affidavits, names of witnesses and their statements that were relied upon or other statements, reports, exhibits, excerpts from investigative reports and any other material used to support the adverse action. The adverse action file shall be available to the employee or designated representative for review at the employee's designated representative's request.

Section 39.07 The Deciding Official shall issue a decision to the employee either sustaining, modifying or canceling the Notice of Proposed Adverse Action. With the exception of employees defined in Section 39.08, such decision shall be issued pursuant to 5.C.F.R. & 752.203, 752.404.

Section 39.08 Access to the negotiated grievance procedure for matters covered by this Article shall not apply to probationary employees, employees serving trial periods, nonpreference eligible excepted service employees who have not completed two (2) years of current continuous service in the same or similar positions or preference eligible excepted service employees who have not completed one (1) year of current continuous service in the same or similar positions or employee in the competitive service who have not completed one (1) year of current continuous employment under an appointment other than a temporary appointment limited to one (1) year or less.

Article 40.00 Reduction in grade and removals based on unacceptable performance.

An employee covered by the Performance Appraisal System pursuant to 5 C.F.R. Part 430 may be reduced in grade or removed from the Federal Service for unacceptable performance in accordance with 5 C.F.R. Part 432.

The provisions of this Article do not apply to employees in the competitive service who are served probationary or trial periods under an initial appointment, employees in the competitive service serving in a type of appointment that requires no probationary or trial period who have not completed one (1) year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one (1) year or less or employees in the excepted service who have not completed, etc.

Section 40.01 For the purpose of this Agreement, reduction-in-grade means the involuntary assignment of an employee to a position at a lower classification or job grade level.

Section 40.02 At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one (1) or more critical element(s) of his/her position, the employee shall be placed on a Performance Improvement Plan (PIP) and given a reasonable opportunity to demonstrate acceptable performance and to correct any noted deficiencies. The PIP shall be in writing and include the following:

(a) the critical elements and performance standards in which the employee's performance is unacceptable.
(b) The performance requirements or standards which must be met to demonstrate acceptable performance;
(c) An offer of supervisory assistance in improving unacceptable performance; and
(d) The possible consequences of failure to improve performance to an acceptable level and sustain an acceptable level of performance for at least one (1) year from the start of the PIP period.

Section 40.03 If the completion of the PIP period, the supervisor determines that the employees performance is at an acceptable level, the supervisor shall so advise the employee.

Section 40.04 if at the end of the PIP period, the employee's performance is one (1) or more critical elements continues to be unacceptable, the Employer may propose to reduce in grade or remove the employee in accordance with 5 C.F.R Part 432.

Section 40.05 A proposal to reduce in grade or remove an employee may be based only on those instances of unacceptable performance which occurred during the one (1) year period ending on the date of the notice of proposed reduction in grade or removal.

Section 40.06 If an employee successfully completes a PIP but within one (1) year from

the beginning of the PIP, the employee's performance falls to the unacceptable level in the same critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance, the Employer may propose a removal or reduction in grade without placing the employee on another PIP. However, if the employee's performance falls to an unacceptable level in a different critical element than that which the employee was provided an opportunity to demonstrate acceptable performance, the employee shall be placed on a PIP as provided for under 5 C.F.R and 432.104.

Section 40.07 The Proposing Official will give the employee a 30 calendar day advance written notice of the proposed action in accordance with 5 C.F.R Part 432.

Section 40.08 Upon request, the employee shall be granted a reasonable amount of duty time to prepare a response to the proposed adverse action.

Section 40.09 The employee shall be afforded an opportunity to respond to the proposal orally and in writing. The right to answer orally does not include the right to a formal hearing with examination of witnesses. The Official who hears the oral reply shall make a written summary of it.

Section 40.10 The Deciding Official shall issue a decision in accordance with the provisions of 5 C.F.R Part 432.

Section 40.11 When the employee is not reduced in grade or removal because of improved performance during the advance notice period, and the employee's performance continues to be acceptable for one (1) year from the date of the advance written notice, then any entry or other notation of the unacceptable performance for which the action was proposed, shall be removed from any Agency record relating to the employee.

Section 40.12 When it becomes necessary to mail any of the notices under the provisions of this Article, the Employer shall do so by certified mail to the employee's address of record. Employees are responsible for ensuring that the Employer's records accurately reflect their current mailing address.

Section 40.13 Whenever the Employer reduces in grade or removes an employee under this Article, the Employer shall establish a performance-based action file which consists of a copy of the notice of proposed action, the answer of the employee when it is in writing, a summary thereof when the employee makes an oral reply, the written notice of decision and the reasons therefore and any supporting material, including documentation, regarding the opportunity afforded the employee to demonstrate acceptable performance.

VI. OPINION

The issues to be decided are whether the Agency was justified in giving the

grievant an unsatisfactory rating in the two critical elements under her performance appraisal system plan and subsequently removing her for unacceptable performance in critical element I (quality of work) and critical element II (individual accountability). A review of the relevant record has established the following material facts. On September 27, 1999 the grievant started work with the Agency in its Norfolk, Virginia local office as a GS-13 Trial Attorney. The Norfolk office and the grievant reported to the Baltimore office which was then a district office. As an attorney in the Norfolk office, the grievant practiced primarily in the U.S. District court for the Eastern District of Virginia, comprised of trial courts in Norfolk, Newport News, Richmond and Alexandria, Virginia. For the rating period October 1, 2001 through September 30, 2002 the grievant received ratings of outstanding in each of two critical elements; quality of work and individual accountability. On June 15, 2002 the grievant was promoted to the GS-14 grade. For the rating period October 1, 2002 through September 30, 2003 the grievant was rated outstanding in both critical elements, quality of work and individual accountability. For the period October 1, 2003 through September 30, 2004. The grievant was rated as outstanding in both critical elements. For the period October 1, 2004 through September 30, 2005, the grievant was again rated as outstanding in both critical elements. In January 2006 there was a nationwide reorganization of the Agency, and the Norfolk office began reporting to the Agency's Charlotte District office. Regional attorney Lynette Barnes became the grievant's immediate supervisor, and the grievant reported directly to Ms. Barnes from January 2006 to June 2006. In June 2006 Tracey Spicer became a Supervisory Trial Attorney, and she began supervising the grievant. On December 1, 2006 Ms. Spicer evaluated grievant's performance as being unacceptable in

both critical elements for the period October 1, 2005 through September 30, 2006. On January 25, 2007, the grievant was placed on a performance improvement plan. The performance improvement plan continued to April 25, 2007. On June 13, 2007 Ms. Spicer issued a notice of proposed removal to the grievant. On September 11, 2007, Ms. Barnes issued the decision on the proposed removal, removing the grievant effective September 14, 2007.

At the outset, the Union has raised several procedural issues which it claims would result in prejudicial error for the Agency. The Union argues Ms. Barnes denied the grievant a right to an oral reply related to the proposed removal, and this was required under the Agreement. The Agency argues the grievant's contention that the Agency was legally obligated to have the decision maker travel to Norfolk to hear grievant's oral reply is without merit. Upon carefully considering the position of the parties in conjunction with what occurred, it becomes readily apparent the grievant did in fact have the opportunity to make an oral reply to Ms. Barnes. This was never denied, and the grievant had the opportunity to follow through with an oral reply. It was the grievant's determination to provide a written reply to Ms. Barnes, and in doing so she exercised her choice to respond to the proposed removal. In my considered opinion, there was no requirement for Ms. Barnes to travel to a location more favorable to the grievant to hear her oral response. The grievant certainly had the opportunity to travel to Ms. Barnes office location and give her an oral response. The grievant had the opportunity to give an oral response to Ms. Barnes, and because it was more expedient for her own purposes, the grievant chose to provide a written response. This was her choice, but it was certainly not a deprivation of her right to respond to Ms. Barnes. Also, upon reviewing the

language cited by the Union in the Agreement, the response can be oral and/or written. In my opinion, what occurred in this specific circumstance did not result in a violation of the Agreement, and the manner in which the response was provided by the grievant was consistent with the applicable provisions of the Agreement. Consequently, it is my determination the Agency did not commit a prejudicial error by the grievant deciding to submit her written response to Ms. Barnes.

Another procedural issue raised by the Union is that Ms. Barnes was not a disinterested person and she could not make an impartial decision regarding the grievant. The Agency believes it was not improper for Ms. Barnes to be the decision maker in this specific situation, and in fact it is not unusual for Regional Attorneys to act as the deciding official in removal cases for Trial Attorneys. Upon carefully considering what occurred in this specific case, it is clear that Ms. Barnes was a second level supervisor of the grievant. Also, as the restructuring occurred in January 2006, Ms. Barnes directly supervised the grievant for a period of time. When Ms. Spicer became the grievant's immediate supervisor, Ms. Barnes became the next level supervisor of the grievant, but as the evidence has established, Ms. Barnes would occasionally be in a position to directly supervise the grievant. This did not appear to be unusual, but a reflection of the way Trial Attorneys would work together on a day to day basis. In any event, I have carefully reviewed the documents and evidence which have been submitted by the parties. Upon reviewing such evidence and documentation, it is my opinion that there was no evidence to establish that Ms. Barnes, acting as the deciding official in the removal of the grievant, was bias, or held any personal animus towards the grievant. Furthermore, upon carefully considering all of the evidence, it is my belief that there is no evidence to show Ms.

Barnes did not attempt to fairly consider the notice of proposed removal and the reply of the grievant in making her decision. The evidence shows Ms. Barnes reviewed each contention of the grievant, in conjunction with the proposed removal, and considered the position of the grievant before she made her decision. Because Ms. Barnes disagreed with the arguments and position being taken by the grievant does not mean that Ms. Barnes was not objective in assessing the facts and circumstances that were present before she made her determination. As previously stated, even though Ms. Barnes and the grievant disagreed as to their respective positions, this fact, in and of itself, does not establish that Ms. Barnes was not objective in the manner in which she reviewed the situation before she made her decision. Consequently, it is my determination that there was no procedural error, nor was the determination of Ms. Barnes tainted because she was the deciding official, who had, on occasion, provided supervision to the grievant prior to the time she became the decision maker regarding the removal of the grievant.

The crux of the issue in this case is whether or not the Agency had a basis for giving the grievant an unsatisfactory rating in her performance appraisal and then subsequently removing her after her performance improvement period was completed. Upon reviewing what occurred in this particular situation, it is clear that Agency supervision followed the established procedure related to the performance appraisal and performance improvement plan it put in place for the grievant. Furthermore, the applicable process was administered in accordance with the applicable provisions of the Agreement. With respect to the applicable time limits and method of approaching the performance appraisal of the grievant, the Agency followed the established procedure in evaluating the grievant, and taking the necessary steps to review her performance.

Upon reviewing all of the extensive specific detail involving the work performance of the grievant, I have been careful to closely consider the specific concerns of the reviewing supervisors and the grievant. Obviously, there is considerable detail involved in the litigation of Commission cases, and undoubtedly, there are extensive procedures in effect and many variations which occur through the processing of a case. Furthermore, while certain matters may be predictable, other matters are uncertain and need to be addressed on a contemporaneous basis. Additionally, in the practice of law related to litigation, there are a number of different strategies to be employed under different circumstances. In other words, depending upon the circumstances of a specific case, there may be variations in the approaches taken by different attorneys. While it is quite understandable that the Agency would seek to develop standardization of practice methods for similar situations, this is always not possible under each and every circumstance.

Upon carefully considering the specific tasks performed by the grievant under each and every circumstance cited by the Agency, it becomes readily apparent the manner in which the grievant performed her work prior to the reorganization and subsequent to the reorganization in January 2006 was very similar. In my considered opinion, what changed was her supervision. The testimony and evidence submitted clearly shows that prior to the reorganization, the grievant was supervised, but not nearly so closely as she was after the reorganization was completed. It is obvious that the detail considered by her supervisors after the reorganization was very significant. This is not to say that the methods and means used by her supervisors was inappropriate, it is only very clear that the supervision used with the grievant subsequent to the reorganization was

quite different than the supervision she was accustomed to prior to the reorganization. As the record reflects, the grievant had been considered to be very capable prior to the reorganization, and she was able to complete the necessary tasks of her position without difficulty. Furthermore, there is no evidence whatsoever which would explain why the grievant's performance was always outstanding prior to the reorganization, but her performance deteriorated once the reorganization was concluded and she was assigned new supervision. The evidence also shows in addition to her receiving consistent outstanding ratings prior to the change, she was promoted from a GS-13 Trial Attorney to a GS-14 Trial Attorney. In my opinion, a GS-14 Trial Attorney should have been able to work independently without close supervision, and in fact this occurred in the case of the grievant with several different supervisors.

The evidence shows when Ms. Barnes became responsible for the grievant's work activities, her procedures and methods of practice began to change. While Ms. Barnes issued directives as to how specific matters would be handled, and under what specific time frames, she did not consider the procedures usually used in specific jurisdictions. It is evident that grievant's entire practice with the Agency was in a District which required faster time constraints than many other jurisdictions. This being the case, the grievant was aware of issues that she faced on a day to day basis, that needed to be considered in conjunction with the local jurisdictional procedures and local court rules and existing time frames in such jurisdiction. Undoubtedly, it was the differences in the practice of law in the grievant's District which conflicted with the manner in which Agency cases were processed in other jurisdictions which caused problems between the grievant and her supervisor. In my opinion, the evidence showed there were occasions when conflicts

existed between the grievant and her supervisors because of the differences in the manner in which cases needed to be processed in jurisdictions that had different procedures than the grievant's jurisdiction. It is my opinion that certain events cited by the Agency had implications as a result of the expedited procedures in the jurisdiction where the grievant practiced, and resulted in certain criticism of her work. In my view, this was not taken into consideration by grievant's supervisors when her performance was considered.

I have carefully reviewed all of the contentions of the Agency regarding the specific cases that have been cited. Upon making such review, it is my opinion that many of the shortcomings cited by the Agency involve the drafting of various documents that are used in the legal process. Obviously, some of the cited documents were reviewed and revised several times, while other documents were reviewed more extensively. However, in my considered opinion, the review of legal documents by different attorneys will usually result in varying amounts of revisions. In fact, it would be unusual to have a review of a document by several different attorneys without the necessity of revisions to a document. In certain instances the review may be minor, whereas in other instances the review and revision may be more substantial. This is due to the fact different reviews raise different issues which would result in different revisions. In any event, in my considered opinion, review and revision of documents is to be expected in the practice of law, and such review and revision is something which is positive, because it usually results in a more complete and persuasive document. In many of the situations put forth by the Agency, there were reviews and revisions of both the grievant's and Ms. Spicer's work product by Ms. Barnes, but as I indicated, such reviews and revisions are not in and of themselves, a detriment to the work performance of the grievant. As was confirmed

by Mr. Scanlan, it is not unusual to have several drafts of a document, and in my considered opinion, this could occur on a consistent basis when several different attorneys are reviewing the same document. As I previously indicated, there is nothing wrong with Ms. Barnes or Ms. Spicer making a determination to closely supervise the grievant, but close supervision, in and of itself, will result in many more instances of changes and revisions than will managerial delegation to a GS-14 Trial Attorney. In this case, the Agency chose to closely supervise the grievant, and in doing so brought about the opportunity for many incidents of review and revision regarding the grievant's work product. However, as the evidence has established, some of the changes were minor and some changes more substantive, but it is my determination that because a number of documents worked on by the grievant were altered or revised does not negatively impact her performance.

Upon reviewing the position of the Agency, there was considerable contention made with respect to discovery and investigation issues. I have carefully reviewed the issues and contentions of the Agency regarding these matters. As is evident to all concerned, discovery matters are basic and fundamental to a practicing Trial Attorney. The issues surrounding discovery are basic, frequently arise during trial preparation, and are handled whenever the need arises. Upon reviewing the entire record regarding the discovery, it is my opinion that there was not any specific deficiencies exhibited by the grievant during handling of discovery issues. Undoubtedly, this is not to say that each and every discovery issue was handled perfectly or in a manner that has resulted in the Agency "getting the best of the discovery" but this is not inconsistent with the handling of discovery issues. There are certain circumstances which result in discovery being

more favorable to one side or the other, but this is simply a part of the legal process. While the discovery issues cited by the Agency may have been processed differently by either of the supervising attorneys, there is nothing in the evidence which would support a finding that the grievant's manner of handling discovery issues in the cases involved has caused detriment to any of the cases being processed by the Agency. Therefore, based on the evidence provided in the record, the Agency improperly cited several discovery issues as being detrimental to the work performance of the grievant.

Upon further reviewing the contentions of the Agency, there has been considerable argument raised as to the procedures utilized by the grievant involving the filing of complaints, and her work related to settlement agreements. The assertion of the Agency has been that the grievant was not efficient in the way she completed her tasks, and was sloppy in the way she performed her activities related to case handling. I have carefully considered all of the allegations of the Agency related to how the grievant performed her duties. It is evident that the grievant has not completed every task that was in the area of her responsibilities in a perfect manner. However, the record evidence does not support a finding that the grievant disregarded her job responsibilities and failed to complete her work as a Trial Attorney. As previously indicated, the grievant understood the local rules of court, which required more expedited filing of documents in certain instances, and she continually worked within such system. While certain specific matters were highlighted as deficiencies on the part of the grievant, certain situations were handled in the appropriate manner, as required by the existing jurisdiction. Also, some of the contentions of supervision questioned the grievant as to her following through with specific directives, but the evidence has showed in certain situations the grievant was not

disregarding the advice of her supervisors, but in fact was exercising her judgment as to how certain matters needed to be handled. In my considered opinion, the record evidence does not show that the grievant intentionally disregarded her supervisors advice, but did in fact attempt to follow such direction in the course of performing her usual work responsibilities. The grievant continued to exercise her judgment, and her judgment was interpreted as an insubordinate act against her supervisor or supervisors. In my opinion, the grievant was not attempting to avoid complying with the directions of her supervisors, but on occasion, with advice and direction coming from several different sources, resulted in the grievant not being able to fully comply with each and every directive. However, I do not interpret the grievant's actions as being an attempt to refuse certain orders, but in fact shows her judgment while attempting to comply with her supervisor's direction. In my considered opinion, the overall practice of grievant was not unsatisfactory as has been alleged by the Agency.

The Agency has contended there were a number of instances where the grievant waited until the last minute to complete a specific filing and provide a draft of a document to one of her supervisors at the very last minute causing the supervisors to work evenings or during weekends. I have carefully considered the allegations of the Agency in this regard. Unquestionably, the practice of law does not necessarily occur during usual business hours in each and every instance. There are times when it is necessary to perform duties beyond what would be termed the normal "reference hours" of work. While many tasks occur during such "reference hours", it is not uncommon or unusual for attorneys to work beyond such reference hours, or on weekends, if necessary, to meet deadlines relating to document filing or a whole array of legal activities. This is

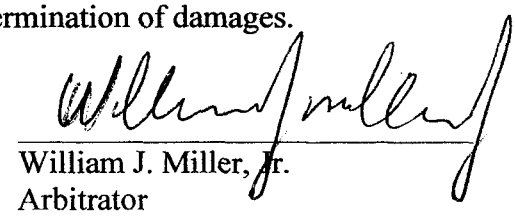
particularly true in a trial environment when each phone call, mailing, fax or e-mail can require additional matters to be addressed in a timely manner. This would be the responsibility of a Trial Attorney on a recurring basis. Meeting time requirements and deadlines, while completing various documents and addressing other communications can result in last minute attempts to meet such deadlines. In addition to the usual tasks of a Trial Attorney, in this case, the evidence has shown the grievant was required to have almost every task she performed reviewed by her supervisor and/or her supervisors. As has been established, many of these reviews became repetitive and necessitated additional reviewing by her supervisors. Upon carefully considering all of the evidence, it has become clear that the grievant and both of her supervisors were required to work beyond the so called "reference hours." This was the nature of the work they performed, and it was not unusual for work to be performed after work, during an evening or on a weekend. The fact the grievant may have submitted something to her supervisors to be reviewed at a time outside the "reference hours" is something which went with the responsibilities of the positions being worked by the grievant and her supervisors, the nature of the work which required continual deadlines, and the direction of grievant's supervisors to review almost every document she prepared or almost every decision she made. In my considered opinion, the fact that documents, questions or problems may have arrived at grievant's supervisors at times which were outside the normal reference hours should not have been used as a basis for considering the grievant's work performance as unsatisfactory.

When the entire record is carefully considered and reviewed, it is my determination that the Agency improperly gave the grievant an unsatisfactory rating and

subsequently removed her from his position of Trial Attorney. However, in my considered opinion, there was insufficient evidence to substantiate that the grievant's supervisors discriminated against her because of her race. Rather, what occurred in this situation was the grievant continued to perform as she did in the past, but when the reorganization occurred, the grievant became subjected to a different style of supervision. This change in style eliminated the opportunity of the grievant to work independently as a GS-14 Trial Attorney, and instead required her to be supervised closely, which caused each and every task she performed to be reviewed, analyzed, and in many instances reconsidered, redrafted or redirected. It is my determination the grievant's performance was not unsatisfactory, and the Agency did not have the right to remove the grievant from her position of Trial Attorney.

AWARD

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.



William J. Miller, Jr.
Arbitrator
May 13, 2009