

LABOR AND EMPLOYMENT: PROTECTION OF EMPLOYEES.

Department of Labor and Industry has no authority to assess and collect attorney's fees for services of staff attorneys employed by Department to review documents and render informal advice; has no authority to collect attorney's fees in all cases, but only to compensate private attorney engaged by Commissioner.

Mr. John Mills Barr

Commissioner, Department of Labor and Industry

October 8, 1998

You ask whether § 40.1-29(F) of the *Code of Virginia* permits the Department of Labor and Industry ("Department") to collect attorney's fees for the services of staff attorneys employed by the Department to review documents and render informal advice, although such attorneys make no appearance in a formal proceeding. You also ask whether the Department may collect attorney's fees upon entry of an order regardless of whether the services of an attorney are required for collection of wages in a particular case.

You advise that the Department enforces § 40.1-29, which mandates the payment of wages by employers to their employees. Pursuant to § 40.1-29(F), the Commissioner of Labor and Industry "may institute proceedings on behalf of an employee to enforce compliance" with the provision in § 40.1-29(A) requiring employers to "pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice in each month." You advise further that the Department uses the services of private attorneys for legal representation in such proceedings. The staff attorneys employed by the Department review documentation and provide informal advice to employees seeking assistance in obtaining wages improperly withheld by employers.

Section 40.1-29(F) provides:

The Commissioner may require a written complaint of the violation of this section and, with the written and signed consent of an employee, may institute proceedings on behalf of an employee to enforce compliance with this section, and to collect any moneys unlawfully withheld from such employee which shall be paid to the employee entitled thereto. In addition, following the issuance of a final order by the Commissioner or a court, the Commissioner may engage private counsel, approved by the Attorney General, to collect any moneys owed to the employee or the Commonwealth. Upon entry of a final order of the Commissioner, or upon entry of a judgment, against the employer, the Commissioner or the court shall assess attorney's fees of one-third of the amount set forth in the final order or judgment.

A rule of statutory construction requires that a statute be read as a whole and every provision be given effect if possible.¹ Section 40.1-29(F) permits the Commissioner to obtain a written complaint from an employee and to institute proceedings to enforce compliance with the law.² Such proceedings may be either an informal conference with the Commissioner,³ or a formal proceeding before a court of the Commonwealth.⁴ When a final order is entered by either the Commissioner or a court in such proceeding, the Commissioner is authorized to retain the services of a private attorney approved by the Attorney General to collect any moneys owed to

the employee and the Commonwealth.⁵ When the final order is entered by the Commissioner following an informal conference, or a judgment order is entered by a court, "the Commissioner or the court *shall* assess attorney's fees of one-third of the amount set forth in the final order or judgment."⁶

The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.⁷ In addition, under well-accepted principles of statutory construction, when a statute contains a specific grant of authority, the authority exists only to the extent specifically granted in the statute.⁸ Furthermore, mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.⁹ Finally, a statute stating the manner in which something is to be done or the entity which is to do it evinces a legislative intent that it not be done in another manner or by another entity.¹⁰

Section 40.1-29(F) clearly authorizes an assessment of attorney's fees in the final order of the Commissioner or the judgment order of a court only when private counsel is retained by the Commissioner to collect moneys owed the employee and the Commonwealth by an employer. The decision of the Commissioner at the conclusion of the informal conference is a final order.¹¹ A judgment order is a final order and may only be entered by a court.¹² Therefore, it is my opinion that § 40.1-29(F) does not permit the Department to assess and collect attorney's fees for the services of staff attorneys employed by the Department to review documents and render informal advice.

You also ask whether the Department may collect attorney's fees upon entry of an order, regardless of whether the services of an attorney are required for collection of wages in a particular case.

A principle of statutory construction requires that where the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning.¹³ The plain language of § 40.1-29(F) permits the Commissioner to engage private attorneys to collect moneys determined by the Commissioner or a court to be owed to an employee resulting from an informal proceeding order entered by the Commissioner or a final order entered by a court. It is equally clear that when such private attorneys are engaged by the Commissioner, the Commissioner, in his final order, and the court, in its judgment order, are required to assess attorney's fees to compensate such private attorney. Therefore, I am of the opinion that the Department is not authorized to collect attorney's fees in all cases, and, furthermore, that such attorney's fees included in the Commissioner's final order and judgment order of a court are for the benefit of and intended to compensate such private attorney.

¹ See *Posey v. Commonwealth*, 123 Va. 551, 96 S.E. 771 (1918); see also *Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964).

² "May" should be given its ordinary meaning intended by the General Assembly, i.e. "permission, importing discretion." *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949).

³ Section 40.1-29(A)(2).

⁴ Section 40.1-29(F).

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

⁸See *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992 & Supp. 1998) ("*Expressio unius est exclusio alterius.*").

⁹*Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); see also *Christiansburg v. Montgomery County*, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976).

¹⁰See *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); *Christiansburg v. Montgomery County*, 216 Va. at 658, 222 S.E.2d at 516.

¹¹Section 40.1-29(A)(2); see also § 40.1-29(F).

¹²See generally tit. 8.01, ch. 17, §§ 8.01-426 to 8.01-465.

¹³*Ambrogi v. Koontz*, 224 Va. 381, 297 S.E. 2d 660 (1982).