

Issues: Two Group III Written Notices with termination (falsification of State records); Hearing Date: 12/05/03; Decision Issued: 12/23/03; Agency: DOC; AHO: Lorin A. Costanzo; Case No. 5825-5826

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

Case No. 5825
Case No. 5826

Hearing Date: December 5, 2003
Decision Issued: December 23, 2003

PROCEDURAL BACKGROUND

(Note: "[business name]" is substituted for actual name as it appears in Written Notice issued and in this decision)

On June 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with Removal for:

"Falsification of state records, specifically the Statements of Economic Interest for 1997 and 1998 did not include your spouse's ownership of [business name]."

And, on June 11, 2003, Grievant was issued a Group III Written Notice of disciplinary action with Removal for:

Falsification of state records, specifically the Statement of Economic Interest for 2002 did not include your co-ownership of rental property with your subordinate employee {name}. Additionally, you violated Department Procedure 5-4.7E, "Accept any business or professional opportunity wherein the employee may gain a financial benefit where the opportunity being afforded may influence their conduct in the performance of official duties" when you entered into the business agreement with your subordinate employee.

On June 11, 2003 a total of five Written Notices were issued Grievant and on July 3, 2003 Grievant initiate five grievances, one for each Written Notice received. This grievance hearing addresses the two grievances above set forth. On July 3, 2003 Grievant timely filed grievances challenging the two above described disciplinary actions.

The outcomes of the Third Resolution Step were not satisfactory to the Grievant and he requested hearings on each of the above. Grievant requested consolidation of the five grievances filed on July 3, 2003, and requested that the five grievances proceed to three separate administrative hearings (two grievances being consolidated into each of two separate hearings and one grievance being addressed in a third grievance hearing).

The Director granted Grievant's request for consolidation (see Compliance Ruling of Director- Ruling Number 2003-169, issued October 10, 2003). The Ruling further noted Grievant requested neither of the two EDR full-time hearing officers be assigned to conduct the hearings and that the two full-time hearing officers voluntarily disqualified themselves in these cases.

On October 30, 2003 Grievant requested The Department of Employment Dispute Resolution to assign a three separate hearing officers to hear the three grievance hearings (consolidated as above set forth). However, by letter of November 21, 2003 Grievant withdrew his request and agreed to one hearing officer for all grievances.

At the parties' joint request, the this grievance hearing was held in Richmond, Virginia to facilitate the testimony of witnesses for each party. Upon the motions of both party, the Hearing Officer found just cause to grant an

extension of the 30 day time frame for issuing the decision because of a.) the conflicting schedule of the parties; b.) the issue pending of the Grievant's request for three separate hearing officers to be appointed; and c.) witnesses availability.

APPEARANCES

Grievant:
Counsel for Grievant:
Agency Advocate:
Agency Party Designee/Regional Director:
Special Agent:
Warden:
TPS: (via telephone)
Deputy Director:

ISSUES

Whether Grievant should receive a Group III Written Notice of disciplinary action with Removal.

Whether Grievant should receive a Group III Written Notice of disciplinary action with Removal.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") '5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM '9.

FINDINGS OF FACTS

1. Wife of Grievant owned a franchise business called "[business name]" in Gatlinburg, Tennessee from its purchase in 1995 until it was sole in July of 1998.

Gross Sales for [business name] in 1995 reflect \$99,742.00. (part year)

Gross Sales for [business name] in 1996 reflect \$180,020.00.

Gross Sales for [business name] in 1997 reflect \$199,365.00.

(Tab K)

2. In July of 1998 the [business name] was sold for \$35,000.00. Wife of Grievant received \$30,000.00 cash plus a \$5,000.00 promise to pay. (Tab K)

3. A house in Richlands, Virginia was purchased Grievant and TPS. The house was deeded to Grievant and TPS on February 13, 2002 for a consideration of \$39,333.00. (Tab L)

4. Statement of Economic Interests for 1997 was signed and acknowledged before a Notary Public by Grievant on 12-10-97 and did not indicate any ownership (by Grievant and/or Grievant's spouse) of "[business name]". Question number 7 thereon was checked indicating, "NO". Question Number 7 on the Statement of Economic Interests stated, (see Tab H)

"7 BUSINESS INTERESTS.

Do you or a member of your immediate family, separately or together, operate your own _____ business, or own or control an interest in excess of \$10,000 in a business?

If yes, is checked, complete Schedule F."

5. Statement of Economic Interests for 1998 was signed and acknowledged before a Notary Public by Grievant on 12-14-98 and did not indicate any ownership (by Grievant and/or Grievant's spouse) of "[business name]". Question number 7 thereon was checked indicating, "NO". Question Number 7 on the Statement of Economic Interests stated, (see Tab H)

"7 BUSINESS INTERESTS.

Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?

If yes, is checked, complete Schedule F."

6. Statement of Economic Interest for 2002 did not include co-ownership of rental property Grievant owned with TPS. Statement of Economic Interests for 2002 was signed and acknowledged before a Notary Public by Grievant on 1-13-03. Questions number 7 and 9A thereon were both checked indicating, "NO". Question Number 7 and Question Number 9A on the Statement of Economic Interests stated, (see Tab H)

"7 BUSINESS INTERESTS.

Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?

If yes, is checked, complete Schedule F."

"9A State Officers and Employees.

Do you or a member of your immediate family hold an interest, including a partnership interest, valued at \$10,000.00 or more in real property (other than your principal residence) for which you have not already listed the full address on Schedule F? Account for real estate held in Trust.

If yes, complete Schedule H-1."

(See Tab H)

7. Grievant was a Warden since November of 1997 and TPS was a subordinate employee of Grievant.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, VA Code '2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code '2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may

arise between state agencies and those employees who have access to the procedure under '2.2-3001.

In disciplinary actions the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. '5.8 EDR Grievance Procedure Manual, effective July 2001.

To establish procedures on Standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to ' 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's Department of Personnel and Training Policy and Procedures Manual - Policy 1.60 , effective date of 9/16/93, Standards of Conduct, provides that Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal. The Department of Corrections has promulgated its own Standards of Conduct patterned on the state standards but tailored to the unique needs of the Department of Corrections. Section 5-10.7C "D.O.C. Procedures Manual" states: "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of this procedure.". At Section 5.10.17A of the "D.O.C. Procedures Manual" it is provided that Group III offenses "include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal."

Department of Corrections Procedures Manual, Chapter 5: Human Resources, Subject: Standards of Ethics and Conflicts of Interests at 5-4.7, states: PROHIBITED CONDUCT: The rules listed below are intended to be illustrative, but not all inclusive, of unacceptable conduct. No employee of the Department shall:

E. "Accept any business or professional opportunity wherein the employee may gain a financial benefit where the opportunity being afforded may influence their conduct in the performance of official duties" when you entered into the business agreement with your subordinate employee.

Section 2.2-3114 of the Code of Virginia, 1950, as amended provides, " . . . other persons occupying such offices or positions of trust or employment in state government, . . . , shall file, as a condition to assuming office or employment, a disclosure statement of their personal interests and such other information as specified on the form set forth in Section 2.23117 and thereafter shall file such a statement annually on or before January 15."

VADOC Procedure Manual at Section 5-4.12: states, "Disclosure Statements. Employees in positions designated by the Governor shall file a disclosure statement of personal interests on appropriate forms as furnished b the Secretary of the Commonwealth."

Grievant does not contested that upon becoming Warden he was required to file an annual Statement of Economic Interests. Grievant does present that he

was not trained in filing out the form and had to file his first form within a few weeks of assuming the position of Warden.

Between 1995 and July of 1998 the wife of Grievant owned a business called "[business name]" in Gatlinburg, Tennessee. Gross Sales for [business name] in 1995 were \$99,742.00 (for partial year); Gross Sales for [business name] in 1996 were \$180,020.00 and gross sales in 1997 were \$199,365.00. In July of 1998 the [business name] business was sold for \$35,000.00. Wife of Grievant received \$30,000.00 in cash plus a \$5,000.00 promise to pay. (Tab K)

Statements of Economic Interests for 1997 and 1998 were submitted by Grievant which indicated a "No" to the question "Business Interests: Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?"

The Statement of Economic Interests, (Revised Form as of July 1, 1997) notes at the top of page 2 under DEFINITIONS AND EXPLANATORY MATERIAL, "This statement constitutes a report of economic interests and activities for the calendar year beginning January and ending December 31. The information on this statement must be provided on the basis of the best knowledge, information and belief of the individual filing the statement as of the date of this report unless otherwise." (emphasis added) This appeared in both the 1997 and 1998 Statements of Economic Interests signed by Grievant.

As to the Statement of Economic Interests for 1997, concern was raised by Grievant that he became Warden in the end of November of 1997 and that the Statement of Economic Interests was filed a few weeks later. Grievant does not contest the existence of the requirement for him as Warden to file the Statement but does contend he had no formal training on the form.

Grievant further indicated that this form was believed by him to be to report conflicts with the state. And, he believed this form was concerned with an interest over \$10,000.00 which, Grievant contended, meant net (after all expenses, costs, etc. were deducted) and since he subsequently sold the business for \$35,000.00 when he took out his costs/expenses he never held an interest over \$10,000.00.

[Business name] had a gross sales in 1997 reported in the amount of \$199,365.00. Additionally, a report of interview of a sales clerk in the business indicated the employee would call Grievant at the prison on decisions needed and that checks of a personal nature were written on the business checking thus keeping the business checking low. (Tab G)

Attention is directed to the actual language of question which asks, "BUSINESS INTERESTS. Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?" Grievant was a Warden, a Supervisor, and a College Graduate. The question itself specifically addresses " do you or a member of your immediate family. . . operate your own business" and Grievant did indicate "No". At the very minimum Grievant's wife operated her own business.

As to the Statement of Economic Interests for 1998 Grievant presented his belief that upon reading question 7 his reply of "no" was correct because his wife sold [business name] in July of 1998 and prior to filing the Statement.

The Statement of Economic Interests, (Revised Form as of July 1, 1997) notes under DEFINITIONS AND EXPLANATORY MATERIAL, "This statement constitutes a report of economic interests and activities for the calendar year beginning January and ending December 31. The information on this statement must be provided on the basis of the best knowledge, information and belief of the

individual filing the statement as of the date of this report unless otherwise stated.

Question 7 states, "Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?" (emphasis added) This question is in the present tense however other questions address specifically matters during the past 12 months. In reviewing the Statement of Economic Interests Form it is noted that Questions 4 and 5 states, "During the past 12 months did..." and Question 8A indicated "Did you ... compensation during the past 12 months...".

The issues of the question's ambiguities, the lack of specific instruction on the form defining the disclosure requested, and the form's specific request in other questions for past information reporting periods are consistent with Grievant's testimony as to his reading of the question and his response. And are consistent with Grievant's expressed intent to respond as requested on the basis of his best knowledge, information and belief as of the date of the report.

The Agency has shown, by a preponderance of the evidence, that the Agency's disciplinary action taken was appropriate and warranted as to falsification of state records, specifically that the Statement of Economic Interests for 1997 did not include Grievant's spouse's ownership of [business name]. However, for the reasons above stated, the Agency has not shown falsification of state records as to the Statement of Economic Interests for 1998 or that the disciplinary action taken was warranted and appropriate as to the Statement of Economic Interests for 1998.

A Written Notice of Disciplinary Action stated:

"Falsification of state records, specifically the Statement of Economic Interest for 2002 did not include your co-ownership of rental property with your subordinate employee {name}. Additionally, you violated Department Procedure 5-4.7E, "Accept any business or professional opportunity wherein the employee may gain a financial benefit where the opportunity being afforded may influence their conduct in the performance of official duties" when you entered into the business agreement with your subordinate employee.

VADOC Procedure Manual at Section 5-4.7E states: PROHIBITED CONDUCT: . . . No employee of the Department shall: "Accept any business or professional opportunity wherein the employee may gain a financial benefit where the opportunity being afforded may influence their conduct in the performance of official duties."

On February 2002, Grievant and TPS, who was employed at the same correctional center Grievant was Warden at, purchased a house located in Richlands, VA. (Deed recorded February 25, 2002) (Tab L) TPS testified that a bid was put in to purchase the house for \$39,333.00 of which all but about \$8000 was borrowed. The house was renovated, refinanced for \$70,000.00 and ultimately sold after being rented.

Credit Line Deed of Trust (maximum aggregate principal amount to be secured being \$31,666.40) was signed by Grievant and TPS on February 22, 2002 and recorded February 25, 2002. (Tab L)

Credit Line Deed of Trust (maximum aggregate principal amount to be secured being \$70,000.00) was signed by Grievant and TPS on November 5, 2002 and recorded November 21, 2002.

In July of 2002 C/O (who was employed at the same correctional center as Grievant and TPS) moved into the property in Richlands, Va. paying \$650.00 per

month to TPS. Subsequently in October or November of 2002 C/O's wife received a call from Grievant or TPS stating they wanted to sell the house and offering that Grievant would assist in helping find financing. This was declined and in December of 2002 Correctional Officer moved out. Per TPS another tenant moved in during January of 2003 and stayed in until August or September of 2003.

On January 13, 2003 Grievant signed before a notary his 2002 Statement of Economic Interests. The Statement of Economic Interests was filed. Grievant answered "No" on the 2002 Statement of Economic Interests to questions number 7 and 9A thereon which stated:

7. "Business Interests: Do you or a member of your immediate family, separately or together, operate your own business, or own or control an interest in excess of \$10,000 in a business?"

"9A State Officers and Employees. Do you or a member of your immediate family hold an interest, including a partnership interest, valued at \$10,000.00 or more in real property (other than your principal residence) for which you have not already listed the full address on Schedule F? Account for real estate held in Trust. If yes, complete Schedule H-1."

The Statement of Economic Interests, (Revised Form as of 10/01/01) notes under DEFINITIONS AND EXPLANATORY MATERIAL, "This statement constitutes a report of economic interests and activities for the calendar year beginning January and ending December 31. The information on this statement must be provided on the basis of the best knowledge, information and belief of the individual filing the statement as of the date of this report unless otherwise stated. ..."

TPS testified that after the property was rented to C/O it was sold on or about October 15, 2003 for approximately \$82,000.00 and he and Grievant each received about \$4275.00.

Grievant indicates that he did not falsely respond because question 7 refers to operate your own business, or own or control an interest in excess of \$10,000.00 in a business and question number 9A refers to ... hold an interest, including partnership interest, valued at \$10,000.00 or more in real property Grievant contends that the interest is not valued at \$10,000.00 because he only made \$4,275.00 when the property was sold.

Consideration is given to the property's purchase price, the two credit line deeds of trust, the rental moneys paid over the periods the property is rented, and the sale price. Grievant contention of not holding an interest valued at \$10,000.00 does not appear controlling.

Attention is given to the fact that Grievant is a Warden who has entered into a real estate purchase with a subordinate, has undertaken remodeling of the house with this subordinate, has entered into two credit line deeds of trust with a subordinate, and has with a subordinate rented the house and offered for sale that house to a third subordinate employee.

The business interests between Grievant and TPS is relevant and of special concern due to the fact that Grievant is a Warden with the Department of Corrections and is a supervisor charged with duties of overseeing the correctional center, supervising the employees and inmates, and carrying out policy and procedures. Grievant has entered into an economic partnership/arrangement with a subordinate employee. Grievant and TPS were involved with renting to an employee and the issue of sale of the property also came up.

TPS testified the business with Grievant did not affect his relationship with Grievant as Warden. DOC Procedure Manual at Section 5-4.7E does not require there be actual influence of conduct but ... if the opportunity being afforded may influence their conduct in the performance of official duties. (emphasis added)

A significant business partnership/arrangement is present between TPS and Grievant. This involves issues of liabilities, ownership, and moneys being received. Concerned at hearing was expressed with the effect this could have in the work place not only between themselves but as it would affect other employees and the other employees perceptions.

Mitigating circumstances are described by the Standards of Conduct describe as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance. The hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct. In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy. (Rules for Conducting Grievance Hearings, Effective 7/1/2001, Department of Employment Dispute Resolution).

Mitigation considerations were taken into consideration by the agency and were addressed both in the Written Notices and in this hearing and at hearing. Mitigating circumstances were presented at hearing and have been considered including Grievant's length of service, quality of service, and his achievements. Evidence was also presented and considered concerning the nature of the Warden position and its unique responsibilities, authorities, and impact within the Department of Corrections.

DECISION

Upon consideration of the above, and for the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice with Removal is upheld as to "Falsification of state records, specifically the Statements of Economic Interest for 1997 did not include your spouse's ownership of [business name]."

For the reasons stated herein falsification of state records as to the Statement of Economic Interests for 1998 not including spouse's ownership of [business name] is not found by a preponderance of the evidence.

Upon consideration of the above, and for the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written notice with removal is upheld. as to "Falsification of state records, specifically the Statement of Economic Interest for 2002 did not include your co-ownership of rental property with your subordinate employee {name}. Additionally, you violated Department Procedure 5-4.7E, "Accept any business or professional opportunity wherein the employee may gain a financial benefit where the opportunity being afforded may influence their conduct in the performance of official duties" when you entered into the business agreement with your subordinate employee."

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure manual set forth in more detail, this hearing decision is subject to administrative and judicial

review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

The hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substances Abuse Services which challenge allegations of patient abuse, a challenge that a hearing decision is inconsistent with law may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. (Note: the 10 day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HMR, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decisions

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer