

Issue: Group III Written Notice with termination (fraternization); Hearing Date: 10/30/07; Decision Issued: 11/14/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8724; Outcome: Full Relief; Attorneys' Fees Addendum issued 11/27/07.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8724**

Hearing Date: October 30, 2007  
Decision Issued: November 14, 2007

**PROCEDURAL HISTORY**

On July 18, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for the act of or giving the appearance of association with an offender.

On August 14, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 4, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 30, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## **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 FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities. He had been employed by the Agency for approximately 15 years until his removal effective July 19, 2007. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on June 29, 2007 and a Group I Written Notice issued on September 22, 2006.<sup>1</sup>

On Saturday, May 19, 2007, the Intelligence Officer was listening to a telephone call between the Inmate<sup>2</sup> and a caller located outside of the Facility. There are signs next to the telephones where inmates make calls advising the inmates that their conversations may be monitored. Nevertheless, the Inmate told the person with whom he was speaking that he was "twisted". The Intelligence Officer understood this term to mean that the Inmate was under the influence of an illegal substance. She concluded that the Inmate should be tested immediately. She contacted Sergeant G and asked him to

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> The Inmate was a four-star general of a nationwide gang.

conduct the drug screening by collecting a urine sample. Sergeant G told the Intelligence Officer he would give the Inmate a urinalysis test when he got a chance.

The Intelligence Officer returned work on Monday on the May 21, 2007. Sergeant G had not completed the drug screen. Grievant did not work on May 21, 2007. Grievant was working on May 22, 2007, but the Intelligence Officer did not approach him that day regarding a drug screen for the Inmate.

On Wednesday, May 23, 2007, the Intelligence Officer contacted Grievant and asked him to conduct a drug screen of the Inmate. At approximately 4:30 p.m. to 5:30 p.m., Grievant contacted the Captain to see if he had any collection cups. The Captain looked in a box where he stored collection cups in his office. The box was empty so he told Grievant to contact someone working at the sally port.

On Thursday, May 24, 2007, the Intelligence Officer contacted Grievant and learned that the drug screen had not been completed. She contacted another Agency supervisor and asked him to begin the testing process. That supervisor was able to obtain a collection cup and obtain a urine sample from the Inmate. Results from the drug test showed that the Inmate tested positive for marijuana.

On June 6, 2007, the Intelligence Officer observed Grievant in the Housing Unit where the Inmate's cell was located. Grievant was speaking to the Inmate for a few minutes. Since Grievant was not assigned to that Housing Unit, the Intelligence Officer considered Grievant's behavior to be unusual. The Sergeant in that Housing Unit testified that he had asked Grievant to come to his Housing Unit to help him escort the Inmate to another location in the Facility.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>3</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>4</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>5</sup>

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Group III offenses include "violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders."<sup>6</sup> DOC Operating Procedure 130.1(V)(B) provides:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, Standards of Conduct and Performance (dated September 1, 2005, updated August 29, 2006). A "fraternization" brochure has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies (see Attachment #1).<sup>7</sup>

DOC Operating Procedure 130.1(III) defines fraternization as:

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work-related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* \*\*\* 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. \*\*\* 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

The Agency contends that Grievant did not respond to the request of the Intelligence Officer for over two days thereby creating the appearance of fraternization with the Inmate.<sup>8</sup> The Intelligence Officer testified that she notified Grievant on Tuesday, May 22, 2007 that he should test the Inmate. She testified Grievant did not conduct the test on Tuesday or Wednesday so she asked another employee to conduct

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25).

<sup>7</sup> Hearing Officer Exhibit 1.

<sup>8</sup> The Agency's Second Step Responded wrote, "You worked for two consecutive days in the building and still did not conduct the test because you claim there were no cups."

the test on Thursday. The Intelligence Officer's written statement, however, contradicts her testimony. In her investigative report, the Intelligence Officer writes:

I spoke with [Grievant] on Wednesday, May 23, 2007, and told him to test [Inmate]. When I got to work Thursday this inmate still hadn't been tested so I notified [Warden].

The Intelligence Officer's written statement shows only one day passed between the time she asked for the test and the time she had to ask another employee to conduct the test. Grievant testified that the Intelligence Officer did not speak with him on Tuesday, May 22, 2007. He testified that she spoke with him on Wednesday, May 23, 2007.<sup>9</sup> Grievant's testimony is consistent with the Intelligence Officer's written statement. The question becomes how does this conflict in the Agency's evidence affect the outcome of this case. The answer is determined by applying the burden of proof. In this case the Agency has the burden of presenting sufficient credible evidence to support its issuance of disciplinary action. The inconsistency between the oral testimony and the written statement of the Intelligence Officer must be construed against the Agency. Thus, the Hearing Officer finds that the Intelligence Officer first contacted Grievant on Wednesday in May 23, 2007 and asked him to conduct drug screen. A delay of one day is not unreasonable under the facts of this case.

The Agency argued it had several hundred collection cups available for Grievant to use to collect a urine sample from the Inmate.<sup>10</sup> Grievant testified he contacted the Captain to obtain a collection cup but the Captain did not have any cups. The Captain suggested Grievant speak with someone working at the sally port. Grievant testified no one at the sally port could provide him with a cup. The Captain testified that as he was about to end his shift at 5 p.m., Grievant approached him and asked for a collection cup. The Captain looked for a collection cup but noticed that the box for collection cups was empty. The Hearing Officer finds that the Agency's assertion that Grievant failed to timely obtain a collection cup is unsupported by the evidence.

The Agency argued Grievant created the appearance of fraternization based on the letters written by and statements made by the Inmate. The Inmate wrote a letter stating, "I have [Grievant] on the payroll and I got tested in locked up." The Inmate told the Agency Investigator that he was approached by Grievant and informed that the Inmate was going to be tested in the upcoming days. The Inmate said he told Grievant he was going to give Grievant seven packs of cigarettes to continue to warn him about upcoming drug tests. The Inmate said that two other officers gave him the drug test

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<sup>9</sup> Grievant wrote a statement on July 18, 2007. His statement also reflects some confusion regarding the dates of his contacts with the Intelligence Officer.

<sup>10</sup> The Agency's Second Respondent wrote, "I find it difficult to believe that [Captain] informed you there were no cups since a case was found in his office and numerous cups were in the property area when they were being maintained by him." The Captain testified he obtained another box of cups shortly after Grievant asked him for a collection cup and he realized that his box of cups was empty.

several days later which he failed. The Inmate said, "I was mad with [Grievant] for playing me like he did."

There are several reasons why the Inmate's statements are insufficient to show that Grievant created the appearance of fraternization. First, it is difficult for the Hearing Officer to give significant weight to the statements of an inmate. This is because inmates (1) are typically convicted felons unworthy of trust, (2) have substantial free time to develop and coordinate rumors, and (3) often have reason to harm those who control them. Second, the Inmate wrote his letters and made his statements after he had tested positive for drugs. He had a motive to seek revenge against any security staff he could. Third, Grievant had no control over what the Inmate wrote in his letters. Writing letters were the actions of the Inmate, not the actions of Grievant. This weakens the argument that Grievant took actions that created an appearance of fraternization. Fourth, Grievant testified that the Inmate's allegations were untrue. The Inmate did not testify at the hearing.

The Agency argued Grievant created the appearance of fraternization by spending too much time with the Inmate. For example, on June 6, 2007, Grievant was assigned to work in a housing unit. Instead of working in that housing unit, Grievant was observed in the Housing Unit where the Inmate's cell was located. The Agency presented a copy of a videotape showing Grievant's interaction with the Inmate.<sup>11</sup> The videotape shows Grievant and another Sergeant removing the Inmate from his cell. The other Sergeant then leaves to attend to other duties in the building. Grievant escorts the Inmate down to the interview room next to the exit door of the pod. Grievant removes a chair from the interview room and places it outside and in front of the interview room. The Inmate sits in the chair. After a few minutes, an employee whose identity cannot be determined from the video walks across the floor to the exit door next to the interview room and exits the pod. Grievant and the Inmate exit right behind this employee. It is not clear whether Grievant and the Inmate waited until that employee was ready to leave the pod and then walked with him or whether that employee and Grievant and the Inmate left the pod at the same time by coincidence. The Agency argued that there was no need for Grievant to be in the Housing Unit attending to the Inmate since Grievant did not work in that housing unit. The Agency points out that while Grievant was removing the Inmate from the cell, there were several other employees assigned to that pod who could have performed the same duties that Grievant performed with respect to the Inmate. The video shows several employees who could have assisted with the removal of the Inmate instead of Grievant. The Housing Unit Sergeant, however, testified the reason Grievant was in the Housing unit, was because the Sergeant had asked for Grievant's assistance. If Grievant is working in the Inmate's Housing Unit at the request of the other Sergeant, Grievant has not taken actions that would create the appearance of fraternization. Rather, he complied with the request of a coworker who testified that sergeants at the Facility often helped out each other.

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<sup>11</sup> The video is a series of still camera shots taken from a distance. The identity of employees shown on the video cannot be established with certainty.

When the Agency's evidence is considered as a whole and in a light most favorable to the Agency, it is equally likely that Grievant created the appearance of fraternization as it is likely that Grievant did not create the appearance of fraternization. The Agency has the burden to prove it is more likely than not that Grievant created the appearance of fraternization. The Agency has not done so in this case. Accordingly, the disciplinary action must be reversed.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action removal is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400



Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>12</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

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**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 8724-A**

Addendum Issued: November 27, 2007

**DISCUSSION**

Grievant seeks reimbursement for the fees he incurred to have a representative at his hearing. To be eligible for reimbursement of attorney's fees pursuant to *Va. Code § 2.2-3005.1*, a grievant's representative must be licensed to practice law in Virginia.<sup>13</sup> According to the Virginia State Bar Association, Grievant's representative is not licensed to practice law in Virginia. Accordingly, the Hearing Officer is not authorized to award fees to Grievant with respect to his grievance hearing representative.

**APPEAL RIGHTS**

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> See EDR Director's Ruling 2006-1322 (March 31, 2006).