

Issues: Group III Written Notice (fraternization) and Termination; Hearing Date: 03/24/09; Decision Issued: 06/01/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9040; Outcome: Full Relief; Addendum Decision issued 07/22/09 awarding attorney's fees.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9040**

Hearing Date: March 24, 2009  
Decision Issued: June 1, 2009

**PROCEDURAL HISTORY**

On October 1, 2008, Grievant was issued a Group III Written Notice of disciplinary action for violating DOC Policy 130.1 Rules of Conduct Governing Employee Relationships with Offenders.

On October 7, 2008, 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 February 19, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 24, 2009, 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 Carpenter Supervisor at one of its Facilities. He had been employed by the Agency for over four years until his removal effective October 1, 2008. The purpose of his position was:

Recruit, train, monitor, control and supervise inmates to provide cost effective corrective maintenance (CM), preventative maintenance (PM), special project (SP) and routine duties (RD) on equipment, structures or systems to prolong their life-cycle expectancy and ensure their maximum availability while reducing downtime and long term operational expenses utilizing the TMS System.<sup>1</sup>

The Facility's arts and crafts program is run by the Recreation department and is not part of the Buildings and Ground department of which Grievant is an employee.

Grievant works in a building with several work areas including a shop. He is one of five supervisors with separate offices in the building. Grievant's office is approximately ten by eighteen feet in size. The shop is approximately twenty feet by fifty feet in size. All of the woodworking activities in the shop would be under Grievant's control.

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<sup>1</sup> Agency Exhibit 4.

In April 2008, a search was conducted of Grievant's work area. Cedar wood, arts and crafts, and sand paper were found in Grievant's work area. Grievant was instructed to remove these items because they were contraband. Grievant did not get rid of the cedar wood. In June 2008, the Superintendent inspected Grievant's area and did not see any cedar wood or arts and crafts. The Superintendent conducted approximately four or five inspections of Grievant's area from April 2008 to September 2008. On September 10, 2008, the security staff captains, lieutenants, and corrections officers did a complete search of the shop and building. A corrections officer found a handmade oak clock hidden on top of a light fixture. He found a box full of wood surplus with dolphins on them. Under Grievant's desk they found a box made of pine that the Agency described as an arts and crafts easel.

Grievant was given a Group II Written Notice for failing to follow a supervisor's instructions to remove the cedar wood. Grievant did not appeal that Written Notice. The merits of that Written Notice are not before the Hearing Officer. Grievant also had a prior active Group I Written Notice.

### **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>2</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>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25), *Standards of Conduct*, states that Group III offenses include "[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders*.

Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, and/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 visits between offenders and employees, non-work related relationships with family members of

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

offenders, spending time discussing staffs' personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.<sup>5</sup>

This policy prohibits “[i]mproprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders ....” Special privileges are prohibited by the policy. In particular, “[e]mployees shall not extend or promise to an offender special privilege or favors not available to all persons similarly supervised, except as provided for through official channels.”

The Agency contends, “[i]t is clear that these inmates were allowed to work on arts and crafts projects during the period of time they were supposed to be working and getting paid by the state. You allowed inmates assigned to you and under your supervision to openly violate policy and exhibited behavior contrary to established policies and procedure; additionally, you admitted to bringing contraband into a secured facility.”<sup>6</sup>

The Agency found arts and crafts items in Grievant's work area and from this assumed Grievant's was permitting inmates to make arts and crafts. This assumption is not supported by the evidence. No evidence was presented showing that inmates actually engaged in arts and crafts while working at Grievant's shop. None of the inmates were asked whether they were involved in arts and crafts. None of the inmates were observed with arts and crafts. Several templates used to cut images of animals on wood were found in Grievant's area. Grievant testified that wood images of animals were placed on flower boxes built for employees at the Facility. No inmates were found with wood cut outs of animals.

Grievant had a pine box under his desk that the Agency referred to as an arts and crafts easel. Grievant knew the box was there. Nothing was inside the box. If the box were being used for arts and crafts it would be likely that some evidence of arts and crafts would be found inside the box.

The Agency found a clock hidden on top of light fixture. The Agency has not established who put it there. Someone hid it. It could have been an inmate, another supervisor, or Grievant. The clock was made of oak, not cedar. Grievant admitted to bringing in cedar and failing to remove it as instructed. He received a Group II Written Notice for that behavior.

Grievant denied giving special privileges to inmates. He denied fraternizing with inmates. No one observed Grievant bringing inappropriate items into the Facility.

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 130.1(III), *Rules of Conduct Governing Employees' Relationships with Offenders*.

<sup>6</sup> Grievant admitted to bringing in cedar wood in April 2008 and failing to remove it after being instructed to do so.

It is certainly possible that the items found were used by inmates to engage in arts and crafts as the Agency alleges. It is also possible that none of the inmates engaged in arts and crafts. When the evidence is taken as a whole, the Agency has not met its burden of proof regarding Grievant's relationships with offenders.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with 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  
600 East Main St. STE 301  
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>7</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>7</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**

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 9040-A**

Addendum Issued: July 22, 2009

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>8</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>9</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

The petition appears to include costs incurred prior to the hearing and unrelated to the hearing. The Hearing Officer will allow 8.9 hours from February 9, 2009 forward at the rate of \$131 per hour.

**AWARD**

The grievant is awarded attorneys' fees in the amount of \$1,165.90.

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<sup>8</sup> Va. Code § 2.2-3005.1(A).

<sup>9</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.



## 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