

Issue: Group III Written Notice with Termination (gross negligence); Hearing Date: 05/24/11; Decision Issued: 06/01/11; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9570; Outcome: Full Relief; Fee Addendum issued 06/27/11 awarding \$3,943.10.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9570

Hearing Date: May 24, 2011

Decision Issued: June 1, 2011

PROCEDURAL HISTORY

On February 18, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for gross negligence in managing the classroom.

On February 22, 2011, 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 April 13, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 25, 2011, the EDR Director issued Ruling No. 2011-2963, 2011-2964 consolidating this grievance with a grievance filed by another Grievant. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this case due to the unavailability of a party. On May 24, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Correctional Education employed Grievant as an Academic Teacher at one of its Facilities. He had been employed by the Agency for approximately 5 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Two cameras are located inside Grievant's classroom. The video recordings made by those cameras were under the exclusive control of the Department of Juvenile Justice. One of the video recordings for January 13, 2011 was shown during the hearing but not admitted into evidence. The video showed Grievant's classroom but only showed the front of Grievant's desk. When Grievant was standing behind his desk working, the video did not show his behavior.

On January 13, 2011, Grievant was in his classroom with four female students, Student S, Student Z, Student B, and Student ST. Student S and Student Z had a romantic or sexual relationship prior to entering the Facility. Grievant had not been advised by the Department of Juvenile Justice of the relationship. Grievant stood at the door when the students entered the classroom. Student S sat in a student desk within a few feet of Grievant's desk. Student Z sat in a student desk directly behind Student S.

Student B sat at a desk in a row to the right of and behind Student Z and Student S. Student ST sat in a desk in a row to the right of Student B.

Grievant began the class by doing a “pencil and paper activity” to get the students engaged. He lectured standing in the front of the classroom and standing in the back of the classroom. He often used flashcards to help students practice for the Standards of Learning examination. Grievant had a projector on the corner of his desk. The projector showed an image on the wall behind his desk. When students were seated in their desks they could view the image on the wall. Grievant would sometimes turn to his side to point to parts of the image on the wall and then discuss the image.

Sometime after 1 p.m., Grievant approached Student S and helped her with a question she had regarding her work. At 1:09 p.m., Student S moved her head backwards towards Student Z so that she was facing the ceiling. Student Z moved forward in her desk and kissed Student S on the mouth. Grievant was in the front of the room behind his desk. As Student S moved her head backwards, she held up a piece of paper vertically and positioned the paper near her face and blocked Grievant’s view of her kissing Student Z.

At 1:13 p.m., Grievant stood next to the girls and directed their attention to the board. Grievant sat at an empty student desk next to Student S and talked to the students. He sat there for approximately 5 minutes. He asked Student B to share part of the work she had completed. Student ST was disengaged from the class because she was not feeling well. At 1:20 p.m., Student S was called outside of the classroom to meet with a counselor. Student S returned to the classroom at 1:23 p.m. A Special Education Instructor entered the room for a short period of time to share information with the students. The Special Education Instructor spoke with Student ST. Grievant was lecturing and turned to the board a number of times. The Special Education Instructor left the room at 1:27 p.m. At 1:28 p.m., Student B walked to the front of the room and stood in front of Grievant’s desk. She blocked Grievant’s view of Student S and Student Z as she talked with Grievant. Student S leaned her head backwards with her hands over her face while Student Z leaned forward and kissed Student S. Student B sat on a stool next to Grievant’s desk. Grievant could now see Student Z and Student S sitting in their student desks. At 1:33 p.m., Student B began talking to Grievant again. Student S leaned backwards and kissed Student Z on the lips several times. At 1:34 p.m., Student B returned to her desk. At 1:37 p.m., Grievant stood next to Student Z and worked with Student Z. Grievant returned to his desk. At 1:38 p.m., Student S put paper in front of her face and leaned to kiss Student Z. At 1:43 p.m., Grievant walked to the back of the room to work with Student B. At 1:44 p.m., Grievant walked next to Student Z to go over Student Z’s responses. Grievant began speaking with Student B. Student Z kissed the neck of Student S. At 1:48 p.m., Grievant went to Student S and asked her questions. At 1:53 p.m., Student S and Student Z left the room, but shortly returned. At 1:54 p.m., another employee came to the room to speak with Student B. Grievant remained at the door so he could see what Student B was doing as well and see what the other students were doing. Grievant walked next to Student S and talked to her. At 1:58 p.m., Student B walked to the front of Grievant’s desk and blocked his

view of Student S and Student Z. Grievant can hear the two students quizzing each other regarding test questions. The students kissed several times but Grievant could not see them doing so. Student S stood up to get a paper and then sat back down. At 2 p.m., Students Z lowered and kissed Student S on the side of her neck. At 2:04 p.m., Grievant stood and walked to the back of the class to remove something from a cabinet. At 2:06 p.m., Student S and Student Z moved their student desks to the front of Grievant's desk so that the desks were touching. Grievant was located behind his desk. Student Z placed her hand into the lap of Student S and began rubbing Student S. Grievant could not see what Student Z was doing because Student S had a coat over her lap covering Student Z's hand, and because Grievant's view was blocked by his desk and a student desk. Student S and Student Z leaned over and appeared to be focused on Grievant's lecture. It is unclear whether Student Z had her hand inside Student S's pants. At approximately 2:27 p.m., Student Z and Student S stood up and moved away from Grievant's desk. Student S adjusted her clothing but she was not observed zipping up her pants.

CONCLUSIONS OF POLICY

In order to support disciplinary action, an agency may show that an employee engaged in misconduct. In this case, the Agency has not established for several reasons that Grievant engaged in misconduct. First, the videotape showed Grievant's classroom and the behavior of Student S and Student Z but it did not show Grievant's behavior when he was sitting or standing behind his desk. Much of the inappropriate touching by Student S and Student Z occurred while Grievant was sitting or standing behind his desk. It is not possible to determine from the evidence whether Grievant was ignoring the students' behavior or merely engaged in work responsibilities. Second, Student S and Student Z effectively hid their behavior. It is unreasonable to expect Grievant to be able to see through paper when it is held up to shield Student S leaning backwards to kiss Student Z. It is unreasonable to expect Grievant to be able to see through a desk and underneath a coat to see inappropriate touching by the students. Grievant did not witness any behavior by the two students that should have raised suspicion that the two students might be hiding inappropriate behavior. Third, Grievant was actively engaged in teaching his students. He walked to the back of the classroom and talked to Student B and turned to look at Student Z and Student S. He approached Student S and spoke with her while standing close to her. Grievant's behavior was consistent with someone who was performing his duties as expected.

The Agency has not presented sufficient evidence support the issuance of disciplinary action against Grievant. Grievant is not subject to disciplinary action merely because two students engaged in inappropriate behavior in his class. The Agency must also show that Grievant was at fault for failing to notice that inappropriate behavior. The Agency has not done so. Accordingly, the disciplinary action against him must be reversed.

The Agency argued that it was obligated to remove Grievant from employment because the Department of Juvenile Justice banned Grievant from all of its facilities. Since there were no other positions available within the Agency at the time of the removal, the Agency contends that Grievant could not meet a condition of his employment and thus his removal was authorized under the Standards of Conduct. The Agency's argument fails for two reasons. The Agency has not established that Grievant received notification that in the event the Department of Juvenile Justice banned him from its facilities, that fact alone would result in his removal from employment. Second, the Department of Juvenile Justice was not a party to the grievance proceeding or the disciplinary action. Grievant did not have an opportunity to challenge the decision made by the Department of Juvenile Justice. Removing Grievant from employment based on the decision of a State Agency without providing Grievant the opportunity to challenge that decision would deny him procedural due process.

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 reinstated. 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 14th St., 12th 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.¹

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

¹ 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: 9570-A

Addendum Issued: June 27, 2011

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.² 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.³

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.

Grievant's attorney submitted a fee petition showing 30.10 hours⁴ professional services rendered. This number of hours is reasonable. The EDR Director has set the allowable hourly rate for attorney's fees at \$131. Grievant should be awarded attorney's fees in the amount of \$3,943.10.⁵

² Va. Code § 2.2-3005.1(A).

³ § 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.

⁴ Grievant's attorney rendered an additional .2 hours but did not charge for that service.

⁵ Grievant also incurred costs for filing fees in Circuit Court. These costs are not reimbursable because they are not attorney's fees.

AWARD

The Grievant is **awarded** attorneys' fees in the amount of \$3,943.10.

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

Carl Wilson Schmidt, Esq.
Hearing Officer