

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. 9572; Outcome: Full Relief; Fee Addendum issued 06/27/11 awarding \$4,663.60.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9572**

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 18, 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 she requested a hearing. On April 18, 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 one 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?
5. Whether the Agency retaliated against Grievant?

### **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 a Teacher at one of its schools prior to her removal effective February 18, 2011. She began working for the Agency February 26, 1998. Grievant had prior active disciplinary action. On December 2, 2009, Grievant received a Group II Written Notice for failure to follow supervisory instruction.

On January 13, 2011, Grievant was in her classroom with three female students, Student S, Student Z, 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.

At approximately 2:30 p.m., the students entered the classroom and sat in their student desks. The video camera in the back of the room initially only showed Student S. Student S and Student Z left the room. Grievant stood in the doorway and watched them while they were in the hall. At 2:36 p.m., Student S and Student Z reentered the classroom. Grievant gave the students papers to use. Student ST moved to the front of the classroom and sat by Grievant's side and talked to Grievant. As Grievant answered

Student ST's questions, Grievant turned her head and looked at Student S and Student Z. Grievant stood up and talked to all the students. At 2:50 p.m., Student Z stood up and walked to Grievant and gave Grievant her paperwork. Student Z received a book she had requested to read. At 2:53 p.m., Student ST moved a chair facing Student S's student desk. They began setting up a board game. The board game was educational in nature and involved deductive reasoning. Grievant was writing on the white board in front of the classroom. Student Z also played the board game. Student S was facing towards the front of the classroom. Student Z sat to the left of Student S and to the right of Student ST. The students began playing again. Student ST moved her chair from Student Z's left to her right. Grievant wiped the white board in preparation for a lesson. Grievant walked to the file cabinets. Grievant continued to look in the direction of the students while looking for files in the cabinets. Student Z was facing Student S with Student ST sitting to the right of Student Z. Student Z stood up and rearranged the chairs. Student S continued to face the front of the room. Student Z was sitting to the left of Student S. Student ST was now facing Student S. Grievant was working at her desk. At 2:59 p.m., Grievant stood and turned to the white board. Student Z put her hand underneath Student S's desk and touched her leg. Grievant looked at the students several times but could not see Student Z's hand because her view was blocked by the desks. At 3:20 p.m., Student Z put her hand on Student S's leg. Grievant looked up periodically, but her view of Student Z's hand was blocked by the student desks and Student S's coat which was in Student S's lap. An Office Assistant entered the classroom and spoke with Grievant. Grievant looked at the students as she talked to the Office Assistant. As Grievant moved around in the classroom, Student Z removed her hand from Student S's lap. At approximately 3:10 p.m., Grievant was marking papers in the front of the classroom. At 3:13 p.m., Grievant talked to the Students as she worked on papers. Grievant entered student grade information into the computer system. At 3:14 p.m., Grievant got up and walked to the students and gave them papers. Student Z removed her hand as she saw Grievant approach. From 3:17 p.m. to 3:26 p.m., Student Z had her right hand in Student S's lap. Student Z used her left hand to play the game. Grievant's view was blocked by the student desks and Student S's coat which was in her lap. At 3:26 p.m., the students began putting away the game and stood up. Student S adjusted her clothing while facing away from Grievant but her pants did not appear unzipped and she did not appear to zip up her pants.

On May 16, 2011, Grievant submitted to a polygraph examination.<sup>1</sup> The results indicated that Grievant was truthful when she answered the following questions:

1. Were you aware at any time that the two students in question were engaging in sexual activity while in class on January 13?  
Answer: No.
2. On January 13, did you position yourself in the classroom in order to maintain site supervision?  
Answer: Yes.

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<sup>1</sup> Neither party objected to the submission of the results of a polygraph.

3. Were you aware of the whereabouts of all of your students on January 13 while in your classroom?  
Answer: Yes.<sup>2</sup>

### **CONCLUSIONS OF POLICY**

In order to support disciplinary action, an agency must show that an employee engaged in misconduct. In this case, the Agency has not established for several reasons that Grievant engaged in misconduct. First, Student Z and Student S hid their behavior from Grievant. The students sat in close proximity in order to play an educational board game. Grievant cannot be expected to be able to see through student desks or underneath Student S's coat. Second, Grievant actively engaged the students. She spoke with them frequently and observed their behavior. When Grievant approached the students, they stopped their inappropriate behavior until Grievant walked away. Third, Grievant did not ignore or disregard the students. When she was looking away from the students, she did so in order to carry out other teaching duties.

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 her 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 her 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 the conditions of her employment and thus her 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 her from its facilities, that fact alone would result in her 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 her procedural due process.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>3</sup> (2) suffered a

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<sup>2</sup> Grievant Exhibit 13.

<sup>3</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a

materially adverse action<sup>4</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>5</sup>

Grievant engaged in protective activity because she filed a grievance to challenge a prior disciplinary action. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a connection between her protective activity and a materially adverse action. It is clear that the Agency took disciplinary action against Grievant because it believed that she had engaged in misconduct. . The Agency did not retaliate against Grievant.

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.

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violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>4</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>5</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

## 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>6</sup>

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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





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

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 9572-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.<sup>7</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>8</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.

Grievant's attorney submitted a fee petition showing 35.60 hours<sup>9</sup> 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 attorneys fees in the amount of \$4,663.60.<sup>10</sup>

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<sup>7</sup> Va. Code § 2.2-3005.1(A).

<sup>8</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.

<sup>9</sup> Grievant's attorney rendered an additional .1 hours but did not charge for that service.

<sup>10</sup> Grievant also incurred costs for online legal research, filing fees in Circuit Court, and polygraph of client. These costs are not reimbursable because they are not attorney's fees.

## AWARD

The Grievant is **awarded** attorneys' fees in the amount of \$4,663.60.

## 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