Issues: Group III Written Notice (failure to follow policy), Group II Written Notice (alleged criminal conduct), and Termination; Hearing Date: 10/07/11; Decision Issued: 10/11/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9690; Outcome: Full Relief; **Fee Petition issued 11/10/11 awarding $4,794.60.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9690

Hearing Date: October 7, 2011
Decision Issued: October 11, 2011

PROCEDURAL HISTORY

On June 29, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating Operating Procedure 130. On June 29, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for being under investigation for alleged criminal conduct that related to the nature of his job in the Agency's mission.

On July 27, 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 September 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 Officer at one of its Facilities. He began working for the Agency on July 2, 2008. He was an honor graduate of the Agency's Academy for Staff Development. The purpose of Grievant's position was to "provide security and supervision of adult offenders at this facility."[1] No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Tobacco is considered to be contraband at the Facility. The Agency prohibits fraternization between corrections officers and inmates. Operating Procedure 130.1 defines fraternization to include the, "act of, or giving the appearance of, association with offenders … that extends to unacceptable, unprofessional and prohibited behavior". If an employee brings tobacco into the Facility and distributes it to inmates, that employee would be acting contrary to Agency policy and be subject to criminal prosecution.

When employees enter the Facility, they are subject to a "shakedown". Their persons, clothing, and possessions may be subject to inspection to determine whether they are bringing contraband into the Facility.

On February 27, 2011, Grievant conducted a security check on the recreation yard at the Facility. He discovered what appeared to be an ink pen in a drainage grate. Upon further examination, he discovered that the ink pen casing contained two live .22

[1] Agency Exhibit 3.

long caliber rifle bullets, a prop rivet, and spring mechanism. This type of instrument is commonly referred to as a "zip gun" and can be used as a weapon. Grievant reported his findings to Agency managers.

The Agency sent an Investigator to the Facility. The Investigator spoke with 20 or 30 inmates who had access to the recreation yard, however none were able to implicate, speculate, or identify any other inmates or visitors who would have a desire or responsibility for introducing the zip gun on to prison grounds. This seemed unusual to the Investigator because inmates often accuse other inmates or agency employees of engaging in inappropriate behavior. Some inmates, however, suggested that the weapon might have been brought into the Facility by Corrections Officers because some officers were known to smuggle contraband into the institution to the inmates. Grievant was one of the officers named by the inmates.

On March 2, 2011, Inmate M was found to be in possession of tobacco. On March 3, 2011, the Investigator interviewed Inmate M regarding how he obtained the tobacco. Inmate M told the Investigator about his relationship with Grievant. When he arrived at the Facility in 2007, he and Grievant established a friendship.[2] Grievant had a "fueled hatred" for the administration at the Facility. Grievant initiated a conversation with him about whether he would be interested in a business proposition to traffic tobacco at the Facility to other inmates. Around August 2009, Grievant provided his first quantity of tobacco to Inmate M. Initially, Grievant did not charge Inmate M a fee for the tobacco. That later changed and Grievant required Inmate M to pay him $100. Grievant would smuggle the tobacco into the institution, usually concealing the tobacco in his coat. Grievant would leave the tobacco in a particular supply closet for Inmate M to pick up. Once Inmate M received his package of tobacco, he would prepare it in bundles and later sell it to other inmates for $25-$100 a bundle, or he would sell single cigarettes for $2 or $8. Inmate M claimed that he did not directly pay Grievant for the tobacco on most occasions. Money was sent to a third party outside of the Facility who would leave money at a particular "drop-off" spot somewhere in the local community. Grievant would obtain the money at the drop-off spot. The Investigator concluded that Inmate M was truthful.

The Investigator spoke with Inmate D. Inmate D said that after he arrived at the Facility in August 2008, he started receiving tobacco from Inmate M that was being supplied by Grievant.[3] Inmate D admitted that he was the person who arranged for inmates interested in obtaining tobacco to forward their money to an address in the local community.

The Investigator spoke with Inmate T. Inmate T said that he observed a drug transaction of "tobacco and weed" between Grievant and another inmate. Inmate T said

[2] The evidence showed that Grievant did not arrive at the facility until July 2008, contrary to Inmate M's assertion.

[3] Inmate D's assertion that in August 2008 he began receiving tobacco brought to the Facility by Grievant is inconsistent with Inmate M's assertion that he received his first quantity of tobacco from Grievant in August 2009.

he witnessed Grievant pull a bag of tobacco from the crotch of his pants, put it in a washing machine, and another inmate retrieved and later distributed it to other inmates. The Investigator concluded that Inmate T was truthful.

The Investigator spoke with Inmate R. Inmate R said that he observed Grievant place a game box on a table in the day room near the bathroom. Inmate M picked up the box and took it to his bed. Inmate M took the tobacco out of the box and put it in his locker and began selling tobacco to inmates. The Investigator concluded that Inmate R was truthful.

The Investigator spoke with Grievant. Grievant denied that he brought the zip gun into the Facility. He denied bringing tobacco into the Facility. He informed the Investigator that he would not answer additional questions without his attorney being present.

Grievant was given the opportunity to take a polygraph examination regarding the allegations against them. Grievant initially refused to take a polygraph examination if it was conducted by an Agency employee. He agreed to take a polygraph examination it was conducted by an employee of the local Police Department. Grievant subsequently agreed to take a polygraph conducted by an Agency employee. The Polygraph Examiner asked Grievant about his medical history but decided not to take the polygraph. The Polygraph Examiner wrote:

> Based on his responses to the medical questionnaire, the polygraph examiner decided not to administer the polygraph test without first receiving a medical release from [Grievant's] medical care provider.

The Investigator wrote about the matter as follows:

> As he was informed of this Agent's reason for an additional interview, and later asked if he would be willing to consent to a polygraph examination to help clear up any unjust speculations against him, [Grievant] denied he had anything to do with bringing the zip gun into [the Facility]. He also said he never provided inmates with any contraband. [Grievant] also said he would not consent to a polygraph examination if it was conducted by a DOC employee. He then presented questionable information about personal health issues and past polygraph examinations that would prevent him from taking a current exam. [Grievant] would eventually refuse to take a polygraph examination and also said that he would not continue to answer any further questions without the presence of legal counsel.[4]

A Warrant of Arrest was issued for Grievant on June 15, 2011 alleging that Grievant had acted contrary to Section 18.2–474 of the Code of Virginia. The Warrant alleged that Grievant "willfully delivered an article to a confined prisoner without having secured the permission of the custodian of the prisoner or a person authorized to grant

[4] Grievant Exhibit 8.

or refuse permission."[5] At the time of the hearing, the local Court had taken no action that could be construed as finding that Grievant had acted contrary to any laws of the Commonwealth. The matter remained pending for adjudication.

The Agency did not take disciplinary action against Grievant for failing to participate in the Agency's investigation of him. The Agency did not take disciplinary action against Grievant for being convicted of delivering contraband to prisoners because Grievant has not been convicted of any crime.

CONCLUSIONS OF POLICY

The Agency contends that Grievant brought tobacco into the Facility and distributed it to inmates at the Facility. The evidence is insufficient to support this allegation. Because the Agency cannot established that Grievant brought tobacco into the Facility and distributed it to inmates, there is no basis to take disciplinary action against him.

The Agency's evidence against Grievant consists of two sources. First, inmates made statements that Grievant brought tobacco into the Facility and distributed that tobacco. Second, the Investigator interviewed inmates and formed an opinion based on his experience that the Inmates were telling the truth. These sources of proof are consistent with the Agency's allegations against Grievant. Although they are consistent with the Agency's allegations against Grievant, they are insufficient separately and when considered together to support the Agency's burden of proof in this case.

None of the inmates testified during the hearing. The Hearing Officer was not able to determine their credibility. The Hearing Officer cannot rely solely on written hearsay statements of inmates 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.

The Investigator had been conducting investigations for almost 20 years. His investigations often included obtaining statements from prisoners at correctional facilities. He was aware that inmates are often untruthful. He developed expertise enabling him to determine when inmates were telling the truth. In this case, he concluded that inmate statements that Grievant was bringing tobacco into the facility and distributing that tobacco were truthful statements. Although it may be the case that the inmates were telling the truth and that the Investigator's opinion regarding their truthfulness was accurate, no evidence was presented to corroborate the inmate's statements. An investigator's opinion regarding the truthfulness of inmates who do not appear before the Hearing Officer is not sufficient, in itself, to support disciplinary action including removal.

Grievant testified during the hearing. Although the Hearing Officer observed minor changes in Grievant's demeanor that were inexplicable, the Hearing Officer was

[5] Grievant Exhibit 6.

unable to conclude that Grievant was untruthful when he answered key questions about whether he brought tobacco into the Facility and distributed it to inmates. Grievant's testimony during the hearing is insufficient to support the Agency's allegations against him.

Based on the evidence presented during the hearing, the Group III Written Notice must be reversed. Although Grievant has been charged with a criminal offense, the matter remains pending in the local court. The Agency has not separately established the facts supporting the criminal proceeding.[6] Absent a resolution of the criminal proceeding, there is no basis to take disciplinary action against Grievant. Accordingly the Group II Written Notice must be reversed. Grievant's removal must also be reversed.

Operating Procedure 135.1 (XVII) provides:

> C. Any employee who is formally charged with a criminal offense (that is related to the nature of his or her job or to the Department's mission) by outside authority shall be immediately suspended without pay for a period not to exceed (90) calendar days. The Department has the option to allow an employee to charge accrued annual, over time, compensatory, or family personal leave to this period of suspension provided the employee has sufficiently balances.
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> D. If the nature of the charges allow, and at the conclusion of the 90 day period there has been no resolution of the criminal charge, the employee will be placed on or returned to pre-disciplinary leave (for a maximum of 15 days total for this action) with pay. At the conclusion of the pre-disciplinary leave period a decision regarding employment status must be made. If employment is maintained and the criminal investigation is concluded without any formal charges being made, or if the charges are resolved without the employee being convicted, the employer shall return the employee to active status. Accrued annual leave applied to the period of suspension without pay shall be reinstated.

Although the Agency did not suspend Grievant, the Agency's decision to remove Grievant from employment based on the Group II Written Notice and the accumulation of disciplinary action had the same effect as a suspension without pay. Accordingly, the Hearing Officer will deem Grievant to have been suspended without pay for a period of 90 days. The Agency will not be obligated to provide Grievant with back pay and benefits during that period of suspension.

[6] Although Operating Procedure 135.1 states that a "conviction is not necessary to proceed with disciplinary action", procedural due process requires that the Agency present sufficient facts to support a basis to take disciplinary action. When an employee is charged with a crime but a court has taken no action whatsoever regarding the nature of the allegations against the employee, the criminal allegation does not form a basis to take disciplinary action.

Grievant asked the Hearing Officer to make an adverse inference against the Agency because it failed to comply with the Hearing Officer's order to produce certain documents. Although the Agency failed to comply with the Hearing Officer's order to produce documents, it is unnecessary to draw an adverse inference against the Agency because it has failed to meet its burden of proof independently of any adverse inference.

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's issuance to the Grievant of a Group II 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. The Agency may consider Grievant to have been suspended without pay for a period of 90 days prior to providing him with back pay and credit for leave and seniority.

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.[7]

[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

[7] 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: 9690-A

Addendum Issued: November 10, 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.[8] 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.[9]

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 devoted 36.6 hours to representing Grievant in a grievance hearing resulting in his reinstatement. Reimbursement for these hours is appropriate at the rate set by the EDR Director of $131 per hour.

AWARD

Grievant is awarded attorneys' fees incurred in the amount of $4,794.60.

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[8] Va. Code § 2.2-3005.1(A).

[9] § 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