

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (violation of safety rule) and Termination (due to accumulation); Hearing Date: 05/22/12; Decision Issued: 05/25/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9809; Outcome: Partial Relief; Attorney's Fees awarded in the amount of \$1,350.00.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9809**

Hearing Date: May 22, 2012  
Decision Issued: May 25, 2012

**PROCEDURAL HISTORY**

On November 22, 2011, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow policy. On November 22, 2011, Grievant was issued a second Group II Written Notice of disciplinary action for a safety rule violation and failure to follow policy. Grievant was removed from employment based on the accumulation of disciplinary action.

On November 28, 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 23, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Attorney  
Agency Representative  
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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities. The purpose of his position was:

To ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform.<sup>1</sup>

The Agency considers contraband to be any item not issued to a resident by the Agency, an item issued to a resident but altered by a resident, or any item in excess of the number of items properly issued to the resident. Grievant received training regarding identifying and understanding what items constituted contraband.

The Resident resided in a pod with 12 other residents. He lived in a room on the pod. The Resident did not have a roommate. The door to the Resident's room locked automatically when it was closed. Grievant had a key to enable him to unlock the door to the Resident's room. The Agency did not issue trash bags to the Resident and did not authorize him to have a trash bag in his cell. Officer T had a personal relationship with the Resident. Grievant was unaware of that relationship.

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<sup>1</sup> Grievant Exhibit 1.

On November 2, 2011, Grievant was seated at his desk inside the pod observing the residents and completing his paperwork as part of his duties. Behind Grievant was a wall with six glass windows. To his right, after the last window on his right was a metal door enabling entrance into the pod. The door to the pod was locked and could only be opened by an employee working in Master Control. The door had a window and a tray slot below the window. An employee standing outside of the pod and possessing a key could unlock the tray slot even though the door remained closed and locked. Once the tray slot was open, items could be passed from outside of the pod into the pod through the tray slot.

Also, to Grievant's right was a trash can. The height of the trash can was a few inches below Grievant's waist. To the right of the trash can was a larger trash bin used to hold laundry to be cleaned. When Grievant was seated at his chair, it was unlikely he could see the tray slot in the door.

Officer T approached the pod and spoke loudly enough to get Grievant's attention. She told Grievant that she wanted to speak with the Resident but did not tell him why she wanted to speak with the Resident. Grievant walked to the Resident's room and spoke to the Resident. Grievant told the Resident that Officer T wanted to speak with him. Initially, the Resident indicated he did not wish to speak to Officer T. The Resident changed his mind and told Grievant that he would speak with Officer T. Grievant turned away from the room and walked to his desk and sat down. Grievant resumed working on his paperwork. He had his elbows on the table of his desk and was writing in a book on the desk. Grievant assumed that the Resident would exit his room immediately and walk behind Grievant and then walk to the pod door. Instead, the Resident remained in his room for a few more seconds and then exited his room. When the Resident left his room he did not close the door. The Resident walked out of his room, in front of Grievant's desk, and to the pod door to speak with Officer T. The Resident had to walk approximately 10 paces from his room to the point in front of Grievant's desk and then another approximately six paces to reach the pod door. When the Resident passed in front of Grievant's desk, the Resident was moving from the left side to the right side of Grievant's desk.

While Grievant was seated at his desk, Resident 2 was standing near the back wall with the windows. Resident 2 was located a few feet to Grievant's left side and a few inches behind Grievant. While the Resident was at the pod door speaking with Officer T, Grievant turned to his left and began speaking with Resident 2. Grievant's body was positioned towards the front of his desk, but his head was turned to his left. Grievant was holding a document in his right hand while he was speaking with Resident 2.

The Resident obtained a black bag from Officer T. The black bag itself was contraband and inside it was also contraband consisting of food items. The Resident held the bag down in his right hand towards his waist. The Resident had his left hand in his pocket. As the Resident walked in front of Grievant's desk, the Resident's left side

was towards Grievant's desk. When the Resident was at the right corner of Grievant's desk, Grievant began turning his head away from Resident 2 and towards the paperwork on his desk. The Resident was holding the black bag to the right side of his leg as he passed in front of Grievant's desk. As Grievant turned his head towards the front of his desk, he continued to hold a document in his right hand and used his left hand to begin closing a book on the desk. Grievant closed the book as the Resident passed the left corner of Grievant's desk. Grievant took the document in his right hand and placed it in the center of his desk so that he could read the document. The Resident walked to the open door of his room and threw the black bag inside the room.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>2</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow policy is a Group II offense.<sup>3</sup> The Agency's policies include post orders.

### Group II Written Notice Regarding Contraband

Grievant knew that residents were not permitted to have contraband. Grievant knew that the black bag would constitute contraband. If Grievant observed the black bag and did nothing about it, he would have acted contrary to the Agency's policy prohibiting residents from possessing contraband. If Grievant was not aware the Resident had contraband, the Agency would not have a basis to take disciplinary action against Grievant regarding the Resident's possession of contraband.

The evidence is insufficient for the Hearing Officer to conclude that Grievant observed the Resident in possession of the black bag and did nothing about it in response. The Agency presented a video with images taken from two cameras inside the pod. One camera was positioned at an angle directed at Grievant's front right side of his body. That camera showed Officer T approaching the pod door and the Resident obtaining the bag from Officer T. The second camera was positioned on the back wall of the pod behind Grievant's desk and on Grievant's left side.<sup>4</sup> Both cameras lacked

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Only the first camera was viewed and discussed during the hearing. Agency Exhibit 5 includes video from the second camera.

some clarity in their images, but the second camera was closer to Grievant and better revealed his body position and where he was looking when the Resident passed his desk. The second camera showed that Grievant was focused on his paperwork before the Resident went to speak with Officer T. Grievant was focused on Resident 2 as the Resident began walking to the front of Grievant's desk. As Grievant turned his focus away from Resident 2, he resumed his focus on the papers on his desk. It is possible that Grievant was able to glance towards the Resident and observe the black bag, but it is more likely that Grievant resumed his focus on the paperwork on his desk without seeing or recognizing that the Resident was holding a black bag. Grievant testified that he did not see the black bag. The Hearing Officer was unable to determine that Grievant's testimony was untruthful. The video of the incident is consistent with Grievant's testimony.

The Agency argued that Grievant admitted to seeing the black bag and, thus, there is a basis for disciplinary action. Captain S was responsible for investigating the incident. Captain S asked Grievant to prepare a statement regarding the incident. Grievant wrote, in part, "She then handed him a black trash bag with contents unknown. He then threw it in his room."<sup>5</sup> Grievant's statement is not sufficient to establish the Agency's case. Captain S asked Grievant to write the statement after Grievant had viewed the video at Captain S's request. Once Grievant viewed the video, he knew Officer T had given the Resident a black bag and that the Resident threw the bag into his room. Grievant's admission was not based on what Grievant knew at the time of the incident, it was based on what Grievant knew about the incident as reflected in the video.

#### Group II Written Notice for Leaving a Cell Door Unsecured

Grievant's post order stated, "When opening a cell door, the staff will remain at the cell door and secure it when the resident either enters or exits the cell." Grievant unlocked and opened the Resident's room door. Grievant walked away from the Resident's room and left the door open and unlocked. The Resident exited room but left the door open. Because the door remained open, the Resident was able to walk back to his room and throw the black bag inside the room. Grievant failed to comply with his post order thereby justifying the issuance of a Group II Written Notice.

Because the Agency attempted to remove Grievant from employment, it is reasonable to assume that the Agency would have suspended Grievant for ten work days had it recognized it was unable to remove Grievant. Accordingly, the removal must be reduced to a ten work day suspension.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute

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<sup>5</sup> Agency Exhibit 3.

Resolution....”<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

### Grievant’s Reinstatement

Grievant was removed based on the accumulation of two Group II Written Notices. The Agency has presented evidence to support only one Group II Written Notice with a ten work day suspension. An employee may not be removed based on the issuance of only one Group II Written Notice. Accordingly, Grievant must be reinstated.

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 the first Group II Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of the second Group II Written Notice is **reduced** to a Group II Written Notice with a ten work day suspension.

The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent 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 after accounting for a ten work day suspension.

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<sup>6</sup> Va. Code § 2.2-3005.

## 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>

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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.



[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: 9809-A**

Addendum Issued: July 3, 2012

**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.

Grievant's attorney devoted 11.25 hours to the hearing. The Hearing Officer only included time beginning on April 15, 2012 because time prior to that was devoted to resolving a management step. The hourly rate of reimbursement is \$120.

**AWARD**

The Grievant is awarded attorneys' fees in the amount of \$1,350.00 incurred from April 15, 2012 through May 22, 2012 as listed on the attorney's invoice submitted with the petition.

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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