

Issue: Group III Written Notice with Termination (fraternization and safety rule violation);  
Hearing Date: 02/21/14; Decision Issued: 03/10/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10263; Outcome: Full Relief; Administrative Review: **EDR Ruling Request received 03/21/14; EDR Ruling No. 2014-3844 issued on 04/16/14; Outcome: Remanded to AHO; Administrative Review: DHRM Ruling Request received 03/21/14; DHRM Ruling issued 04/18/14; Outcome: Remanded to AHO; Remand Decision issued 05/29/14; Outcome: Original decision affirmed; Attorney's Fee Addendum issued 06/18/14 awarding \$5,365.65.**

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10263

Hearing Officer Appointment: January 15, 2014  
Hearing Date: February 21, 2014  
Decision Issued: March 10, 2014

**PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued November 22, 2013 by the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated December 17, 2013.

The Grievant raised the issues and is seeking the relief requested in his Grievance Form A including reinstatement, restoration of any lost pay and benefits and rescission and removal from his record of the Group III Written Notice.

The Grievant's attorney, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on January 22, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on January 24, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his attorney and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing<sup>1</sup>.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

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References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

## APPEARANCES

Representative for Agency  
Grievant  
Witnesses

## FINDINGS OF FACT

1. On November 22, 2013, the Agency issued a Group III Written Notice to the Grievant with a termination effective December 1, 2013 for a disciplinary offense which allegedly occurred on April 24, 2013. GE 2.
2. The discipline which is the subject of this hearing was imposed on November 22, 2013.
3. There is no valid reason for the inordinate delay concerning the issuance of the Written Notice on November 22, 2013.
4. To compound the confusion, all parties agreed that the April 24, 2013 date specified on the Written Notice as the date of the offense which is the subject of this discipline, has absolutely no significance at all.
5. The Assistant Superintendent for School Operations of the Agency issued the discipline based on an "investigation" by the Principal at the facility where the Grievant worked for the alleged material and serious security breaches by the Grievant.
6. Pursuant to the Agency's Operating Procedure No. 135.1 concerning the Standards of Conduct ("SOC"):

Disciplinary investigations should include the following information:

- a. Summary of reason for investigation; how issue came to attention of supervisor/manager
- b. Type of incident
- c. Time of incident
- d. Date of incident
- e. Place of incident

- f. Individuals involved in the incident
- g. Witnesses of the incident (both management and employee) and their reports (any additional statements; signed and dated)
- h. Applicable offense or rule violation - How?
  - 1. Employee's explanation of the incident (written statement; signed and dated)
- J. Extenuating circumstances (e.g. unclear orders or instructions)
- k. What provoked the incident?
- l. Unit's past action in similar cases (precedent)
- m. Past record of the employee

AE 6 at 5.

- 7. Atypical of the Agency, especially for alleged security breaches, the so-called investigation was highly irregular.
- 8. For example, there was no written investigative report; the Grievant was not interviewed and asked to sign a written statement; and witnesses were not interviewed and asked to sign written statements, etc.
- 9. Basic facts which led to the discipline being issued were incorrectly assumed to be facts and not checked up on at all.
- 10. For example, to teach his class the Grievant uses an aid titled "[Grievant] Family Foods", a fictitious business name, with a fictitious address and e-mail account. AE2.
- 11. The Principal in conducting his investigation assumed that those items were in reality the business, business address and e-mail account of the Grievant, without bothering to ask the Grievant. AE 2.
- 12. Similarly, the medication retrieved by the Agency from the Grievant's locked drawer was permissible under the Grievant's prescription from his physician and had been approved by the facility's security upon the Grievant's admission to the facility.

13. The testimony of the Grievant and the Grievant's witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

#### ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

The Grievant's attorney correctly points out that disciplinary actions must be administered promptly under the SOC. The hearing officer agrees with the Grievant's attorney that under the facts and circumstances of this case, where the discipline was on the face of the Written Notice imposed some 7 months after the alleged serious security breaches, based on a highly irregular investigation and concerning an offense date which has no meaning, the Agency's discipline should be voided because it is not prompt and violates the Grievant's rights of due process. *See, also, EDR Case No. 7886 and EDR Ruling Nos. 2006-1157 and 2004-870.*

The General Assembly enacted the *Virginia Personnel Act*, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

**It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under§ 2.2-3001.**

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*,§ 5.8. In any event, additionally, the Agency has failed to sustain its burden.

#### DECISION

For the reasons stated herein, the disciplinary action is reversed. The Agency is directed to reinstate the Grievant and to provide the Grievant with **back pay** for the full period permitted under Section VI(D) of the *Rules for Conducting Grievance Hearings*, (the "Rules") concerning the Grievant's suspension, less any interim earnings that the employee received during the and

credit for annual and sick leave that the employee did not otherwise accrue. The hearing officer hereby grants the Grievant's request for attorneys' fees provided that the Grievant's attorney ensures that each of (1) the advocate for the Agency and (2) the hearing officer *receives*, within fifteen (15) calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees and otherwise complies with Section VI(D) of the Rules.

### APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 11th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 ore-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed ore-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

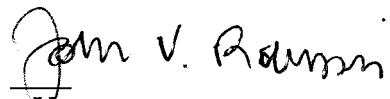
A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 3 / 10 / 14

  
John V. Robinson  
nV.

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10263

Hearing Officer Appointment: January 15, 2014  
Hearing Date: February 21, 2014  
Decision Issued: March 10, 2014  
Remand Decision Issued: May 29, 2014

**PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued November 22, 2013 by the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated December 17, 2013.

The Grievant raised the issues and is seeking the relief requested in his Grievance Form A including reinstatement, restoration of any lost pay and benefits and rescission and removal from his record of the Group III Written Notice.

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Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on January 24, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his attorney and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing<sup>1</sup>.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

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## APPEARANCES

Representative for Agency  
Grievant  
Witnesses

## FINDINGS OF FACT

1. On November 22, 2013, the Agency issued a Group III Written Notice to the Grievant with a termination effective December 1, 2013 for a disciplinary offense. GE2.
2. The discipline which is the subject of this hearing was imposed on November 22, 2013.
3. The April 24, 2013 date specified on the Written Notice as the date of the offense which is the subject of this discipline, has absolutely no significance at all.
4. The Assistant Superintendent for School Operations of the Agency issued the discipline based on an "investigation" by the Principal at the correctional facility for women where the Grievant worked (the "Facility") for the alleged material and serious security breaches by the Grievant.
5. Pursuant to the Agency's Operating Procedure No. 135.1 concerning the Standards of Conduct ("SOC"), disciplinary investigations should include the following information:
  - a. Summary of reason for investigation; how issue came to attention of supervisor/manager
  - b. Type of incident
  - c. Time of incident
  - d. Date of incident
  - e. Place of incident
  - f. Individuals involved in the incident
  - g. Witnesses of the incident (both management and employee)

and their reports (any additional statements; signed and dated)

- h. Applicable offense or rule violation - How?
- 1. Employee's explanation of the incident (written statement; signed and dated)
- J. Extenuating circumstances (e.g. unclear orders or instructions)
- k. What provoked the incident?
- l. Unit's past action in similar cases (precedent)
- m. Past record of the employee

AE 6 at 5.

- 6. Atypical of the Agency, especially for alleged security breaches, the so-called investigation was highly irregular.
- 7. For example, there was no written investigative report; the Grievant was not interviewed and asked to sign a written statement; and witnesses were not interviewed and asked to sign written statements, etc.
- 8. Basic facts which led to the discipline being issued were incorrectly assumed to be facts and not checked up on at all.
- 9. For example, to teach his class the Grievant uses an aid titled "[Grievant] Family Foods", a fictitious business name, with a fictitious address and e-mail account.  
AE2.
- 10. The Principal in conducting his investigation assumed that those items were in reality the business, business address and e-mail account of the Grievant, without bothering to ask the Grievant. AE 2.
- 11. Similarly, the medication retrieved by the Agency from the Grievant's locked drawer was permissible under the Grievant's prescription from his physician and had been approved by the facility's security upon the Grievant's admission to the facility.
- 12. Up until the alleged disciplinary infraction which is the subject of this proceeding, the Grievant has been a good employee of the Department for about 10 years, with no prior disciplinary infractions. GE 4-8. Up until the termination of his employment on December 1, 2013, the Grievant was a technical educator at the Facility. The Grievant taught a Building Maintenance and Repair Class and a

Custodial Maintenance Class for approximately 12 - 18 inmates. The Grievant's performance evaluations have all shown an overall rating of "Contributor" or better. *See*, e.g., GE 4-8.

13. When the Grievant was first hired at another facility of the Department, the Grievant informed the Department that he did not like paperwork or computer work. The Department responded to the Grievant not to worry because he would have a clerk/aide to do that. The aides are inmates who are paid by the Department for their clerical services once hired.
14. One of the Grievant's witnesses was until his recent retirement a computer systems technology instructor at the Facility ("H"). H provided credible unrefuted testimony that many instructors who are very good at their trades are computer illiterate or have very limited computer skills. Accordingly, these Department instructors need help with their computers from the clerks/aides.
15. The Department pays the clerks and tutors who are also inmates. The Department was unable to say whether there were any binding policies concerning what the clerks and tutors could and could not do concerning their computer job functions for the Department. For example, the Assistant Superintendent testified that he believed there were guidelines, but could not point to any guidelines or policy and certainly the Agency has not provided credible, probative evidence concerning any such guidelines, protocols or policy which govern the computers of aides/clerks and/or tutors.
16. By contrast, all of the Grievant's witnesses and the Grievant who testified to this matter, credibly and consistently stated that they had never been told of or seen any Department policies or guidelines concerning what computer tasks were appropriate for the tutors and clerks to perform.
17. The tutors and aides, who are classified the same as far as pay by the Department, differ in job functions. The aides do clerical work for the instructors while the tutors work directly with the inmates/students.
18. The Grievant had 1 aide (JB) and 5 tutors assigned to him.
19. The Department is aware that the Grievant is disabled as defined under the Americans with Disabilities Act, as amended. The Grievant, a qualified individual under such Act, has been given the reasonable accommodation by the Department that he be permitted not to come into contact with inmates who have contagious illnesses, such as influenza. The Grievant has severe rheumatoid arthritis and takes medication for this condition which has severely compromised his immune system. The Grievant's major life activities substantially limited by such impairment include working and walking. The Grievant is 73 years old and was 72 years old at the time of the alleged disciplinary infraction.

20. On July 22, 2013, a student ("KG") came into the Grievant's class and informed one of the tutors ("Y") that she had the flu. The Grievant heard this while he was walking to the tool room to dispense tools and told Y to tell KG to return to housing because the Grievant had low immunity and KG could not be in class. KG could hear the Grievant instruct Y and KG left as instructed by both the Grievant and Y.
21. The very next day, July 23, 2013, KG (still with the flu) came back to class. Again the Grievant, within earshot of KG, instructed JB this time to tell KG to leave because of the medical risk to the Grievant.
22. When the entry officer saw KG returning from class, the entry officer questioned KG and KG said that the aide in the Grievant's class had told her to go back to her cell. The Principal was in the entry area and sent the student back to the Grievant's class in violation of the Grievant's accommodation and in complete disregard of the Grievant's health, safety and welfare. The Agency's unbelievable position is that KG's comment caused the Principal to think that the Grievant had essentially surrendered control of his class to the aide and/or tutors, who were essentially running amok. Because the Grievant was not feeling well on July 23, 2013, the Grievant went home at noon.
23. The unrefuted evidence is that each new student to the Grievant's class was fully informed at orientation about the Grievant's accommodation that he could not come into contact with contagious people. The Principal testified that he had spoken to the Grievant about his health conditions in detail. The Grievant had never before the July 23, 2013 incident heard any concerns from management about any lack of control or giving too much authority to aides and/or tutors. The Principal testified he regularly observed the Grievant in the classroom.
24. On the morning of July 24, 2013, while walking to class, the Grievant heard over the PA system that his class had been cancelled. The Principal came into the Grievant's class and informed the Grievant that "there were things found on my clerk's [JB] computer." GE 1.
25. On July 25, 2013, the Principal sent out an e-mail admitting that the Principal had dropped the ball in addressing [the Warden's] previous memo regarding the use of offenders in clerk positions. GE 1.
26. The incident with KG allegedly caused the Principal to search the Grievant's locked desk drawer in the Grievant's classroom and to search JB's computer in the Grievant's classroom under the ostensible Department theory that JB was in control of the classroom and the Principal was concerned to establish the extent to which JB was running amok.

27. The Assistant Superintendent freely admitted that if the facts were as the Grievant represents (and as the hearing officer finds them to be on the record before him), there would be nothing wrong with the aide or a tutor, on direction from the Grievant, dismissing KG from class.
28. Concerning the record before the hearing officer, the hearing officer stresses that, to a large extent, the Grievant's case was unrefuted by the Department. For example, the Assistant Superintendent was the only witness called by the Department in its case in chief. The Assistant Superintendent freely admitted that he did not have personal or first hand knowledge of the underlying facts. The Assistant Superintendent gave the offense date in the Written Notice as April 24, 2013, well removed from the now acknowledged July date. The Assistant Superintendent could not testify whether the Grievant's medicine came from the Grievant's locked drawer in the classroom or who discovered the medication, "assumed" but could not verify that the documents, which the Department asserted showed fraternization, came from the aide's computer, etc.
29. Similarly, the Principal was only briefly called by the Department at the last minute to testify as a rebuttal witness by telephone. The Principal was clearly unprepared, testifying that he could have prepared if he had known he would be called but had been told that he would not be needed.
30. The Principal did not have any documents in front of him and so could not see the documents which the Department said came from the aide's computer presented as exhibits at the hearing to verify/authenticate that these documents in fact came from such computer, as alleged by the Department.
31. When asked what documents generally the Principal alleged JB should not have had on her computer from his recollection, the Principal responded, the training log, the social security numbers and the Family Foods documents. On cross-examination, the Grievant admitted that, in fact, there were no social security numbers and said he "assumed" the Family Foods documents contained actual addresses, names of business, etc., whereas in fact, they did not. The Assistant Superintendent had no problem with the fictitious business documents once he learned the facts at the hearing, while the Principal continued to assert that they were "inappropriate" documents for that course. However, when challenged twice by the Grievant's attorney to say how the documents constituted "fraternization" within the meaning of Agency Operating Policy No. 130.1, the Principal only responded that they were inappropriate documents and was clearly unwilling to say that the documents constituted "fraternization". Of course, the Department did not charge the Grievant concerning the aide maintaining inappropriate documents.

32. The Department has also clearly failed to show that even if such allegedly inappropriate documents were found on the aide's computer, that the Grievant was in some way responsible for the aide having those documents, and that this conduct constituted a violation of Agency Operating Procedure 130.1.
33. The inappropriateness of the documents was also not established by the Agency pursuant to its burden of production and persuasion. For example, no policy that the aides should not have access to State identification numbers was shown. To the contrary, the unequivocal evidence was that these numbers are publicly displayed on each inmate's tag which they wear consisting of Name, Picture, and Inmate Identification Number. Such numbers are posted publicly and conspicuously on lists in the wings; anything to which the inmates sign up requires this information; correctional officers up front ask for the Master Pass List to be brought by clerks from the classrooms and these lists show inmate identification numbers; etc.
34. Concerning the alleged mediation violation, the Department has also failed to meet its burden.
35. Local Operating Procedure #440.2 provides that the Grievant may have a "one (1) day dose of prescription medication." GE 12. Dictionaries commonly define a day as a period of 24 hours (*see*, e.g., dictionary.com). Accordingly, pursuant to policy, the Grievant could have even under his outdated prescription a total of 6 pills. The Department found 5. In any event, the Grievant's prescription applicable to the date of incident allowed him pursuant to even the Agency's unwarranted interpretation of an 8-hour "day" to be in his possession of more than 5 pills.
36. Consistent with the hearing officer's interpretation and finding that the Grievant did not violate the Department's medication policy, Lieutenant M, a correctional lieutenant at the Facility, testified that when the Grievant or anyone else at the Facility entered, they underwent a security check by 2 guards of bags and whatever they brought in, including prescription medications. Lieutenant M credibly and convincingly testified that if the Grievant had tried to bring in, in the container he used for that purpose, more than a day's supply, it would have been detected and not allowed entry to the Facility.
37. For some time, the Principal has regularly asked the Grievant if he was going to retire. The Principal has also asked H to speak to the Grievant to try to convince the Grievant to retire. The Principal made comments to H to the effect that "[G] should retire" and "[G] is going to have a hard time at work because of the rheumatoid arthritis and what it is doing to his joints." GE 19.

38. The testimony of the Grievant and the Grievant's witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

#### ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8. To make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or Group III offense.)

In this proceeding, the Agency has not shown upon a preponderance of the evidence that the Grievant engaged in fraternization as defined in the Agency Operating Procedure No. 130.1. There was no improper association or other impropriety shown between the Grievant and JB. The Agency did not establish that the documents came from JB's computer or that the Grievant was in some way responsible for JB having those documents on her computer as asserted by the Department. The evidence to the contrary was that until H left, the Grievant made every effort to have H ensure that no inappropriate items were on the aide's computer and H would remove games, etc.

Similarly, there is nothing to show that the Grievant brought into the Facility more medication than allowed him under the policy. To the contrary, the Grievant did not bring in more prescription medicine than the prescription or policy permitted. Lieutenant M testified that

the Grievant's medication was checked daily and was found to be in compliance with policy before it was allowed in by security. This testimony was unchallenged and unrefuted by the Agency.

The Agency has not shown that the alleged behavior constituted misconduct. Much unrefuted testimony revealed that tutors and clerks do precisely what the Agency complains of in this proceeding for many other instructors. No guidance or policy prohibiting such computer clerical tasks was established by the Agency and H even testified that one of the inmates at Augusta Correctional Center actually wrote one of the computer programs in the early 1990's, which the Department asserts clerks should not maintain. Again, such testimony was not challenged or refuted by the Agency.

Similarly, under any theory, the Grievant was permitted by policy to have the 5 pills which were in the old prescription bottle.

The hearing officer also decides that the disciplinary action taken by the Agency against the Grievant was transparently merely a pretext to force the Grievant from the Facility because of the Grievant's age and disability. Because the Grievant's age and disability were the motivating factors behind the Grievant's termination of employment, the Agency's actions were also unlawful, constituting age and disability discrimination.

Grievant has proven upon a preponderance of the evidence that he is within the ADA's protected class (i.e. a "qualified individual with a disability"). The Grievant suffered an adverse employment action, termination. The Grievant's job performance met his employer's expectations when he suffered the adverse employment action. The Grievant's performance evaluation for 2012/2013 (GE 8) shows an Overall Rating Earned of Contributor and many stellar comments covering many core responsibilities. The adverse employment action was motivated by unlawful disability discrimination.

Additionally, Grievant has proven upon a preponderance of the evidence that Grievant is a member of a protected age group (over 40 years old). Grievant has suffered an adverse job action, termination. Grievant was performing satisfactorily at the time his employment was terminated (GE 8) and the termination was the result of Grievant's age.

## DECISION

For the reasons stated herein, the disciplinary action is reversed. The Agency is directed to reinstate the Grievant and to provide the Grievant with **back pay** for the full period permitted under Section VI(D) of the *Rules for Conducting Grievance Hearings*, (the "Rules") concerning the Grievant's suspension, less any interim earnings that the employee received during the and credit for annual and sick leave that the employee did not otherwise accrue. The hearing officer hereby grants the Grievant's request for attorneys' fees provided that the Grievant's attorney ensures that each of (1) the advocate for the Agency and (2) the hearing officer *receives*, within

fifteen (15) calendar days of the issuance of the remand decision, counsel's petition for reasonable attorneys' fees and otherwise complies with Section VI(D) of the Rules.

### APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 5 /29 /14

John V. Roberson  
John V. Roberson, Hearmg Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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

**DIVISION OF HEARINGS**

**ADDENDUM TO  
DECISION OF HEARING OFFICER**

In the matter of: Case No. 10263

Hearing Officer Appointment: January 15, 2014

Hearing Date: February 21, 2014

Original Decision Issued: March 10, 2014

Addendum Issued: June 18, 2014

**DECISION OF HEARING OFFICER ON  
AWARD OF ATTORNEYS' FEES**

In the matter of: Case No. 10263

**APPLICABLE LAW AND PROCEDURE**

Applicable law provides that an employee who is represented by an attorney and who substantially prevails on the merits of a grievance challenging her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.<sup>1</sup> Accordingly, a 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>2</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. *Id.*

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<sup>1</sup> Rules for Conducting Grievance Hearings, effective July 1, 2012 (the "Rules"), Section VI(E); Va. Code § 2.2-3005.1.A.

<sup>2</sup> § 7.2(e) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective July 1, 2012; the Rules, Section VI(E).

## FINDINGS AND DISCUSSION

The decision rescinded the discipline and reinstated the grievant. Accordingly, the hearing officer finds that grievant substantially prevailed in this case. The hearing officer also finds that there are no special circumstances which would make an award of attorneys' fees unjust and that the attorneys' fees requested in the grievant's amended fee petition provided, by counsel, to the hearing officer on May 29, 2014, are reasonable and warranted. No agency response to the petition or amended fee petition, was received by the hearing officer. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve 39.80 hours of attorney time and related costs in the amount of \$151.85 for a total of \$5,365.65.

## AWARD

The grievant is awarded attorneys' fees incurred from December 17, 2013 through May 9, 2014, in the amount of \$5,213.80 (39.80 hours x \$131.00 per hour), and related costs in the amount of \$151.85 for a total of \$5,365.65.

## APPEAL RIGHTS

A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The opposing party may contest the fees petition by providing a written rebuttal to the hearing officer.

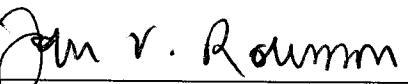
If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition and should do so no later than 30 calendar days from the date of the initial decision.

If either party has timely requested one or more administrative reviews as described in §VII(A) of the *Rules*, all administrative reviews must be issued (as well as any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the addendum within 15 calendar days of the issuance of the last of the administrative review decisions.

Within 10 calendar days of the issuance of the fees addendum, either party may petition EDR for a decision solely addressing whether the fees addendum complies with the *Grievance Procedure Manual* and these *Rules*. Once EDR 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 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.

*See, also, the Rules and the Grievance Procedure Manual.*

ENTER: 6/18 / 2014

  
John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail, e-mail transmission and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, §5.9).