

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 08/15/16; Decision Issued: 08/18/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10845; Outcome: Full Relief; **Attorney's Fee Addendum issued 09/06/16 awarding \$1,716.10.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

REVISED DECISION OF HEARING OFFICER

In re:

Case Number: 10845

Hearing Date: August 15, 2016

Decision Issued: August 18, 2016

PROCEDURAL HISTORY

On June 17, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization with an inmate.

On July 6, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 18, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 15, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as an Equipment Repair Supervisor at one of its facilities. He had been employed by the Agency since 2005. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a Shop at the Facility. The Shop was outside the Facility's secured perimeter. The Shop had a bay and an office that was used as a break room. The break room had two desks facing each other. A small "dorm size" refrigerator was located on the floor near the office door. Staff as well as inmates used the refrigerator to keep their food items cold. A microwave was located in the office as well. Bowls were kept in the office.

Inmates who left the secured perimeter of the Facility to work outside were given a bag lunch to take with them. These lunches were typically "cold meals" such as peanut butter and jelly sandwiches.

On November 10, 2015, the lunch meal for offenders working outside the secured perimeter was peanut butter and jelly sandwiches, carrots, pears and apples. Inmate B and Inmate R worked in the Shop assisting Grievant. When they left the secured perimeter they would have been given bag lunches.

On November 10, 2015 at approximately 12:40 p.m., the Intelligence Officer entered the Shop office to return keys to a van. He entered the office door and walked past Inmate R who was seated at the first desk facing Grievant. Grievant was seated in

the second desk against the wall facing Inmate R. As the Intelligence Officer handed the keys to Grievant, he noticed that Grievant and Inmate R were eating what appeared to be the same meal. The Intelligence Officer knew that inmates working outside of the secured perimeter typically ate from "paper bag lunches". Approximately one and a half hours later, the Intelligence Officer described in an email his observation of the food as:

It was some form of meat with gravy on white bread and I was unable to see what was in the bowl because I didn't want to draw [too] much attention that I was looking. It was not hard to tell that this was not an offender's lunch.¹

On November 18, 2015, Sergeant H and Intelligence Officer G interviewed Inmate B. Inmate B said he had "been receiving food from [Grievant] since the time I started 6 months ago. This last meal I ate was green's and chicken on 11-17-15. It was common knowledge that all inmate [sic] working for [Grievant] have receiving [sic] food."

The matter was reported to the Special Investigations Unit on December 18, 2015. The Special Agent was assigned to the case.

On January 12, 2016, the Special Agent interviewed Inmate B with Sergeant H present. The Special Agent wrote:

According to [Inmate B], [Grievant] would routinely share the [food] he brought from home with him and [Inmate R] most every day such as baked chicken and Red Shaper Fish and other food products. He explained that [Grievant] would cook enough food at home to have left overs to bring to him and [Inmate R]. If you did a good job for him in the shop he would bring you food from home. [Inmate B] said he worked in the shop for about 6 months. During that period of time [Grievant] brought food from home to the shop and put it in the refrigerator in the shop for him and [Inmate R] to eat around 30 times.

On the day [the Intelligence Officer] came to the motor pool and saw [Grievant] and [Inmate R] sitting at the table eating, that was one of the days he brought enough food from home and shared it with them. [Inmate B] said he normally eats his lunch or the food [Grievant] brought in the shop. He said he never eats at the table with [Grievant] and [Inmate R]. [Inmate B] said [Grievant] has never brought them any tobacco products, drugs or alcohol. [Inmate B] said he was subsequently removed from the motor pool on the day [the Intelligence Officer] came to the garage.²

¹ Agency Exhibit 5.

² Agency Exhibit 5.

On January 12, 2016, the Special Agent interviewed Inmate R with Sergeant H present. The Special Agent wrote:

According to [Inmate R] [Grievant] never brought him any food from home for him to eat. [Inmate R] said the only food he has eaten from outside the facility is a cake that staff brought over from [another facility] when they had left over food from an event that was held there.

When asked was he being truthful [Inmate R] thought for a moment and said he is always truthful. When told that [the Intelligence Officer] saw him and [Grievant] eating the same meal that day [Inmate R] said [the intelligence Officer] must be mistaken.

[Inmate R] appeared more interested in when he was going back to work in the garage with [Grievant]. When [Sergeant H] informed him that he might not be going back to work for [Grievant], [Inmate R] became verbally and visually upset, explaining that he was the only offender mechanic available to help [Grievant] in the shop.³

On January 12, 2016, the Special Agent interviewed Grievant with Sergeant H and the Intelligence Officer present. Grievant wrote a statement:

I have never gave the inmates food from home. They have been given food from [Officer J's] crew. They have had trays from [another location] and also food from [another location] including offender [R] and [B]. Intel Officer said he saw me eating white bread and gravy. I don't even buy white bread. He said we were eating the same thing. I don't remember what I was eating 11/10/15. Whatever the offender was eating was not from my home. No polygraph.⁴

CONCLUSIONS OF POLICY

The burden of proof in this case rests with the Agency to establish a basis for disciplinary action. The Agency has not presented sufficient evidence to support the Group III Written Notice with removal. Grievant must be reinstated.

The Agency relies on three factors to support the disciplinary action. First, the Intelligence Officer observed that on November 10, 2015, Inmate R was eating food not provided to him from staff at the Facility. Second, Inmate B confirmed that Grievant routinely brought food from home to give to inmate workers. Third, Grievant's failure to agree to take a polygraph is consistent with having brought food to inmate workers.

³ Agency Exhibit 5.

⁴ Agency Exhibit 5.

The Hearing Officer believes that Inmate R was eating food similar to food Grievant was eating and that the food Inmate R was eating did not come from the Facility's food service that day. Inmate R likely was given a bag lunch with a peanut butter sandwich and not meat or gravy. Based on this fact, the Agency infers that Grievant was the one who brought the meat and gravy into the shop and gave it to Inmate R. Grievant was not able to counter this fact because he could not remember what he and Inmate R were eating on November 10, 2015. The difficulty with the Agency's reliance on the Intelligence Officer's observation is that the Agency did not question Grievant until approximately two months after the event. The Agency questioned Inmate B within a week of the incident. Inmate B was not eating lunch in the office on November 10, 2015. The Agency waited approximately two months to question Inmate R and Grievant. With the passage of two months, it was inevitable that Grievant would not be able to explain what he and Inmate R were eating on November 10, 2015. The Agency's conclusion regarding what Grievant and Inmate R were eating is built on the back of the Agency's failure to timely interview Grievant. The matter was reported on November 10, 2015. The Agency has offered no explanation as to why it did not interview Grievant within at least a week of the incident as it did with Inmate B. The Agency's failure to timely confront Grievant undermined his ability to present any explanations regarding what Inmate R was eating.

The Special Agent believed Inmate B was telling the truth and Inmate R was not. The Special Agent perceived Inmate B as being more responsive to questions and understanding that it would be more appropriate for Inmate B to answer the Special Agent's questions truthfully. The Special Agent perceived Inmate R as being untruthful because Inmate R was combative and appeared more focused on whether he would be able to return to the Shop than on telling the truth. Although the Special Agent's assessment seems logical, there is no way for the Hearing Officer to confirm his assessment. The Special Agent elected not to record his interviews with the Inmates. The facts before the Hearing Officer consist of hearsay statements made by two inmates with opposite views. Which inmate is telling the truth is the lynchpin of this case.⁵ The Special Agent was credible regarding why he chose to believe Inmate B instead of Inmate R. The Hearing Officer, however, has no way to confirm or verify the Special Agent's opinion.

Grievant was offered the opportunity to take a polygraph examination. Grievant's failure to do so was consistent with the allegations against him, according to the Agency. Grievant explained at the hearing he refused to take the polygraph because he viewed the request as harassment.

From an evidentiary standpoint, Grievant's failure to take a polygraph examination is meaningless. Grievant was not obligated to take a polygraph

⁵ Inmate B claimed that it was "common knowledge" that Grievant brought food to inmates. No credible evidence was presented to support this assertion. Indeed, Grievant presented evidence showing Grievant's co-workers had not observed him bring in food for inmates.

examination. Employees sometimes refuse to take polygraph examinations because the examinations are not always reliable. Even if Grievant took a polygraph, the results would be inadmissible in grievance hearings.⁶

Grievant consistently denied bringing food to inmates working in the Shop. He testified that he did not eat white bread and did not know about “Red Sharper” fish.⁷ Grievant pointed out that inmates were permitted to use the refrigerator along with staff and that Inmate R’s food could have come from there.

Based on the evidence presented to the Hearing Officer, it is equally likely that Grievant gave food to Inmate R as it likely that he did not give food to Inmate R. The Agency is obligated to present evidence showing that it is more likely than not that Grievant brought food from his home and gave it to Inmate R on November 10, 2015. The Hearing Officer cannot reach that conclusion. The disciplinary action must be reversed.

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 **reversed**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. 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.

⁶ See, *Rules for Conducting Grievance Hearings*: “Pursuant to §§ 8.01-418.2 and 40.1-51.4:4 of the Code of Virginia, the results of polygraph tests of a party or a witness are not admissible as evidence in a grievance hearing except as to disciplinary or other actions taken against a polygrapher. Evidence related to such inadmissible polygraph tests shall not be submitted, referenced, referred to, offered or presented in any manner at hearing.”

⁷ The Hearing Officer is not aware of a fish called “Red Sharper”. Possibly Inmate B meant to say “Red Snapper” fish, but the Special Agent’s report shows the phrase “Red Sharper” several times.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁸

⁸ Agencies must request and receive prior approval from 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

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10845-A

Addendum Issued: September 6, 2016

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.⁹ 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.¹⁰

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 Counsel submitted a petition showing 13.1 hours of services rendered to Grievant relating to the grievance hearing. EDR allows reimbursement of attorney's fees at an hourly rate of \$131. Accordingly, Grievant must be awarded attorney's fees in the amount of \$1,716.10.

AWARD

The Grievant is awarded attorneys' fees in the amount of \$1,716.10.

⁹ Va. Code § 2.2-3005.1(A).

¹⁰ § 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 DHRM 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 DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer