

Issue: Group III Written Notice with 20-days suspension (violation of policy regarding relationships with inmates); Hearing Date: 02/28/03; Decision Issued: 03/03/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5657



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5657**

Hearing Date: February 28, 2003  
Decision Issued: March 3, 2003

**PROCEDURAL HISTORY**

On November 20, 2002 Grievant was issued a Group III Written Notice of disciplinary action with twenty days suspension for:

*Violation of DOC 5-22 Rules of Conduct Governing Employees' Relationships with Inmates, Probationers or Parolees. According to the report furnished by Internal Affairs, you, [Grievant] admitted that you put your hands on [Inmate L] and that he has touched or bumped into you from time to time. You described this touching as "not aggressive touching, more like pushing." This conduct resulted in you kicking at [Inmate L] and actually kicking [Inmate J] who has complained that he injured his right knee during this incident. You admitted in your statement to the Special Agent that "[Inmate L] asked me not to write him up. He looked like he was going to step toward me, so I kicked at him. [Inmate L] moved and I actually kicked [Inmate J] on the leg. I was playing with [Inmate L] and kicked [Inmate J]."*

On December 10, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 11, 2003, the Department of

Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2003, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Special Agent  
Lieutenant  
Health Nurse Tech

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension.

## **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 employs Grievant as a Corrections Officer Senior at one of its Facilities. An organizational objective of her position is:

*To conduct and perform, in accordance with established written procedures, security functions relating to the supervision and security of inmates, the institutional physical plant, and security equipment, while providing appropriate written documentation required to support and/or account for these functions.<sup>1</sup>*

---

<sup>1</sup> Agency Exhibit 5.

No evidence or prior disciplinary action against Grievant was presented during the hearing.

In August 2002, Inmate J alleged that Grievant kicked him on the leg while she was horseplaying with his cellmate, Inmate L. The Agency began an investigation of that allegation. As part of the investigation Grievant gave the following account:

I remember [Inmate J] and [Inmate L] because there were not the type of inmate that never gave me any major trouble. [Inmate L] was the humorous type and [Inmate J] was quiet.

From time to time, [Inmate L] and I put our hands on each other in a joking manner, not an aggressive touching, more like pushing [Inmate L] out of the way when he bumped me or something like that.

On the day this incident occurred, I caught [Inmate L] trying to keep the cell door from closing. I knew [Inmate L] jammed the lock with cardboard because I had seen him with it earlier in the day. I asked who the cardboard belonged to. [Inmate L] said it was his, so I wrote him up. [Inmate L] was standing at the cell door when I opened it. I took the cardboard out of the lock.

I stood in the doorway and [Inmate L] was standing in front of me. I told [Inmate L] to step back, which he did.

[Inmate L] asked me not to write him up. He looked like he was going to step toward me, so I kicked at him. [Inmate L] moved and I actually kicked [Inmate J] on the leg.

After it happened, we laughed. [Inmate J] told me that I had kicked him. I asked if he wanted to go to medical, but he said no.

I was playing with [Inmate L] and kicked [Inmate J]. It was an accident. None of this was done on purpose.

Inmate J did not suffer any significant medical injuries as a result of being kicked.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16.

Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

The Department has issued Procedure Number 5-22 addressing “Relationships with Inmates, Probationers, or Parolees.” The purpose of this policy is to “establish the rules of conduct to be observed by employees when dealing with inmates, probationers, or parolees of the Department.” The policy encourages staff to interact with inmates in a courteous and respectful manner, but cautions:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee’s effectiveness to carry out his responsibilities may be treated as a Group III offense under DOC Procedure 5-10, *Standards of Conduct*.<sup>2</sup>

The policy also requires:

While performing their job duties, employees are encouraged to interact with persons under Department supervision on a personal, professional level as necessary to further the Department’s goals. Interactions shall be limited to the employee’s performance of job duties.

Grievant developed an inappropriate pattern of interaction with Inmate L culminating in a horseplaying incident where Grievant accidentally kicked another inmate. Corrections Officers and inmates should not be putting their hands on each other in a joking manner. Kicking at an inmate in a playful manner is not a professional interaction. Grievant’s interactions with Inmate J were contrary to DOCPM § 5-22.

Violation of DOCPM § 5-22 is a Group III offense.<sup>3</sup> A suspension issued pursuant to a Group III offense may not exceed 30 days. Grievant’s twenty-day suspension is within the appropriate level of disciplinary action. Thus, the Group III Written Notice with suspension must be upheld.

Grievant contends she was acting in self-defense when she kicked at Inmate J. Her argument fails for two reasons. First, the Agency is not disciplining her solely for kicking an inmate, but also for her playful pushing and bumping with Inmate L during Grievant’s supervision of Inmate L. Second, Grievant’s evidence is contradictory. On the one hand, she contends she was acting in self-defense when Inmate L moved towards her, but, on the other hand, she admits, “I was playing with [Inmate L] and

---

<sup>2</sup> DOCPM § 5-22.7(A).

<sup>3</sup> DOCPM § 5-10.17(B)(25).

kicked [Inmate J].” Grievant could not have been acting in self-defense while also “playing” with the inmate.

Grievant contends she did not intend to kick Inmate J and did not assault him. Grievant is correct, but her contention does not excuse her violation of DOCPPM § 5-22. DOCPPM § 5-22 does not require intentional battery of an inmate in order for the policy to be violated.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **10 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.
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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer’s **decision becomes final** when the 10-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>4</sup>

---

<sup>4</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].

---

Carl Wilson Schmidt, Esq.  
Hearing Officer