

Issue: Group III Written Notice with suspension (fraternization); Hearing Date:  
03/18/04; Decision Issued: 03/23/04; Agency: DOC; AHO: Carl Wilson Schmidt,  
Esq.; Case No. 605



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 605**

Hearing Date: March 18, 2004  
Decision Issued: March 23, 2004

**PROCEDURAL HISTORY**

On October 20, 2003, Grievant was issued a Group III Written Notice of disciplinary action with eight workdays suspension for:

*Violation of DOC Procedure 5-22, Rules of Conduct Governing Employees' Relationships with Inmates, Probationers or Parolees – Specifically and by your own admission on October 9, 2003 you were observed by [Captain B] and [Lieutenant M] sitting at a table with several inmates under the recreation shed for approximately 50 minutes. During part of that time, you were also observed actively playing cards. For approximately 50 minutes you failed to perform your job duties in accordance with your post orders. Your actions constituted fraternization which in turn compromised security and undermined your effectiveness to carry out your job responsibilities.*

On November 11, 2003, 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 February 19, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2004, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

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

## **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. The purpose of his position is:

To provide security over inmates at the institution and while in transport; supervise their daily activities; and observe and record their behavior and movement to ensure their safe and secure confinement.<sup>1</sup>

He has been employed by with the Agency for over four years without any prior disciplinary action against him.

On October 9, 2003 Grievant was assigned responsibility for supervising inmates in the front recreation yard. At least 20 inmates were in the recreation yard. Several inmates were playing cards. Grievant joined the card game and played several hands. During that time, Grievant was not performing his duties because he was not supervising or observing inmates. Approximately 50 minutes later, Grievant left the

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<sup>1</sup> Agency Exhibit 4.

area where the inmates were playing cards and resumed his duties of supervising inmates. Once Agency staff confronted Grievant, Grievant stated, "He was wrong for not patrolling the recreation yard and playing cards with inmates."

## 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." DOCPM § 5-22.7(A) provides:

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*.

Grievant fraternized with inmates by playing cards with them. *Webster's II New Riverside Dictionary* defines "fraternize" to include, "To associate with others in a friendly or brotherly way." Playing cards with inmates is a way to associate with them in a friendly or brotherly way. The Agency has presented sufficient facts to support its issuance of the Group III Written Notice.

Violation of DOCPM § 5-22 is a Group III offense.<sup>2</sup> A suspension issued pursuant to a Group III offense may not exceed 30 days. Grievant's eight day suspension is within the appropriate level of disciplinary action. Thus, the Group III Written Notice with suspension must be upheld.

The inconsistent application of discipline forms a basis to reduce disciplinary action. Grievant contends that Corrections Officer V played cards with inmates in another part of the Facility on the same day Grievant was disciplined, yet Corrections Officer V received no disciplinary action. Several witnesses testified regarding what

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<sup>2</sup> DOCPM § 5-10.17(B)(25).

they had “heard” about the incident. This testimony, as presented to the Hearing Officer, is that Corrections Officer V picked up a hand of cards held by an inmate to determine whether the cards were marked and then put the cards down. She was observed briefly by Captain D. Based on this testimony, the Hearing Officer finds that the Agency did not inconsistently apply disciplinary action. Corrections Officer V did not engage in behavior giving rise to disciplinary action. Corrections Officers are obligated to prohibit inmates from using marked cards to gamble. Corrections Officer V's actions were consistent with her obligation to prevent gambling in the Facility. Grievant's assertion is unfounded. Remarkably, neither party called as a witness Captain D and Corrections Officer V so that the Hearing Officer could determine what actually happened when Corrections Officer V was observed holding an inmate's cards.

### **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. 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  
830 East Main St. STE 400

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 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>3</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.