

Issue: Group III Written Notice (fraternization); Hearing Date: 08/16/04; Decision Issued: 08/26/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 801;  
**Administrative Review: Hearing Officer Reconsideration Request received: 09/03/04; HO Reconsideration Decision issued 09/03/04; Outcome: No newly discovered evidence or incorrect legal conclusions. Reconsideration denied;**  
**Administrative Review: EDR Ruling requested 09/03/04; EDR Ruling No. 2004-870 issued 11/03/04; Outcome: HO ordered to modify decision in include explanation...; Revised Decision issued 11/15/04**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 801**

Hearing Date: August 16, 2004  
Decision Issued: August 26, 2004

**PROCEDURAL HISTORY**

On April 27, 2004, Grievant was issued a Group III Written Notice of disciplinary action for:

*Fraternization/Improprieties with an Inmate. An investigation by the Office of Inspector General ... concluded that [Grievant] did in fact participate in an inappropriate relationship with an inmate. This relationship consisted of spending an inordinate amount of time with the inmate and discussing matters of a personal nature.*

On May 21, 2004, 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 July 22, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 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 for fraternization and improprieties with an inmate.

## **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 Sergeant at a woman's correctional institution. He began serving at the Facility in 1999. The purpose of his position is:

To provide security and supervision of Correctional Officers and adult offenders. Directs the work of all Corrections Officers in their assigned area by keeping them advised of policy/rule changes and by providing guidance whenever needed. Compiles duty rosters and work schedule. Continually inspects assigned area of unit/facility to ensure that high levels of security, safety and sanitation are maintained.<sup>1</sup>

Grievant works from 5:45 p.m. until 6:15 a.m. Grievant supervises several units. He is required to make rounds at those units. The Agency's mental health therapists work during the day but can be called by the night security staff in the event of an emergency.

Inmate B has borderline personality disorder. She distorts reality. Inmate B regularly attempted to manipulate others in order to get what she wanted. She can observe a male who is being nice to her and distort reality to the point that she believes the male is the only person who can save her. When confronted with her distortion of

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<sup>1</sup> Agency Exhibit 3.

reality, Inmate B would disregard anyone confronting her and continue to see the male as her savior. According to the Mental Health Director, Inmate B had identified a series of males<sup>2</sup> at the Facility and treated them in a similar manner. Grievant was one of those males.

Grievant often met with Inmate B in the supervisor's office. This office is about 20 feet long by 15 feet wide with a glass front door. The door stays open most of the time and security staff enter and exit the office regularly. Activities inside the office can be observed from several angles in the housing unit.

On June 26, 2003, the Mental Health Director sent Grievant an email stating:

I met briefly with [Inmate B] who was upset that I didn't want to sign off on the plan<sup>3</sup> that you had written for her. I told her that I appreciated the work you do to keep her safe but that she has a serious personality disorder and my recommendation is that she be treated by a therapist. She dropped out of therapy some time ago and now seems to believe that you are the only person who can help her. This is very typical behavior with someone with borderline personality disorder. They find someone who they idealize and then, when you do not live up to their expectations (and none of us can), they feel abandoned and rejected. They may move on to the next person or the feelings may lead to self-harm. Right now I feel the most helpful thing you could do for her is to keep being supportive and encourage her to trust the mental health department and get back into therapy.

Grievant replied to the Mental Health Director's email:

The plan in question was authorized by [Inmate B] with limited, if any, input from me. It was her idea pretty much all of the way. I agree that a qualified therapist is what [Inmate B] needs. I guess my part in all this has been to try to keep her going but I am severely limited in what I am able to do with limited Psych experience and no qualifications in this field whatsoever, and the fact that I am Security, and have many responsibilities in this area that need to be addressed during the 12 hours that I am on shift. Also, of much concern is that I may not be available to [Inmate B] as much as I have been in the past due to the fact of undermanning – I have four (4) housing units to supervise for the past two days and I do not see a change in the immediate future AND I have

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<sup>2</sup> For example, Inmate B began idolizing a male therapist at the Facility. She would threaten to harm herself in order to see the therapist. Once the Mental Health Director recognized Grievant's behavior, the therapist was removed as Inmate B's primary therapist. Inmate B was informed she would be assisted by the entire therapy team.

<sup>3</sup> Security staff sometimes assisted inmates in developing and drafting plans to enable inmates to avoid hurting themselves.

“racked-up” some serious time on the books and may have to take more than a few days off soon to get my time down to a more manageable level. \*\*\* All of this added to the feeling that [Inmate B] has become dependent on me, and me alone, is giving me great concern. It may be helpful for you to know that, on a recent test I took at the Academy, my results labeled me as an “Intuitive Feeler” and I FEEL that [Inmate B] may have an unrealistic, and ultimately damaging, attachment to me. Not because I do not have a genuine desire to help – I do – but, rather, because I can, and am, pulled away from H.U. 6 frequently, regardless of what her needs at the time might be. In closing, I sincerely want to meet with you regarding this issue.

On July 9, 2003, Grievant sent the Mental Health Director an email:

An interesting turn has taken place that I thought you should know about, [Inmate B] has gotten to the point of asking if I can continue counseling her upon her release from the Institution. She has asked this before and, rather than give her a flat “NO”, I pointed out that I am governed by Policy and Procedure 5-22: Relationship with Inmates, Probationers and Parolees. I went on to say that for me to enter into anything of the kind, it would have to be made part of my job and her Parole Officer would probably have to request I do so through property channels. This seemed to satisfy her and she refrained from bringing up the subject for awhile. Now, she is bringing it up again and I have given her the same answer. You may want to cover this with your team, especially in light of the “fixation” potential of what we spoke at our meeting.<sup>4</sup>

In July 2003, the Captain had received information from several staff that Grievant was spending a lot of time with Inmate B in his office. The Captain remembered Inmate B as the inmate who cut herself several times when Grievant refused to see her, yet she remained in the same building to which Grievant was assigned. The Captain concluded Inmate B and Grievant should not be in the same housing unit. The Captain instructed him to have no further contact with Inmate B. Grievant complied with the instruction. Inmate B had cut herself several times when Grievant refused to see her.

On December 17, 2003, a memorandum from Inmate B to Grievant was intercepted. The memorandum suggested a personal relationship between Inmate B and Grievant. Security staff searched Inmate B's property and found a second letter written to Grievant by Inmate B but never sent. The letter also suggested Inmate B and Grievant were in a personal relationship. After allegations of an inappropriate relationship between Inmate B and Grievant were brought to light, the Special Investigation Unit was asked to investigate. As part of the investigation, Grievant was required to submit a statement. Grievant stated, in part:

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<sup>4</sup> Agency Exhibit 2I.

She was having serious mental issues, and would cut herself on occasions. She seemed comfortable talking with me, so I would talk with her hours at a time. My intention was to try and help her stop cutting herself. During our conversations I probably shared too much of my personal life with her trying to build a rapport. \*\*\* I never held hands with her, but [on] one occasion she asked to see my hand and held it momentarily. During the time I was having conversations with [Inmate B], I was in contact with [Mental Health Director] and her staff on occasion. \*\*\* I can see now, that the way I was trying to help [Inmate B] was wrong. I can see that mental issues should be handled by the mental health professionals. I was not neglecting my duties as building Sgt. when I was talking to her hours on end.

### 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, the *Standards of Conduct*.<sup>5</sup>

Policy 5-10.17(B)(25) states that Group III offenses include “Violation of DOC Procedure 5-22, *Rules of Conduct Governing Employees’ Relationships with Inmate, Probationers, or Parolees*.”

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<sup>5</sup> DOCPM § 5-22.7(A).

Grievant's behavior does not rise to the level of a Group III Written Notice for fraternization because the facts necessary to support fraternization come from Inmate B and Inmate B is not credible. Inmate B's borderline personality disorder and inability to perceive reality renders unreliable her perception of a relationship with Grievant. After excluding statements made by Inmate B, the evidence shows that Grievant did not intend to fraternize with Inmate B, he intended to treat her and help her stop hurting herself.

Another reason why a Group III Written Notice is not appropriate is because of the delay by the Agency in taking disciplinary action against Grievant. DOC PM § 5-10.17(C) requires the Agency to take disciplinary action "as soon as practicable." It was practicable for the Agency to take disciplinary action in July 2003. Although new allegations were discovered in December 2003, none of those allegations are valid. By waiting approximately five months to take disciplinary action after knowing sufficient facts exist to support disciplinary action, the significance of Grievant's behavior has been reduced.

Grievant's behavior rises to the level of a Group II Written Notice. It was appropriate for Grievant to talk to Inmate B about her threats to injure herself. It was appropriate for Grievant to attempt to draft a "plan/contract" with Inmate B wherein she would promise not to hurt herself. This practice was not unusual for security officers working at the Facility. Grievant's mistake, however, was to assume he was capable of treating Inmate B. He failed to recognize that Inmate B was attempting to manipulate him. His mistake justifies the Agency's concern about his perti iE3 Tm 0.2876 Tw 12 0016e of Gsu

To the extent there was an appearance of impropriety, that appearance was built on assumptions and speculation. Grievant was attempting to help Inmate B stop self-mutilating and not to have a personal relationship or friendship with her. The email Grievant sent the Mental Health Director before the Captain questioned his relationship with Inmate B shows that Grievant was concerned about Inmate B's dependence on him and that he was trying to help her. The Mental Health Director told Grievant "to keep being supportive and encourage her to trust the mental health department and get back into therapy."

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice.

### 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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 831-R**

Reconsideration Decision Issued: September 3, 2004

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant seeks reconsideration of the hearing decision because he sent an email to the Mental Health Director showing that he recognized that he had only “limited Psych experience” and “no qualifications in this field whatsoever.” This argument fails because the evidence clearly showed that he devoted a substantial amount of time attempting to prevent Inmate B from self-mutilating. Until Inmate B and Grievant began extensive discussions about Inmate B, Inmate B was receiving mental health treatment from Agency professionals designed to prevent her from self-mutilating. Grievant took over part of that responsibility even though he may not have realized he was doing so until a later date. If Grievant had realized sooner that he lacked the necessary skills to assist Inmate B, he may have been able to avoid having Inmate B become focused on him.

Grievant argues he should not be disciplined because the Agency took a lengthy period of time before taking disciplinary action. Although the Standards of Conduct obligate the Agency to take disciplinary action on a timely basis, this policy does not specify any consequences to the Agency for failing to do so. Under the facts of this case, it was appropriate to consider the Agency’s delay when determining the level of disciplinary action. The Agency’s delay was not so unreasonable as to justify removal of all disciplinary action.

Grievant points out that the Hearing Officer did not find he had engaged in fraternization under DOCPM § 5-22. To the extent the Written Notice refers to

Fraternization, that portion of the Written Notice is unfounded. The Written Notice is supported as a Group II offense because the Agency has established that Grievant spent “an inordinate amount of time with the inmate....”<sup>8</sup> and discussed “matters of a personal nature.”<sup>9</sup>

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant’s request for reconsideration is **denied**.

### **APPEAL RIGHTS**

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

1. The 10 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 the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Grievant wrote, “I would talk with her hours at a time.”

<sup>9</sup> Grievant wrote, “During our conversations I probably shared too much of my personal life with her trying to build a rapport.”



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 801-R2**

Reconsideration Decision Issued: November 15, 2004

**RECONSIDERATION DECISION**

On November 3, 2004, the EDR Director issued Ruling Number 2004-870 asking the Hearing Officer to discuss "the standard for determining when security staff exceeds the satisfactory amount of time to spend with inmates" and to identify "why the grievant's behavior constitutes a violation of the Standards of Conduct, and if so, why the behavior rises to the level of a Group II offense and not some other level of discipline." The EDR Director questions "whether the grievant's behavior warrants, at most a Group I offense for poor performance."

As stated in the original hearing decision:

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.

Grievant was not responsible for providing therapy or counseling to Inmate B. The purpose of his position was to "provide security and supervision of Correctional Officers and adult offenders." Grievant's behavior was not consistent with providing security and supervision.

Grievant's actions had consequences to Inmate B and to the Agency. By attempting to treat her, Grievant was attempting to counsel someone with borderline personality disorder without Grievant being properly trained or licensed to render such services. By analogy, Grievant's actions, to some extent, are similar to an individual giving legal advice without being trained and licensed as a lawyer. Grievant's actions caused Inmate B to believe falsely Grievant could help her rather than the trained mental health professionals. Grievant's actions caused the Agency to take steps to

correct the problem by prohibiting Grievant from having any further contact with Inmate B thereby interfering with the Agency's normal operations. Because of the degree to which Grievant's actions affected Inmate B and the Agency, his behavior is "more severe in nature" and is "such that an additional Group II offense should normally warrant remove."

The EDR Director asks "whether the grievant's behavior warrants, at most, a Group I offense for poor performance."<sup>10</sup> Behavior rising to the level of a Group II or Group III offense is also "poor performance" but being "poor performance" does not force one to consider the behavior only as Group I offense. In this case, Grievant's behavior is poor performance but it is poor performance that rises to the level of a Group II offense because it is "more severe in nature and [is] such that an additional Group II offense should normally warrant removal."<sup>11</sup>

The EDR Director focuses on "the standard for determining when security staff exceeds the satisfactory amount of time to spend with inmates." It was not the amount of time Grievant devoted to Inmate B that was of concern, however, it was the degree of counseling Grievant attempted to provide to Inmate B. The amount of time Grievant devoted to his interaction<sup>12</sup> with Inmate B confirms the conclusion that Grievant was attempting to counsel Inmate B which ultimately leads to Grievant's own conclusion that the way he "was trying to help [Inmate B] was wrong" and that "mental issues should be handled by the mental health professionals."

## APPEAL RIGHTS

Grievant and the Agency should review the Grievance Procedure Manual regarding steps for further appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> The original hearing decision discusses why the disciplinary action does not rise to the level of a Group III offense.

<sup>11</sup> DOCPM § 5-10.16

<sup>12</sup> Corrections Officer P observed Inmate B in Grievant's office so frequently that Corrections Officer P believed it was necessary to express his concerns to Grievant.