Issue: Group III Written Notice with 15-day suspension (conduct unbecoming an officer); Hearing Date: 09/16/03; Decision Issued: 09/17/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5798

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5798

Hearing Date: September 16, 2003
Decision Issued: September 17, 2003

APPEARANCES

Grievant
Attorney for Grievant
Warden
Advocate for Agency
One witness for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the agency's Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for conduct unbecoming an officer.[1] She was suspended for 15 days, as part of the disciplinary action. Following failure of the parties to resolve the grievance, the agency head qualified the grievance for a hearing.[2] The Department of Corrections (DOC) (hereinafter referred to as agency) has employed grievant for 20 years; she is a corrections officer. She has performed at a satisfactory or better level and has no previous disciplinary actions.

Agency policy provides that employees must exercise a high level of professional conduct when dealing with inmates.[3] They must also avoid improprieties or the appearance of improprieties between themselves and inmates and inmates' families.[4]

Inmate visitation occurs only on weekends during the day shift. Each inmate is allowed to designate up to 15 visitors, usually family or friends, to be on a pre-approved list of visitors. The names and other pertinent information about each pre-approved visitor are entered in the agency's computerized Visitor Tracking System (VTS). Visitors to the facility must produce a driver's license (or equivalent identification) which is checked against VTS to assure that the visitor has been pre-approved for visitation to the inmate.

While employed full-time by the agency, grievant began working part-time for a department store in October 2000 and continued working there until December 2002. Employees were expected to solicit credit card applications from customers who come into the store. The department store requires employees to submit at least four credit card applications per month and pays them $2 per application. During calendar year 2002, the store received 125 credit card applications submitted under grievant's associate number (employee number).

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[1] Exhibit 5. Written Notice, issued June 9, 2003.

[2] Exhibit 6. Grievance Form A, filed July 3, 2003.

[3] Exhibit 3. Procedure Number 5-22, *Rules of Conduct Governing Employee's Relationships with Inmates, Probationers, or Parolees,* June 15, 2002. Section 5-22.6 states, "Employees of the Department shall exercise a high level of professional conduct when dealing with inmates, probationers, or parolees to ensure the security and integrity of the correctional process." Section 5-22.6.A states, "Abuse of Employment Status. Employees shall not use their official status as employees of the Department as a means to establish social interactions or business relationships not directly related to Department business."

[4] Exhibit 3. *Ibid*. Section 5-22.7.A.1 states, "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*."

In December 2002, the department store received a telephone call from one of the people whose application had been submitted by grievant. The caller lives approximately 115 miles away from the department store.[5] She stated that she had never been in the department store and had never completed a credit card application for that store. The department store's loss prevention unit investigated and learned that the caller had visited the correctional center at which grievant is employed. Two loss-prevention employees interviewed grievant on December 28, 2002. During the interview, grievant admitted that some of the credit card applications were obtained from visitors to the correctional center and that she had worked at the correctional center's front entry.[6] She also stated that she had given applications to two other corrections officers.

During the first part of the interview, grievant stated that all of the credit card applicants had been in the store when they filled out the applications. However, when one of the interviewers left the room, she admitted that she had lied about that because she did not want to get her supervisor involved.[7] She then claimed that her supervisor had permitted her to take applications out of the store to be completed by family or friends. She also acknowledged that she had taken credit card applications to the correctional center and returned about 25 to the department store to be submitted under her associate number. She said that, "Some of the applications wasn't filled out in my present. (Sic)"[8] At the end of the interview, the department store placed grievant on suspension. The following day, grievant sent a letter of resignation to the store.[9]

The agency's first notice of this matter occurred on January 15, 2003 when a sheriff's office called the warden regarding a complaint from the same person who had called the department store. The complainant was concerned about the possibility of identity theft and was exploring the possibility of filing a criminal charge against grievant. An agency investigator was assigned and he promptly interviewed grievant and the two other corrections officers she named. The department store list of 125 credit card applicants was cross-checked against the facility's VTS system; 23 of the people on the list had visited inmates at the correctional center. Of the 23 visitors, 12 visited the facility on the weekend of October 26-27, 2003; grievant was working at the front entry on both days. Grievant admitted bringing credit card applications to the correctional center beginning about August 2002.[10] When questioned about how she completed the complainant's application, grievant said, "I got that information

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[5] The caller lives in Alexandria, VA; the department store is located in Chesterfield County, VA.

[6] Exhibit 1. Grievant's *Interview Log*, December 28, 2003. See also Exhibit 6. *Grievant's Work Schedule* reflecting that she had worked at the front entry location on three occasions during October 2002.

[7] Exhibit 1. *Ibid.*

[8] Exhibit 1. Grievant's signed *Employee Statement*, December 28, 2003, 1:13 p.m.

[9] Exhibit 6. Letter from grievant to department store, December 29, 2002.

[10] Exhibit 1. Grievant's Investigative Interview, January 28, 2003. "I started bringing applications to [the correctional facility] about 4-5 months ago."

from [complainant's] driver's license." Grievant could not recall whether she signed the applicant's name, but admitted that she had, "signed for people in the past if they asked me."[11]

Of the two officers to whom grievant had given credit card applications, one stated that he and some family members completed applications. This officer normally does not work at the front entry to the facility. He denied obtaining any information from visitors to the correctional center.[12] The other officer acknowledged that she completed one application for herself and mailed it to the store; that application was entered into the store's computer system on April 2, 2002.[13] She also denied giving applications to facility visitors or anyone else.[14] This officer works evening shift and is not involved with visitors since inmate visitation takes place only during day shift.

Grievant was absent from work on short-term disability (STD) from February 2003 to June 8, 2003. The disciplinary action was issued to her on June 9, 2003. Grievant said she was sorry for having brought the applications to work, acknowledged that she had used poor judgement, and said that she did not intend to do anything wrong.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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

[11] Exhibit 1. *Ibid*.
[12] Exhibit 1. Investigative Interview, January 29, 2003, 1:10 p.m.
[13] Exhibit 1. Department store computer printout, *New Account VRU Listing*.
[14] Exhibit 1. Investigative Interview, January 30, 2003, 10:00 a.m.

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.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Group III offenses include Violation of DOC Procedure 5-22 *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*.[16] The policy also provides for disciplinary action for offenses not specifically listed in the examples.[17]

Much of grievant's argument focused on what grievant considers to be the inapplicability of Procedure Number 5-22. To a point, grievant's contention has some merit. The language of 5-22 speaks only to conduct and improprieties as they relate to inmates, probationers, and parolees, or families of these three categories; however, the policy does not address non-family visitors. While most inmate visitors are family members, some visitors (e.g., friends or attorneys) may not be related to the inmate. Accordingly, Procedure 5-22 is technically not applicable with regard to the complainant herein who, according to the available evidence, was the inmate's girlfriend. The evidence did not address whether the remaining 22 visitors were related to the inmates they visited. However, it is far more likely than not, that the majority of those 22 visitors were related to the

[15] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

[16] Exhibit 4. Section 5-10.17A & B.25, Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

[17] Section 5-10.7C. Ibid. "The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency's activities or the employee's performance, should be treated consistent with the provisions of the procedure."

inmates they visited. Thus, while Procedure 5-22 may technically be inapplicable to the complainant's situation, it does apply in the case of most of the remaining visitors who, in all likelihood, were related to inmates.

However, even in the highly improbable event that none of the 23 different visitors were related to the inmates they visited, the inapplicability of Procedure 5-22 would not be fatal to the agency's case. On the Written Notice, the agency described the offense as "Conduct unbecoming a Correctional Officer," to wit: using information obtained from a visitor to file a credit card application with a department store. Even though the agency is not required to do so, it gratuitously added to the description of the offense the procedure it believed grievant violated. The issue to be adjudicated here is the grievant's *offense,* not whether the agency cited the correct procedure number. Had the agency not cited a procedure number, the focus would be where it should be – on 1) whether an offense occurred and, 2) what the appropriate discipline for the offense should be.

The agency is concerned that employees should not develop relationships with inmates, their families, or any visitors the inmate might have. Even if a family member or other visitor does an apparently insignificant favor for a corrections officer, an inmate might attempt to use that favor as leverage against the officer. If an officer believes that his favor was not in compliance with agency rules, an inmate might be able to persuade the officer to return the favor by bringing contraband into the facility in return for the inmate's silence. The agency is also concerned that corrections officers on entry duty should devote full attention to screening and searching visitors. If the officer is taking a credit card application from a visitor, the officer will be unable to pay complete attention to the screen/search process, and to other visitors in the entry area.

For four reasons, it is concluded that the agency has demonstrated by a preponderance of the evidence that grievant did engage in conduct unbecoming an officer. First, the evidence shows that grievant submitted to the department store credit card applications from 23 people, all of whom visited inmates at the correctional facility where grievant worked. Second, more than half of these people visited the facility on the only weekend when grievant was working at the front entry where she had to screen and search visitors. It is inconceivable that grievant was not involved in soliciting and taking applications from visitors on those two days.

Third, grievant's testimony during the hearing was significantly different from her statements to the loss prevention interviewers and the agency's investigator. For example, during the hearing, grievant testified that she never completed any of the 23 applications. However, in her statement to the loss prevention interviewer, she said only that "some" of the applications were not filled out in her presence – thereby acknowledging that some were filled out in her presence. Similarly, during the hearing, grievant denied any knowledge of

how the complainant's credit card application was completed. However, in her statement of December 28, 2002, grievant said she obtained the information from the complainant's driver's license. Likewise, when interviewed in January 2003, grievant said she had signed for people in the past. However, during the hearing, grievant claimed she was referring only to signing for a family member who was unable to sign a document. Finally, during the December interview, grievant admitted to lying to one of the interviewers. However, during the hearing, grievant denied that she ever admitted to lying.

Grievant attributes these inconsistencies between her statements and testimony to the interviewers transcribing her statements incorrectly. While interviewers might occasionally mishear something, the differences between what grievant said then and what she testified to during the hearing are too significant and too numerous to attribute to interviewer error. Grievant has neither demonstrated, nor even alleged, that either the department store's loss prevention employees or the agency's investigator had any reason not to prepare accurate interview statements and investigative reports. As the credibility of these three independent investigators has not been challenged, the evidence they collected must be given a substantial amount of evidentiary weight. Moreover, grievant's statements given soon after the event and before discipline had been issued are likely to be more accurate than her recollections several months after the fact.

Fourth, grievant testified that she did not complete any of the 23 applications. The undisputed evidence established that one officer completed one application for herself in April 2002. The other officer also filled out an application for himself in April 2002.[18] Grievant's explanation for the remaining applications is that one day a corrections officer handed her an envelope with her name when she arrived at the facility. Grievant avers that she put the envelope in her car without opening it. She did not open the envelope until one day later when she arrived at the department store. When she found credit card applications inside, she handed the envelope to her supervisor. However, the grievant has not explained why these applications were entered into the store's computer system on 13 separate dates from August 14, 2002 through December 19, 2002.

The agency's evidence reflects that both of the two officers to whom grievant gave applications only filled out applications themselves or had family and friends complete them. Both denied having visitors complete applications. Grievant did not rebut this evidence and did not offer the testimony of these witnesses to challenge their signed statements. Similarly, grievant has neither shown nor alleged that the initial complainant had any reason to want to cause trouble for grievant; the complainant was only upset because she was concerned that she might become a victim of identity theft.

[18] Exhibit 1. New Account VRU Listing. Application entered in the department store computer system on April 5, 2002.

Group III offenses are normally disciplined by termination of the offender's employment. However, in this case, the agency took into account grievant's long service to the agency, and her previously unblemished record. In lieu of removal from service, the agency suspended grievant for 15 workdays – a far milder discipline than terminating her employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on June 9, 2003 and the 15-day suspension for conduct unbecoming an officer are hereby UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in Section 5-10.19 of the Standards of Conduct.

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.[19] 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.[20]

[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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David J. Latham, Esq.
Hearing Officer

[19] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[20] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.