

Issue: Group III Written Notice with suspension (conduct unbecoming a Correction's Officer); Hearing Date: 05/27/05; Decision Issued: 05/31/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8053



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8053**

Hearing Date: May 27, 2005  
Decision Issued: May 31, 2005

**PROCEDURAL HISTORY**

On December 13, 2004, Grievant was issued a Group III Written Notice of disciplinary action with three workday suspension for:

*Actions Unbecoming a Corrections Officer – On December 10, 2004, you were questioned about escorting [X-Ray Tech] to the supply closet on the ward hallway, you denied doing this. You were also questioned about following her into the closet and allowing the door to shut, you also denied doing this. Surveillance tape of the hallway confirms that you did in fact escort [X-Ray Tech] and follow her into the closet. Your failure to be truthful when questioned by the Warden and Assistant Warden is a very serious offense and does not support the Goals and Objectives of [the Facility].*

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 April 28, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for conduct unbecoming a corrections officer.

## **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 at one of its Facilities. As a Corrections Officer, Grievant is a sworn law enforcement officer. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On Monday, November 29, 2004, the X-Ray Tech asked Grievant to open a storage closet<sup>1</sup> in the medical observation hallway so that she could place two metal index bins in storage. Grievant used his key to open the door. The X-Ray Tech entered the storage closet and placed the bins on top of a box in front of her. When she turned around to leave, Grievant was in the closet and the door had shut behind him. Grievant then asked "are we going to have any problems with you and me?"<sup>2</sup> The X-Ray Tech responded that as far as she was aware "we were not going to have any." After about 30 to 45 seconds of conversation, the X-Ray Tech left the storage closet.

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<sup>1</sup> The storage closet was approximately four by ten feet.

<sup>2</sup> Grievant and the X-Ray Tech had had a conflict in 2002 at another institution.

The X-Ray Tech complained to another employee on the following day. On December 3, 2004, the X-Ray Tech wrote a General Incident Report stating the events involving her interaction with Grievant. Later that day, the Warden asked Grievant if he opened the door to the storage closet for the X-Ray Tech and entered the closet with her. Grievant denied having opened the door for her and entering the closet with her. The Warden asked if Grievant was sure of his answer and Grievant responded he was sure. The Warden instructed Grievant to write a report of what he told the Warden. Grievant wrote, in part, “[X-Ray Tech] asked me to call inmate worker to come over and try to get her storage closet open [so] she can get into it. She [tried] to open the door in front of me and it didn’t open. I, [Grievant], told her I will call the inmate worker [name] over here.”<sup>3</sup> On December 10, 2004, Grievant was asked to write another report. He wrote, “I [Grievant] [worked in] medical on Monday [November] 29, 04. I didn’t open any storage closet for [X-Ray Tech].”<sup>4</sup>

The Facility had cameras positioned to observe the storage closet. The Warden showed Grievant the video of him entering the storage closet with the X-Ray Tech on November 29, 2004. After viewing the video, Grievant acknowledged that he had opened the door to the storage closet and walked inside with the X-Ray Tech.

### **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.

DOCPM § 5-10.7(C) states, “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 this procedure.”

Grievant knew or should have known that the Warden was questioning him as part of an administrative investigation. Grievant knew or should have known that he opened the storage closet door at the request of the X-Ray Tech, he entered the storage closet with the X-Ray Tech, and had a conversation with her. When asked whether he opened the storage closet door for the X-Ray Tech and entered the storage

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<sup>3</sup> Agency Exhibit 8.

<sup>4</sup> Agency Exhibit 9.

closet after her, Grievant denied doing so. He was given ample opportunity to refresh his recollection and correct any errors in his statements. By failing to fully and accurately answer the Warden's question of him, Grievant engaged in conduct unbecoming a corrections officer. In the Agency's judgment, Grievant's behavior should be treated as a Group III offense. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. A suspension of up to 30 workdays is permitted as part of a Group III Written Notice. Accordingly, the Agency's three workday suspension is consistent with the Agency's Standards of Conduct.<sup>5</sup>

Grievant contends he failed to remember opening the storage door and that he confused a time when he was unable to open the door with the information sought by the Warden. Grievant's argument fails because the length of time between the event and Grievant's being questioned was not lengthy and the nature of the conversation was unusual and more likely to be remembered.

Grievant argues he was instructed by the Warden to write on the incident report that he had not entered the storage closet with the X-Ray Tech. This argument is untenable because Grievant is being disciplined for making false oral statements to the Warden. The Warden did not tell Grievant to write that he had not entered the storage closet. The Warden instructed Grievant to write what Grievant had told the Warden and what Grievant had told the Warden happened to be that Grievant had not opened the storage closet for the X-Ray Tech and entered it with her.

## 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 **15 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:

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<sup>5</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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 15 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 15-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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.