

Issue: Group III Written Notice with Suspension (conduct unbecoming); Hearing Date: 05/14/10; Decision Issued: 05/24/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9305; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 06/08/10; EDR Ruling #2010-2676, 2011-2728 issued 08/13/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/08/10; DHRM Ruling issued 07/29/10; Outcome: Declined to review.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9305**

Hearing Date: May 14, 2010  
Decision Issued: May 24, 2010

**PROCEDURAL HISTORY**

On October 26, 2009, Grievant was issued a Group III Written Notice of disciplinary action with a 240 hour suspension for conduct unbecoming a correctional officer.

On November 19, 2009, 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 April 5, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 14, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **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 Correctional Officer/Canine Handler at one of its Facilities. The purpose of her position is:

Work as a member of a Special Operations Team trained to conduct searches and/or interdictions involving the use of and distribution of illegal drugs on properties owned and/or operated by the Department of Corrections. Train and handle specially trained dogs capable of detecting narcotics. Be able to respond to any departmental emergency on a 24-hour basis. Apprehend individuals wanted by the department to include extradition activities.<sup>1</sup>

Sometime in May or early June 2009, two training sessions were held for canine handlers. Corrections officers attending the training were permitted to make videos of the training using their cell phones or other recording devices. Officer C took a video using his cell phone of one of the training sessions. This video is referred to as the "short video". Officer W used his cell phone to make a video recording of one of the sessions. This video is referred to as the "long video". Although the videos were not presented as evidence during the hearing, witnesses who observed the videos testified that the video showed Officer T masturbating a dog used by the Agency to conduct

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

patrols. The training session instructors were Sergeant E and Sergeant B. The instructors actively encouraged Officer T to masturbate the dog in front of the students. Sergeant B used his cell phone to make a video of Officer T masturbating the dog. Grievant was not present during the training and learned about it later from other canine handlers.

Officer C sent the short video to Grievant and she had it on her cell phone. Officer W talked to Grievant about the long video. He said the video was so long that he was unable to send it to other corrections officers. Grievant told him that he could transfer the video using Bluetooth technology. Grievant had Bluetooth capability on her cell phone. She took Officer W's cell phone and transferred the long video to her cell phone. Grievant later showed the videos to at least two other corrections officers who were also canine handlers.

Once the Agency learned of the videos, it began an investigation. The Investigator met with Grievant and a few other employees and told them that they were subjects of the investigation. The Investigator did not ask Grievant if she had any videos and did not ask Grievant to send her any videos. The Investigator told Grievant that she would meet with Grievant on August 13, 2009 to discuss the incident.

Grievant was concerned about being part of the investigation. She did not believe that the Investigator had both videos. Grievant downloaded the two videos from her cell phone onto a compact disc using her home computer. She gave the compact disc to Mr. H and told him to give the disc to the Investigator without identifying the source of the disc. Mr. H was a manager with the Agency who served as a coordinator for the canine unit. In addition, Mr. H worked in the same office building as did the Investigator.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>2</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive.

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

The Agency contends that Grievant engaged in behavior unbecoming a Correctional Officer. There is sufficient evidence to support this assertion. The Officer who masturbated the dog engaged in animal cruelty and abuse. His actions were not consistent with any training offered by the Agency. When Grievant viewed the videos, she recognized that the behavior of Officer T was inappropriate and should not have occurred. Grievant assisted in the transfer of a long video from Officer W's cell phone to her cell phone. Grievant should not have assisted in the transfer of the video onto her cell phone. Grievant showed the videos to at least two other canine handlers. Grievant should not have displayed the videos to other employees. Grievant failed to immediately report the existence of the videos to Agency managers to enable Agency managers to investigate the inappropriate behavior of Agency employees. Although Grievant attempted to ensure that the Investigator had both videos, Grievant would not have notified any Agency managers of the animal abuse had the Agency not begun an investigation. When these facts are considered as a whole, is clear that Grievant engaged in behavior unbecoming a Correctional Officer. In the absence of mitigating circumstances, the facts of this case would be sufficient to support the issuance of a Group III Written Notice of disciplinary action.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

There are both mitigating and aggravating circumstances in this case. The Department of Corrections is a quasi military organization where security employees hold rank and wear uniforms. Subordinate employees are expected to follow the orders and direction of employees holding higher rank with a lesser degree of scrutiny than might otherwise occur between superior and subordinate employees working in other State agencies. Sergeant E and Sergeant B were instructors at the training sessions where

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<sup>5</sup> *Va. Code § 2.2-3005.*

the animal abuse occurred. Not only did they observe the abuse, they actively encouraged that abuse. In addition, Sergeant B was one of the individuals who made a video recording of the abuse. Grievant's understanding of the seriousness and harm of Officer T's inappropriate behavior was undermined by her observation that two instructors holding superior rank actively sanctioned that behavior. Grievant's understanding of the seriousness and harm of letting others view videos of the abuse was undermined by her observation that Sergeant B was involved in creating his own video of the abuse. These facts serve as a basis to mitigate the disciplinary action. An aggravating factor is that Grievant also sometimes served as an instructor for the training of dogs involved in narcotics detection. Grievant recognized that the videos depicted inappropriate behavior and should have considered whether the behavior of Sergeant E and Sergeant B was appropriate for trainers. When the mitigating and aggravating circumstances are considered as a whole, there exists a basis to reduce the disciplinary action from a Group III Written Notice to a Group II Written Notice. Upon the issuance of a Group II Written Notice an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's suspension is reduced to 10 workdays.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 240 hour suspension is up to a Group II Written Notice of disciplinary action with a 10 workdays suspension. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension exceeding ten workdays and credit for leave and seniority that the employee did not otherwise accrue.

## 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:

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  
600 East Main St. STE 301  
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 all of your appeals to the other party and to the EDR Director. 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].

*S/Carl Wilson Schmidt*

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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.

July 29, 2010

RE: **Grievance of [Grievant] v. Department of Corrections**  
**Case No. 9305**

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to 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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. Summarily, in your appeal to the DHRM you stated that you disagreed with the hearing officer's decision and expressed concern regarding the lack of attention he gave to the details of your case. For example, you pointed out the following:

1. The hearing decision contained some inaccuracies regarding the location of the hearing and who videotaped the incident.
3. The hearing decision incorrectly stated the number of times you showed the tape to other employees.
4. Regarding the investigation of the incident, you were not told nor were you aware that you were under investigation.



5. Other employees of higher rank than you also knew of the incident for which you were disciplined and should have taken the initiative to report it.

6. The hearing officer did not apply the mitigating circumstances principle.

7. You were treated differently than other employees either who had knowledge of the incident or who observed the incident.

8. The Department of Corrections did not prove its case.

9. The hearing officer did not deal with all the issues raised in your grievance.

In our opinion, your request does not identify any human resource management policy, either state or agency, that the hearing officer violated in making his decision. Rather, your concerns are evidentiary in nature and are beyond the authority of the DHRM to address. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley