

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 06/01/11; Decision Issued: 06/03/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9568; Outcome: Full Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9568**

Hearing Date: June 1, 2011  
Decision Issued: June 3, 2011

**PROCEDURAL HISTORY**

On January 4, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a one workday suspension for failure to follow established written policy.

On January 26, 2011, 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 25, 2011, the EDR Director issued Ruling No. 2011-2953, 2011-2954 consolidating this grievance with a grievance filed by another Grievant. On May 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 Corrections Officer at one of its Facilities.

The Facility is an "S" level facility. It houses inmates convicted of serious crimes who are so disruptive and dangerous that they cannot be housed in other Agency institutions.

Offender G and Offender C were imprisoned at the Facility in July 2010. Offender G resided in cell 22. Offender G was transferred to the Facility because he had killed his cellmate when he resided at another institution. Offender C resided in cell 14. Both cells were on the second floor of a segregation housing unit but separated by several cells in between them.

Offenders in the segregation housing unit are allowed to leave their cells for one hour per day and enter one of five recreational cages located outside of the housing unit. The five cages are aligned in a row so that several of them share a common fence. Security staff typically inspect the cages before and after inmates are placed in the cages. Nothing is supposed to be inside the cages for inmates to access.

Two security staff are responsible for searching and escorting offenders in the segregation housing unit from their cells to the recreational cages. This process involves strip searching<sup>1</sup> the offenders while they are in their cells, placing restraints on them, frisk<sup>2</sup> searching them, and escorting them to the cages.

On July 28, 2010, Grievant and Mr. M were working as corrections officers in the housing unit where Offender G and Offender C resided. They walked to cell 22 in order to remove Offender G and escort him to the recreation cage. Offender G anticipated their arrival and had removed all of his clothing except for his underwear. Offender G's clothing consisted of a T-shirt, smock, pants, underwear, and socks. He also had shoes. He placed his clothing and shoes in a box attached to the tray slot in the cell door. Mr. M removed each item of clothing and ran his hands over the clothing in order to detect contraband that may have been hidden inside the clothing. Offender G had removed several pieces of his bed sheets and hid them inside his clothing. Mr. M failed to detect the pieces of the sheets. While Mr. M was inspecting Offender G's clothing, Grievant instructed Offender G to remove his underwear, lift his testicles and penis, turnaround, spread his buttocks, squat, and cough. Grievant instructed Offender G to open his mouth so that Grievant could look inside. Grievant observed Offender G as he completed the instructions. Once Mr. M finished inspecting Offender G's clothing, the clothing was placed back inside the tray box and Offender G retrieved his clothing. Offender G's shoes were not returned to the tray box. Offender G put on his clothing with the exception of his smock. Offender G placed his wrists behind his back and through the tray slot in the cell door. Offender G was handcuffed and told to get down on his knees. The Control Booth Officer opened the cell door. Leg restraints were placed on Offender G's ankles. Offender G stood up and was given his smock to hold in his hands that were cuffed behind his back. Offender G stepped out of his cell and put on his shoes. Offender G was frisked by either Grievant or Mr. M. Grievant and Mr. M escorted the inmate through the pod and out to the recreation cages. After they secured him in the cage, they returned to the housing unit and removed three other inmates and placed them in recreational cages. The fifth and final inmate that they escorted was Offender C. They placed Offender C in the cage next to Offender G's cage because that was the only cage remaining unoccupied.

Offender G removed the strips of material from his clothing. The strips were braided into a ligature. Offender C placed the ligature around his neck and Offender G pulled the ligature. Offender G used the ligature to strangle Offender C to death. As part of the Agency's investigation of the death, the Agency's investigators determined that the ligature was made from strips from Offender G's bed sheets.

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<sup>1</sup> Agency Operating Procedure 445.1 defines "strip search" as "a complete visual search of the body of an employee, a visitor, or offender when that person's clothing is removed in accordance with this operating procedure."

<sup>2</sup> Agency Operating Procedure 445.1 defines "frisk search" as "a 'pat down' search of an offender, employee, or visitor while that person is fully clothed."

## 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>3</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>4</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>5</sup>

The Agency argued that Grievant failed to comply with Policy 445.1 governing offender searches. The Agency contends that this policy was breached because Offender G was able to take strips from his bed sheets with him to the recreational cage. No credible evidence was presented to show that Offender G had inserted the bed sheets into a body cavity prior to being searched. This means that the most logical method by which Offender G used to transfer the strips was by inserting them into his clothing. Grievant was not responsible for inspecting Offender G’s clothing. Grievant conducted the strip search of Offender G in accordance with the Agency’s expectations. The Agency has not established which employee conducted the frisk search after Offender G stepped out of his cell. Based on the evidence presented, the Agency has not established that Grievant was at fault for permitting Offender G to carry strips of material from his cell to the cage.

The Agency argued that Grievant and Mr. M worked as a team and because Offender G was able to transport contraband from his cell to a cage, they should be disciplined equally. Although Grievant and Mr. M worked as a team, their responsibilities with respect to Offender G on July 28, 2010 were different. Grievant was not involved in inspecting the clothing of Offender G. Offender G used his clothing to hide contraband and move it to the recreational cage.

The Agency argued that Grievant should have known that Mr. M failed to comply with policy and corrected Mr. M’s mistake. This argument fails. The evidence showed that Grievant was obligated to maintain a constant view of Offender G during the strip search. Grievant would have been unable to observe how well Mr. M inspected Offender G’s clothing.

## DECISION

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

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

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the day of suspension 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.