

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. 9573; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 06/20/11; EDR Ruling No. 2011-3022 issued 09/06/11; Outcome: Remanded to AHO for rehearing; Rehearing Date: 11/??/11; Reconsideration Decision issued 11/28/11; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request on Reconsideration Decision received 12/13/11; EDR Ruling No. 2012-3195 issued 02/15/12; Outcome: Reconsideration Decision affirmed; **Administrative Review**: DHRM Ruling Request on Reconsideration Decision received 12/13/11; DHRM Ruling issued 12/13/11; Outcome: AHO's decision affirmed.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9573**

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. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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. Several cages 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, Mr. Me and Grievant 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. Grievant 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. Grievant failed to detect the pieces of bed sheets. While Grievant was inspecting Offender G's clothing, Mr. Me instructed Offender G to remove his underwear, lift his testicles and penis, turnaround, spread his buttocks, squat, and cough. Mr. Me instructed Offender G to open his mouth so that Mr. Me could look inside. Mr. Me observed Offender G as he completed the instructions. Once Grievant 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 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 Mr. Me or Grievant. Mr. Me and Grievant 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 escorted them to the 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>

Under Agency Policy 445.1, Grievant was expected to conduct a strip search of Offender G before he exited his cell and a frisk search immediately after leaving his cell. The primary purpose for these searches was to ensure that Offender G did not take contraband with him into the recreational cage. Section VII(B)(4) of the Policy states that “[t]he offender shall remove every article of clothing including wigs, dentures, etc. and give them to the corrections officer for inspection.” Grievant ensured that Offender G complied with this provision of the policy. There is no basis to conclude that Grievant failed to comply with Policy 445.1. Although Grievant complied with the policy, he failed to satisfy the Agency’s expectations of his performance under that policy. The Agency expected Grievant to detect any contraband in Offender G’s clothing. Grievant inspected Offender G’s clothing but failed to detect contraband hidden inside the clothing. Grievant’s work performance was unsatisfactory to the Agency.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>6</sup> “In rare circumstances, a Group I may constitute a Group II where the Agency can show that a particular offense had an unusual and truly material adverse impact on the agency.”<sup>7</sup> The Agency has presented sufficient evidence to show an unusual and truly material adverse impact on the Agency resulting from Grievant’s unsatisfactory job performance. The Agency was responsible for the care and protection of Offender C while he was in the Agency’s custody. When a correctional officer fails to stop an offender from taking contraband from his cell to a recreational cage and then killing another offender, the adverse impact on the Agency is unusual and material. The Agency has presented sufficient evidence to support the elevation of Grievant’s unsatisfactory job performance from a Group I offense to a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant’s one-day suspension must be upheld.

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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).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

<sup>7</sup> See, Attachment A, DOC Operating Procedure 135.1.

Grievant argued that it was unknown how Offender G was able to get the strips into the cage. Although other methods may have been possible, the most logical explanation based upon the evidence presented is that Offender G hid the strips in his clothing and took them with him from his cell to the cage on July 28, 2010.

Grievant argued that the Agency was slow to issue the Written Notice. The Agency explained that its delay resulted from its desire to avoid interfering with a criminal investigation conducted by the Virginia State Police. The Agency's explanation is sufficient to excuse its delay.

*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>8</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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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

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<sup>8</sup> *Va. Code § 2.2-3005.*

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>9</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>9</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: 9573-R**

Reconsideration Decision Issued: November 28, 2011

**RECONSIDERATION 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.

On September 6, 2011, the EDR Director issued Ruling No. 2011-3022 remanding the case for rehearing. On October 14, 2011, a second hearing was held at the Agency's office.

**RECONSIDERATION APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Witnesses

**RECONSIDERATION ISSUES**



5. Whether Grievant engaged in the behavior described in the Written Notice?
6. Whether the behavior constituted misconduct?
7. 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)?
8. 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.

### **RECONSIDERATION 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. He began working for the Agency in May 2009. Grievant received an overall rating of "Contributor" as part of his October 2010 annual performance evaluations. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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. Several cages 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.<sup>10</sup>

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>11</sup> the offenders while they are in their cells, placing restraints on them, frisk<sup>12</sup> searching them, and escorting them to the cages.

On July 28, 2010, Mr. Me and Grievant 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.<sup>13</sup> He also had shoes. He placed his clothing and shoes in a box attached to the tray slot in the cell door. Grievant 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. Grievant failed to detect the pieces of bed sheets. While Grievant was inspecting Offender G's clothing, Mr. Me instructed Offender G to remove his underwear, lift his testicles and penis, turn around, spread his buttocks, squat, and cough. Mr. Me instructed Offender G to open his mouth so that Mr. Me could look inside. Mr. Me observed Offender G as he completed the instructions. Once Grievant 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.<sup>14</sup> 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 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 Mr. Me or Grievant. Mr. Me and Grievant escorted the inmate through the pod and out to the

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<sup>10</sup> Although Mr. Me and Grievant would have been responsible for searching the cages prior to placing inmates in the cages, it is unclear who searched the cages in which Offender G and Offender C were placed.

<sup>11</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>12</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."

<sup>13</sup> The Agency does not require inmates to wear socks. On July 28, 2010, Offender G was wearing socks.

<sup>14</sup> Under the Agency's policies, Offender G should have been required to wear his smock. The practice at the Facility, however, was to permit inmates to carry their smocks if the inmates chose to do so.

recreation cages. After they secured him in the cage, they returned to the housing unit and removed three other inmates and escorted them to the 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.

The Facility has several cameras located in the housing building. The video showed images at a distance and it often was difficult to discern the identity of the corrections officers and what actions they were taking. The Hearing Officer gives little weight to the video.

### **RECONSIDERATION 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>15</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>16</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>17</sup>

Under Agency Policy 445.1, Grievant was expected to conduct a strip search of Offender G before he exited his cell and a frisk search immediately after leaving his cell. The primary purpose for these searches was to ensure that Offender G did not take contraband with him into the recreational cage. Section VII(B)(4) of the Policy states that "[t]he offender shall remove every article of clothing including wigs, dentures, etc. and give them to the corrections officer for inspection." Grievant ensured that Offender G complied with this provision of the policy. There is no basis to conclude that Grievant failed to comply with Policy 445.1. Although Grievant complied with the policy, he failed to satisfy the Agency's expectations of his performance under that policy. The Agency expected Grievant to detect any contraband in Offender G's clothing. Grievant inspected Offender G's clothing but failed to detect contraband hidden inside the clothing. Grievant's work performance was unsatisfactory to the Agency.

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<sup>15</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>16</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>17</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>18</sup> “In rare circumstances, a Group I may constitute a Group II where the Agency can show that a particular offense had an unusual and truly material adverse impact on the agency.”<sup>19</sup> The Agency has presented sufficient evidence to show an unusual and truly material adverse impact on the Agency resulting from Grievant’s unsatisfactory job performance. The Agency was responsible for the care and protection of Offender C while he was in the Agency’s custody. When a correctional officer fails to stop an offender from taking contraband from his cell to a recreational cage and then killing another offender, the adverse impact on the Agency is unusual and material. The Agency has presented sufficient evidence to support the elevation of Grievant’s unsatisfactory job performance from a Group I offense to a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant’s one workday suspension must be upheld.

Grievant argued that it was unknown how Offender G was able to get the strips into the cage. Although other methods may have been possible, the most logical explanation based upon the evidence presented is that Offender G hid the strips in his clothing and took them with him from his cell to the cage on July 28, 2010.<sup>20</sup>

Grievant argued that the Agency was slow to issue the Written Notice. The Agency explained that its delay resulted from its desire to avoid interfering with a criminal investigation conducted by the Virginia State Police. The Agency’s explanation is sufficient to excuse its delay.

*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>21</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.

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<sup>18</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

<sup>19</sup> See, Attachment A, DOC Operating Procedure 135.1.

<sup>20</sup> Grievant presented evidence of hearsay statements made by Officer G explaining how he took the ligature into the recreational cage. Offender G gave several different explanations. The Hearing Officer gives no weight to the hearsay statements made by Offender G.

<sup>21</sup> *Va. Code § 2.2-3005.*

Grievant argued that the Agency inconsistently disciplined its employees. On some occasions, security employees found inmates in possession of items they were not permitted to possess. The evidence showed that the inmates found with contraband were not inmates residing in isolation cells like those where Offender G resided. The search procedures for these other inmates were not the same as those governing Offender G when he was moved out of his cell into a recreational cage. Grievant presented evidence of some instances where inmates under restrictions similar to Offender G were able to take contraband into the recreational cages. Grievant was unable to establish whether those instances were reported to Facility managers such as the Warden or Chief of Security and that Facility managers failed to take disciplinary action. The Hearing Officer is unable to conclude that the Agency singled out Grievant for disciplinary action.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### **RECONSIDERATION DECISION**

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

### **APPEAL RIGHTS**

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

1. The 15 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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Corrections  
December 13, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9573. The original hearing decision was remanded to the hearing officer for rehearing by the Department of Employment of Dispute Resolution. In making this ruling, the Department of Human Resource Management confined its review to the reconsideration decision. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his RECONSIDERATION PROCEDURAL HISTORY, the hearing officer stated, in relevant part, the following:

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.

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In his RECONSIDERATION FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

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. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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. Several cages share a common fence. Security staff typically inspects 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 the offenders while they are in their cells, placing

restraints on them, frisk- searching them, and escorting them to the cages.

On July 28, 2010, Mr. Me and Grievant 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. Grievant 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. Grievant failed to detect the pieces of bed sheets. While Grievant was inspecting Offender G's clothing, Mr. Me instructed Offender G to remove his underwear, lift his testicles and penis, turnaround, spread his buttocks, squat, and cough. Mr. Me instructed Offender G to open his mouth so that Mr. Me could look inside. Mr. Me observed Offender G as he completed the instructions. Once Grievant 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 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 Mr. Me or Grievant. Mr. Me and Grievant 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 escorted them to the 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.

In his RECONSIDERATION CONCLUSIONS OF POLICY, the hearing officer wrote the following:

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. 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. ..." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

Under Agency Policy 445.1, Grievant was expected to conduct a strip search of Offender G before he exited his cell and a frisk search immediately after leaving his cell. The primary purpose for these searches was to ensure that Offender G did not take contraband with him into the recreational cage. Section VII(B)(4) of the Policy states that "[t]he offender shall remove every article of clothing including wigs, dentures, etc. and give them to the corrections officer for inspection."

Grievant ensured that Offender G complied with this provision of the policy. There is no basis to conclude that Grievant failed to comply with Policy 445.1. Although Grievant complied with the policy, he failed to satisfy the Agency's expectations of his performance under that policy. The Agency expected Grievant to detect any contraband in Offender G's clothing. Grievant inspected Offender G's clothing but failed to detect contraband hidden inside the clothing. Grievant's work performance was unsatisfactory to the Agency.

"[I]nadequate or unsatisfactory job performance" is a Group I offense. "In rare circumstances, a Group I may constitute a Group II where the Agency can show that a particular offense had an unusual and truly material adverse impact on the agency." The Agency has presented sufficient evidence to show an unusual and truly material adverse impact on the Agency resulting from Grievant's unsatisfactory job performance. The Agency was responsible for the care and protection of Offender C while he was in the Agency's custody. When a correctional officer fails to stop an offender from taking contraband from his cell to a recreational cage and then killing another offender, the adverse impact on the Agency is unusual and material. The Agency has presented sufficient evidence to support the elevation of Grievant's unsatisfactory job performance from a Group I offense to a Group II offense. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's one-day suspension must be upheld. Grievant argued that it was unknown how Offender G was able to get the strips into the cage. Although other methods may have been possible, the most logical explanation based upon the evidence presented is that Offender G hid the strips in his clothing and took them with him from his cell to the cage on July 28, 2010.

Grievant argued that the Agency was slow to issue the Written Notice. The Agency explained that its delay resulted from its desire to avoid interfering with a criminal investigation conducted by the Virginia State Police. The Agency's explanation is sufficient to excuse its delay.

*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 ...." 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 bearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A nonexclusive 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.

Grievant argued that the Agency inconsistently disciplined its employees. On some occasions, security employees found inmates in possession of items they were not permitted to possess. The evidence showed that the inmates found with contraband were not inmates residing in isolation cells like those where Offender G resided. The search procedures for these other inmates were not the same as those governing Offender G when he was moved out of his cell into a recreational cage. Grievant presented evidence of some instances where inmates under



restrictions similar to Offender G were able to take contraband into the recreational cages. Grievant was unable to establish whether those instances were reported to Facility managers such as the Warden or Chief of Security and that Facility managers failed to take disciplinary action. The Hearing Officer is unable to conclude that the Agency singled out Grievant for disciplinary action.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

In his RECONSIDERATION DECISION, the hearing officer made the following determination:

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

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his request to this Department for an administrative review, the grievant stated that the decision is inconsistent with state and agency policy, namely DOC Policy 135.1, Standards of Conduct, and DHRM Policy No. 1.60. The grievant argues that the hearing officer used faulty and incorrect evidence and made certain assumptions when he drew his conclusions regarding his grievance.

### **CONCLUSION**

Summarily, the hearing officer concluded that the grievant's behavior was best categorized as poor performance. A performance issue normally is addressed by issuing a Group I Written Notice. In rare circumstances, however, a Group I may constitute a Group II where the Agency can show that a particular offense had an unusual and truly material adverse impact on the agency. In this case, according to the hearing decision, the Agency presented sufficient evidence to show an unusual and truly material adverse impact on the Agency resulting from Grievant's unsatisfactory job performance. Therefore, the hearing officer upheld the Group II Written Notice with the one-day suspension.

The grievant also raised a concern that the Agency inappropriately delayed taking disciplinary action. The hearing officer properly addressed that concern.

Finally, the grievant contended that the agency inconsistently disciplined its employees. However, based on the evidence, the hearing officer was unable to conclude that the agency singled out the grievant for disciplinary action.

In conclusion, this Department's review of the hearing decision does not reveal that the decision is in violation of any human resource management policy. Rather, it appears that the grievant is contesting the evidence considered by the hearing officer, the weight he accorded that

evidence, how he assessed that evidence and the conclusions he drew. Therefore, we have no authority to interfere with the application of this decision.

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Ernest G. Spratley  
Assistant Director  
Office of Equal Employment Services