

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/08/15;  
Decision Issued: 01/12/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10498; Outcome: Full Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10498**

Hearing Date: January 8, 2015  
Decision Issued: January 12, 2015

#### **PROCEDURAL HISTORY**

On June 16, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On July 11, 2014, 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 November 24, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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. She has been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.

Inmates who are excused from the Agency's requirements for shaving must possess a "shaving profile" and be ready to present it to a corrections officer who questions whether an inmate has met the Agency's shaving requirements. A shaving profile shows a medical reason for the inmate not to shave and has an expiration date. An inmate with a shaving profile is expected to carry the document with him when he is out of his cell.

The Agency began an investigation of Officer A for fraternizing with the Inmate. As part of the investigation, the Investigator and the Captain reviewed the Rapid Eye video recording for incident involving Grievant and Officer A as well as interviewing Grievant. The Investigator and the Captain interviewed Grievant on April 10, 2014. The Investigator listened to Grievant's answers and typed a statement intended to reflect Grievant's answers. The Investigator presented the statement to Grievant for her to read and asked if it reflected her answers. Grievant read the statement which included an acknowledgment, "I have read or had read to me the above statement. I agree that I have given this statement without threat or promise." Grievant signed the statement which said:

I understand that I am being questioned about Corrections Officer [A] and [Inmate] and the allegations they are engaged in an unauthorized relationship. Maybe a month ago I realized there was possibly something going on between [Inmate] and [Officer A]. [Inmate] was always hanging around [Officer A] talking with her, when he was working on the floor. I also noticed when [Officer A] was not working [Inmate] would not be out on the floor as much. I did observe on one occasion where [Officer A] was doing a security check and [Inmate] was with her. I confronted [Inmate] and asked him what he was doing? [Inmate] stated he was helping [Officer A] and he had the inmate shaving profiles. I have never seen [Inmate] and [Officer A] being intimate, but he does follow her a lot when she is here. I would like to explain the incident I observed on Rapid-eye. I was relieving [Officer A] and I did not [realize] the 300 Pod door was open or that there was an inmate standing near the open door. [Officer A] used a Folger-Adams key to open the Control Booth door, [Officer A] stepped out, still holding the door and then she must have realized the 300 Pod door was open, when she stepped back inside and closed the Control Booth door.<sup>1</sup>

## CONCLUSIONS OF POLICY

Fraternization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior. Examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.<sup>2</sup>

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* \*\*\* 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. \*\*\* 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 130.1(III), Rules of Conduct Governing Employees' Relationships with Offenders.

Extending a special privilege to an inmate would constitute fraternization. For example, if Officer A permitted the Inmate to accompany her during her rounds and hold documents for her, she would have extended a special privilege to the Inmate.

Grievant wrote that she “realized there was possibly something going on between [Inmate] and [Officer A].” A general suspicion of possible fraternization is not the same as knowledge of actual fraternization or the appearance of fraternization. Grievant’s suspicion that something might be going on is not a sufficient basis for the Hearing Officer to conclude that Grievant observed fraternization or the appearance of fraternization and failed to report her observations.

The Agency has not presented sufficient evidence to support the issuance of disciplinary action. The Agency argued that Grievant admitted to observing fraternization and failed to report her observations.

Grievant wrote that that she noticed the Inmate was more likely to be on the floor when Officer A was working than when she was not working. Whether fraternization occurred depends more on the behavior of Officer A than on the behavior of the Inmate. Simply because an inmate prefers to “hang around” one corrections officer over another does not, in itself, show that the officer was involved in an inappropriate relationship with the inmate. Grievant’s observation about the Inmate’s behavior does not show fraternization.

Grievant wrote that on one occasion she noticed the Inmate following Officer A as Officer A was doing a security check for shaving profiles. This meant that Officer A was walking around the pod with a list of inmates asking to see their shaving profiles. Grievant confronted the Inmate and asked him what he was doing. The Inmate said he had the inmates’ shaving profiles. Grievant testified she did not see the Inmate holding any papers and did not believe the Inmate’s statement. She told the Inmate to stop his behavior and he complied. It is unlikely that the Inmate was telling the truth. Inmates who were excused from shaving were supposed to have shaving profiles in their possession. This means they would have a piece of paper stating that they were excused from shaving for a medical reason. It is unlikely that the Inmate had inmate shaving profiles because the inmates with the profiles were supposed to retain them in their possession at all times. If the Inmate was collecting expired shaving profiles, he would have been holding them and visible to Grievant. The Inmate’s assertion that he had shaving profiles is not sufficient to show that he actually had shaving profiles and that he was receiving a special privilege from Officer A.

The Agency alleged that Grievant “admitted that you failed to secure the 300 pod door and opened the control booth door with an open door and an offender standing in it.” The Agency presented testimony of a witness who observed the Rapid-eye video of the event. The Agency did not present a copy of the actual video. The Agency’s Investigator did not testify regarding the event. The Agency maintained, but did not

present as evidence, a log book in which Grievant would have signed to indicate the time she assumed responsibility for the control booth post.

Based on the evidence with the appropriate weight given to it, it appears that the pod door already was open when Grievant entered the control booth. Officer A used the key to the control booth to open the door to the control booth from the inside and then moved her body partially out of the control booth door and observed that the pod door was open. Officer A recognized that having both the pod door and the control booth doors open at the same time was prohibited<sup>3</sup> and she moved back inside the control booth and closed the door. Within a few seconds, the pod door was closed. The video did not show what Grievant was doing when Officer A opened and closed the control booth door.

The Hearing Officer cannot determine whether Grievant had assumed control of the post and, thus, would be obligated to have in her possession the key to the control booth door. Only if Grievant had assumed responsibility for the post, would she have been obligated to ensure that the key was not in the control booth door or in Officer A's possession. No one testified who left key in the control booth door or that Officer A had handed the key to Grievant. Grievant's statement that "I was relieving [Officer A]" does not show that Grievant had finished relieving Officer A and assumed the post duties.

## DECISION

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

## 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 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

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<sup>3</sup> Having both the pod door open and the control booth door open at the same time was a security breach because an inmate in the pod could leave the pod and enter the control booth. Once inside the control booth, the inmate could control the pod and cell doors.

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.