

Issues: Group II Written Notice (failure to follow instructions/policy), Group III Written Notice (safety rule violation), demotion and pay reduction; Hearing Date: 10/18/16; Decision Issued: 11/28/16; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10877; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/06/16; EDR Ruling No. 2017-4453 issued 01/06/17; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Bland County Circuit Court (01/24/17); Outcome pending.**

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10877

**Hearing Date: October 18, 2016
Decision Issued: November 28, 2016**

PROCEDURAL HISTORY

On June 23, 2016 Grievant was issued a Group III Written Notice and a Group II Written Notice (both with offense dates of 4/27/16).¹

The Group III Written Notice was issued for “*Safety Rule Violation*” (Written Notice Offense Code 14) and provided for a demotion to lower pay band with 15% disciplinary pay reduction effective 6/25/16. This Group III Written Notice further indicated:

An investigation into an incident happened at front search revealed that [Grievant] violated Operating Procedure 440.2, Operating Procedure 445.1, Warden’s Memo #6 and Operating Procedure 135.1 by allowing [Deputy] into the Administration Building without being searched or surrendering his ID. [Grievant] also interfered with the Front Search Operations by taking over the control of the front door. [Grievant] took control of Front Search Operations and prevented staff working in this area from carrying out their responsibilities in accordance with policy. Her interference resulted in the Deputy remaining inside the doorway of the Administration building, where some offenders are located, with his firearm for over four minutes. [Grievant’s] repeated failure to follow procedures that exist to prevent the introduction of contraband into the facility and to contribute to the safety of all persons confined in, working in, or visiting (*and*) the safety in front of staff could have created a potentially dangerous situation and/or comprised the security of the facility.

The Group II Written Notice was issued for “*Failure to follow instructions and/or policy*” (Written Notice Offense Code 13) and indicated:

An investigation into an incident happened at the Sallyport revealed that [Grievant] violated Operating Procedure 440.2 and Operating Procedure 430.3, Operating Procedure 445.1, and Operating Procedure 135.1 by allowing a Deputy from Washington County to pull his patrol car into the Sallyport without being searched. [Grievant] acquired the keys to the cable allowing access into the Sallyport. [Grievant] then re-entered the compound without being searched.

Grievant filed three Grievance Form A’s. on 7/11/16. Matters proceeded through the Resolution Steps and, when matters were not resolved to her satisfaction, Grievant requested hearing. One *Grievance Form A* addressed issues related to the Group II Written Notice she received.² Another *Grievance Form A* addressed issues related to verbal counseling and the Written Notices.³ And, a third *Grievance Form A* addressed issues related to the Group III Written Notice she received.⁴

¹ A. Tabs A & B.

² A. Tab C, pg. 1.

³ A. Tab C, pg. 3.

⁴ A. Tab C, pg. 6.

The matters addressed in the Grievance Form A concerning verbal counseling were duplicative and addressed matters set forth in the Group III Written Notice. As discussed in a pre-hearing conference call, matters concerning verbal counseling were found to be at issue and could be being addressed at hearing.

Undersigned was appointed Hearing Officer effective September 27, 2016.⁵ Matters raised in the three Grievance Form A's were addressed in one hearing. The Grievance hearing in this cause began on October 18, 2016, at Facility, however, due to a witness being unavailable this date, by agreement of the parties, the hearing was continued to receive that witness's testimony via conference call. The witness's testimony was received October 28, 2016 by conference call participated in by the witness, Grievant, Advocate for Grievant, and Counsel for Agency. The presence of the Agency Party Representative in this conference call was waived by Agency counsel.

Written closing arguments were, by agreement of the parties, submitted on November 4, 2016.

ISSUES

1. Whether the Grievant engaged in the behavior described in the two Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency 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 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 action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence. Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.⁶

HEARING and EXHIBITS

The following appeared at the grievance hearing (held on 10/18/16 at Facility and continued to 10/28/16 to take telephone testimony):

Grievant
Grievant's advocate
Agency attorney
Agency Party Representative at Hearing (*appearance waived on 10/28/16*)
Witnesses

⁵ A. Tabs C.

⁶ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

By agreement of the parties, Grievant's and Agency's Exhibits exchanged were admitted *en masse* and one joint exhibit was additionally admitted at hearing. Exhibits consist of:

1. Grievant's Exhibits - one binder of exhibits tabbed A through T (and page numbered within tabs).
2. Agency's Exhibits - one binder of exhibits with exhibit numbers 1 through 58.
3. One "Joint Exhibit 1" was admitted at hearing by agreement of the parties.

FINDINGS OF FACT

After reviewing evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

01. Facility is a correctional center operated by Agency. As such, only authorized persons and property are permitted to enter or exit Facility. Search of employees, visitors and offenders are conducted to assist in the detection of contraband.⁷

02. Grievant was issued a Group III and a Group II Written Notice for matters occurring on 4/27/16 at Facility. The Group III Written Notice was issued for *Safety Rule Violation* concerning an incident occurring at or around Front Search and the Group II Written Notice was issued for failure to follow instructions and/or policy concerning an incident occurring at or around Sallyport.⁸

03. Grievant was employed by Agency as a Unit Manager at Facility on 4/27/16. No evidence was admitted that Grievant has had any other active Written Notices prior to the two Written Notices issued 6/23/16. As a Unit Manager, Grievant was in charge of several housing units within Facility. She managed the total operation of these units with responsibility for supervision of staff assigned to these housing units. As a Unit Manager, she is non-security staff, however, she can supervise security staff.⁹

04. Facility has an Administrative Duty Officer ("ADO") assigned throughout the year. Duty as ADO is assigned, on a rotational basis, from a list of qualified individuals, which included Grievant. While Grievant was assigned to be ADO during a number of periods throughout the year, she was not the assigned ADO on 4/27/16.¹⁰

05. Generally, all employees and visiting non-employees entering Facility are required to be searched in accordance with OP 445.1 and OP445.2.¹¹ Facility Unit Head (i.e. Warden) has authority to determine who may enter Facility and authority to exempt individuals from search.¹²

06. Control is maintained of persons and property entering and exiting Facility. At Facility's Front Entry Search a Security Officer is posted to provide for control of persons and property entering and exiting Facility at this location. The door granting access to Facility at Front Search Entry is controlled electronically by a button. Upon entering the building into the Front Entry Search area, individuals are required to be positively identified, to be searched, and are required to leave an identification card with Front Search before proceeding on.¹³

⁷ A. Tabs E, F, G, H and Testimony.

⁸ A. Tabs A and B.

⁹ A. Tab. S, Testimony.

¹⁰ A. Tabs O and S, and Testimony.

¹¹ A. Tab E.

¹² A. Tabs E and J and Testimony.

¹³ A. Tabs H and J and Testimony.

07. On 4/27/16 C/O B was assigned, at times relevant to this proceeding, to Front Entry Search. Her post included the front entry search area and other areas and operations contiguous thereto. As a part of her duties she was to determine the purpose of persons wanting to enter Facility, conduct a search of entering persons, and obtain an ID card from each person entering. The ID card was kept at Front Entry Search and returned upon the person exiting.¹⁴

08. Grievant, as Unit Manager, was in the chain of command at Facility. Grievant was C/O B's superior in the chain of command on 4/27/16.¹⁵

09. On 4/27/16, Deputy arrived at Facility seeking to obtain custody of Inmate and transport the inmate to a Court proceeding. Deputy appeared at the front door of Facility and was buzzed into the Front Search area. Deputy had not cleared the metal detector while C/O B was talking with him to determine what he needed. At this point he had not been searched or provided an ID. Grievant came and began talking to Deputy at this point.¹⁶

10. Grievant had observed C/O B tell Deputy he could not come in and she asked him what his reason was for entering Facility. On his saying her was there to pick up an Offender, she went to the Records Department to check on matters. On returning, Grievant observed Deputy had a weapon and Grievant told Deputy he needed to take his weapon and cell phone back to his car. Grievant pushed the button controlling front door to let him out. As Deputy was returning, Grievant had returned Technician's ID card to her and was buzzing her out the front door. Technician held the door open for Deputy to re-enter as she was exiting. Grievant then escorted Deputy into Records Department without Deputy having been searched and without Deputy having provided an ID card.¹⁷

11. While Deputy was in the Records Department he was asked for identification. However, Deputy said he left his identification in his vehicle. Deputy then left the Records Department, exited the building, secured his identification card, and then re-entered the building.¹⁸ Once more Grievant escorted him to Records Department without Deputy having been searched and without his having to provide an ID card at Front Entry Search.¹⁹

12. After matters in the Records Department, Deputy left through the Front Entry Search area and went to the area of Facility Tower and its Sallyport to wait for the count to clear so Inmate could be processed into his custody. Reconciliation of the count had been delayed which prevented Inmate from being moved. While Deputy was waiting, Grievant saw him in the area of Tower and apologized for the delay in being able to process out Inmate.²⁰

13. Grievant exited the compound via the Tower Sallyport and obtained the key to the Tower Sallyport barrier from C/O in Tower. Grievant asked the other deputy to step outside the vehicle and remain outside the compound with all the weapons. She removed the cable barrier and Tower C/O opened the gate letting her, the deputy and the vehicle into the Sallyport.²¹

¹⁴ A. Tabs H, K, and Testimony.

¹⁵ Testimony.

¹⁶ A. Tab C, Testimony.

¹⁷ A. Tabs C pg. 8, Tab K, and Testimony.

¹⁸ A. Tab C pg. 8.

¹⁹ A. Tab C pg. 8 and Testimony.

²⁰ A. Tab K and Testimony.

²¹ A. Tab K pg.11.

14. Tower C/O was disciplined for lowering key to Grievant as Grievant was not a security officer and keys to security barrier are not to be in possession of non-security staff. C/O B. was given verbal counseling for her actions.²²

15. After the Deputy's vehicle entered the Sallyport, Sgt. was notified and arrived to verify the paperwork needed for taking custody of Inmate. Sgt. determined the Gate Pass Report that Deputy had was not signed. Sgt. obtained permission of Shift Commander to sign off on the Gate Pass Report and then did so. Additionally, the Release of Custody form for Inmate which Watch Commander was supposed to sign was only signed after Deputy and his vehicle had entered the Sallyport.²³

16. Grievant returned the cable keys to the Tower Officer having to exited the Sallyport to do so.²⁴

CONCLUSIONS

OP 135.1²⁵

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: October 1, 2015) divide unacceptable behavior into three groups according to the severity of the behavior, Group I being the least severe and Group III being the most severe.

Group III offenses include acts and behavior of such a serious nature that a first occurrence normally would warrant termination. Examples of Group III offenses listed in this policy include *violating safety rules where there is a threat of physical harm*.

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 termination. Examples of Group II offenses listed in this policy include *failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy*

OP 135.1 also provides that the list of offenses contained therein is illustrative and not all-inclusive. 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 operating procedure based on the severity of the offense.

OP 440.2²⁶

Operating Procedure 440.2 - *Perimeter Security* provides written guidance for Agency facilities to maintain perimeter security appropriate for the security level to control movement of persons and contraband into and out of the facility. OP 440.2 provides, in pertinent part:

All employees and visiting non-employees entering a facility will be searched in accordance with Operating Procedure 445.1 *Employee, Visitor, and Offender Searches* and Operating Procedure 445.2, *Facility Searches and Inspections*.

²² Testimony.

²³ A. Tab K pg. 15, 35 and Testimony.

²⁴ Testimony.

²⁵ A. Tab D.

²⁶ A. Tab E.

Facility Security Perimeter – A physical structure, such as a fence or wall that forms a barrier intended to keep offenders inside the facility, and unauthorized persons from entering a facility. The perimeter is generally the last physical barrier, or set of barriers on the outer edge of the security compound.

OP 430.3²⁷

Operating Procedure 430.3 addresses key control and security keys. “Security keys”, under this policy, are defined to include keys for gates, doors, and keys to areas unauthorized for offenders access or through which strict control of offender movement is required. Per OP 430.3 security keys are generally issued only to certified corrections staff, however, this policy also provides security keys used to control movement in/out of such an area may be issued to a properly trained non-security employee that are assigned to that area. Furthermore, this policy provides security keys should not be issued to volunteers or non-certified Corrections Officers.

OP 445.1²⁸

Operating Procedure 445.1- *Employee, Visitor, and Offender Searches* defines “facility security perimeter” to generally be the last physical barrier/set of barriers on outer edge of security compound.

This policy further provides any employee, volunteer, visitor, or offender who enters a DOC facility shall be subject to a complete search. Additionally, this policy provides that searches of official visitors shall be under the same conditions as searches of employees; however, the Facility Unit Head has the discretion to suspend the search if they determine that the official visitor is not carrying weapons or contraband.

Warden Memo #6²⁹

Warden Memo #6 - Front Search Entrance Protocol (effective April 5, 2016), issued by Facility Warden, sets forth, in writing, his policy and procedures for entering Facility at front entrance search area of the Administrative Building and the memo provides in pertinent part:

1. A Search Officer is available at the Front Search Post 24-hours 7-days per week for the purpose of searching all employees, official visitors, vendors and volunteers. ...
5. Only the Search Officer shall open and/or close the Front Search door to properly manage the flow of traffic in and out of the Search Area. The only exception is when Master Control has assumed control of the Front Search door access switch.
8. The Search Officer shall receive the ID from the individual who wants to enter the facility and check to verify authorization to enter the facility. ...

Search Procedures for Law Enforcement Personnel

1. All law enforcement personnel shall leave their weapon, ammunition and cell phone ... before entering the secure facility.
2. Law enforcement personnel do not have to remove their gear or any other equipment to enter the secure facility.
3. The Search Officer shall use the wand detector to assure there is no contraband.
4. Law enforcement personnel must leave a picture ID at the search area.

Security Post Order 42³⁰

Security Post Order 42 addresses matters related to the Front Entry Search post and requires everyone shall be searched prior to entering inside the compound. This Post Order further defines

²⁷ A. Tab F.

²⁸ A. Tab G.

²⁹ A. Tab J

³⁰ A. Tab H

the area of control to be the administration building area and other areas and operations contiguous to that area. Duties include searches and inspection of persons, property, and areas.

Unit Manager, ADO, Chain of Command:

On 4/27/16 Grievant was a Unit Manager at Facility and, as such, was non-security staff. Even though she could supervise security staff. She had authority over matters in the assigned unit she managed but her authority did not automatically extend out to the whole institution.³¹ During designated periods throughout the year, Grievant was assigned additional duty as the Facility's Administrative Duty Officer ("ADO"). Duty assignment as ADO was rotated among several qualified individuals. The assigned ADO had her duties and responsibilities that extended throughout Facility. However, on 4/27/16 Grievant was not assigned duty as the Facility's ADO.

Grievant was C/O B's superior in the chain of command on 4/27/16.³²

Group III re: Front Search

Grievant's Group III Written Notice was issued for a *Safety Rule Violation* and addressed matters occurring at Front Search in which it was alleged she violated OP 440.2, OP 445.1, Warden's Memo #6, and OP 135.1. It was further alleged that she:

- Allowed Deputy into Administration Building without being searched or surrendering his ID.
- Interfered with the Front Search Operations by taking over the control of the front door.
- Took control of Front Search Operations and preventing staff working in this area from carrying out their responsibilities in accordance with policy.
- Repeatedly failed to follow procedures and her actions could have created a potentially dangerous situation and/or comprised the security of the facility.

Facility is a Correctional Center operated by Agency. Control of persons and property going both in and out of Facility is required not only for purposes of controlling contraband but to provide for the safety and security of employees, offenders, and the public. To this end, a number of Operating Procedures, including those addressed herein, were promulgated addressing searches, inspections, and control activities within Facility.³³

OP 440.2 provides all employees and visiting non-employees entering a facility will be searched in accordance with OP 445.1 and OP 445.2. As provided in OP 445.1, the Facility Unit Head (i.e. the Warden at Facility) has the discretion to suspend the search. Grievant was a Unit Manager and did not have authority to waive or suspend a search of an individual entering Facility.

Warden Memo #6 sets forth his policy for entering Facility and provides only the Search Officer shall open or close the Front Search door (except when Master Control has assumed Control of the Front Search door access switch). This Memo provides for receipt of an ID from individual wanting to entry and a check to verify authorization to enter. It also requires all law enforcement personnel to secure their weapon, ammunition and cell phone before entering the secure facility and to leave a picture ID at the search area. While law enforcement personnel do not have to remove their gear or any other equipment to enter Facility, the Search Officer is required to use the wand detector to assure there is no contraband.

PO 42 requires all persons entering Facility are to be searched, are to be positively identified, and that they are required to leave an identification with Front Search before entering. Only Warden is authorized to waive these requirements.

³¹ A. Tab S and testimony.

³² Testimony.

³³ A. Tabs E, F, G, H and Testimony.

On 4/27/16 Facility's Front Entry Search post was staffed by C/O B when matters related to this Group III Written Notice arose. Her assigned post included not only the Front Entry Search area but also certain areas contiguous to it. Entering Facility building at the front search entrance from the outside entails entering through a door opened and closed electronically from inside the building. On entry, there is a small standing area preceding a walk-through metal detector and then a small area on the other side of the metal detector.³⁴

On 4/27/16 Deputy arrived at Facility to obtain custody of an inmate to transport him to a court proceeding. The electronically controlled door at Front Entry Search was opened for him allowing him to enter. Deputy was inside the building but had not cleared the metal detector while C/O B was attempting to determine why he was at Facility. At this point he had not been searched/wanded and C/O B had not permitted him to come past the metal detector.

C/O B was charged with determining the purpose of persons wanting to enter Facility, searching those persons, and obtaining an ID card from them which was kept until they exited the Facility. Grievant was in the area and observed C/O B telling Deputy "You can't come in."³⁵ Grievant asked the Deputy his purpose for entering and went and checked on matters. Returning she told Deputy he would have to wait on verification of the transportation request and his identity. Subsequently, she observed Deputy had a weapon and, pointing out the Warden's Memo, requested Deputy to secure his weapon and cell phone in his vehicle.³⁶ Deputy then left to secure these items.

C/O B went to another area within her assigned post and Grievant, who was in the area, saw that a Technician wanted to leave. She gave Technician her ID and pressed the button to electronically open the door for her to exit. As Technician was exiting, Deputy returned and was allowed to enter the building.

Grievant stated she saw Deputy had no weapon. Grievant then escorted Deputy into the Records Department. Deputy was not searched and/or wanded and had not provided an ID card, as was required by OP 440.2, OP 455.1, and Wardens Memo #6, prior to Grievant escorting him into the Records Department

While Deputy was in the Records Department, a Manager asked Deputy to see identification, however, Deputy said he left his identification in his vehicle. Deputy then departed the Records Department, exited the building, retrieved his ID, and then re-entered the building.³⁷ Grievant again escorted him to the Records Department without Deputy having been searched, wanded, or having to provide and leave an ID card at Front Entry Search.

Grievant contends she "did not waive any search of him, the search officer was there and it is their responsibility to clear anyone entering the building".³⁸

C/O B contends she was in the process of talking to Deputy to find out what he needed and Grievant came up and stepped in front of her and just took over, not letting her talk to Deputy. When Grievant told him to take his weapon and cell to his vehicle Grievant pushed the button electronically opening the door to let him out. C/O B further contends, when Deputy re-entered the building, Grievant came out of the Warden's Center and "just took the Deputy with her" without C/O B obtaining his ID or wanding him.

³⁴ A. Tab K pg. 17.

³⁵ A. Tab K pg. 11.

³⁶ A. Tab C pg. 8.

³⁷ A. Tab C pg. 8

³⁸ A. Tab K pg. 11.

Grievant was above C/O B in the chain of command. C/O B expressed concern to her Watch Commander on 4/27/16 that Grievant would not let her do her job. She was concerned that Grievant took charge of matters and Grievant allowed entry to Deputy who had not been wanded/searched and who had not furnished his ID.³⁹

Grievant was not assigned duty at Front Search Entrance. Grievant made the decision step in and take certain actions. When she intervened in matters and chose to take action she was responsible for her actions. Her actions let Deputy enter without being searched, wanded, or providing an ID twice. If she felt there were problems with matters at Front Entry Search, she could have notified appropriate authority within Agency. She could have directed C/O B to search and/or wand Deputy and take his ID before escorting him to the Records Department.

Her being C/O B's superior in the chain of command when she interjected herself and twice escorted Deputy through to Records Department without him being searched, wanded, or providing an ID was taken into consideration. Testimony indicated management considered this and determined that C/O B was correct in following the orders of her superior in the chain of command and reporting these matters to Watch Commander, her supervisor.

Grievant contends that when Deputy re-entered the building no one was at the search area and C/O B was off her assigned post. However, the evidence indicates while C/O B was not at the immediate front search area she had gone to an adjacent area which was within her assigned post.

Grievant gave a Technician back the ID she had previously left with Front Search and then electronically opened the building's front door to let her out. C/O B returned as the Technician was exiting.⁴⁰ Upon Deputy re-entering at Front Entry Search Grievant then escorted Deputy into the Records Department without Deputy having been searched with a wand detector and without him having provided an identification card.

Grievant knew or should have known that Deputy was required to be searched and to leave an ID before entering. When she twice took Deputy to Records Department she was responsible for not following policy which required searching and leaving an ID before entering.

Rapid Eye Video Photograph exhibits⁴¹ bearing time marks were admitted into evidence in this cause. These photographs and testimony indicate certain events and the time of these events ,occurring on April 27, 2016, at or around the Front Entry Search area. Rapid Eye Video Photographs and/or testimony indicated as follows:

11:16:39 a.m.	Deputy enters Front Search area with C/O B at metal detector area facing Deputy.
11:16:53 a.m.	C/O B. leaving Front Search area. Deputy in Front Search area.
11:17:49 a.m.	Grievant approaching Deputy in Front Search area.
11:17:53 a.m.	Grievant addressing Deputy in Front Search area with Metal detector between them.
11:20:53 a.m.	Grievant pointing at memo with C/O B at table beside metal detector.
11:21:16 a.m.	Deputy exits (to return firearm and cell phone to his vehicle per Grievant's statement).
11:21:45 a.m.	C/O B is at Armory Window - Grievant retrieving ID of Technician (2 photos at same time show this).
11:22:04 a.m.	Grievant buzzing open door for Technician to leave.
11:22:12 a.m.	Technician holding door as Deputy returns into building.
11:22:16 a.m.	Grievant and Deputy exit search area going further into building.
11:22:19 a.m.	Grievant and Deputy enter Records Department/Warden's Center Area.
11:22:52 a.m.	Grievant and Deputy exit Records Department/Warden's Center Area.

³⁹ A. Tab C pg. 12.

⁴⁰ A. Tab C pg. 8.

⁴¹ A. Tab K.

11:22:59 a.m. Grievant opens the door electronically to allow Deputy to exit the building.
11:23:52 a.m. Deputy returns to front door and C/O B opens the door as Grievant observes.
11:23:56 a.m. Grievant and Deputy walking together from /through search area.
11:23:59 a.m. Grievant and Deputy enter Records Department/ Warden's Center Area.
11:28:40 a.m. Grievant and Deputy exit Records Department and enter Master Control.
11:31:11 a.m. Deputy exits building.

Upon review of the totality of the evidence presented in this cause, Agency has met its burden of proof, by a preponderance. Grievant's actions were a violation of established safety rules and procedures. She twice allowed Deputy past the Front Entry Search and into the Administration Building without being searched and without surrendering his ID as was required by policy and procedure. Her actions included taking over control of the front door and buzzing people in or out. Her actions interfered with Front Search Operations. By her actions, she took control of Front Search Operations and prevented staff working in this area from carrying out her responsibilities in accordance with policy. Furthermore, her actions failed to follow established policy and, in failing to follow established policy and procedure could have created a potentially dangerous situation and/or compromised the security of Facility.

Group II re: Sallyport

Grievant was issued a Group II Written Notice for "Failure to follow instructions and/or policy". The Written Notice alleged violations of OP 440.2, OP 430.3, OP 445.1, and OP 135.1 by allowing a Deputy to pull his patrol car into the Sallyport without being searched. Grievant acquired the keys to the cable allowing access into the Sallyport. Grievant then re-entered the compound without being searched.

OP 445.1- defines "facility security perimeter" to generally be the last physical barrier/set of barriers on outer edge of security compound and provides any employee, visitor, or offender who enters a DOC facility shall be subject to a complete search.

OP 440.2 requires Agency facilities to maintain perimeter security to control movement of persons and contraband into and out of the facility and provides all employees and visiting non-employees entering a facility will be searched as per OP 445.1. Facility Security Perimeter is defined in OP 440.2 as "A physical structure, such as a fence or wall that forms a barrier intended to keep offenders inside the facility, and unauthorized persons from entering a facility. The perimeter is generally the last physical barrier, or set of barriers on the outer edge of the security compound."

OP 430.3 indicates "Security keys" are defined to include keys for gates, doors, and keys to areas unauthorized for offenders access or through which strict control of offender movement is required. This OP also provides security keys are generally issued only to certified corrections staff. Furthermore, this policy provides security keys should not be issued to non-certified Corrections Officers.

Grievant was not assigned to the Sallyport or to the Tower and was not certified as a security staff. The key she obtained from Tower C/O was for a perimeter barrier of the security compound.

When Deputy left the Front Entry Search area he went to Tower area and its nearby Sallyport to wait for the count to clear so Inmate could be processed out into his custody. Grievant saw him while he was waiting. A count reconciliation had delayed matters, Grievant apologized for the delay and told Deputy the inmate was on the way and would be out shortly. She contacted Sgt. and asked him to come to Tower area.

Sallyport has a locked cable barrier and a locked inner and outer gate. For a vehicle to enter the Sallyport, a key must be first be secured from Tower to unlock the cable barrier. Grievant exited the compound and secured the key to the cable barrier from Tower C/O. She asked the officer with

Deputy to step outside the vehicle and remain outside the compound with all the weapons. Grievant unlocked and moved the cable barrier and Tower Officer opened the gate letting Grievant, Deputy, and his vehicle into the Sallyport. Grievant later returned the key to Tower when Inmate's restraints were being swapped and proceeded back through the Sallyport into the compound.⁴²

Grievant had picked up required paperwork and taken it to the Sallyport without it being appropriately signed. Watch Commander was required to sign a Release of Custody Form for Inmate. Watch Commander was concerned the Release of Custody Form was signed after Deputy and his vehicle had entered the Sallyport.⁴³ Sgt. determined the Gate Pass Report Grievant has was not signed.⁴⁴ Sgt. secured the permission of the Shift Commander to signed off on this document and then did do so.

Sgt. escorted Deputy to Building and, while matters were being address for Deputy to take custody of Inmate, Grievant exited the Sallyport. Grievant returned the cable key to Tower C/O and then she re-entered the Sallyport and passed through into the compound without being searched.

Grievant does not contest securing the keys to the cable barrier from Tower C/O or returning the key to the Tower C/O. OP 430.3 defines the term "Security keys" to include, among other matters, keys to areas unauthorized for offender's access or through which strict control of offender movement is required. The key to the cable barrier for the Sallyport meets this definition. OP 430.3 also provides security keys are generally issued only to certified corrections staff and should not be issued to non-certified Corrections Officers.

OP 440.2 requires Agency facilities to maintain perimeter security to control movement of persons and contraband into and out of the facility and provides all employees and visiting non-employees entering a facility will be searched as per OP 445.1. Facility Security Perimeter is defined in OP 440.2 as "A physical structure, such as a fence or wall that forms a barrier intended to keep offenders inside the facility, and unauthorized persons from entering a facility. The perimeter is generally the last physical barrier, or set of barriers on the outer edge of the security compound."

The C/O in the Tower, who gave Grievant the cable barrier key, was disciplined for giving the key to Grievant. His discipline addressed giving the key to the cable barrier to a person who was not a security officer (i.e. Grievant), and who, not being a security officer, was not authorized to have a security key.

In a written statement dated 7/8/16, Deputy indicated his vehicle was searched on 4/27/16 after he pulled the vehicle into the Sallyport. Deputy indicated, "I then proceeded to pull the vehicle into the Sally Port where it was searched."⁴⁵ There is no information provided as to the circumstances concerning his statement or indicating who conducted the search (whether it was Grievant or someone else) or describing any activities associated with the referenced search.

Lt. D was standing nearby when the Deputy's vehicle pulled in and she never saw anyone search the vehicle. She observed the vehicle before and after being pulled into the Sallyport. Lt. D testified Deputies and Marshalls have always had their vehicles searched. Though additional matters have applied to emergency type vehicles.⁴⁶

⁴² A. Tab K pg. 11.

⁴³ A. Tab K pg. 15.

⁴⁴ A. Tab K pg. 10.

⁴⁵ G. Ex. 51.

⁴⁶ G. Ex. 52, 53, and Testimony.

Lt. D talked with Major regarding concerns as to matters occurring on 4/27/16. She observed Grievant outside the fence and then enter the Sallyport by herself. She confirmed Grievant's opening of the gate was against policy, as Grievant was not a security officer, but also noted that Grievant was her Superior in the chain of command. She observed problems with the required paperwork Grievant had. She noted the practice was for the Shift Commander to sign the Transfer Sheet and the Face Sheet to verify that the correct inmate is being sent out and that the people taking the inmate have the authority to do so.

Lt. D was also aware of a practice of staying under constant sight supervision and stepping out of Sallyport and then returning without being searched. Lt. D also expressed concerns as to prior statements of Grievant pointing out her own (i.e. Grievant's) rank, being a Unit Manager, and her authority or right to make decisions. In response to questions, she opined that Grievant could have put Facility at risk or danger by her actions given certain situations.⁴⁷

Sgt. C was not aware of a practice of constant supervision allowing an employee to be able to enter and return into the compound without being searched.⁴⁸ He has seen Central Transportation was allowed to exit to get the Porta John without being searched but noted police vehicles are searched. He heard Grievant being told by a former warden about 2 – 3 years ago, that a Unit Manager, as to putting hand on inmate, had authority to do that. However, when Warden B took over at Facility Warden B informed Grievant she was no longer allowed to escort prisoners.

Warden Z stated Grievant was not in a security position or a security officer and she did not go through required security training. He noted a Unit Manager can be ADO and as an ADO the Unit Manager would make administrative and operational decisions within Facility after working hours, weekends, and holidays. He also affirmed that the Warden only has power to waive search and Grievant doesn't have power to search/shake people down or to search/shake down a vehicle.

While the practice has changed, a number of witnesses indicated prior experience wherein certain employees would exit and then re-enter the compound without being searched, if they were maintained in constant visual supervision. Also, a number of witnesses addressed matters where certain situations have occurred where a vehicle or individual would not be searched.

The evidence in this cause indicates that Grievant was not Security staff, was not authorized to search or obtained security keys but did allow a Deputy's vehicle to enter the Sallyport after she obtained the key from Tower C/O.

Grievant was not involved in an emergency situation involving ambulances, medical vehicles and equipment, or medical staff. She was not involved in a situation involving Agency personnel or Agency vehicles entering or exiting. Grievant was involved in the matter of deputies coming to Facility to take custody and transport inmate from Facility. The deputies were had armed, potentially had riot guns/shotguns etc. kept in their vehicle, and the two deputies wanted access to Facility and to Inmate.

Grievant was not assigned duties requiring or authorizing her to address this matter. She was not a security officer, but took it on herself to step into matters. She was, as a Unit Manager considered to be mid-level management. She was not an AOD or authorized to act as AOD as she was not assigned that duty on 4/27/16 and matters occurred during the normal working day.

Grievant was issued a Group II for "Failure to follow instructions and/or policy". Her actions concerning the events at and around the Sallyport did violate OP 440.2, OP 430.3, and OP 445.1 and

⁴⁷ G. Ex 19; A Tab K pg. 16.

⁴⁸ A. Tab L pg. 28.

were in violation of the Standards of Conduct (OP 135.1). The evidence, by a preponderance, indicates she allowed Deputy to pull his patrol car into the Sallyport. The evidence, by a preponderance, indicates this was done without the Deputy's vehicle being searched as was required by policy. Furthermore, testimony indicated Deputy's and Marshall's vehicles have consistently been subject to search at Facility.

Grievant does not contest she obtained the key to the cable allowing access into the Sallyport or that she re-entered the compound without being searched. She does raise that others have re-entered the compound without being searched based upon being under constant view. However, the testimony does address these employees being under constant view for short periods of time and most, if not all, being security staff. Irrespective of allegations of re-entering without being searched there is sufficient evidence to find Grievant failed to follow instruction and policy as alleged.

Upon consideration of the evidence in this cause, and for the reasons above stated, it is found that Agency has met its burden of proof, by a preponderance, as to this Group II Written Notice issued for failure to follow instructions and/or policy.

Counseling:

Allegations were made that Grievant received verbal counseling on 4/22/16 and 5/14/15 as to not exceeding the scope of her responsibilities and working on areas of assignment.

Grievant, in her Attachment A to her Grievance Form A, raised issue with the counseling addressed as occurring on 5/14/15. She stated that she was not informed she was receiving verbal counseling nor afforded the opportunity to review or sign the write up or comment on the "counseling". In this statement, she also acknowledged "the meeting that is now being classified as a counseling session".⁴⁹

Grievant also raised issue with the statement that she received verbal counseling regarding her "scope" on 4/22/16. Grievant contends the only meeting she had on that date was at her request to discuss an operational issue. She raised she was not informed that she was receiving verbal performance counseling.

While the two statements contested are alleged, in Grievance Form A, by Grievant to have been made in the Group II Written Notice they are set forth in the Group III Written Notice issued Grievant. Irrespective, the Hearing Officer will address the allegations as to counseling.

The statements at issue are found in the Group III Written Notice under Section IV – *Circumstances considered* wherein it is stated:

[Grievant] has received verbal counseling from her supervisor on 04/22/16 about the scope of her responsibilities and the need for her not to exceed it.

[Grievant] received counseling on 05/14/15 from the Warden [--] and [Chief of Housing] where she was reminded to "stay in her land and work on areas of assignment."

Chief of Housing and Programs ("Chief of Housing") was Grievant's supervisor. She spoke Grievant on 4/22/16 and made a written record of the conversation. She addressed Grievant's involvement with issues outside her scope of supervision. Chief of Housing told Grievant she had to stay within her lane/land and her scope of supervision. She also told her outside job duties were not her responsibility but the assigned units were her responsibility.⁵⁰ Also, Grievant was counseled to step down and to allow people to do their jobs.

⁴⁹ A. Tab C pg. 5.

⁵⁰ A. Tab P.

Grievant, as a Unit Manager, was responsible for her assigned housing units and any additional duties require of her by administration.⁵¹ Additionally, she was responsible for duties as ADO when assigned to such duties. Grievant could be, and was, assigned or asked to do additional tasks and would then be authorized to conduct such activities.

As a Unit Manager, Grievant had authority over matters in her housing units but this authority did not extent out over the whole institution. Also, while she was a Unit Manager she was not security staff even though she does supervise security staff. While a Unit Manager could assist in carrying out count a Unit Manager is not authorized to carry out or perform other security operations⁵².

Chief of Housing, as a supervisor, utilized verbal counseling to coach employees, to address areas needing improvement, and to bring matters to employee's attention. Chief of Housing noted these counseling sessions or discussions with an employee were instigated when she, as a Supervisor, wanted to address matters. She has told Supervisors under her that she maintains an informal or fact file and encouraged her Supervisors to do so likewise when they counsel with their employees. Additionally, Chief of Housing used these as a step before discipline.

Grievant contends on both 4/22/16 and 5/14/15 she was not informed that she was receiving verbal performance counseling. A Supervisor is charged managing the affairs of the Agency. A Supervisor is charged with supervising the employees under the Supervisor and assisting the employee with understanding the employee's work assignment and the objectives and performance expectations of the employee's job duties.

Counseling, as defined in OP 135.1, can be informal (verbal) or formal (written) intervention that consist of a discussion regarding problems with work performance. Counseling can refer to an informal discussion with an employee. Supervisors may use formal or informal means of addressing performance or behaviors with employees.

In the workplace, Grievant was given instructions by a Supervisor and told she needed to address certain problems. Policy does not require formal notice that what a Supervisor is telling an employee is to be is to be considered verbal performance counseling.

Grievant appears to be taking issue with these discussions and instructions being referred to or characterized as "verbal counseling", "counseling", and/or "counseling sessions". She also appears to object to these being so called unless formal notice and/or formalities are observed.

However, based upon the evidence, and for the reasons stated above, the matters addressed to Grievant on 4/22/16 and 5/14/15 were properly referred to and/or characterized in the Group III Written Notice.

Unfair, Unequal or misapplication of policy:

Grievant contends unfair, unequal or misapplication of policy in that she was treated differently than other employees. Whether the discipline is consistent with the agency's treatment of other similarly situated employees is addressed in Section VI. (B)(2) of the *Rules* and presented as an example of "mitigating circumstances" to be considered by the hearing officer.

⁵¹ Testimony.

⁵² Testimony, G. ex. 34.

To find misapplication or unfair/unequal application of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

A number of circumstances differentiate Grievant's circumstances from the circumstances of other employees.

C/O B was given informal verbal counseling and was not issued a Written Notice for her actions on 4/27/16. The evidence also indicates that Tower C/O was disciplined for giving Grievant, who was not a security officer the key to the cable barrier. He received a written counseling and a "Needs Improvement"

While both these employees were carrying out/attempting to carry out their assigned duties, Grievant was not assigned the duties she was involved in. Neither of these individuals were Supervisors as was Grievant, in fact Grievant was considered mid management. Grievant was a Unit Manager and qualified as ADO and had served as ADO. Grievant's actions involved C/O B who, while she did not supervise her, occupied a position below her position in the chain of command. C/O B operated under the belief her Superior in the chain of command took control of matters. C/O B reported matters immediately to her Supervisor and expressed to him her feeling that her Superior (i.e. Grievant) put her into a position where she could not do her job. Agency also determined that she was on her assigned post and had not left her assigned post as was alleged. Management took into consideration Tower C/O was not aware that Grievant, even though a Unit Manager and had ADO qualifications was not to receive security key even when she asked.

Grievant had been counseled previously regarding not getting involved with matters outside her duties and scope of supervision. She had been instructed by her Supervisor to stay in her lane and her scope of supervision.

The evidence in this cause does not indicate there were similar actions, facts, and/or circumstances involved. Upon consideration of all the evidence presented in this cause, for the reasons stated herein, the Hearing Officer does not find mitigation is warranted or appropriate under the circumstances as to Grievant's contention that Agency has applied inconsistent discipline and/or she was treated differently than other employees.

There is insufficient evidence to find management violated a mandatory provision of policy or that the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. There is insufficient evidence to find other employees were inconsistently disciplined in the same or similar situation or that Grievant was unfairly or differently treated than other employees in the same or similar situation.

Mitigation or Aggravation.

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination)

and policy (e.g., properly characterized as a Group I, II, or III offense). If the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances.

Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Upon review of all evidence admitted in this cause, as more fully discussed above, the Hearing Officer finds that Grievant engaged in the behavior described in the Group III Written Notice and Group II Written Notice, her behavior constituted misconduct, and Agency's discipline was consistent with law and policy.

Agency took into consideration mitigating circumstances. The evidence indicates that Agency did not terminate even though OP 135.1 provides that a first Group III normally should warrant termination. Agency's disciplinary action was to demote to lower pay band with 15% disciplinary pay reduction and transfer (New Role Title – Counselor II). Warden further testified that the Group II was a result of mitigation of matters from a Group III to a Group II.

Agency took into consideration that Grievant performed her duties as a Unit Manager and these direct duties were not an issue. However, Agency expressed concern as to the other matters she undertook within Facility not directly related to her work as Unit Manager.

Upon consideration of all the evidence presented in this cause, the Hearing Officer does not find, under the record evidence, that the discipline exceeds the limits of reasonableness. Mitigation is not found to be warranted and appropriate under the circumstances.

retaliation for applying for job:

Grievant contends these disciplinary actions were retaliation for her application for the position of assistant warden. She raises that, "It appears rather convenient that the day I announced I would be applying for the Assistant Warden position, charges are brought against me..."⁵³ However, there is insufficient evidence in this cause to find that either or both of the Written Notices were issued on account of, or related to, any application or announcement that she would be applying for the Assistant Warden position.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds as to each of the two Written Notices issued Grievant:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.

⁵³ A Tab C pg.5.

5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group II Written Notice and the issuance of a Group III Written Notice with demotion to lower pay band with 15% disciplinary pay reduction effective 6/25/16 are **Upheld**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's 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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant's Advocate
Agency's Attorney
EDR