



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11787

Hearing Date: May 23, 2022

Decision Issued: June 7, 2022

PROCEDURAL HISTORY

On December 3, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On December 30, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 24, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency for approximately one year. No evidence of prior active disciplinary action was introduced during the hearing.

If an inmate at the facility wanted to make a copy of a paper, he was expected to present a form requesting copies, pay for the copies, and then ask a counselor or office service assistant to make the copies. It was unusual for a corrections officer to be involved in that process.

On November 5, 2021, the Inmate had an envelope containing gambling sheets. The sheets showed team cities and reference to "The Sports Zone" and payment through "cash app." The sheets were gambling paraphernalia. Inmates possessing gambling paraphernalia were subject to disciplinary charges.

The Inmate wanted copies of the gambling sheets. A copier was located on the second and fourth floors of the Housing Unit. Grievant and the Inmate walked up the stairs without stopping to make copies on the second floor. On the wall of the stairway was painted, "STAIR 2, LEVEL 3, NO INMATES BEYOND THIS POINT."¹ Grievant and the Inmate walked past that sign up to the fourth floor.

¹ Agency Exhibit p. 22.

The Housing Supervisor's office was located on the fourth floor. To enter the fourth floor, Grievant and the Inmate passed a sign saying, "Under NO CIRCUMSTANCES are inmates authorized to enter the supervisor's office. Please remain behind the RED LINE."² Allowing an inmate into the supervisor's office presented a security risk because an inmate inside the supervisor's office had access to the control booth where inmate cell doors could be opened.

As they entered the supervisor's office, the Inmate handed Grievant a manila envelope containing the gambling sheets. Grievant made more than 12 copies of the document. She returned the envelope and copies to the Inmate and they left the supervisor's office and walked downstairs.

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." 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."³

Group III offenses include, "[v]iolation of Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders." Operating Procedure 135.2 prohibits Special Privileges:

Special Privileges - Employees will not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.

On November 5, 2021, Grievant granted the Inmate special privileges. She made copies for the Inmate without requiring him to pay for the copies. She failed to confiscate the Inmate's gambling paraphernalia. Grievant escorted the Inmate to the fourth floor and allowed him to enter a prohibited area of the Facility. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for providing special privileges to the Inmate. The Agency considered this behavior to be fraternization. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

² Agency Exhibit p. 21.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

Grievant argued the Agency did not have a policy prohibiting her from making copies for an inmate and did not train her regarding the consequences for doing so. Grievant's arguments are not persuasive because the Agency had a policy prohibiting special privileges to inmates and Grievant should have recognized she was providing the inmate a special privilege by copying his gambling sheets without cost and allowing him in an area where he was prohibited from entering.

Grievant asserted other security employees allowed inmates to enter the fourth floor office but did not present sufficient evidence to support this allegation.

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 Human Resource Management"⁴ 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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

⁴ Va. Code § 2.2-3005.

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.