



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11868

Hearing Date: March 1, and March 2, 2023
Decision Issued: May 9, 2023

PROCEDURAL HISTORY

On June 12, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy, violation of DHRM policy for Equal Employment Opportunity, violation of DHRM policy 2.35, Civility in the Workplace, and threats or coercion.

On June 28, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 25, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was initially scheduled for December 5, 2022. At the request of a party and because of pending Rulings, the hearing was delayed several times. On August 22, 2022, the hearing was rescheduled for January 18, 2023. On November 17, 2022, the hearing was rescheduled for March 1, 2023 and March 2, 2023. On March 1, 2023 and March 2, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representatives
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. He began working for the Agency on November 10, 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had worked as a yard officer for the past three or four years. In November 2021, the Agency operated under COVID19 restrictions designed to restrict inmate movement throughout the Facility. Inmates did not attend school and the Facility did not "pull chow." Facility managers decided to "pull rec" one pod at a time for one hour. Once this was over, Grievant had no duties to perform other than escorting kitchen workers. This meant Grievant did not have to do any work unless there was an emergency.

Grievant and Officer 1 did not know one another until Officer 1 began working at the Facility. Grievant and Officer 1 had been working on the same shift for approximately two or three years.

Grievant and Officer 1 became friends on Facebook and remained connected until Officer 1 was informed they remained Facebook friends. Officer 1 then unfriended Grievant in October 2022. Grievant and Officer 1 did not speak privately outside of work. Grievant had never asked Officer 1 on a date.

Grievant and Officer 1 had a good working relationship, but they were not personal friends. Officer 1 would sometimes talk about her boyfriend. Grievant and other officers were trying to get Officer 1 to leave the boyfriend because they believed he was abusing her. Grievant did not like Officer 1's boyfriend. The "final straw" was when Grievant and other employees appeared respectfully dressed in their blue uniforms at a funeral for a corrections officer.¹ Officer 1's boyfriend appeared inappropriately dressed in gray with mud on his boots.

Officer 1 worked as a Control Room Officer on November 26, 2021. Inside the Control Room was a panel with switches. Officer 1 was responsible for using the switches on the panel to open and close doors throughout the housing unit when requested to do so by a corrections officer or supervisor. The Control Room was on a higher level than the floor below and had a large window enabling the Control Room Officer to look out into the pod. Officer 1 had access to two working radios inside the Control Room. The control panel also had a panic button that Officer 1 could push if necessary.

Officer 1 had been trained to deal with extreme violence and taught how to disable a male. Officer 1 had been trained regarding the Prison Rape Elimination Act.

On November 26, 2021, Officer 1 was working in the B Building Control Room. At some point, Officer 1 asked Grievant to come talk to her around 4 p.m. Grievant did not have any duties at that time so he left the Yard. Officer 1 had to open three doors to let Grievant come from the outside into the Control Room. At approximately 4:13 p.m., Officer 1 pushed a button that opened the door to allow Grievant to enter the B Building Control Room. Only Grievant and Officer 1 were inside the B Building Control Room.

Grievant and Officer 1 spoke about their shift, the supervisors, incidents with inmates. Officer 1 also spoke about her boyfriend. Officer 1 talked about being depressed because an officer they knew had died by suicide approximately two weeks earlier.

While Grievant was in the Control Room, Officer 1 continued to push buttons on the control panel as needed to open and close doors throughout the pods and areas within her responsibility.

Grievant exited the B Building Control Room at approximately 4:52 p.m.

¹ A corrections officer working at the Facility died by suicide on November 16, 2021.

Officer 1 was responsible for making entries in the Control Room Log book. On November 26, 2021, at 6 a.m., Officer 1 wrote, "All equipment present, secure, and working." At 12:45 p.m., Officer 1 wrote, "[Officer 1] on Post." At 3:30 p.m., Officer 1 wrote, "Lockdown" and then she wrote "Begin Feeding." At 4:30 p.m., Officer 1 wrote, "Feeding complete. Cleaning disinfecting per COVID protocols."² Officer 1 did not record Grievant's entry or exit of the Control Room.

On December 7, 2021, the Watch Commander instructed Grievant and another officer to go to an inmate's cell and take the inmate to the restricted housing unit because the inmate was exposing himself to staff. The inmate began fighting Grievant and the other corrections officer. The Inmate had a shank (a knife). Officer 1's radio was working that day. Officer 1 testified at trial that there were two radios in the Control Room that were operational at all times. Officer 1 shut the inmate's cell door. Grievant and the other officer were locked inside the cell with the inmate who was fighting them. Officer 1's error placed Grievant in danger. Grievant was "highly upset" by Officer 1's mistake.

On December 10, 2021, Grievant spoke with Officer 1 and told her she had screwed up and there was nothing he could do to cover for her and that she could lose her job. Grievant did not act inappropriately towards Officer 1 on December 10, 2021.

Officer 1 testified at the criminal trial, "I was in fear for my job" regarding her actions on December 7, 2021. She testified at trial, "I was afraid of losing my job."

On December 12, 2021, Grievant was placed on pre-disciplinary leave.

On April 22, 2022, a local Grand Jury indicted Grievant of a felony, Rape by Force or Threat, and two misdemeanor offenses of Sexual Battery.

On June 1, 2022, Grievant met with the Warden and HRO. Grievant stated, "I'm innocent of all these allegations. I've not been convicted."

On June 28, 2022, Grievant filed a grievance and stated, "I have not been found guilty of anything and am innocent of charges."

On October 19, 2022 through October 21, 2022, Grievant was a defendant in a criminal trial before a jury in the local County Circuit Court. Officer 1 testified and Grievant testified. Grievant testified he did not rape Officer 1. The jury acquitted Grievant off all charges.³ Grievant initiated procedures to have the indictments expunged but at the time of the grievance hearing that procedure had not been completed.

² Grievant Exhibit p. 148.

³ The jury's acquittal of Grievant is not dispositive of the outcome of this grievance. The burden of proof in criminal trials is beyond a reasonable doubt. The burden of proof in grievance hearings is by a preponderance of the evidence which is a lesser burden than beyond a reasonable doubt.

CONCLUSIONS OF POLICY

The Agency alleged Grievant should receive a Group III Written Notice with removal for two reasons – (1) Grievant sexually assaulted Officer 1 and (2) Grievant was indicted by a local grand jury. There is no basis for disciplinary action in this case.

The Agency Did Not Prove Grievant Sexually Assaulted Officer 1

The Agency asserted that Grievant asked Officer 1 if he could touch her ass and then touched her buttocks. The Agency claimed Grievant touched Officer 1's hand and placed it on his penis and told Officer 1 she was going to have to do something about this. The Agency alleged Grievant told Officer 1 that she could slip her pants down and sit on his lap and no one would see her. The Agency alleged Officer 1 told Grievant she was uncomfortable with his conversation and sexual advance. The Agency alleged Grievant persuaded Officer 1 to enter the control room bathroom by coercion, penetrated her with his penis and ejaculated in her mouth. The Agency did not establish these allegations with credible and persuasive evidence. Grievant refuted these allegations. The Hearing Officer believes these allegations are not true.

The Agency has not presented credible and persuasive evidence to show that Grievant sexually assaulted Officer 1 for several reasons. First, only Grievant and Officer 1 were in the Control Room between 4:13 p.m. and 4:52 p.m. No one else witnessed what happened during that time. Second, Grievant consistently denied sexually assaulting Officer 1. Grievant testified that he did not sexually assault Officer 1 and did not make the offensive statements alleged by the Agency.⁴ He testified he never touched or did anything inappropriate to Officer 1. His denials were credible. The Hearing Officer believes that Grievant told the truth during the grievance hearing that he did not sexually assault Officer 1. The Agency did not show that Grievant was untruthful. The testimony of Officer 1 does not persuade the Hearing Officer that Grievant's testimony was untruthful. Third, the Agency did not produce any evidence to corroborate Officer 1's testimony.⁵ For example, Officer 1 testified that Grievant ejaculated but there was no physical evidence showing this occurred. Fourth, Grievant established a motive for Officer 1 to be untruthful about him. On December 7, 2021, Grievant and another officer were involved trying to stop an inmate from fighting. Officer 1 locked the inmate's cell while Grievant and the other officer were inside the cell. Grievant was "highly upset" by Officer 1's actions and told her he would not cover for her. Officer 1 feared she might lose her job.

⁴ The Agency alleged but did not establish that Grievant had been involved in prior inappropriate behavior with female staff at the Facility.

⁵ The Agency alleged that Officer 1 attempted to avoid interacting with Grievant following the alleged sexual assault. Grievant presented evidence showing that Officer 1's interaction with Grievant did not change after November 26, 2021. The Hearing Officer does not believe Officer 1 acted differently towards Grievant after November 26, 2021 and prior to Grievant's placement on pre-disciplinary leave.

Based on these considerations, the Agency has not met its burden of proof to show that Grievant engaged in any inappropriate behavior.

Indictment Alone Does Not Determine the Outcome of this Grievance

The Agency argued that once Grievant was indicted, the Agency was authorized to remove him from employment under its policies. The Agency cited Operating Procedure 135.1 (VI)(D), Standards of Conduct, which provides:

A conviction is not necessary to proceed with a disciplinary action. The Unit Head must determine whether the evidence is sufficient to have an impact on the DOC, its employees, and the public and its perception of the DOC.

Grievant was terminated before the criminal trial. The Written Notice was issued based on Grievant's indictment. According to the Warden, the outcome of the trial meant nothing at that point.

The Agency's argument fails for two reasons. First, disciplining an employee who was acquitted of a criminal charge and also did not engage in the underlying offense would be an unfair application of policy. The essence of disciplinary action is fault by an employee based on the employee's behavior. Being indicted is not behavior by an employee. Second, DHRM Policy 1.60 addresses removal from the workplace for alleged criminal conduct. Section C(2)(c) provides:

If the criminal investigation is concluded without any formal charges being made, or **if the charge is resolved without the employee being convicted** of it, the employer shall return the employee to active status. (Emphasis added.)

This section shows DHRM favors reinstatement of employees acquitted of criminal charges.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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

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]

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

[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