DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11950, 11951

Hearing Date: June 22, 2023
Decision Issued: June 26, 2023

PROCEDURAL HISTORY

On June 21, 2022, Grievant was issued a Group II Written Notice.[1] On August 3, 2022, Grievant timely filed a grievance challenging the Agency's actions.[2] On January 12, 2023, Grievant was issued a second Group II Written Notice and was terminated. On February 6, 2023, Grievant timely filed a grievance challenging the Agency's actions.[3] On March 7, 2023, the Director of the Office of Employment Dispute Resolution (EDR) issued Consolidation Ruling Number 2023-5518. The grievance was assigned to this Hearing Officer on March 23, 2023. A hearing was held on June 22, 2023.

APPEARANCES

Agency Counsel
Agency Representative
Advocate for Grievant
Grievant
Witnesses

ISSUES

Did Grievant admit an inmate into a supervisor's office in violation of a memo and institutional postings that this was prohibited?[4] Did Grievant violate VADOC operating procedure by not activating her body camera[5] and did the Grievant fail to respond to a Use of Force incident on November 11, 2022.[6]

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that

[1] Agency Exhibit 1, Page 007
[2] Agency Exhibit 1, Page 001
[3] Agency Exhibit 1, Pages 013, 020
[4] Agency Exhibit 1, Page 007
[5] Agency Exhibit 1, Page 001
[6] Agency Exhibit 1, Page 002

the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[7] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [8] However, proof must go beyond conjecture.[9] In other words, there must be more than a possibility or a mere speculation.[10]

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency submitted a notebook containing pages 1 through 69. Grievant objected to the inclusion of pages 9,10,18 and 19. The notebook was accepted in its entirety, with the exception of those four pages, as Agency Exhibit 1. The Advocate for the Grievant was told that as and if those pages became relevant to this hearing, he would be allowed to raise an objection at that point, and I would make a final ruling as to whether they would be included in Agency Exhibit 1 or excluded. During

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[7] See Va. Code § 2.2-3004(B)

[8] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

[9] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

[10] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

the course of the hearing, two additional exhibits were proffered. The first consisted of two pages which were pictures. I have entered them into Agency Exhibit 1 at pages 70 and 71. The second was an e-mail string proffered by Grievant which, for simplicity's sake, has been entered into Agency Exhibit 1, at pages 72,73,74, and 75.

Grievant submitted a notebook containing Sections 1 through 5. The Agency objected to page 4. During the course of the hearing, the contents of page 4 were entered into evidence at Agency Exhibit 1, pages 72,73,74, and 75. The Agency had no objections to the remaining contents of Grievant's notebook and it was accepted as Grievant's Exhibit 1.

The Agency called Grievant as its first witness. Grievant's Advocate stated that Grievant would not testify in this matter and he instructed her to not answer any questions proffered by counsel for the Agency.

On June 21, 2022, Grievant was issued a Group II Written Notice for admitting an inmate into a supervisor's office.[11] The Offense Date was March 10, 2022, and Grievant signed the Written Notice on July 7, 2022, acknowledging receipt.[12] Grievant filed Grievance Form A on August 3, 2022.[13] In an attachment, Grievant set forth her reasons for why the Written Notice was in error. At no point did she deny that she allowed an inmate into a supervisor's office. Her argument was that the Agency was compelled to use progressive discipline pursuant to Policy 135.1, Standards of Conduct.[14]

On December 29, 2022, Grievant received the Agency's First Resolution Response. In its finding, the Agency stated as follows: *"During your Due Process Hearings it was noted … that you admitted being aware of the memo and the postings that inmates are not allowed in offices. This is a self-admission to being aware of established directives."*[15] At no point during the hearing did Grievant contradict this assertion.

On January 12, 2023, Agency's Second Resolution Step finding was mailed to Grievant.[16] As a part of its finding, it found that Grievant admitted "*allowing an inmate into the supervisor's office and Grievant admitted to being aware of the memorandum and the postings that inmates are not allowed into the offices.*"[17] At no point during the hearing did Grievant contradict this assertion.

On February 7, 2023, the Agency issued its Third Step Resolution Finding. The Regional Administrator met with Grievant prior to issuing the Third Step finding. The finding stated in part as follows: "… *it was determined that signage was posted and visible to employees and inmates which clearly communicated inmates were not allowed in offices. You acknowledged during our meeting that you were aware of this and by your own admission failed to follow instructions*.[18] At no point during the hearing did Grievant contradict this assertion

[11] Agency Exhibit 1, page 7
[12] Agency Exhibit 1, Page 7
[13] Agency Exhibit 9, Page 020
[14] Agency Exhibit 1, Page 022
[15] Agency Exhibit 1, Page 024
[16] Agency Exhibit 1, Page 026
[17] Agency Exhibit 1, Page 027
[18] Agency Exhibit 1, Page 031

Agency Exhibit 1, Pages 70 and 71 are pictures of the signage within the work area of Grievant. Grievant called witnesses who testified regarding this signage. Some said they saw it, some said they did not, and some were unsure. None of their testimony dealt with whether or not Grievant saw the signage and Grievant never denied any of the assertions in Agency's evidence that she did.

Agency Exhibit 1, Pages 73 -75 is an email string regarding notification to Supervisors and Unit Managers regarding not allowing inmates into supervisor's offices. On March 8, 2021, an e-mail was sent to Supervisors and Unit Manager Offices stating as follows: "*Effective immediately, inmates are not allowed to enter the Housing Unit Supervisors or Unit Managers Office Area. No exceptions. This change will greatly enhance our safety and security. Any questions let me know*.[19]

Grievant held the rank of Sergeant. All sergeants and higher-ranking officers are by definition supervisors. The clear unequivocal testimony of all witnesses was that once you attained that rank, whenever you entered the institution for whatever reason or to fill whatever position, you were a supervisor. Grievant, through her witness, attempted to question whether she received the email of March 8, 2021. One of Grievant's witnesses, who held the rank of sergeant, testified that she received such a notice. Of greater importance, at no point during the hearing did Grievant contradict the assertion that she received the March 8, 2021 email.

Grievant, in her first, second, and third Step Resolution appeals, pointed to Operating Procedure 135.1, Standards of Conduct (III)(B) which states in part as follows: "*Supervisors are encouraged to utilize available resources and performance management tools... and provide employees with sufficient time and opportunity to improve unsatisfactory performance and behavior.* ***However, management has the authority to fairly and effectively discipline or terminate employees whose conduct or performance does not improve, or where the misconduct or unacceptable performance is of such a serious nature that a first offence warrants termination.***"[20] (Emphasis added)

The main issue here is the safety of the employees of the Agency as well as that of the inmates. Grievant acknowledged that she was aware of the rule regarding allowing inmates into offices and she simply chose not to follow it. I find that the evidence before me is overwhelming that Grievant allowed an inmate into a supervisor's office in blatant disregard of prior emails and posted signage that said this was strictly forbidden. Accordingly, the issuance of the Group II Written Notice for unsatisfactory performance and failure to follow instructions and or policy was fully justified.

On January 12, 2023, Grievant was issued a Group II Written Notice for failure to activate her body camera during the period of November 3, 2022, and November 23, 2022, and for her failure to intervene in a Use of Force incident on November 11, 2022.[21] A Due Process meeting was held for Grievant on December 22, 2022. When questioned about her failure to activate her Body Worn Camera (BWC), Grievant stated "…*she is not used to it yet*."[22] Grievant acknowledged that she had the training every other supervisor took and that she was aware of the appropriate Operating Procedure regarding a BWC.

[19] Agency Exhibit 1, Page 075
[20] Agency Exhibit 1, Page 041
[21] Agency Exhibit 1, Pages 001, 002
[22] Agency Exhibit 1, Page 011

Operating procedure 430.6 (II)(E)(3) states in part as follows: *Security Supervisors up through Chief of Security positions must activate their BWC when: (a) making rounds in inmate Housing Units … (c) Interacting with or managing a disruptive/assaultive or potentially disruptive/assaultive inmate…"*[23] As stated above, the rank of Sergeant makes the holder a supervisor. As such, that person is issued a BWC whenever they enter the institution. The data from the BWC is downloaded at the end of a shift in order to have a record of the time it was on and of any incidents for which this data would be valuable. An Agency witness, with access to this data, testified that from November 7, 2002, through November 30, 2022, Grievant never activated her BWN. This was more than 100 hours when it was off and should have been on. While I sustained Grievant's objection to pages 9 and 10 of Agency Exhibit 1 because they were offered after the deadline for documentary evidence to be filed, Grievant did not object to this witness's testimony of the same data.

On February 6, 2023, Grievant filed Grievance Form A regarding this second Group II matter.[24] She argues therein as follows: "*…there were only (3) days where I did not activate my BWC while being assigned as a Security Supervisor…The remaining days…when my BWC was not activated were due to my serving in the role as a Corrections Officer…*"[25] This argument fails for several reasons. First, all the evidence before me was that supervisors were issued a BWC upon entry to the institution. The position that one was serving on that day is not the operative factor. The rank of the employee is. It is specious to think a BWC would be issued to someone just as an ornament. And regardless of that, Grievant clearly admits there were 3 days when, even under her logic, the BWC was mandated to be on, and it was off.

On November 11, 2022, an inmate became unruly and began to struggle with Agency employees. Operating Procedure 420.1(I)(A) states in part as follows: "*Employees have a responsibility, consistent with their self-protection, to protect offenders, other employees, and members of the community who are threatened by the actions of any facility offender. Facility employees are also required to …maintain order and control within the facility and protect state property*.[26]

In speaking to the Use of Force incident, in her Grievance Form A, Grievant stated in part as follows: "*Based on my experience with Use of Force as is the belief of other highly regarded use of force experts, there were four staff present dealing with the situation. I did not intervene in violation of policy or dereliction of my duty, but rather for everyone's safety. There were sufficient staff present to restrain the inmate, and my decision not to intervene was due to avoiding a situation where if too many staff were involved, it could have caused a bubble or compound effect where it would have become more difficult to restrain the inmate, and jeopardize the safety of all involved. I stayed in my position, observing and ensuring that the area remained clear while the inmate was brought under control*."[27]

The Grievant seems to imply that she is an "expert" in Use of Force events. She offered no evidence to that effect; nor did she offer any evidence from other experts. Later, Grievant states in part: "*…this was my first emergency response while having a BWC. My adrenaline was pumping, I was providing security during an active scene, and at the forefront of my mind was a serious concern for*

[23] Agency Exhibit 1, Pages 061, 062
[24] Agency Exhibit 1, Page 013
[25] Agency Exhibit 1, Page 014
[26] Agency Exhibit 1, Page 066
[27] Agency 1, Page 015

my fellow staff members, all accompanied by having new equipment that I was not used to handling as of yet…"[28] Grievant seems to argue that the new BWC is what prevented her from engaging as required by Operating Procedure 420.1(I)(A). As an Agency exhibit, a brief video of this event was played at the hearing. It consisted of the video from BWC's worn by 2 officers who engaged in controlling the inmate who was out of control. Grievant and her Advocate viewed this video prior to the hearing and had no objection. Because of security issues, it is not a part of Agency Exhibit 1, but Agency will try to circumvent those procedures if the video is needed on an appeal of this decision. What is clearly shown is that Grievant, with the incident taking place no more than 5 feet in front of her, stood by and did nothing more than pick up a BWC that had been lost by one of the officers engaged in the incident. The Grievant was a by-stander to this incident and did not engage in any way to help her fellow officers. It apparently did not occur to Grievant to activate her BWC even after she picked up the fallen BWC.

I find that Grievant failed to follow instructions and or policy, her performance was unsatisfactory, and she violated safety rules by failing to activate her BWC and by not engaging in the Use of Force incident.

Finally, Grievant alleged in Grievance Form A, filed On February 6, 2023, that the reason this Group II Written Notice was issued was that a ranking officer "*demonstrated a personal bias against me*."[29] Grievant offered not a scintilla of evidence to support this allegation.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

[28] Agency Exhibit 1, Pages 015, 016
[29] Agency Exhibit 1, Page 014

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

Grievant had an active Group 1 Written Notice prior to the issuance of both of the Group II Written Notices that are before me. Grievant called witnesses that testified that they had let inmates into Supervisor's office and that their punishment was a Notice of Substandard Performance. However, one of those witnesses acknowledged that another employee had been terminated for the same offence of allowing inmates into Supervisor's offices. Other than these statements, there was no further evidence to compare the punishments such as length of service, prior Written Notices, evaluations of annual work performance, etc. From the paucity of evidence before me, there is clearly not an issue of disparate treatment. I find there is no reason for me to mitigate the termination of Grievant's employment from the Agency.

DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and the issuance of the two Group II Written Notices, with termination, was proper.

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]

[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].

William S. Davidson

William S. Davidson, Hearing Officer

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