



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11992

Hearing Date: September 7, 2023
Decision Issued: September 27, 2023

PROCEDURAL HISTORY

On February 22, 2023, Grievant was issued a Group III Written Notice of disciplinary action with a suspension, demotion,¹ including a reduction in pay and a transfer to another Agency facility for “violation of DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP 135.3 – Standards of Ethics and Conflicts of Interest.”

On March 17, 2023, Grievant timely filed a grievance to challenge the Agency’s action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 24, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On September 7, 2023, a hearing was held at the Facility.

APPEARANCES

Grievant
Grievant’s Advocate
Agency Representative
Agency Party Designee
Witnesses

¹The second step respondent mitigated the discipline by reinstating Grievant to the rank of Sergeant effective April 25, 2023. This reinstatement was to the position or title at the facility where Grievant was transferred and, based on testimony, did not include the reinstatement of pay. See Grievant Exs. at 14.

Observer

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 Sergeant at the Facility for over five years. Her work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

On February 1, 2023, Grievant was a Corrections Sergeant at the Facility and her post that day was Security Supervisor for the Housing Unit. Grievant had been trained on the Housing Unit and had been posted on the Housing Unit as the Security Supervisor for the Housing Unit on other occasions before that date.

As the Security Supervisor assigned to the Housing Unit, Grievant was the supervisor in charge of the Housing Unit with numerous responsibilities over the operations of the Housing Unit, including overseeing staff assigned to, or visiting, the Housing Unit. Grievant was responsible for decisions to allow staff into any cell on the Housing Unit.

The Housing Unit includes an observation cell (Cell). The Cell is utilized by the Agency when inmates need to be under continuous observation. For example, an inmate may be held in the Cell for a period of time if there are concerns that the inmate may cause injury to himself.

The Cell is equipped with a camera. The camera in the Observation Cell runs continuously and continuously sends images to monitors in the Facility, including a Monitor in the Control Booth² in the Housing Unit. The Monitor in the Control Booth can be viewed by personnel in the Control Booth. The camera also continuously records so that the images captured by the camera may be played back in the event there is an incident in the Cell.

Grievant knew that there was a camera in the Cell.

On February 1, 2023, during the period relevant for this matter, there were four individuals in the Control Booth: the Grievant, the Floor Officer and two Officers in Training.

The Counselor was in the Housing Unit and came to the Control Booth to request that he be given access to the Cell to use the toilet in the Cell.³

The Floor Officer told the Counselor that the restroom in the Control Booth was not in use and was available to the Counselor to use.

The Counselor did not want to use the restroom in the Control Booth and again requested to be given access to the Cell to use the toilet.

Grievant told the Counselor that the Control Booth restroom was not in use and was available to the Counselor. Grievant also told the Counselor that there were restrooms in the medical unit and the staff dining area that also were available for the Counselor's use.

The Counselor told the Officer and Grievant that other security personnel on other shifts allowed the Counselor to use the toilets in the cells.

The Counselor declined the suggestions for other available restrooms and again requested that he be allowed to enter the Cell to use the toilet there.

Grievant agreed to allow the Counselor to use the toilet in the Cell and directed the Floor Officer to let the Counselor into the Cell.

Grievant did not advise the Counselor that there was a camera in the Cell.

Grievant returned to the desk in the Control Booth and was not viewing the Monitor.

² The "Control Booth" is a room that includes a panel of monitors, a desk for the Security Supervisor and a restroom.

³ References "to use the toilet (or bathroom or restroom) in the Cell" in this matter refers to a request to have access to the Observation Cell in order to defecate in the toilet in that cell.

The Floor Officer let the Counselor into the Cell.

Images of the Counselor in the Cell appeared on the Monitor in the Control Booth.

The Grievant heard the Officers in Training in the Control Booth commenting when they could see the Counselor in the Cell on the Monitor.

The Floor Officer re-entered the Control Booth and saw the Counselor in the Cell on the Monitor.

The Floor Officer placed a coat over the Monitor so that the images of the Counselor in the Cell could not be viewed in the Control Booth.

Grievant did not notify the Counselor that he was viewable on the Monitor during the time he was in the Cell and afterwards did not try to inform the Counselor he had been viewed on the Monitor while he was in the Cell.

Grievant did not immediately report the incident to her immediate supervisor or anyone else in her supervisory chain of command.

Grievant learned the next day, from a lieutenant, that the lieutenant had heard other staff at the Facility talking and laughing about the Counselor being captured on camera using the toilet in the Cell.

Sometime over the next two days, the Counselor learned from another employee that he had been captured on camera when he was using the toilet in the Cell.

The Institutional Program Manager and the Assistant Warden observed that the Counselor was very upset after learning that he had been captured on camera while he was using the toilet in the Cell.⁴

Two days after the incident, Grievant saw the Counselor for the first time following the incident. Grievant apologized to the Counselor. According to Grievant, the Counselor would not look at her.

On February 22, 2023, Grievant was issued a Group III Written Notice of disciplinary action with a suspension, demotion,⁵ a reduction in pay and a transfer to another Agency facility for “violation of DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP 135.3 – Standards of Ethics and Conflicts of Interest.”

⁴ The Counselor is no longer employed with the Agency and did not testify during the hearing.

⁵The second step respondent mitigated the discipline by reinstating Grievant to the position of Sergeant effective April 25, 2023. This reinstatement was to the position or title at the facility where Grievant was transferred and, based on testimony, did not include the reinstatement of pay. See Grievant Exs. at 14.

In issuing the discipline, the Agency considered as mitigating factors the Agency's belief that Grievant had not acted with malice and Grievant's more than 5 years of service with no active group notices.⁶

As aggravating factors, the Agency noted the seriousness of the offenses and the impact on Agency operations.⁷

The Agency also considered as aggravating factors Grievant's supervisory role and her failure to take immediate steps to mitigate the situation by informing the Counselor and reporting the situation through the chain of command.⁸

On April 19, 2023, the second level respondent to Grievant's grievance further mitigated the discipline by reinstating Grievant to the rank of Corrections Sergeant because Grievant "took accountability for [her] actions and appeared forthcoming and truthful in [her] responses to difficult questions."⁹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."¹⁰

Department of Corrections Operating Procedure 135.3 (Standards of Ethics and Conflict of Interest) states as its purpose that the procedure:

ensures that all Department of Corrections employees and service providers understand and comply with requirements to act professionally and ethically, and to respect the privacy of fellow employees and individual inmates/probationers/parolees.¹¹

Operating Procedure 135.3 directs that

[e]mployees of the DOC must conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth of Virginia.¹²

⁶ See Agency Exs. at 1-2.

⁷ See Agency Exs. at 2.

⁸ See Agency Exs. at 2.

⁹ See Grievant's Exs. at 11-14.

¹⁰ See Virginia Department of Corrections Operating Procedure 135.1.

¹¹ See Virginia Department of Corrections Operating Procedure 135.3.

¹² Virginia Department of Corrections Operating Procedure 135.3, Procedure II.C.

With respect to employees in a supervisory role, Operating Procedure 135.3 provides that

[e]mployees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others.¹³

Virginia Department of Corrections Operating Procedure 145.3 (Equal Employment Opportunity, Anti-Harassment, and Workplace Civility) states as its purpose that the operating procedure

provides for equal employment opportunity within the Department of Corrections (DOC); educates employees in the recognition of discriminatory practices, harassment, cyber-bullying, and bullying; and provides an effective means of preventing and eliminating such discrimination, harassment, cyber-bullying, bullying, and retaliation from the workplace. DOC fosters a culture that demonstrates the principles of civility, diversity, inclusion, and equity to ensure a safe and civil workplace based on an awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.¹⁴

Operating Procedure 145.3 directs that

[i]t is the responsibility of all employees, applicants, vendors, contractors, and volunteers to maintain a non-hostile, bias-free working environment, and to ensure that employment practices are free from workplace harassment of any kind, cyber-bullying, bullying, retaliation, or other inappropriate behavior....¹⁵

Operating Procedure 145.3 provides that

[a]ny employee who engages in conduct determined to be harassment, discrimination, retaliation, cyber-bullying, bullying, and/or other inappropriate behavior, or who encourages or ignores such conduct by others will be subject to disciplinary action under Operating Procedure 135.1, *Standards of Conduct*, which may include termination from employment.¹⁶

¹³ Virginia Department of Corrections Operating Procedure 135.3, Procedure II.D.

¹⁴ Virginia Department of Corrections Operating Procedure 145.3.

¹⁵ Virginia Department of Corrections Operating Procedure 145.3, Procedure IV.A.

¹⁶ Virginia Department of Corrections Operating Procedure 145.3, Procedures IV.D.

Attachment 1 of Operating Procedure 145.3 provides Guidance on Prohibited Conduct and lists prohibited conduct and behaviors, as including, among other things:

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest
- Behaving in a manner that displays a lack of regard for others and/or significantly distresses, disturbs, and/or offends others
- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip¹⁷

The Department of Human Resources Management has issued Policy 2.35 (Civility in the Workplace) which applies to all state executive branch employees, including employees of the Department of Corrections provides that "[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable."¹⁸

The Department of Corrections Operating Procedure 135.1 (Standards of Conduct) provides that violation of DHRM Policy 2.35 or Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

Whether the Grievant engaged in the behavior alleged in the Written Notice and whether such behavior constituted misconduct.

The Agency has met its burden in proving that the Grievant engaged in the behavior alleged in the written notice and that such behavior constituted misconduct.

During the period at issue in this case, the Counselor could only access the Cell with authorization from the Grievant. Grievant knew there was a camera in the Cell and that the camera in the Cell was continuously transmitting images from the Cell to the Monitor in the Control Booth.

Grievant's authority over access to the Cell included a responsibility for those staff to whom she granted access which required that she grant access only in a manner consistent with all Agency policies, including DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP

¹⁷ Virginia Department of Corrections Operating Procedure 145.3, Attachment I.

¹⁸ DHRM Policy 2.35.

135.3 – Standards of Ethics and Conflicts of Interest. In this situation, those policies required that Grievant deny the Counselor's request to access the Cell so as not to put the Counselor in a compromising position that would embarrass or humiliate the Counselor, breach the Counselor's privacy or undermine the Counselor's self-worth, team cohesion, and staff morale.

Once Grievant realized her mistake in granting the Counselor access to the Cell, Grievant should have taken steps to minimize the impact of her actions. She could have done so by speaking to the Counselor to make him aware of what had occurred and by immediately reporting the incident to her supervisor.

Whether intentional or not, Grievant's behavior showed a lack of regard or concern for others and that lack of regard resulted in significant distress and humiliation to the Counselor. Grievant's behavior showed a lack of respect for the Counselor's privacy. Such behavior erodes the ability of other staff to trust Grievant and undermines team cohesion and employee morale at the Facility.

Grievant asserted that she did not know that the camera was continuously recording because, according to Grievant, looking at the Monitor would not indicate whether images were being recorded. Whether Grievant knew that the camera had been recording or not, Grievant knew that the camera was continuously transmitting images from the Cell to the Monitor. Those images were embarrassing and humiliating to the Counselor and would be to a reasonable person in the Counselor's situation.

Grievant asserted that images from the camera include a "black PREA¹⁹ box" over parts of the images when viewed on the Monitor in order to provide some very limited privacy to inmates. That the Agency had measures in place to provide some minimal privacy to inmates during periods of time when they may be in the observation cell did not relieve the Grievant of her responsibility to deny the Counselor's request to use the toilet in the Cell and does not change the fact that the Grievant authorized the Counselor being captured on camera in a compromising position that was embarrassing and humiliating.

The Grievant asserted that the Counselor may have contributed to his own embarrassing situation by requesting to use the toilet in the Cell. That argument may be more persuasive if the Counselor could have accessed the Cell on his own. However, because the Counselor could only access the Cell with Grievant's approval, Grievant had a responsibility to ensure that her grant of access to the Cell was consistent with all Agency policies, including DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP 135.3 – Standards of Ethics and Conflicts of Interest.

Grievant asserted that there is no policy that prohibits staff from using the toilet in an empty cell and that other staff frequently use the toilets in the cells. Although the Warden testified that he believed there was a policy or post order that prohibited such behavior,

¹⁹ PREA is the acronym used to describe the Prison Rape Elimination Act. The "PREA box" attempts to prevent projection of images of inmate genitalia.

the Agency has not provided nor cited to any written policy that prohibits staff from using the toilets in the cells. Whether such policy exists, Grievant was not disciplined for violating a policy that prohibited staff from accessing cells to use the toilet. The Agency disciplined Grievant for violating DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP 135.3 – Standards of Ethics and Conflicts of Interest.

Grievant asserted that she did not allow the Counselor to access the Cell with an intent to humiliate or embarrass him. While Grievant's intent may be a factor for consideration in determining the appropriate penalty, specific intent is not required for a violation for the policies at issue in this case.²⁰ The record shows that the Agency considered Grievant's intent and lack of malice as a mitigating factor in determining the punishment that was issued to Grievant.

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)

The Agency's discipline was consistent with law and policy.

The Department of Corrections Operating Procedure 135.1 (Standards of Conduct) provides that violation of DHRM Policy 2.35 or Operating Procedure 145.3 may be a Group I, Group II, or Group III offense depending upon the nature of the violation.

Grievant's behavior resulted in significant distress and humiliation to the Counselor. Such behavior also erodes the ability of other staff to trust Grievant and undermines team cohesion and employee morale at the Facility.

Grievant argued that the punishment was excessive. Grievant argued that although she may have made poor decisions in this case, her poor decisions do not rise to the level of a Group III offense and that the Agency should have instead used progressive discipline and utilized this situation as a training opportunity.

Because of the Grievant's supervisory role, it was reasonable for the Agency to hold Grievant to a higher standard with the expectation that she would set an example for appropriate behavior.

Given the nature of the offense and its impact on the Counselor, as well as Grievant's supervisory role, the Agency reasonably characterized the offense as a Group III offense.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal an agency may suspend, transfer, demote, and impose a disciplinary pay reduction.

²⁰ See *also* Office of Employment Dispute Resolution, Administrative Review Ruling No. 2021-5194 (Feb. 2, 2021).

The Agency's disciplinary action was consistent with law and policy. The Agency has met its burden of proof.

Mitigation

Virginia 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..."²¹ 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.

Grievant testified regarding an incident at the Facility involving other employees in supervisory positions that she believed were similarly situated and who she asserted had not received as severe discipline. Considering the facts as Grievant presented them, the Hearing Officer cannot conclude that the situation described by Grievant is comparable. The alleged misconduct as described by Grievant did not involve alleged violations of DOC OP 145.3 – Equal Employment Opportunity, Anti-Harassment, and Workplace Civility (DHRM 2.05 and 2.35) and OP 135.3 – Standards of Ethics and Conflicts of Interest. Therefore, the Hearing Officer cannot conclude that the Agency treated Grievant differently from similarly situated employees.

In light of the standard for mitigation, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group III Written Notice of disciplinary action with suspension, reduction in pay and a transfer to another Agency facility²² is **upheld**.

APPEAL RIGHTS

²¹ Va. Code § 2.2-3005.

²²The second step respondent mitigated the discipline by reinstating Grievant to the rank of Sergeant effective April 25, 2023.

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:

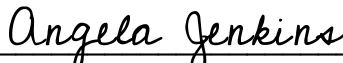
Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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.²³



Angela L. Jenkins, Esq.
Hearing Officer

²³ 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.