

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE
OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: GREVIANCE NO.: 11998

DECISION OF HEARING OFFICER

This matter comes before me pursuant to the grievance filed by an employee of the Virginia Department of Corrections. She challenges the issuance to her of a Group II Written Notice on May 3, 2023, arguing that her actions were justified under the circumstances. I disagree and uphold the discipline.

I. PROCEDURAL BACKGROUND

The agency issued the grievant a Group II Written Notice on May 3, 2023. The grievant filed her challenge to the grievance (Form A) on June 2. The Department of Human Resource Management appointed me as hearing officer effective August 7. I conducted a prehearing conference call with the grievant and the agency advocate. The grievant was apprised of the availability of resources of the Department of Resource Management (DHRM) website for grievants choosing to represent themselves. By agreement of the parties, I scheduled the matter for hearing on October 6.

In accordance with my prehearing order, the agency submitted, prior to the hearing, twenty documents as proposed exhibits. The agency further provided notice that certain secure videos would be introduced into evidence and would be available for review by the grievant prior to the hearing upon request. The grievant submitted no documents or list of witnesses prior to the hearing.

The hearing was commenced as scheduled on Oct 6. The agency was represented by its advocate. It called two witnesses and played the video for which prehearing notice was provided. I accepted twenty documents submitted prior to the hearing into evidence without objection. The grievant continued to represent herself. She called as her own witness one of the individuals listed by the agency as a possible witness. She also testified on her own behalf. She offered no additional exhibits but did present a document corroborating that she is an emergency responder for the facility. The hearing lasted approximately two hours.

II. ISSUE PRESENTED

The issue before me was whether the agency showed by a preponderance of evidence that the grievant committed the act described in the formal discipline and that its issuance of the Written Notice was appropriate and consistent with law and policy.

III. FINDINGS OF FACTS

The grievant is an employee of the agency with approximately 16 years experience. She has consistently received ratings of “contributor” and has no other active written notices. She works as a Corrections Officer and holds the rank of Sergeant.

On April 11, 2023, the grievant relieved an officer (“CO-1”) at the front search area of the facility so that the other officer could take her lunch break. At approximately 11:54 AM, near the end of the scheduled break for CO-1, the grievant heard a message that she (the grievant) needed to return to the secure portion of the facility to assist in distributing lunch to the inmates. She exited the front search area and located CO-1 in her car in the parking lot. She told CO-1 that she needed to return to her post in the front search area for the grievant to respond to the assistance call. The grievant immediately returned to the front search area.

The grievant attempted to enter the secure portion of the prison. Another corrections officer (“CO-2”) told her to stop, that she needed to be searched prior to re-entering the secure area. The grievant refused to undergo any of the required searches or scans; she proceeded into the secure area. The other officer reported the actions of the grievant to a supervisor and an investigation ensued, which culminated in the issuance of the subject disciplinary action.

IV. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) that the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the written notice.

II. Whether the behavior constituted misconduct.

III. Whether the discipline was consistent with policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant does not dispute that she refused to go through the normal search procedures. Those procedures are set forth, in detail, in the following agency Operating Procedures: 401.1, 430.4, and 445.4. With certain limited exceptions, all employees are to be searched prior to entering the secured areas of a prison. The search includes a full body scan, being screened for possession of a cellular phone, and a scan of any tangible personal property to be taken into the secure area. When the grievant reentered the secure perimeter of the facility at approximately 11:59 AM on April 11, she underwent none of these searches.

The grievant was not exempt from being searched or scanned under any of these operating procedures. The grievant argued at the hearing that the message she received at approximately 11:54 AM was interpreted by her as pertaining to an emergency. That testimony is not consistent with her statement in her Form A that she was going back into the facility to assist with "chow." She did not identify the source of the call for assistance, nor any other specific facts tending to establish a reasonable belief that a true emergency existed.

Operating Procedure 401.1 lists a number of emergency situations in which normal search procedures can be waived. Those situations are all of a serious nature, including fire or death of an inmate. The grievant has shown no reasonable belief that any of these situations existed. The agency did not call CO-2 as a witness. It did submit an email from her dated June 16, 2023 (pg. 30 of the exhibits) that supports the agency's theory that the grievant only believed that she was needed to assist with lunch. That is not a true emergency.

The grievant also argues that she believed that no additional search was necessary so long as another corrections officer had continued to observe her. The major at the facility testified, with credible candor, that there was a common practice that a search could be waived under those circumstances. The practice was not a formal policy. That testimony is inconsistent with a portion of the document found as agency exhibit 5 (pg. 19). In that document it is stated that "it is not a practice or procedure that a front entry officer is waived of search procedures if they want to come inside as long as an officer had eyes on them."

Nevertheless, the evidence establishes that when the grievant exited the search area at approximately 11:54 AM and left the building, no other officer had continuous surveillance of her. The testimony of CO-2 on behalf of the grievant was that she did not see her leave the building. This statement is inconsistent with the agency exhibit (p.28)

in which CO-two stated that the grievance never left her “presence.” I view this discrepancy in favor of the agency; CO-2 was the witness of the grievant and she is bound by the testimony. The problematic existence of such a practice is of no benefit to the grievant in this case. It cannot be used to excuse or mitigate the actions of the grievant.

I do not believe that the grievant was acting in bad faith on April 11. Distributing a meal to the inmates was an important part of her job. It was not the only part, however: following established security procedures takes precedence.

Under Section VI(A) of the Rules, I am required to give deference to the decision to the agency in determining what level of discipline to impose. My discretion to modify the action of the agency exists only when the agency has acted unreasonably. Determining reasonableness requires that I look at all the circumstances. The primary consideration here is that the grievant violated security procedures. Because that is an area within the specific expertise of the agency, I will give the appropriate level of deference to its decision. In determining the level of offense, the agency considered the lengthy satisfactory job performance of the grievant. No additional evidence was presented to provide a basis for further mitigation of the punishment. Also, no evidence or argument was presented that the discipline was imposed on an arbitrary or discriminatory basis or otherwise inconsistent with the applicable laws and policies.

V. DECISION:

For the reasons stated above I uphold the agency’s decision to issue the grievant the Group II Written Notice on May 3, 2023.

VI. APPEAL RIGHTS

The parties may file an administrative review request within 15 calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant].

ORDERED this 13th day of October ,2023

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer