



COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12009

Hearing Date: October 26, 2023
Decision Issued: December 4, 2023

PROCEDURAL HISTORY

On March 17, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for unsatisfactory performance, failure to follow instructions or policy and inmate abuse.

On March 22, 2023, Grievant timely filed a grievance to challenge the Agency's action. On April 12, 2023, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management determined that jurisdiction to hear the grievance lay with the circuit court, not EDR, but noted that EDR would consider a request to re-open the grievance hearing file if the circuit court declined jurisdiction. On August 21, 2023, EDR notified the parties that it was re-opening its hearing file after being advised by the Grievant that the circuit court had effectively declined jurisdiction in this matter. On August 28, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On October 26, 2023, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

An Equal Opportunity Employer

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:

Prior to his dismissal, Grievant worked for the Department of Corrections as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On December 19, 2022, Grievant was on post in the yard outside the inmate dining area. Grievant was overseeing the movement of inmates as inmates from a housing unit received lunch.

At approximately 1324, three inmates exited the medical unit and came into the yard area.

The inmates from the medical unit were not supposed to be in the yard.

Grievant instructed the inmates from the medical unit to step back inside the medical unit. Two of the inmates immediately followed Grievant's instruction.

The third inmate, Inmate C, did not immediately follow Grievant's instruction.

Video footage showed an interaction between Inmate C and Grievant in the yard outside of the medical unit. The video footage also showed Inmate C and Grievant interacting as Inmate C re-entered the door to the medical unit with Grievant walking toward Inmate C

as Inmate C re-entered the medical unit and the door closed behind Inmate C. After the medical unit door closed behind Inmate C, Grievant continued to walk toward the door and then opened the door and entered the medical unit.

Grievant entered the medical unit in order to put Inmate C in the holding cell in the medical unit.

Once Grievant was inside the medical unit, Grievant ordered Inmate C to go into the holding cell. The number of times Grievant ordered Inmate C to go into the holding cell varied among differing accounts, but at some point during the exchange, Inmate C put his hands behind his back and told Grievant he would not go into the cell.¹

Grievant put his hands on Inmate C to get Inmate C into the holding cell.

Grievant closed the holding cell door and exited the medical unit to return to his post in the yard.

Grievant returned to the medical unit to prepare for count at approximately 1740 and by 1750 Grievant had released Inmate C from the holding cell. Inmate C returned to his housing unit.

Grievant did not advise his supervisor or the watch commander that Grievant had put Inmate C in the holding cell in the medical unit. Grievant did not advise Grievant's supervisor or the watch commander of any of the circumstances that resulted in Inmate C being in the holding cell in the medical unit from approximately 1326 to 1750.

Grievant did not prepare an internal incident report regarding the circumstances that resulted in Inmate C being placed in the holding cell in the medical unit.

At approximately 1815, Inmate C filed an emergency grievance alleging that he had been assaulted by a corrections officer who Inmate C alleged "grabbed [Inmate C] and thrashed [Inmate C] around the medical waiting room" and who, according to Inmate C, "said over and over he was going to beat [Inmate C's] bitch ass."²

Captain had just come on shift and was the watch commander on duty when Inmate C filed the emergency grievance. Captain interviewed Inmate C. Captain observed bruising over Inmate C's right eye and bruising and scratches on the right and left side of Inmate C's neck. Captain took photographs of the scratches and bruises he observed on Inmate C.³ Inmate C had initially told a corrections officer that he received the bruises playing basketball, but then Inmate C submitted the emergency grievance. When Captain asked Inmate C why Inmate C was changing his story, Inmate C said he initially said the injuries occurred playing basketball because the officers were still working on the same shift as Grievant and Inmate C was fearful about reporting the incident while Grievant was still on shift.

¹ Agency Ex. at 6, 7 and 25.

² Agency Ex. at 10.

³ Agency Ex. at 11-13.

Based on information Captain received from Inmate C as to the timing and circumstances of the alleged incident, Captain reviewed video footage of the yard outside the medical unit. Captain was able to verify that there was an interaction in the yard between Grievant and Inmate C on the video footage.

After Captain confirmed that there was an interaction between Grievant and Inmate C on video footage within the time frame described by Inmate C, Captain took Inmate C to the medical unit and emailed the photographs of Inmate C's injuries to the Warden and the Sergeant.

Warden instructed Sergeant to investigate the allegations made by Inmate C.

Sergeant began his investigation into Inmate C's allegations on December 20, 2022.

Sergeant interviewed Inmate C and Grievant.

Sergeant testified that Inmate C told Sergeant that Inmate C and others came out of the medical unit into the yard and Grievant instructed them to go back inside by giving a hand gesture for the inmates to go back inside. Inmate C told Sergeant that Inmate C told Grievant that he did not understand sign language and that Grievant was going to have to talk to him. Inmate C told Sergeant that Grievant started walking toward Inmate C, and they engaged in dialogue. Inmate C told Sergeant that Inmate C did ultimately go back into the medical unit. Inmate C told Sergeant that Grievant then came into the medical unit and told Inmate C to step into the holding cell. Inmate C admitted to Sergeant that he refused to go into the holding cell, stepped back, put his hands behind his back, and told Grievant that he was going to have to call someone. Sergeant testified that Inmate C told him that Grievant gave Inmate C another directive to go inside the holding cell. That's when, according to Inmate C, Grievant grabbed Inmate C by the head and shoulders and threw Inmate C into the holding cell. Inmate C told Sergeant that Grievant stood over Inmate C. Inmate C told Sergeant that Inmate C asked Grievant what was going on and Grievant closed the door to the holding cell and left.

Sergeant also interviewed witnesses identified by Inmate C. Although there was no camera capturing video footage of the medical vestibule area near the holding cell in the medical unit, Sergeant was able to identify other potential witnesses by reviewing video footage from the dental hall where inmates and others in the area may have had a view of activities in the vestibule area and the holding cell area. Video footage of the dental hall area at the time of the events in question shows inmates seated and apparently waiting for treatment suddenly rising from their chairs and moving forward in the direction of the medical vestibule area. The inmates appear as though they are reacting and looking at something occurring in the medical vestibule area and out of view of the dental hall camera.

In addition to Inmate C and Grievant, Sergeant interviewed five witnesses regarding the incident. Four of the witnesses were inmates and the other witness was a nurse. Although video footage from the dental hall shows two officers in the area at the time of the incident, Sergeant testified that when he spoke to those officers about the incident, they told him they did not see anything.

Sergeant interviewed the nurse. The nurse told Sergeant that she saw Grievant close the holding cell door and exit the medical unit. The nurse said that when she went to the area where inmates were waiting in the medical units' vestibule area, she heard inmates talking. When she asked the inmates about it, the inmates told her that a corrections officer had dragged another inmate by his shirt collar and threw him into the holding cell. The nurse told Sergeant that she then went to the window at the door to the holding cell and asked the inmate in the holding cell [Inmate C] what happened and if he was ok and Inmate C just shook his head.

Sergeant testified that he believed the information provided by the inmate-witnesses corroborated Inmate C's version of events and that he had no reason to disbelieve the information provided by the inmate-witnesses.

The inmate-witnesses did not testify during the hearing, but the information they provided to Sergeant is included in Sergeant's report.

Inmate-witness G told Sergeant that while exiting the medical unit with Inmate C, the officer waved them back into the medical unit. Inmate-witness G told Sergeant that words were exchanged between Inmate C and the officer, but that Inmate-witness G did not know the extent of the words that were exchanged. Inmate-witness G told Sergeant that as they were retreating into the medical unit, Inmate C made a barking sound toward the officer and closed the door. Inmate-witness G told Sergeant that after about 10-15 seconds the officer entered the medical unit and told Inmate C to enter the time out room. Inmate-witness G told Sergeant that Inmate C placed his hands behind his back and told the officer "you need to call someone." Inmate-witness G told Sergeant that the officer then grabbed Inmate C around the collar, slammed Inmate C to the ground and dragged Inmate C into the room. Inmate-witness G advised that Inmate C got to his feet and the officer told him to get back in or "I will knock you the fuck out" several times. Inmate-witness G told Sergeant that Inmate C repeatedly said "you need to call someone." Inmate-witness G told Sergeant that the officer then slammed the door to the room where Inmate C was placed and left the medical unit.⁴

Inmate-witness M told Sergeant that within 10 seconds of the other inmates returning to the medical unit, the officer came in and told Inmate C to get into the cell. Inmate-witness M told Sergeant that Inmate C asked the officer "why are you doing this" and said "you need to call somebody" with his hands behind his back. Inmate-witness M told Sergeant that the officer never responded and without notice grabbed Inmate C by the collar and dragged Inmate C into the holding cell. Inmate-witness M told Sergeant that as Inmate C got to his feet, the officer told Inmate C that he was going to knock Inmate C out.⁵

Inmate-witness E told Sergeant that he saw Inmate C on the ground with the officer standing over him with his fists balled up and saying "I'll knock you the fuck out." Inmate-witness E told Sergeant that Inmate C asked what he did and what was going on. Inmate-

⁴ See Agency Ex. at 7-8.

⁵ See Agency Ex. at 8.

witness E told Sergeant the officer walked out of the holding cell, slammed the door, and walked out of the medical unit.⁶

Inmate-witness A told Sergeant that while Inmate-witness A was waiting to be seen in the medical unit, Inmate-witness A got up when he heard a commotion. Inmate-witness A told Sergeant that Inmate-witness A saw a male correctional officer aggressively pushing around an inmate. Inmate-witness A told Sergeant that the correctional officer pushed the inmate to the floor and was standing in a motion to entice the inmate. Inmate-witness A told Sergeant that the correctional officer then pushed the inmate into the holding cell.⁷

Sergeant prepared a report of his findings and his conclusions.⁸ Sergeant's report also includes his summary of his interviews of the witnesses.

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."⁹

Operating Procedure 135.2 "establishes rules of conduct that employees will observe when interacting with offenders under the direct supervision of the Virginia Department of Corrections."

Operating Procedure 135.2 directs that Agency employees should be respectful, polite, and courteous in their communication and interaction with offenders."

Operating Procedure 135.2 requires that offenders be "treated humanely" and specifically prohibits "[a]buse or any form of corporal punishment or hazing."¹⁰ "Abuse" for these purposes is defined as

[t]he improper use or treatment of an individual that directly or indirectly affects an individual negatively; abuse may include, but is not limited to, any improper intentional act that causes physical, mental, or emotional injury to an individual. Mental or emotional injury may be inferred by the nature and circumstances of the act.¹¹

⁶ See Agency Ex. at 8.

⁷ See Agency Ex. at 9.

⁸ Agency Ex. at 6-9.

⁹ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁰ Department of Corrections, Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders, Procedure II, I.2.

¹¹ Department of Corrections, Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders.

Operating Procedure 135.2 further provides that “[n]o profane, demeaning, indecent, insulting, threatening, harassing or discriminatory conduct (verbal, written or physical) will be tolerated, including but not limited to abuses of authority, and derogatory language or actions that is based on race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or disability.”¹²

Operating Procedure 135.2 directs that “[p]hysical contact with offenders must be conducted in a professional manner using the minimum amount of force necessary to provide appropriate apprehension, intervention, and control as needed to protect the offender, staff, the general public, and to maintain a safe and secure environment.”¹³

Employees have an “affirmative duty to disclose to their supervisors or other management officials any staff or offender boundary violations and any conduct that violates this [Operating Procedure 135.2] or behavior that is inappropriate or compromises safety of staff, offenders, or the community.”¹⁴

Operating Procedure 038.1 requires reporting of all incidents. An “incident”¹⁵ as

[a]n actual or threatened event or occurrence outside the ordinary routine that involves:

- The life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision)
- Damage to state property
- Disruption or threats to security, good order, and discipline of a facility or organizational unit
- Exposure of the Department of Corrections to significant media or public attention

Operating Procedure 038.1 requires submission of an Internal Incident Report to the “Facility Unit Head or designee no later than the end of the shift” when “[f]orce is used to control offenders.”¹⁶

Operating Procedure 038.1 also requires employees to report all allegations and incidents of abuse, neglect, or exploitation of an offender.¹⁷

In addition to reporting a use of force on an inmate, facility staff are directed to utilize Internal Incident Reports as a method of communicating information up the chain of command at the facility. The Procedure identifies a number of incidents that are required

¹² Department of Corrections, Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders, Procedure II, I.3.

¹³ Department of Corrections, Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders, Procedure IV.F.3.

¹⁴ Department of Corrections, Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders, Procedure V.

¹⁵ Department of Corrections, Operating Procedure 038.1, Reporting Serious or Unusual Incidents, III.

¹⁶ Department of Corrections, Operating Procedure 038.1, Reporting Serious or Unusual Incidents, Procedure IV.B.3.

¹⁷ Department of Corrections, Operating Procedure 038.1, Reporting Serious or Unusual Incidents, Procedure IV.C.8.

to be recorded on an Internal Incident Report including, property damage that does not result in disruption of security or normal operations and “[a]ny other incident considered to warrant being documented.”¹⁸

Whether Grievant engaged in the behavior described in the Written Notice and whether the behavior constituted misconduct

Warden and Sergeant both credibly testified that once Inmate C complied with Grievant’s instruction and re-entered the medical unit, Grievant had no reason to leave his post and follow the inmate into the medical unit.

Grievant asserted that he entered the medical unit because he heard a loud bang that led him to believe that Inmate C was destroying property. From the video, it appears that Inmate C and Grievant were engaging in dialogue as Inmate C was standing at the door and preparing to re-enter the medical unit. Grievant was walking slowly toward Inmate C. Inmate C entered the medical unit and closed the door. Grievant continued to walk to the door after Inmate C re-entered, never pausing, suggesting that Grievant may have intended to enter the medical unit whether or not there also was a banging sound on the door. Even if Inmate C had banged on the door or engaged in the destruction of property, the corrections officer on post within the medical unit would have been responsible for addressing such behavior. Further, beyond Grievant’s assertion that he heard a banging sound, which he assumed was Inmate C destroying property, there is no indication that any property was destroyed or that if such destruction had taken place that Inmate C was determined to be responsible.

Although there is no video footage of the interaction between Grievant and Inmate C once Grievant entered the medical unit, both Inmate C’s and Grievant’s¹⁹ descriptions of events consistently describe that at some point Inmate C put his hands behind his back and refused to go into the holding cell. According to Grievant, after Inmate C refused to go into the holding cell, Grievant was then able to “guide” Inmate C into the holding cell without using force. Grievant argues that he used physical contact consistent with his training to escort Inmate C into the holding cell and that such contact was not a use of force. Grievant appears to cite to Procedure I, A.3 of Operating Procedure 420.1 (Use of Force) which states that “[i]ncidental contact that cannot reasonably be predicted to present a risk of injury (for example guiding an offender in an intended direction by placing a hand on elbow or shoulder) is not considered use of force.”²⁰

The preponderance of the evidence suggests that Grievant’s physical contact with Inmate C was more than “incidental.” Although Inmate C did not testify at the hearing, his reporting of the event through the emergency grievance and his description of the event to Captain and to Sergeant indicate that Grievant used sufficient physical force to get Inmate C into the holding cell and that it resulted in bruising and abrasions to Inmate C.

¹⁸ Department of Corrections, Operating Procedure 038.1, Reporting Serious or Unusual Incidents, Procedure IV.F.

¹⁹ Agency Ex. at 7 and 25.

²⁰ Department of Corrections, Operating Procedure 420.1, Use of Force.

Inmate C's assertions are corroborated by the evidence of bruising and abrasions on Inmate C²¹ and by the information witnesses to the event provided to Sergeant.

Grievant argued that the Agency cannot meet its burden of proof because there was no video footage to capture Inmate C going into the holding cell and that the approximately 70 seconds when Grievant was off-camera and in the medical unit with Inmate C was not enough time for Grievant to have caused Inmate C's injuries. Grievant also argued that any information provided by Inmate C and other inmates cannot be believed because they are inmates incarcerated at the Facility and therefore, according to Grievant, cannot be trusted.²²

This Hearing Officer does not find Grievant's arguments to be persuasive. There is sufficient corroborating evidence, even in the absence of video footage, to support Inmate C's account of events and seventy seconds is sufficient time for events to have occurred as described by Inmate C. This Hearing Officer also is not persuaded by Grievant's suggestion that information provided by inmate-witnesses is never credible, especially in a case such as this where Sergeant was able to confirm the inmate-witnesses' presence in the area at the time of the event, the inmates provided information that corroborated Inmate C's account of the events,²³ and those inmate-witness observations were consistent with the inmate reactions observed by the nurse²⁴ after Inmate C was put into the holding cell.

Once Grievant had gotten Inmate C into the holding cell, Grievant left Inmate C in the holding cell for more than four hours. Grievant did not inform anyone in his supervisory chain of command, or anyone else it appears, that he had placed Inmate C in the holding cell in the medical unit. The Warden credibly testified that as a dormitory facility, it is unusual for an inmate to be kept in a cell at the Facility and it is a disruption of normal operations. The Warden also credibly testified that placing an inmate in a cell without notifying the watch commander or other appropriate staff can create a potential safety risk for the inmate.

Grievant did not prepare an internal incident report regarding his actions and the circumstances that resulted in Inmate C being in the holding cell in the medical unit. Grievant argues that he did not use force to "guide" Inmate C into the holding cell, so he was not required to report the activity. Grievant's arguments are not persuasive. The preponderance of the evidence suggests that Grievant's physical contact with Inmate C was more than "incidental" and was sufficiently forceful that it resulted in bruising and abrasions to Inmate C.

The Agency has proved by a preponderance of the evidence that Grievant's behavior including physical contact with Inmate C that resulted in Inmate C suffering bruising and abrasions and leaving Inmate C in a holding cell for more than four hours violated the

²¹ Agency Ex. at 11-13.

²² Grievant also appears to have asserted at one point during the Agency's investigation that there was video footage of Inmate C self-inflicting his wounds. However, this assertion was not raised during the hearing and there is no evidence to support this assertion. (Agency Ex. at 27-28).

²³ Agency Ex. at 7-8.

²⁴ Agency Ex. at 8-9.

requirements of Operating Procedure 135.2 that inmates be treated humanely and prohibiting abuse or any form of corporal punishment as well as “profane, demeaning, indecent, insulting, threatening, [and] harassing” conduct. The Agency also has proved by a preponderance of the evidence that Grievant violated the requirements of Operating Procedure 038.1 when he failed to prepare an internal incident report regarding Grievant’s actions to put Inmate C in the holding cell.

Whether the Agency’s discipline was consistent with law and policy

Group III offenses are of such a serious nature that a first occurrence normally should warrant termination.²⁵ “Physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of inmates” is a Group III offense.²⁶

Given the nature and severity of this incident that resulted in injuries to Inmate C, the Agency has met its burden of proving that the discipline is consistent with law and policy.

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...”²⁷ 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 state herein, the Agency’s issuance to Grievant of Group III Written Notice of disciplinary action with termination is **upheld**.

²⁵ Virginia Department of Corrections Operating Procedure 135.1, Standards of Conduct, Procedure XIV.A.

²⁶ Virginia Department of Corrections Operating Procedure 135.1, Standards of Conduct, Procedure XIV.B.17.

²⁷ Va. Code § 2.2-3005.

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.²⁸

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

²⁸ 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.