

Issue: Group III Written Notice with Termination (failure to follow instructions/policy, and safety rule violation; Hearing Date: 06/22/18; Decision Issued: 06/29/18; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10952; Outcome: No Relief - Agency Upheld.

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

IN RE: DEDR CASE NO.: 10952

DECISION OF HEARING OFFICER

HEARING DATE: JUNE 22, 2018

DECISION DATE: JUNE 29, 2018

I. PROCEDURAL BACKGROUND

The agency issued the grievant a Group III Written Notices on December 2, 2016. He filed this grievance on December 29, 2016. I was appointed as Hearing Officer on January 23, 2017. I contacted the grievant by phone on January 25, 2017 in an attempt to schedule a prehearing conference call. He apprised me that due to his personal situation he was requesting that the matter be continued indefinitely. Without objection from the agency, I agreed to do so and sent a confirming letter on January 31. I attempted to speak with him on March 21, 2017 to determine his status. A voicemail was left but not returned. I made an additional call to the grievant on September 10. The next day he requested that the matter remain pending without a hearing being set. The agency never objected to the matter being held in abeyance. After a brief discussion with the agency advocate on December 4, I began efforts to set a hearing.

After obtaining available dates from the agency on January 23, 2018, I scheduled the hearing for February 7. A notice was sent to the grievant by both first class and certified mail. He signed for the certified mailing on January 30. He called me on February 2 at 4:20 p.m. and left a message. I returned his call on February 5. He requested a postponement of the hearing due to certain medical issues. He stated that he would be in contact with me after an upcoming medical appointment. The agency did not object to the continuance. He has since failed to

contact me in either written or oral form. At the request of the agency on May 18 that the matter be concluded, I scheduled the hearing for June 22, 2018. Notice of the hearing was sent to the grievant by first-class mail and by certified mail on June 4. The first-class mailing has not been returned to me. The certified mailing was returned by the postal service on June 28 after unsuccessful delivery attempts on June 6 and June 21. The hearing was conducted on June 22, 2018 as set forth in the notice. The grievant did not appear. The agency advocate stated that he also had received no return contact from the grievant despite efforts to communicate with him.

II. APPEARANCES

The agency was represented by an attorney. It presented two witnesses and eight exhibits. The exhibits were accepted into evidence. As stated above, the grievant did not appear, either personally or through an advocate. No exhibits on behalf of the grievant were submitted.

III. ISSUE

Whether the agency was justified in issuing the grievant Group III Written Notices on December 2, 2016 and terminating him from employment?

IV. FINDINGS OF FACT

The grievant was an employee of the agency on November 20, 2016, serving as a Correctional Officer. That morning he walked past the officer manning the front search area and began entering the secure portion of the facility. He stated he needed to speak to a superior officer about a confidential matter. Established policy is for every employee (other than the Warden), and other visitors, to be screened and searched at that point. The officer on duty requested the grievant to turn around, come back, and be properly screened and searched. She asked him multiple times. He complied only after the repeated requests.

Upon his emptying his pockets, a flash drive was found among the contents. The grievant stated that he believed the drive to contain only music. He explained that he had found the flash drive in the parking area. He gave no explanation why he believed it contained only music. The agency allowed him to retain the item and did not attempt to determine the actual contents of the drive. The agency issued a Group III Written Notice for failing to follow the policy regarding the searches. It cited that incident as also being a safety rule violation. A separate Group III was given for attempting to introduce contraband (i.e. the flash drive) into the facility. He had a prior Group III issued on January 27, 2015 that remained active at that time. He was terminated from employment by the agency.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to 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 Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) 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 law and policy; and

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

The uncontested evidence is that the grievant bypassed the front search area of the facility while in the possession of an unauthorized flash drive. Both actions qualify as misconduct under the agency's policies. Therefore, the first two questions are answered "yes."

Section V of Agency Operating Procedure 445.1 requires any employee entering an agency facility to be subject to a complete search. Pursuant to Subsection A(7)(C), the refusal of an employee to submit to a search is classified as a Group III offense under Agency Operating Procedure 135.1, Standards of Conduct. The failure of the grievant to immediately respond to the initial request by the front search officer to return and be searched was clearly misconduct within the coverage of the Operating Procedure. Agency Exhibit 8 is an e-mail message by the grievant sent on November 21, 2016, providing his version of the events. He attempted to justify his actions by saying he needed to speak with a superior officer regarding alleged practices in which "some officers, offenders and other persons don't get searched like others do at different times and places." The irony of this explanation undermines the purported rationale for the grievant's efforts to avoid being searched.

That same exhibit contains the explanation from the grievant that the flash drive had been found while checking the outside perimeter fence and parking lot. The grievant stated that he "did not plan on having to come back into the facility and was going to ask people as we were leaving if it belonged to any of them." He explained that he was not aware of the flash drive being in his pocket when he "had to come back inside." The explanation regarding the flash

drive is inconsistent with his story regarding his avoiding the front search out of a need to speak with a Sergeant in the front search area.

The flash drive in the possession of the grievant qualifies as contraband under Operating Procedure 445.1. Contraband found in possession of an employee will subject the employee to disciplinary action in accordance with the Standards of Conduct, Operating Procedure 445.1(D). Assuming that the grievant was truthful in his explanation that the drive contained only music, it would still qualify as contraband under the Operating Procedure. Therefore, the agency was justified in issuing the grievant the Group III Written Notice for its possession, as well as the separate Written Notice for avoiding the requirements, and in terminating him from employment.

I express no opinion on whether the failure of other agency employees to take possession of the flash drive from the grievant and process it as evidence in accordance with Operating Procedure 445.1 would have justified a mitigation of the punishment of the grievant as that argument has not been made. I further note, however, that his own failure to treat the item as possible evidence under that procedure may have been a separate violation. The argument of whether the item was contraband, if found by the grievant as described in Exhibit 8, prior to it being introduced into the facility by him has also not been raised. Accordingly, I express no opinion on that argument.

VI. DECISION

For the reasons stated above, I affirm the issuance of each of the Group III Written Notices to the grievant by the agency on December 2, 2016 and its terminating him from employment.

VII. APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

RENDERED this June 29, 2018.

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