

DECISION OF HEARING OFFICER
IN RE: [REDACTED] v. VIRGINIA DEPARTMENT OF CORRECTIONS,
MARION CORRECTIONAL TREATMENT CENTER
CASE NO. 11548
HEARING DATE: SEPTEMBER 11, 2020
DECISION ISSUED: OCTOBER 1, 2020

PROCEDURAL HISTORY

On April 13, 2020, Grievant was placed on leave without pay status to investigate her interactions with Inmate between February 2020 and April 2020.

On May 11, 2020, a Group III Written Notice¹ with termination was issued for violation of Operating Procedure 135.2 Rules of Conduct for Governing Employees Relationships with Offenders.

On June 4, 2020, Grievant filed a grievance to challenge the Agency's action. A Hearing Officer was assigned on June 16, 2020. On June 24, 2020, a pre-hearing phone conference was held, and a hearing date of August 17, 2020 was scheduled. On August 11, 2020, Agency's attorney requested a change of Hearing date. On August 19, 2020, a second pre-hearing phone conference was held to reschedule the hearing. An in-person hearing was conducted on September 11, 2020 at the Agency.

APPEARANCES

Agency Representative, as witness
Agency Attorney
Four (4) Additional Agency Witnesses

Grievant
Grievant's Attorney

ISSUES

1. Whether Grievant failed to maintain professional boundaries with Inmate and violated Department of Corrections Operating Procedure 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*.²
2. Whether a Group III is a proper discipline.
3. Whether mitigating factors were considered.

¹ Agency Exhibit 7

² Agency Exhibit 5

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM § 5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2020.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes 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 requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.

This case involves O.P. 135.2 Standards of Conduct³ as well as offense codes 13 and 55⁴.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant had been employed by the Agency for approximately 20 years. Grievant had no previous disciplinary actions.

Grievant was a Correctional Officer. She worked as a medical transport personnel, that is she accompanied inmates from their cells to the medical unit, waited for them, and escorted them back to the cell block after their treatment.

This Department of Corrections facility housed inmates with mental health disorders. The inmate with whom Grievant was believed to be having unprofessional conduct was diagnosed as having a factitious disorder, that is he believed things that were not actual or factual.

³ Agency Exhibit 6

⁴ Agency Exhibit 7

Inmates are able to communicate with certain persons on an approved list who are located outside the facility in two ways. One is by telephone which is paid for by the receiver and handled through an independent agency. The other is "J-Pay", which is a limited internet like system for email transmission. Both methods are monitored by the facility and can be reviewed.

In February 2020, Inmate communicated with his sister and asked her to find data on Grievant such as where she lived, if she was living with someone, and so forth. Thereafter, Inmate asked his sister to accept and transport messages from himself to Grievant. Inmate created a "code name", that being "Jennifer Blevins." There was more than ample proof that Inmate intended "Jennifer Blevins" to be Grievant.

Inmate was infatuated with Grievant. There were numerous "love letters" that Inmate sent to his sister to be transported to Grievant.

Investigator had been with the Department of Corrections for 28 years. He had been an institutional investigator for the last 5 years. Investigator received an anonymous note that something was going on with Grievant and Inmate. He subsequently received a note from a named inmate stating the same allegation. Investigator stated this caused him to start an inquiry. He stated after he felt he had enough evidence he reported to the warden.

Investigator interviewed witnesses, reviewed emails and phone calls and screened the rapid eye video in and about the medical office.⁵

Three witnesses in addition to the Investigator and the Warden gave testimony.

Witness One was a nurse in the facility.⁶ When I arrived at the medical room, she reported she gave Inmate his catheter kit. Inmate reported to her that there was only one glove in the cup, and that he had two hands. Grievant then stated, "What are you saying, it takes two hands?"

Witness One on cross examination stated it made her feel "uncomfortable" but that no sexual reference such as the word "penis" was used and nothing more was said.

Witness Two was a social worker at the facility.⁷ She saw inmates in group therapy sessions. Inmate was one of her patients. Witness Two stated she had seen Grievant and Inmate in the hall adjacent to the medical room on a few occasions whispering and standing close but did not recall any touching. Witness Two described Inmate's mental illness as Factitious Disorder. That is by example, for some time he believed he couldn't walk. She believed Inmate could be delusional.

⁵ Agency Exhibit 1

⁶ Agency Witness testimony

⁷ Agency Witness testimony

Witness Three was a nurse practitioner at the facility.⁸ She noted that when Grievant brought Inmate to the medical waiting area it would only take 5 minutes if Inmate's prep kit was ready. Sometimes it took longer. She stated she never saw Inmate and Grievant touching one another. Sometimes Inmate and Grievant would converse, other times not. Witness Three stated on previous admissions Inmate always wanted transferred out of the facility but this admission he wanted to stay at this facility.

Inmate told Witness Three that he was being investigated about an affair with Grievant and called her by first name. However, he also told Witness Three he was using a code name and the person to whom he was sending his messages was really a person at R... jail.

When Witness Three heard that one of Inmate's sisters had passed away, although she was not on duty, she called to see how Inmate was reacting to the news. Witness Three reported Inmate was asking for Grievant. Witness Three said she never saw Inmate being brought to the medical department with anyone other than Grievant. Witness Three did not believe Inmate was delusional.

Agency's fourth witness was the Institutional Investigator.⁹ He had been employed by Agency for 28 years and had been an investigator for 9 years.

After hearing rumors of a relationship between Inmate and Grievant, he started an investigation. Investigator reviewed phone calls, emails, rapid eye video, and interviewed Agency personnel.

It was established through 23 phone calls¹⁰ that Inmate was calling his sister first to ask her to find information about Grievant and then later to relay messages to a code name "Jennifer Blevins". There was ample evidence that "Jennifer Blevins" was intended to be Grievant. Although in Inmate's mind it was sometimes some other party at another institutional location. Two other women's names were mentioned. Investigator reported that Inmate told his sister about his ability to have conjugal visits with Grievant. Investigator stated there are never conjugal visits allowed at the facility. Investigator stated none of the phone calls monitored were Grievant's voice.

Investigator also reviewed 37 email messages¹¹ which were similar to the phone calls. All messages were romantically inclined. Some were specific about Grievant's activities such as her days off and Inmate seeing her from his window. Investigator reviewed rapid eye camera videos and produced times that he believed Grievant was in close proximity to Inmate.¹² Investigator produced a video of Grievant with her shirt tail untucked while escorting Inmate.¹³

⁸ Agency Witness testimony

⁹ Agency Witness testimony

¹⁰ Agency Exhibit 1 numbered pages 39-45

¹¹ Agency Exhibit 1 numbered paged 45-62

¹² Agency Exhibit 4

¹³ Agency Exhibit 4

Investigator talked to other staff about anything they observed about Grievant.

Investigator alleged two of the many correspondences through Inmate's sister were replies from "Jennifer", however Investigator admitted he had no evidence any correspondence came directly from Grievant and he wasn't able to connect the replies directly to Grievant.

The fifth witness was the Warden.¹⁴ He has been employed as Warden at the facility for the last 1½ years. Warden was not privy to any firsthand observation. Warden stated that fraternizing with an inmate was a very serious matter which impacted on safety to the facility.

Warden stated when he met with Grievant she was visibly upset. Warden believed the videos he saw of Inmate and Grievant indicated Grievant was letting Inmate stand too close to her. Warden could not verify the "Jennifer Blevins" messages either went to or came from Grievant. They were all traced to Inmate's sister. Warden never heard Grievant's voice in a phone conversation with Inmate. Warden stated Inmate said "crazy stuff". Warden stated Grievant told him she had "fucked up" when interviewed but did not know specifically what she was referring to other than perhaps Grievant let inmates stand too close to her.

Videos of Grievant with the many other inmates she accompanied to medical were not introduced to fact check what her normal proximity distance might be.

Warden stated that fraternizing with an inmate is a zero-tolerance issue and a very serious infraction that could not be mitigated by Grievant's previous good record.

When the Agency rested its case, this Hearing Officer advised both attorneys she had neither seen nor heard anything that directly linked Grievant to unprofessional behavior or fraternizing behavior. Additionally, Inmate's mental condition needed to be considered. This Hearing Officer then gave the attorneys the option for Grievant's attorney to continue the hearing or rest with no Grievant evidence presented. The decision was made to not present Grievant's evidence.

OPINION

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances.¹⁵

Further, a Hearing Officer is not to disrupt an Agency's decision unless it is clearly incorrect.

¹⁴ Agency Witness testimony

¹⁵ GPM §5.8

A Hearing Officer is not a “super-personnel officer”. Therefore, 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.¹⁶

There is more than ample evidence Inmate was sending romantic notes to his sister’s account intended for someone other than his sister. There is also sufficient evidence at least most of his unrealistic emotions were intended for Grievant. However, Inmate’s behavior is not the point. Grievant’s behavior is at issue in this matter.

There is not a single actual trace to Grievant that Grievant engaged in or encouraged Inmate’s behavior. If anything, Grievant had a habit of standing too close to inmates. Yet a video of Grievant with any other inmate she transported to medical was not presented as comparison.

DECISION

Based on the above analysis of evidence, Grievant’s disciplinary action is **RESCINDED**. Grievant shall be reinstated to her former position or equivalent position. Grievant is awarded full back pay from which interim earnings should be deducted and full benefits reinstated.

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.

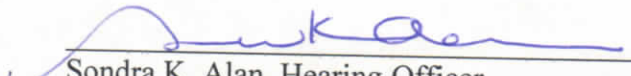
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must

¹⁶ Rules for Conducting Grievance Hearings 2020, VI.A., page 15

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.¹⁷

[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].


Sondra K. Alan, Hearing Officer

¹⁷ Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

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ADDENDUM TO DECISION OF HEARING OFFICER
ADDENDUM ISSUED: DECEMBER 3, 2020

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.²

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

The petition appears to include costs incurred prior to the hearing and unrelated to the hearing. The Hearing Officer will allow 44.75 hours from May 2020 forward at the rate of \$131 per hour.

AWARD

The grievant is awarded attorneys' fees in the amount of \$5,862.25.

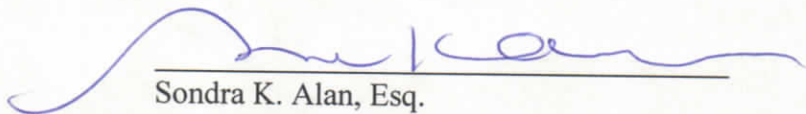
APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of

¹ Va. Code § 2.2-3005.1(A)

² § 7.2 E Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2020. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective July 1, 2020.

the Rules and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.



Sondra K. Alan, Esq.
Hearing Officer