

DECISION OF HEARING OFFICER

IN RE: [REDACTED] v. VIRGINIA DEPARTMENT OF CORRECTIONS,
[REDACTED]

CASE NO. 11653

HEARING DATE: MAY 10, 2021

DECISION ISSUED: JUNE 8, 2021

PROCEDURAL HISTORY

On October 11, 2020, an incident involving Grievant and an inmate took place. On December 3, 2020, the Grievant was issued a Group II Written Notice with 10 day suspension¹. This was issued for violation of Operating Procedures 135.1², 135.2³, 135.8⁴, 038.1⁵, and Internal Policies #11, 13, and 99⁶. A Second Step meeting was conducted on January 4, 2021.

The case qualified for a hearing on January 25, 2021. A Hearing Officer was appointed on February 10, 2021. A pre-hearing phone conference was conducted on February 17, 2021. On February 29, 2021, a second pre-hearing phone conference was scheduled wherein Grievant made a motion requesting additional evidence was conducted. A memo from counsel on Grievant's Motion was due on March 29, 2021. The Hearing Officer ruled on Grievant's motion on March 31, 2021. The Grievant filed for a compliance ruling on April 13, 2021. The hearing scheduled for April 21, 2021, was cancelled and rescheduled. EDR Compliance issued an opinion on April 21, 2021. The Hearing was scheduled for May 10, 2021 at 10:00 am via video conferencing.

APPEARANCES

Agency's Counsel
Agency's Representative, as Witness
Two (2) Additional Agency Witnesses

Grievant's Counsel
Grievant, as Witness
Three (3) Additional Grievant's Witnesses

ISSUES

¹ Neither party submitted the Written Notice into evidence.
² Agency Ex. 15
³ Agency Ex. 11
⁴ Agency Ex. 12
⁵ Agency Ex. 1
⁶ Neither party submitted internal policies list.

1. Whether Grievant's conversation with inmates of cell [REDACTED] contained dangerous or sexual comments.
2. Whether Grievant's conversation with inmates of cell [REDACTED] rose to the level of a requirement to report to supervision.
3. Whether inmates calling Grievant "bro" or "dawg" showed an inappropriate level of familiarity.
4. Whether Agency's assessment of the October 11th incident was appropriate.
5. Whether consistent discipline was applied by Agency.
6. Whether previous undisciplined matters involving Grievant caused Agency to have improper motives.

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 § 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 require 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 OP 135.1, OP 135.2, OP 135.3, OPI 038.1 and Internal Policies # 11, 13, and 99.

FINDING OF FACTS

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

Grievant is a Correctional Officer with 9 years of service with the Department of Corrections. He has received several Extraordinary Contributor evaluations.⁷

On October 11, 2020, a female correctional officer stopped at the cell door of cell [REDACTED]. The correctional officer proceeded to engage in a personal conversation about her family and so forth with the inmates in cell [REDACTED]. The conversation was recorded by the Command Officer from the command room. The conversation was estimated to be between 7 and 20 minutes⁸. Later in the day, Grievant, also a correctional officer, did rounds past cell [REDACTED]. At that time an inmate called out to him and Grievant had a less than one minute conversation. During the conversation, the inmates reported one of them made an up and down movement with his hand near his groin area. It was not established that, if this motion had occurred, that Grievant saw it. The command officer recorded this as the following conversation⁹:

[Inmate 1] : What's up man?
[Inmate 1] : What you know bro?
[Inmate 2] : Where that bitch at?
[Grievant] : What?
[Inmate 2] : Where that girl at?
Laughing
[Grievant] : I don't know
[Grievant] : You looking for her?
[Inmate 2] : Yeah I'm looking for her, I'm looking for her
[Grievant] : Y'all being nasty
Laughing
[Inmate 1] : Hell man, you alright dog?
[Grievant] : Yeah
[Inmate 1] : Take it easy Brother
[Inmate 1] : We got a double visit
[Inmate 2] : Ain't nobody gonna be in this jank right here.
[Inmate 1] : Hell yeah
[Grievant] : Alright
[Inmate 1] : Alright Bro

Both the female correctional officer and Grievant's conversations were reported. The female correctional officer received a needs improvement substandard discipline which was not a Written Notice as discipline for her behavior¹⁰. Grievant received a Group II discipline and a 10 day suspension from work. The Agency alleged Grievant violated several protocols by not

⁷ G Ex. 5

⁸ Testimony differed as to amount of time of conversation

⁹ G Ex. 9 (This is the conversation both parties agreed was correct)

¹⁰ Testimony of Warden

reporting what Agency identified as a sexually threatening conversation and further by Grievant permitting inmates to call Grievant “bro” and “dawg”.

Prior to this incident, the Warden stated he had received an anonymous tip that drugs were being smuggled into the facility kitchen. At that time Grievant was assigned in the kitchen. The Agency made an appropriate investigation into the allegations and found there was insufficient evidence to implicate Grievant.

The Agency further alleged Grievant was having a relationship with one of the Agency’s counselors. The counselor was occasioning the kitchen where Grievant worked. The Agency stated the counselor had no valid business concerns in the kitchen and was ordered to not return to that area. No disciplinary action was taken.

Grievant’s attorney alleged that because no discipline resulted from the above incidences that the Agency was looking for a prospective way to punish Grievant. Grievant’s attorney requested information regarding the drug matter which the Hearing Officer found overbroad. A Compliance Ruling agreed with the Hearing Officer’s opinion, but allowed Grievant latitude in questioning witnesses about the incidents. Facts regarding the matters were discussed and cross examined during the hearing. No concrete evidence linked the previous investigations to the matter now being heard.

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.¹¹

Further, a Hearing Officer is not to disrupt an Agency’s decision unless it is clearly incorrect. 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 the law and policy.¹²

More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,

¹¹ GPM §5.8

¹² *Rules for Conducting Grievance Hearings 2020 VI.A., page 15*

(ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record of evidence, the discipline exceeds the limits of reasonableness.¹³

The Agency alleged the conversation between Grievant and Inmates relayed intention to do harm to the female commanding officer. In a prison facility one would expect sequestered males to take advantage of any opportunity with a female. Therefore, attention should already have been given to protect all women present in the facility be they correction officers, counselors, nurses, visitors, or others. In other words, even if Grievant's conversation rose to the level of threat to do harm, heightened security should already have been in place for females.

The inmates in cell [REDACTED] gave conflicting evidence each time they were interviewed. Even if one of the inmates had made a sexual gesture there is no direct evidence that Grievant saw it. There is no evidence that Grievant was aware the female correction officer on duty had given the inmates extra attention and therefore no reason to believe he connected the inmates' comments with her. Grievant's conversation with the inmates was jovial, laughing was heard. There is no preponderance of evidence that, reportable threatening or dangerous remarks were made.

The Warden stated in testimony that using the word "man", as in "Hey, man," was ok but "hey, bro" or "hey, dawg" showed familiarity. The actual difference is cultural dialect preference. Further, if correctional officers should be addressed as "Sir" or "Officer", then there should have been written policy advising inmates how to address prison officials. Correctional Officers should have a written policy they must correct inmates when using any form of "hey, you". No such policy was presented as evidence. The use of dialect slang shows no particular intimate relationship.

While Agency may have believed Grievant disregarded the many infractions they listed and described in detail, there would need to be a preponderance of the evidence that the conversation between Grievant and inmates of cell [REDACTED] presented a dangerous, sexual threat and that Grievant had an especially friendly relationship with inmates. Neither alleged infractions reached that level.

Va. 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 the rules established by the Department of Human Resource Management..."¹⁴ 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

¹³ *Rules for Conducting Grievance Hearings* § VI(B)(I)

¹⁴ Va. Code §2.2-3005

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.

The female correctional officer on the October 11th date had spent at least 5 minutes having a cordial conversation with inmates in cell [REDACTED] providing them with her family information. She received needs improvement sub-standard discipline as punishment. Grievant spent less than one minute in a later conversation with inmates in cell [REDACTED] joking about their desire for female attention. Grievant received a Group II discipline and a 10 day suspension. The discipline given to Grievant, in light of the discipline given to another officer in a similar situation, was starkly different.

DECISION

For the above reasons, the Group II discipline with ten days suspension is **RESCINDED**. Any back pay or benefits due to Grievant should be 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-day 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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.