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

IN RE: EDR CASE NO.: 11495

DECISION OF HEARING OFFICER

HEARING DATE: AUGUST 10, 2020
DECISION ISSUED: AUGUST 26, 2020

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing his Form A on January 21, 2020, challenging the Group III Written Notice given to him on January 3, 2020. I was appointed as hearing officer on February 5. During a pretrial conference call counsel for the grievant indicated that an in-person hearing was desired. Due to COVID-19 concerns which resulted in temporary restrictions on access to the facilities of the agency, the parties eventually agreed to schedule the hearing for August 10. The restrictions having been lifted by that date, the hearing was conducted at the facility with all parties and witnesses appearing in-person.

II. APPEARANCES

The Agency was represented by legal counsel. It presented three witnesses and eight documents as exhibits. The exhibits were accepted into evidence.

The grievant was also represented by counsel. He presented five witnesses and testified on his behalf. Prior to the hearing he proffered exhibits labeled A through U. I accepted exhibits A through N into evidence. Exhibit O was rejected upon the objection of the agency to its relevance. Exhibits P through U were accepted not as evidentiary exhibits but as argument on behalf of the grievant.

III. ISSUE

Whether the Department of Corrections properly issued the grievant a Group III Written Notice and terminated him from employment on January 3, 2020 for a violation of Operating Procedure 320.6?

IV. FACTS AND EVIDENCE

On September 30, 2019, the grievant was working as a corrections officer for the Virginia Department of Corrections at a secure facility. He had 5 years' experience in that job. During his lunch break he left the grounds to return home for a meal. While at his home he used chewing tobacco. The tobacco was kept by him in a sandwich-size plastic bag. Prior to returning to work, he placed the plastic bag of tobacco into his rear pocket.

He returned to the facility with the tobacco still in his rear pocket. According to established procedure, before he was to be allowed to enter the secure portion of the facility, he was to undergo a complete search, subject to certain limitations based on a medical condition of his. The search was to have included his emptying all pockets so a search officer could verify he was not introducing any contraband into the facility. The search of the grievant on this date failed to include the required emptying of his rear pockets and exposing the pockets completely. As a result, the grievant returned to his post in a control room within one of the inmate housing buildings with the tobacco on his person.

The grievant testified when he returned to the control room and was seated, he discovered the tobacco was still in his rear pocket. He removed it from his pocket and placed it in open view on a desk in the control room. One other officer (hereafter "the gun officer") was stationed in the

control room with the grievant. Approximately 2.5 hours after the grievant had returned to work after his lunch break, the control room was entered by a Lieutenant and a Sergeant who were in the process of making regular rounds. The Lieutenant noticed the baggie on the desk and asked the grievant what it was. He initially replied, "beef jerky." The gun officer was directed to leave the room and the Lieutenant and Sergeant proceeded to question the grievant further. The grievant admitted that it was tobacco in the bag. The tobacco was then voluntarily flushed down a toilet by the grievant at the direction of the superior officers. Inmates do not have access to the control room but the officers there can be called to a pod where inmates are present at any time.

About three months later, on January 3, the grievant was given the subject Written Notice and terminated from employment. The Warden considered as a mitigating factor that the grievant had capably served as a Corrections Officer since February 2015, without any prior formal disciplinary notices. His Employee Work Profile for 2019 reflected a rating of "exceeds contributor." It was prepared prior to the disciplinary action being taken He testified the untruthfulness of the grievant in the initial encounter with the superior officers was an aggravating factor serving to counterbalance the mitigating factor. Other employees at the facility commonly use tobacco products while in the parking lot at the facility. The Warden testified he was not aware of this common practice, although witnesses other than the grievant confirmed the fact.

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 Equal Employment and 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 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 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.

Agency Operating Procedure 320.6 provides all agency facilities are to be tobacco free. It declares all tobacco products to be contraband. The violation of this Operating Procedure subjects an employee to discipline under Operating Procedure 135.1, the Standards of Conduct. Subsection E(2)(gg) provides that the introduction of contraband into an agency facility shall be a Group III level offense. Operating Procedure 135.1 has a hierarchy of offenses based on the seriousness of the offense. Only the section of the procedure dealing with Group III offenses specifically mentions contraband.

The grievant has not contested his possession of the tobacco within the facility. Although this behavior could have been disciplined on many different levels and in many ways, it clearly qualifies also as a Group III offense. The *Rules for Conducting Grievance Hearings* requires a

hearing officer to give "due consideration to management's rights to exercise its good faith business judgment in employee matters, and the agency's rights to manage its operations." See Section VI(B). A hearing officer may reduce a disciplinary action only if the grievant has shown, by a preponderance of the evidence, mitigating circumstances that would justify a reduction or removal of the disciplinary action. Despite this deference, a hearing officer may mitigate the discipline when necessary to promote the interest of fairness.

The grievant has made two arguments in support of mitigation. First, he points to a similar incident that occurred approximately four years prior to his. In that factually similar (but not identical) case, an officer received merely a Group I Written Notice for failing to follow policy. He had returned to his work post with a dip of tobacco in his mouth. The person who issued that discipline is the same individual who is the Warden who disciplined the grievant. In the earlier situation, the Warden (then Assistant Warden) gave weight to the truthfulness of the officer and his expression of remorse.

Here, the Warden viewed the lack of openness by the grievant in his initial encounter of the superior officers as an aggravating factor. The grievant has contested whether he was being serious when he misidentified the tobacco as beef jerky. He now claims he was being merely sarcastic. Neither the Sargent nor the Lieutenant who confronted him in the control room believed him to be joking at that time. (Recording at 13:01 and 27:30). He is also claiming, as did the previously sanctioned officer, that his bringing the tobacco into the facility was accidental. Certain circumstances do not support the grievant's version of events. His failing to remove the tobacco from his back pocket during the search is curious. He testified he placed the tobacco on the desk only when he sat in the control room chair and realized it was there. Logic would indicate it was

just as likely he should have noticed the presence of the bag in his pocket when he was driving back to the facility after the break. He testified he tried to shield the presence of the tobacco from the gun officer so that she could avoid being in the awkward position of having to report him for a violation of the policy. That statement appears to be belied by his placing the tobacco on the desk, rather than allowing it to remain in his rear pocket or flushing it down the toilet before being discovered by anyone. These doubts about the truthfulness of the grievant cause me to conclude he has not met his burden of proof that he is similarly situated with the previously disciplined employee.

The other argument of the grievant is that the common usage of tobacco by other employees in the parking lot of the facility is a mitigating factor. If the evidence showed the Warden was aware of that practice, I would agree. The Warden testified credibly that he was not aware of employees using tobacco on the facility grounds. I cannot find that these unsanctioned employees can serve as the basis for proper mitigation in this matter. See *DHRM Ruling* 2016-4258.

The grievant also has argued that the three-month delay in the issuance of the formal discipline should be given consideration. The delay was caused by the Warden's being away from the facility for family-related medical reasons. During the three months, the grievant continued to work without further performance or disciplinary issues being noted. Although unusual, I find the delay to be excusable and non-prejudicial to the rights of the grievant.

The *Rules* allow me to mitigate punishment only where it is shown to be arbitrary or capricious. Operating Procedure 320.6 is unquestionably harsh. The question is not whether I or a reasonable Warden could have treated the actions of the grievant as a lower level offense under the Standards of Conduct, or even merely subject to oral counseling. The question is whether this

Warden, based on the facts as known to him, made a decision no reasonable Warden would have made. For me to make that conclusion is a bridge too far.

VI. DECISION

For the reasons stated above, I uphold the issuance of the Group III Written Notice and termination of the grievant from employment by the agency.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was 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 Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

or, send by fax to (804) 371-7401, or e-mail to EDR.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all your appeals to the other party, EDR, 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.

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.

RENDERED this August 26, 2020.

/s/Thomas P. Walk, Hearing Officer

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IN RE: CASE NO.: 11495

ORDER UPON MOTIONS TO VACATE OR RECONSIDER

The grievant has submitted Motions requesting the vacating or suspending or Reconsideration of my Order entered on August 26, 2020. For the reasons stated below, the Motions are denied.

In Department of Human Resource Management Ruling 2019-4053 the Standards for Consideration of a Request for Relief based upon newly discovered evidence are set forth. Those requirements are as follows:

> "(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended."

In Section 21 of his Motion for Reconsideration the grievant asserts that an e-mail dated May 23, 2019 has come to his attention after the hearing and my decision. No explanation is given as to how the grievant became aware of the e-mail. The Motion is ambiguous as to it was received directly from the author of the email or another source. He points to the fact that it was addressed to "All River North" as an indication that it was seen by the Warden at or about that time. He provides no evidence as to who was included in that e-mail group, but I will assume that the Warden was included in the group. More problematic for the grievant, however, is whether he himself was included in that group, being an employee at the Correctional Center at that time.

The grievant asserts in Section 21 of his Motion for Reconsideration that the e-mail should have been provided by the agency as part of his initial request for certain documents. The

implication is that the e-mail was withheld intentionally prior to the hearing. The subject disciplinary action was taken on January 3, 2020. The hearing was not conducted until August 10. That length of time gave the grievant ample opportunity to speak with other possible witnesses employed at the facility to pursue possible leads for evidence supporting his theory developed at the hearing that the usage of tobacco on facility grounds was common and widely known. The fact that the e-mail suddenly appeared after my decision was rendered leads me to conclude that due diligence was not exercised.

The e-mail has been proffered by the grievant to show that the Warden testified falsely. The e-mail certainly supports the position of the grievant that tobacco was being used on the grounds and that at least the Assistant Warden and some high-ranking members of the administration were aware of the possibility. To that extent, the e-mail would have been cumulative to the testimony provided by the grievant and some of his other witnesses. It possibly would have served to impeach the testimony of the Warden. Under the requirement set forth above, that is not sufficient reason for me to reconsider my decision.

There is no question that the e-mail would have been material evidence if timely presented. I cannot find that it would have likely produced a different outcome. Rather than supporting the argument of the grievant that he should not be severely punished for a tolerated, common violation of policy, the e-mail shows that the administration was prepared to take disciplinary action against any employee found to be in violation of the policy. Lower level officers were instructed to make subordinate employees, such as the grievant, aware of the reminder of the prohibition against tobacco usage. Also, the grievant has chosen to ignore the doubts expressed in my earlier decision about his own credibility. Even if I were to find that the Warden misrepresented the level of his knowledge regarding tobacco usage, my finding based on circumstantial evidence that the Warden

was substantially correct in his assessment of the credibility of the grievant would be enough to sustain my original decision.

The grievant has not met his burden of proving that this matter should be reconsidered based on the newly discovered evidence. Therefore, his Motions are denied.

RENDERED this September 10, 2020.

/s/ Thomas P. Walk, Hearing Officer