



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11426

Hearing Date: December 13, 2019

Decision Issued: December 27, 2019

PROCEDURAL HISTORY

On August 9, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for introducing contraband into a secured facility.

On September 3, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

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:

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on September 10, 2010. No evidence of prior active disciplinary action was introduced during the hearing.

The Department prohibits employees from bringing tobacco products into the Facility because inmates gaining access to tobacco products can use them as a substitute for money.

On July 11, 2019, Grievant was in uniform reporting to work at the Facility. He had two cans of smokeless tobacco. One can was full and the other one was empty or almost empty. He had \$167.00. Grievant entered the security check point. The security officer patted down Grievant but failed to require him to empty the contents of his uniform pockets into a separate container. Grievant passed through the security checkpoint with the tobacco and money.

Grievant went to the shift briefing room where several employees were waiting to go to their posts once the outgoing shift had ended. Some employees left the briefing room to assist with count. This was a common practice. Grievant and the other employees on his shift not involved in count remained in the briefing room.

Grievant was standing next to the door connecting the briefing room to the rest of the Facility. He stood there for several minutes. Two K9 officers and their drug detection dog entered the briefing room through a door on the other side of the room. Grievant saw the dog and reacted immediately. He moved from the left side of the door to standing in front of the doorway facing as if he were leaving the room. He hesitated and then turned so that his back was against the right side of the doorway. After a few seconds, he moved to his right to pass through the doorway and into a hallway. He continued walking to his post.

Other employees remained in the room once the dog entered. They stood as the dog passed each one to determine whether an employee was in possession of illegal drugs.

The Lieutenant observed Grievant leaving the briefing room. The Lieutenant became concerned. Two corrections sergeants relieved Grievant of his post and he was taken to a conference room. Grievant agreed to be scanned by the dog. The drug detection dog alerted to Grievant even though he was not in possession of any narcotics.¹ Grievant was subjected to a search and the tobacco and money were found in his possession.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”² Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

DOC Operating Procedure 445.1 governs Employee, Visitor, and Offender Searches. Under this policy, “[c]ontraband is “[a]n item forbidden for entry, possession, or removal from a Department of Corrections facility.” Contraband includes, “[t]obacco and tobacco related products.” An “Allowable Personal Items List” describes items that can be brought into the institution perimeter. Items on list include, “[a] maximum of \$20 in cash.” Cash in excess of \$20 is contraband.

¹ The Agency suggested that the cash Grievant held may have retained traces of illegal drugs.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“Introducing or attempting to introduce contraband into a facility or to an offender, or possession of contraband in the facility” is a Group III offense. On July 11, 2019, Grievant brought contraband into the Facility. He brought tobacco products and cash in excess of \$20 thereby justifying the Agency’s issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he forgot he had the tobacco and excess cash in his possession when he entered the Facility. The video shows that Grievant was waiting patiently with other staff before the narcotics detection dog entered the briefing room. Grievant reacted immediately upon seeing the dog. Grievant went to the doorway to exit and waited a few sections before leaving the briefing room. Grievant’s behavior is consistent with someone who knew he was in possession of contraband and wished to avoid being revealed. No other staff left the briefing room once the dog entered the room. The Hearing Officer cannot conclude that Grievant simply forgot he was in possession of contraband.

Grievant argued that he was talking to another employee who was standing behind the door when the dog entered the briefing room. He asserted that he entered the hallway after hearing that employee say “come on.” This argument is not persuasive. No credible evidence was presented explaining why an employee would be behind the door talking to Grievant. The video of the incident does not show an employee entering the hallway and not continuing to walk down the hallway through the doorway.

Grievant argued that the front entry staff should have properly searched him and discovered the contraband before permitting him into the secured area. Grievant’s assertion is correct. Based on Grievant’s reaction to the dog entering the briefing room, it appears that Grievant knew he was in possession of contraband. The front entry search would not have revealed anything about Grievant that he did not already know.

Grievant argued that the Agency failed to properly protect Grievant’s privacy during the search of Grievant. If the Hearing Officer assumed for the sake of argument that the Agency failed to protect Grievant’s privacy during the search, it would not affect the outcome of this case. Grievant’s remedy would not include reversing the disciplinary action.

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 rules established by the Department of Human Resource Management”⁵ 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

⁵ Va. Code § 2.2-3005.

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.

Grievant contends the disciplinary action should be mitigated. Grievant presented evidence of another employee at the Facility who attempted to bring in cigarettes but was stopped at the front entry when the employee was properly searched. That employee received a written counseling. The evidence does not show that Grievant simply forgot he possessed contraband when he entered the Facility. Grievant presented evidence of another employee who received a Group I for possession of tobacco approximately five years ago. The employee worked at another facility and the discipline was "signed off on by a warden that's retired." That Warden owned the employee "a pretty big favor on some s-t that happened that I fixed too."⁶ Grievant is not similarly situated to the employee at another facility. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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.

⁶ Grievant Exhibit 2.

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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.