

DECISION OF HEARING OFFICER
v. DEPARTMENT OF CORRECTIONS, RIVER NORTH
CORRECTIONAL CENTER
CASE NO.: 11706
HEARING DATE: NOVEMBER 3, 2021
DECISION ISSUED: November 24, 2021

PROCEDURAL HISTORY

On May 3, 2021, Grievant was given a Written Notice in regards to an offense of March 6, 2021¹ Grievant was advised of agency's evidence and was given an opportunity for response.² On June 2, 2021, a Hearing Officer was assigned to Grievant's appeal. June 24, 2021, a phone conference was initiated with advocates for both parties. A hearing was set for August 27, 2021, via video conferencing. This hearing was cancelled due to Agency Advocate's illness. The matter was set for hearing by agreement of all parties for November 3, 2021.

APPEARANCES

Agency Advocate
Agency Representative as Witness
Three (3) Additional Agency Witnesses
Grievant Advocate
Grievant, as Witness
Four (4) Additional Grievant Witnesses

ISSUES

- 1) Whether Grievant violated operational procedure 135.2 regarding association between staff and offenders.³
- 2) Whether Grievant violated operational procedure 135.1⁴ and offense #33⁵ by refusal to follow instructions/policies.
- 3) Whether Grievant's actions could be considered fraternizing.⁶
- 4) Whether a Group III discipline with termination was an appropriate discipline.⁷
- 5) Whether there were mitigating circumstances.⁸

¹ Agency Ex.1

² Agency Ex.3

³ Agency Ex.4

⁴ Agency Ex. 5

⁵ Agency Ex. 1

⁶ Agency Ex. 4 II D1pg3

⁷ Agency Ex. 4 IV C and D pg6

⁸ See later discussion of Mitigation infra

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 Grievance hearing 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.

Agency also relies on O.P. 135.2 and O.P. 135.1.

FINDING OF FACTS

On March 6, 2021, a sleeve of crackers was discovered with the predetermined menu food cart that was to distribute food to inmates that day.⁹ The crackers were not on menu for the meal being served The crackers were insufficient in number to feed the approximately 96 inmates. A correctional officer noticed the crackers and put them aside in “the cage” (a closet like area on the pod floor that was locked from inmates entering). Grievant admitted he became aware of the crackers and admitted giving them to a kitchen worker inmate.¹⁰

On a rapid eye video camera, the inmate is seen with the crackers and stuffing them in his pants, although, he is standing next to an empty food cart.¹¹ Grievant is then observed joining the inmate and they walk down the hall together next to the empty food cart that inmate is pushing.¹² A Correctional Officer was in an office where Grievant and

⁹ Agency Ex. 6 pg 16

¹⁰ Agency Ex. 3

¹¹ Agency Ex. 2 rapid eye still photos

¹² Agency Ex. 7 (was seen by hearing officer at video hearing but exhibit disc appears damaged)

inmate then entered. Both the Correctional Officer and Grievant stated the crackers were divided between Grievant and inmate.¹³

Grievant stated that he gave the crackers to inmate because he was told by the inmate that some inmates were “shorted” in receiving crackers on the previous day. Crackers were on the previous day menu.¹⁴ Grievant said inmate was a kitchen worker and gave the crackers for inmate to distribute. Grievant did not describe any plan for how inmate was to distribute a box of crackers among 96 men. The warden and other witnesses stated that if a food item was short, it was always replaced the same day. Items were never replaced the following day.

OPINION

The total of the investigator’s evidence was not compelling as the video did not clearly show Grievant giving inmate a food item. However, the investigator’s evidence from the rapid eye video did show inmate with a food item which he “stored” in his pants while standing next to an empty food cart. The video did also show grievant and inmate walking down the hall together with an empty food cart between them.¹⁵ The evidence that Grievant gave inmate crackers only occurred because Grievant admitted to giving inmate the crackers.¹⁶ Grievant Advocate, in his opening statement, also mentioned that Grievant had given inmate crackers.

Grievant stated he only gave the crackers to inmate because inmate told Grievant that some inmates were “shorted” crackers from the day before. Yet, Grievant gave no evidence that he checked with the kitchen to verify this statement. Grievant also stated he had no plan for how inmate was to distribute a limited number of crackers to a select few of 96 inmates. Grievant apparently thought six packs of crackers could be fairly distributed among 96 men without causing a disruption and required no further supervision by Grievant. Further, Grievant had no explanation for why he distributed the remaining packs of crackers to himself. Whether Grievant honestly thought the crackers were in the food supply due to a shortage from the day before or whether Grievant gave the crackers to inmate so he and the inmate could share them later, the end result is that Grievant did not act in a responsible manner and put the security of the prison at risk.

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.¹⁷ 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

¹³ Agency Rx. 3

¹⁴ Agency Ex. 6 pg 15

¹⁵ Agency Ex. 7

¹⁶ Agency Ex. 3

¹⁷ GPM §5.8

should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy.¹⁸

The preponderance of evidence then is that Grievant gave the food item to inmate and walked down the hall with inmate when the food item was clearly concealed and not on the food cart. It cannot be ignored that the food item was purposefully hidden and common sense would dictate Grievant knew the food item he had given inmate was concealed. Further, there was no explanation for why Grievant distributed some of the crackers to himself, which could reasonably be concluded Grievant was sharing crackers for personal use between himself and inmate. The agency also reasonably concluded that a correctional officer showing favoritism to an inmate could cause negative dynamics between the correctional officer and the inmate and the inmate and other inmates. This would put the security of the prison at risk. Grievant's behavior did violate OP 135.2, II, D1 and a group III discipline was appropriate by OP 135.2, IV, C and D.

It should be noted that the crackers were described as stolen from the kitchen. There is no evidence they were stolen. They were simply found on the cart. Also, referring to the crackers as contraband is excessive. Regardless of how the crackers were described they were the subject of an item that shouldn't have been passed to inmate. Also, it is not relevant whether inmate attempted to distribute crackers to other inmates. The issue is the manner in which Grievant conducted himself in regards to the inmate.

MITIGATION

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...." 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 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) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule;
- (2) whether the disciplinary is consistent with the Agency's treatment of other similarly situated employees: or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.¹⁹

Grievant mentioned three matters, which he believed should mitigate his discipline. The facts are as follows:

¹⁸ Rules for conducting Grievance hearing VI A

¹⁹ Rules for conducting Grievance hearings VI B 2

- 1) Another Correctional Officer was emotionally upset about a relationship and discussed her feelings. An inmate reported the Correctional Officer had been talking to him about the matter and expressed factual detail of the conversation. The Warden considered the Correctional Officer's explanation and reviewed the rapid eye video. The Warden stated he was convinced the Correctional Officer was talking on the phone and the conversation was over-heard by the inmate and not directly spoken to him. The Correctional Officer was not disciplined for fraternizing with the inmate but was given admonishment to be more careful about what was said in the vicinity of an inmate's hearing distance.

Since the Correctional Officer was not believed to be fraternizing, it is not a similar matter to Grievant's issue.

- 2) Grievant's advocate also attempted to elicit evidence that the same correctional officer had previously been in a fraternizing situation, but no evidence of any discipline or lack of discipline was obtained.
- 3) Grievant and inmate were equally engaged in the activity regarding the handling of the food item. Yet, the Warden did not even question the inmate and gave the inmate no reprimand or punishment. This was clearly disparate treatment in what was the same incident. However, the rules regarding mitigation as stated *supra* refer only to **employees** (emphasis added) for comparison of treatment in disciplinary actions. Also, the Warden gave a reasonable explanation as to the disparity of treatment as he believed the Grievant had "rank" over the inmate. That is, Grievant was the party with superior power to control this situation.

While fairness might consider this to be disparate treatment, the law and policy as stated preclude this from being an option to reduce Grievant's discipline.

In conclusion, Grievant did abridge OP 135.2 in his association (fraternizing) with inmate. Grievant did fail to follow policy #33. Grievant's behavior did meet the definition of fraternizing. Grievance behavior resulted in a Group III discipline with termination, which falls within actions of severe nature that could harm the facility. Grievant failed to produce evidence of employees similarly situated to Grievant who received a lesser punishment. Grievant should have been aware that he was not to fraternize with inmates and the penalty did not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the agency's discipline of Grievant with a Group III discipline and termination 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.

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.²⁰

[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

²⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.