



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11693

Hearing Date: August 13, 2021
Decision Issued: September 1, 2021

PROCEDURAL HISTORY

On March 17, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusing to be strip searched.

On April 2, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 10, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. She began working at the Facility on February 10, 2020. During her orientation, Grievant was advised of the strip search policy. No evidence of prior active disciplinary action was introduced during the hearing.

Agency managers believed contraband was being brought into the Facility by corrections officers. The Agency relied on a trained narcotics dog to detect the odor of illegal drugs coming from employees. Facility employees were asked to line up in a hallway while the K9 Officer walked the dog past each employee. If the dog smelled illegal narcotics on an employee, the dog would "alert" by making a head gesture or sitting. The K9 Officer had sufficient experience to interpret and understand the dog's alerts. He had been a K9 Officer for three years. The narcotics dog had received the necessary certifications for the Agency to use the dog to conduct narcotics searches.

On March 3, 2021, Grievant was working at the Facility. One group of employees lined up in the hallway and the K9 Officer and narcotics dog walked past that group of employees several times. The dog did not alert on any of those employees and they returned to the waiting area. A second group of employees including Grievant lined up in the hallway. As the dog passed Grievant, the dog alerted to Grievant. Grievant's group returned to the waiting area and the first group returned to the hallway. The dog passed

the first group again and did not alert to any employees. The first group was dismissed. Grievant's group returned to the hallway. The dog passed by each person in the group and alerted on Grievant a second time.

The K9 Officer knew someone was suspected of having contraband but he did not know which employee.

The Intel Officer notified the Warden that the narcotics dog alerted to Grievant. The Warden authorized that Grievant be subject to a strip search.

Grievant went to another room. Grievant was informed the narcotics dog alerted to her. Grievant was presented with a consent form to sign. The Intel Officer read the form to Grievant and then gave the form to Grievant. The form stated, "Strip search of person and clothing by trained corrections staff of the same gender."¹ The form also informed Grievant she would be subject to disciplinary action for refusing to consent to the search. Grievant refused to sign the consent form. Grievant said, "Ya'll not going to violate me."

After Grievant refused consent to search, she was escorted off of the Facility property.

Grievant met with the Warden on March 4, 2021. The Warden asked her if she declined the strip search and Grievant admitted declining to be searched. The Warden asked Grievant why she refused to be searched. Grievant replied she did not want other staff to know about a tattoo she had and that she had been sexually assaulted in the past.

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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."²

Operating Procedure 445.1 governs Employee Offender and Visitor Searches. This policy defines "strip search" as a, "complete visual search of the body that requires a person to remove every article of clothing including wings, dentures, etc. as to permit a visual inspection of the person's breasts, buttocks, and genitalia to detect contraband."

¹ Agency Exhibit p. 6.

² See, Virginia Department of Corrections Operating Procedure 135.1.

Section V(A)(6) states, “[a]ll facility employees are subject to search as a condition of employment...”³ Section V(E)(9) provides:

The Facility Unit Head may authorize a strip search of an employee, intern, volunteer, or official visitor only when reasonable belief exists of the possibility of introduction of contraband into the facility. *** If approved by the Facility Unit Head or Assistant Facility Unit Head, the employee, intern, volunteer, or official visitor will be strip searched in accordance with this operating procedure.⁴

Section V(A)(6)(c) provides:

Employee refusal to submit to a search is considered a Group III offense under Operating Procedure 135.1, Standards of Conduct, and is justification for barring the individual from the facility and possible termination.⁵

On March 3, 2021, a narcotics dog alerted to Grievant. This suggested it was possible Grievant was in possession of contraband. The Warden reasonably believed Grievant was in possession of contraband. The Warden was authorized to require Grievant to complete a strip search. Grievant was presented with the consent form to consent to a strip search but she refused to be searched. The Agency has presented sufficient evidence to support the 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 questioned whether the narcotics dog alerted to her. The Agency presented a video showing the dog making a “head pop” as it passed Grievant and the K9 Officer interpreting this as alerting to Grievant. The Agency’s evidence showed the Warden had a reasonable belief to require Grievant’s search.

Grievant asserted she had good reason to refuse to be searched. She asserted the Agency did not identify the officers who would be conducting the search and did not inform her that the officers would be female. The evidence showed that the consent form refers to the search being conducted by officers of the same gender. Grievant read that form. The reasons she expressed to the Warden for refusing to be searched are not exceptions to the Agency’s policy.

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

³ Agency Exhibit p. 42.

⁴ Agency Exhibit p. 46.

⁵ Agency Exhibit p. 46.

....”⁶ 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) 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. In light of this standard, 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.

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.

⁶ Va. Code § 2.2-3005.

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.