



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11596

Hearing Date: January 8, 2021

Decision Issued: January 12, 2021

PROCEDURAL HISTORY

On August 3, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization and workplace violence.

On August 13, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 8, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 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 had been employed for approximately two and a half years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 18, 2020, Grievant reported to work at the Facility. She passed through a body scanner upon entry into the secured area. As she passed through a body scanner an image was taken. This image did not show any objects in her body cavities. She left the Facility during her lunch break and returned. She was scanned again as she passed through the body scanner. The image revealed that she had an object inside her body. Grievant was asked to consent to a strip search and search of her vehicle. Grievant consented and signed two documents acknowledging her consent. The Agency's practice was to conduct a vehicle and bag search when it concluded a strip search was necessary.

Grievant was taken to a private secured room where she undressed in front of two female employees, Lieutenant H and Officer L. Grievant squatted three times and no objects were revealed.

Grievant was asked to go to her vehicle so it could be searched. Lieutenant H, Officer C and Officer L followed Grievant. Officer L was four months pregnant. Grievant's vehicle was parked in the Facility's parking lot. Once they reached the

vehicle, Grievant unlocked her vehicle. Lieutenant H told Grievant to stand at the back of the vehicle next to Lieutenant H. Officer L went to the front door on the driver's side of the vehicle. Officer C went to the front door on the passenger's side of the vehicle. They began searching Grievant's vehicle.

Officer C opened the glove compartment and noticed a clear latex glove with a yellow folded piece of paper. The ends of the glove were tied with the paper inside. Officer C removed the clear glove and yellow paper. He began to unfold the paper. He took the paper out and began reading it. Grievant quickly approached Officer C and attempted to take the paper. She pushed Officer C. To avoid letting Grievant have the paper, Officer C handed the paper to Officer L on the other side of the vehicle. Officer L noticed that the letter was written by an unknown inmate. Grievant quickly moved to the driver's side of the vehicle and "wrapped" herself around¹ Officer L while attempting to get the paper. Lieutenant H and Officer L instructed Grievant several times to back away, but Grievant continued to yank Officer L's arm and attempt to grab the paper. Officer L held the paper away from Grievant. Grievant grabbed Officer L's arm with sufficient force to leave a fingernail imprint on Officer L's skin. Grievant's elbows bumped Officer L's chest as Grievant grabbed for the paper. Officer L was greatly concerned that Grievant was harming her unborn child. Lieutenant H pulled Grievant away from Officer L. Grievant withdrew her consent to search the vehicle. She entered the vehicle and left the Facility parking lot.

The paper was a letter from an unknown inmate who was "up for parole in two months." The letter that would be best described as a handwritten love letter addressed to "Special Lady."

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

Group III offenses include, "[f]raternalization or non-professional relationships with offenders who are within 180 days of the date following their discharge from DOC custody or termination from supervision, whichever occurs last. Exceptions to this

¹ Officer C described what he saw as Grievant "almost wanting to tackle" Officer L.

² See, Virginia Department of Corrections Operating Procedure 135.1.

section must be reviewed and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis.”³

Fraternization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders, connections on social media, and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁴

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. *** 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

Grievant fraternized with an inmate. She was in possession of a love letter from an inmate at the Facility. She obtained the letter from the unknown inmate and held it in her possession.

Group III offenses include violation of DHRM Policy 2.35 depending on the behavior.⁵ This policy prohibits workplace violence which is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

The Policy Guide for DHRM Policy 2.35 lists prohibited conduct to include:

- Injuring another person physically;
- Engaging in behavior that creates a reasonable fear of injury to another person; ***

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

⁴ Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

⁵ See, Virginia Department of Corrections Operating Procedure 135.1.

- Assaultive behavior such as pushing, shoving, grabbing, hitting, kicking, or spitting toward another person;

Grievant engaged in workplace violence. On July 18, 2020, Grievant pushed against Officer C and wrapped herself around Officer L. Grievant grabbed Officer L's arm with sufficient force to leave a fingernail mark. Officer L became fearful Grievant would injury her unborn child as Grievant bumped against Officer L.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization and workplace violence. 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 she did not consent to the strip search and vehicle search because she was told if she did not agree to the searches she would be fired. The evidence showed that Grievant was not pressured to sign the consent documents and not threatened with removal if she failed to do so. The forms themselves indicate that an employee who refusing to complete a search may be subject to disciplinary action. The possibility that an employee may be subject to disciplinary action for refusing to complete a search does not in itself render the search non-consensual.

Grievant argued the two female employees stopped her from calling a relative who worked in law enforcement for counsel. It appears that once the strip search began, Grievant was not allowed to call anyone else. Grievant has not established the Agency violated policy by preventing her from making a telephone call during a strip search or that the Agency's action should undermine its disciplinary action.

Grievant argued that once the Agency determined that the strip search did not produce contraband, the Agency should not have searched her vehicle. The evidence showed that the Agency's standard practice was to conduct a vehicle and bag search anytime a strip search was conducted. The Agency's practice appears consistent with Operating Procedure 445.1 (II)(A)8(a)(ii)(C) which provides:

If an anomaly is detected on the higher "dual" setting, this constitutes reasonable belief so that additional searches of the person, their possessions, and their vehicle using detection canines or other means may be utilized.

Grievant has not established that the Agency violated any policies by extending its search to her vehicle.

Grievant argued that the two female employees conducting the strip search giggled after the search was completed. Those employees denied doing so. It is clear that employees conducting a strip search should not giggle during the search or thereafter, but Grievant did not present a policy violation that would affect the outcome of this grievance assuming those employees had done so.

Grievant argued the consent forms were not fully completed. The evidence showed that Grievant is the one who filled in the descriptive blanks of the consent forms and any lack of completeness was caused by Grievant. It is clear that Grievant identified her vehicle when she took the others to that vehicle and unlocked the vehicle for the search.

Grievant argued that she obtained the yellow paper and placed in another piece of paper called a “request form” and mistakenly took the form out of the institution. The evidence showed there was no “request form”. Neither Officer C nor Officer L observed a form other than the yellow paper note from an inmate. No request form was presented as evidence.

Grievant argued she did not touch Officer C or Officer L. The evidence clearly showed that Grievant attempted to grab the paper away from Officer C and Officer L and while doing so, Grievant inappropriately touched them. Grievant asserted a video of the incident would show otherwise. The Agency presented a copy of the video, but it shows the incident from a distance and does not reveal what happened.

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”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.

⁶ Va. Code § 2.2-3005.

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.

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.