

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
IN RE: CASE NUMBER 12030**

DECISION OF HEARING OFFICER

I. INTRODUCTION

The Virginia Department of Corrections (“the agency”) issued a Group III Written Notice to the grievant on August 11, 2023. The notice specified violations of three separate agency policies or procedures pertaining to an incident on July 27, 2023. The agency demoted the grievant, made a 10% disciplinary pay reduction, and transferred him to a different facility. I uphold the actions taken by the agency.

II. PROCEDURAL MATTERS

This grievance was commenced by the grievant on September 6, 2023. It was qualified for hearing. The Department of Human Resource Management, Office of Employment Dispute Resolution, appointed me as hearing officer on November 6, 2023. I conducted a prehearing conference call with the advocates for the parties. With the agreement of the parties, I scheduled this case for a hearing to be held on January 18, 2024 at the agency facility where the relevant events occurred. Because of a threatening winter weather forecast of hazardous travel conditions, the parties agreed to cancel the original hearing date. As before, with the agreement of the parties I rescheduled the hearing for March 27. The hearing was held on that date, lasting approximately three hours.

Prior to the initial scheduled hearing date, the grievant requested the agency produce certain daily duty rosters. The agency replied that those rosters no longer existed and could not be produced. On January 10, 2024, the grievant moved for the application of an adverse inference against the agency because of the unavailability of the rosters. I took the matter under advisement (my ruling on such is discussed below).

At the hearing, the agency was represented by an attorney-advocate. It presented seven witnesses. It proffered 18 exhibits including several applicable policies. Those exhibits were accepted into evidence without objection.

The grievant was represented by a lay advocate. At the hearing, the grievant testified and called one additional witness. His proffered forty-three pages of exhibits were accepted into evidence. He further tendered additional pages, consisting of his motion for an adverse inference and certain emails. I accepted those into the record of the case, but not to be treated as evidence.

III. ISSUE PRESENTED

Whether the agency was justified in issuing a Group III Written Notice and imposing a transfer and pay reduction to the grievant?

IV. FINDINGS OF FACTS

The grievant has been an employee of the agency for over ten years. He has consistently received performance evaluations of “contributor” or better. On July 27, 2023, the grievant was working as a corrections sergeant for the agency. His posting was at a mental health treatment facility operated by the agency with concurrent certification by the Department of Behavioral Health and Disability Services for the Commonwealth of Virginia.

A certain inmate (referred to herein as W) was incarcerated in a cell on the unit patrolled by the grievant. W had a history of volatile and self-injurious behavior. His behavior included removing his colostomy bag and inserting items into the bag itself or the stoma in his body. These behaviors made W what the agency termed as an “at risk” inmate. The agency used a special form to inform staff of essential information regarding such inmates (Form 730_F13). The form was completed by a mental health clinician and kept posted immediately adjacent to the cell of each such inmate. In the case of W, his “At Risk” form for July 27, 2023, specified that he was to be provided no paper items.

During the evening of July 27, the grievant found W to be agitated in his cell. The grievant was familiar with W and aware of his fondness for reading. In an effort to calm W, the grievant provided him with a page from a newspaper. This directly contradicted the directions found on his Form 730_F13. The form directed W not be allowed reading material. The newspaper had the desired effect on W. No adverse consequences to W came about from the newspaper being provided to him.

When other staff discovered that W was in possession of the newspaper page in violation of the orders from the clinician, an investigation ensued. Video footage established that the grievant had provided the newspaper to W on July 27. The grievant met with his major, a unit manager, and the human resource director for the facility on August 4. He provided a written statement in response to the preliminary allegations against him. None of the other employees asked any questions of the grievant. The grievant made one additional statement during the

meeting. The major made a notation of that statement. No other notes were made during the meeting.

The assistant warden processed the information about the July 27 incident, including that coming from the August 4 meeting. On August 11 he issued the disciplinary action which is the subject of this case.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its 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 Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance 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 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.

To his credit, the grievant has freely conceded that he provided the newspaper to the inmate. The agency relies on three separate Operating Procedures to justify its finding that the action of the grievant constituted misconduct. Agency Operating Procedure 730.5 requires a coordination of efforts between clinicians and security staff, allowing inmates only those privileges determined appropriate by a mental health clinician. Those privileges are the ones specified on form 730_F13. The agency further relies on Operating Procedure 425.4, which requires the living conditions for an inmate on safety status to conform to that status, unless specific property items need to be removed immediately or certain activities denied. The grievant clearly ignored the directions of the notification form for W. By doing so he violated both of those agency policies.

Agency Operating Procedure 135.1 is labeled “Standards of Conduct.” It is the agency’s version of DHRM Policy 1.60. It is the operating procedure that sets forth procedures for a progressive disciplinary process. The agency issued the grievant a Group III Written Notice. Those offenses are specified as being those so serious that a first occurrence “normally should warrant termination.” The agency presented evidence and argument that the action of the grievant in providing the newspaper posed a threat to the safety of the inmate and could have

resulted in an interference of agency operations. A portion of OP 135.1 lists examples of Group III offenses (Section XIV). Although that section does not specifically list the other operating procedures used in this Written Notice, I find that the action of the grievant is properly classified as misconduct as a third group offense. Subsections 7, “violating a safety rule where there is a threat of physical harm,” applies to this situation. Subsection 15 covers negligence that could have resulted in serious injury; the evidence shows it is also implicated.

The grievant acted in good faith in his action using his own best judgment as to how to calm the inmate. The citing of the grievant for a Group II offense would not have been unreasonable. Pursuant to Section VI(B)(1) of the Rules for Conducting Grievance Hearings and Section 5.8 of the Grievance Procedure Manual, I am required to give substantial deference to the choice of the agency in the level of discipline to be imposed. I can substitute my judgment for that of the agency only if I find that its decision to have been unreasonable. The decision by the assistant warden to issue a Group III Written Notice is bolstered by his having a background as a mental health clinician prior to his becoming a security officer. Although he was not the clinician who made the assessment of the risk involved with W, I choose to give a great deal of deference to his assessment of the possible safety risk, albeit on a post-incident basis.

The assistant warden was told by the major that the grievant had indicated in the August 4 meeting that he (the grievant) said “major I’m not going to lie. I did it and I know it was wrong. If I could cover this up and hide it I would but I can’t.” The major made a contemporaneous note of this statement during the meeting. It apparently was the only notation made during the meeting. The grievant denies making the statement as it was recorded. The major and the other two staff people present in the August 4 meeting agree that the written note is accurate. The grievant testified that what he actually said was that he would “cover it” if presented with a comparable situation again. He testified that he meant that he would take the proper steps to involve more trained mental health professionals in the decision whether to provide any additional items to an inmate.

I find the contradictory evidence regarding this statement to be in equipoise. For the agency to rely on this statement as an aggravating factor under Policy 135.1 and Section VI(B)(2) of the Rules, it has the burden of proving it by a preponderance of the evidence. I do not find that the agency met that burden. I do find, however, that any consideration of that statement by the assistant warden in deciding what level of discipline to impose to have been harmless error. The event of July 27, by itself, was sufficient to support a Group III Written Notice. The agency could have terminated the grievant upon the issuance of that discipline but chose not to do so. I find that decision to be reasonable and consistent with policy.

The grievant further attempted to justify his action by proving that the facility was understaffed at the time of these events. A witness agreed with this assessment. This is the issue on which he has requested that I draw an adverse inference against the agency for failing to provide the duty rosters. The failure of the agency to maintain these rosters was done in the ordinary course of its business. An adverse inference would not be proper here.

It would also not benefit the grievant. I do not accept this justification by the grievant for his actions. His explanation was that he believed providing the newspaper could prevent a situation later that evening where the inmate deteriorated to an extent requiring further intervention by multiple staff members. I do not fault the grievant for his intentions. What I do find to have been improper was his choosing not to defer to the written directions of the mental health staff and substituting his judgement for theirs. The fact that he was correct in his assessment is of no consequence.

I find no indication that the decision by the agency is inconsistent with any law or policy. All proper mitigating circumstances were considered by the agency and weighed reasonably. The discipline was not issued for any improper reason.

VI. DECISION

For the reasons stated above, I uphold the issuance and disciplinary actions taken by the agency with regard to the Group III Written Notice against the grievant on August 11, 2023.

VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen calendar days from the date this decision is 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 Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

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

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor

Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile 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 fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The 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 contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.

ORDERED this April 2, 2024.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer