

DECISION OF HEARING OFFICER

IN RE: CASE NO: 12061
HEARING DATE: 3-12-24
DECISION ISSUED: 4-11-24

PROCEDURAL HISTORY

Grievant had an issue with an Inmate in February of 2023. Shortly after this incident, Grievant had an accident and was out of work. Upon return on August 13, 2023, his superior issued a Notice of Need to Improve based on the February event and made a reassignment of job duties.¹ Due to Grievant's reaction to his reassignment a Written Notice Group I² was issued on September 15, 2023. Grievant attended three step meetings on October 13, 2023, November 1, 2023, and December 12, 2023.³ Grievant filed for a hearing which was issued on January 22, 2024. A pre-hearing conference was scheduled for February 1, 2024, and the matter was heard at Grievant's employment location on March 12, 2024.

APPEARANCES

Agency Advocate

Agency Representative as Witness

Eight (8) additional Agency Witnesses (including Grievant as Adverse Witness)

Grievant's Advocate

Grievant called no Witnesses.

ISSUES

- 1) Whether Grievant violated operational procedures 145.3⁴, 135.3⁵ and 135.1⁶.
- 2) Whether Grievant violated operational procedure DHRM 2.35⁷.
- 3) Whether Grievant violated policies 11, 13 and 39⁸.
- 4) Whether a Group I discipline was an appropriate discipline.
- 5) Whether there were mitigating circumstances.

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

¹ Grievant Exhibit 2

² Agency Exhibit 1

³ Agency Exhibits 14, 15, 16

⁴ Agency Exhibit 18

⁵ Agency Exhibit 19

⁶ Agency Exhibit 4

⁷ Agency Exhibit 20

⁸ Agency Exhibit 1

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 Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2017.

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.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of facts:

In February of 2023 Grievant, who was assigned to the treatment team, had an encounter with an Inmate. Shortly after this incident Grievant had an accident and was out on leave. When Grievant returned in August of 2023 he was given a Notice of Need to Improve⁹ based on the February event, and Grievant was advised he would be placed in a different location and assigned another job. This was due to concerns about his ability to work well in the treatment team capacity. At this point Grievant only had a Need to Improve Notice. Grievant had no loss of rank or pay. The matters which led to Grievant’s Group I discipline arose from Grievant’s reaction to the reassignment position. Had Grievant not reacted in the manner that he did, no Group discipline action was anticipated.

When told by his Major of the job reassignment, Grievant was reported to have been loud and exhibited unprofessional behavior¹⁰. That evening Grievant called the Major at his home stating his displeasure and feeling of unfairness that the Major had reassigned him. Additionally, he attempted to “blackmail” the Major into rescinding the job change. Grievant stated the Major had previously made statements that officers could “whip an Inmate’s ass” and Grievant had two (2) other Witnesses to prove it although Grievant did not want to have to bring it up. The Major suggested that matter could be discussed at the

⁹ Grievant Exhibit 2

¹⁰Agency Exhibit 5 – Witness stated Grievant was loud & argumentative, told Major it was “Bullshit” and kicked a chair. Agency Exhibit 8 - Witness stated Grievant was demanding and argumentative calling the action “Bullshit” and kicked a chair.

upcoming meeting two days later.¹¹ It should be noted that this issue was not included in the Written Notice and therefore has no bearing on the Group I discipline.

At the next meeting Grievant was reported to be exhibiting similar unprofessional, rude, and loud behavior.¹² Because of Grievant's response to the first incident when being reassigned, and the second incident at the subsequent meeting, Grievant was issued a Written Notice/Group I on September 15, 2023, with no disciplinary action taken.

DISCUSSION

Notes were taken during the second meeting.¹³ Witness statements of the second meeting were written after the meeting. The purpose of the second meeting was to provide Grievant with his COPGA Form and PDL Letter. The tone of all evidence was that Grievant had certainly overreacted to his job reassignment. Grievant did not produce a single witness who refuted the allegations except when Grievant himself testified. Grievant's testimony was starkly different than all other recounts. Grievant stated he was only appropriately requesting his rights and it was others who were refusing to let him talk. Grievant stated he did not kick a chair, that his keychain was caught in the chair. Grievant also responded with allegations body cameras had not been used. Body cameras are to be used in "disruptive" circumstances. Grievant cannot argue he was quiet and polite and also argue body cameras should have been used because there was disruption. Grievant believed the Agency was trying to terminate him although there was no indication that was the case.¹⁴

Grievant actually received no discipline other than a Group I on his record.

The Agency submitted no evidence that indicated Grievant had received any training such as basic training or post information that would indicate Grievant was aware that his behavior was unacceptable. Grievant did not make complaint that this evidence was not present. Basic knowledge of an employer/employee relationship, however, should give indication that the acting out by Grievant in the manner alleged by several witnesses was considered unacceptable behavior.

OPINION

A Hearing Officer is a neutral person who is expected to listen in an unbiased manner to both parties' opinions. While the Hearing Officer may agree that a matter feels unfair to the Grievant, the Hearing Officer is bound by the rules created for the Hearing Officer's decision. The Agency is given deference to be able to manage its operations and employees.

¹¹ Agency Exhibit 21

¹² Grievant Exhibit 3; Agency Exhibit 5, second page.

¹³ Agency Exhibit 12

¹⁴ Agency Exhibit 9, Agency Exhibit 15

Hearing Officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness.¹⁵

Further, a hearing officer is not a super-personnel officer, therefore in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.¹⁶

The preponderance of evidence would indicate Grievant had breached several policy rules. Grievant did violate Operational Procedures 145.3 in that he committed workplace harassment with unwelcome verbal conduct that showed hostility. Grievant did violate Operational Procedures 135.IG 9, 10 and 13 on page 7 regarding unbecoming misbehavior in that he failed to treat coworkers and managers with respect, courtesy, dignity, and professionalism. He also failed to show respect for the Agency and failed to resolve work-related issues and disputes in a professional and constructive manner through established business processes. Grievant did violate Policy 2.30, page 6 in that he targeted unwelcome verbal conduct. Grievant did violate Policy 11 by his unsatisfactory performance at called meetings. Grievant's allegations that body cameras were not used during his meetings may lead to a later investigation but are not reflective of Grievant's discipline. The weight of evidence is that Grievant was disruptive and unprofessional.

Grievant did have opportunity for notice and due process. Grievant did go through all three steps on October 13, 2023, November 1, 2023, and December 12, 2023. Grievant exercised his right to file for a hearing. Agency permitted Grievant an opportunity to be heard. Agency gave Grievant a Written Notice that outlined the reason(s) for discipline. Agency's evidence met the standard of preponderance of evidence and the Agency acted within its authority to issue a Group I discipline.

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 recorded evidence, the agency's discipline exceeds the limits of

¹⁵ Grievance Procedure Manual, effective July 1, 2020.

¹⁶ Rules for Conducting Grievance Hearings effective July 2020, VI Scope of Relief pg. 14. DeJarnette vs. Corning, 133 F.3d 293, 299 (4th Cir. 1998)("Title VII is not a vehicle for substituting the judgement of a court for that of the employer").

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:

- (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.¹⁷

Agency did consider Grievant's behavior at an August 25, 2023, meeting wherein Grievant did behave in a more professional manner and reduced the discipline to a Group I, although there is certainly sufficient evidence for a Group II discipline. Grievant did not produce positive evidence that would mitigate his discipline. As previously stated, Grievant could not demand a body camera usage when Grievant stated he caused no disruption. The Witnesses' statements were believable and consistent. Grievant was the only person who described his behavior as acceptable at both meetings.

DECISION

For the above reasons, the Agency Written Notice as a Group I discipline is UPHELD.



Sondra K. Alan
Hearing Officer

¹⁷ Rules for Conducting Grievance Hearings, IV B 2, page 17, revised 7/2020.

APPEAL RIGHTS

You may request an administrative review by EDR within **fifteen calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within fifteen 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.

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].

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