

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12074

Hearing Date: March 28, 2024
Decision Issued: April 1, 2024

PROCEDURAL HISTORY

On September 18, 2023, Grievant was issued a Group III Written Notice and was demoted to a lower pay band and was transferred.¹ On October 17, 2023, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on January 29, 2024. A hearing was held on March 28, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant Advocate
Grievant
Witnesses

ISSUES

Did Grievant violate OP 135.1, 135.3, and 145.3 and weaken security?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy. The Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine

¹ Agency Exh. 1, at 1

² Agency Exh. 1, at 5

³ See Va. Code § 2.2-3004(B)

whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact: Agency submitted a notebook containing pages 1 through 202. Agency also admitted into evidence a video recording that is not a part of the notebook. Grievant objected to the contents on pages 29-30. This objection was subsequently denied. The notebook and video were accepted as Agency Exhibit 1. Grievant submitted a notebook containing 56 pages. The Agency objected to the contents on pages 1-4 and 30-35. Grievant did not use any of these pages in the presentation of his case. The objection was based on relevance and that the authors of the documents were unknown and could not be cross examined. The objection would have been sustained had Grievant used any of these pages in the presentation of his case. As they were not used, I will not use them in this decision. The remainder of Grievant's notebook was accepted as Grievant Exhibit 1.

Eight witnesses testified on behalf of the Agency: a Security Manager (SM), the Regional Administrator (RA), the Security Operations Manager (SOM), Warden (W1), Warden (W2), Lieutenant (LT1), a Corrections Officer (CO), and an Employee Relations Manager (ERM).

Five witnesses testified on behalf of Grievant: Lieutenant (LT2), Major (M1), Major (M2), Warden (W3), and a Human Resource Officer (HRO). A stipulation was reached between Grievant and the Agency regarding the testimony of 3 or 4 other witnesses Grievant would have called, but for the stipulation. It will be set forth later in this decision. The Grievant did not testify.

Several Operating Procedures (OP) are relevant to this matter.

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

OP 135.1, **Standards of Conduct** “...applies to all units operated by the Virginia Department of Corrections.”⁷

OP 135.1 (XIV)(A), **Third Group Offenses** states: “These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, **endangering others in the workplace**... or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws.”⁸ (Emphasis added)

OP 135.1 (XIV)(B)(16)(20)(21), state: (16) “Refusal to obey instructions that could result in a **weakening of security**. (20) Violation of DHRM OP 445.4 (II)(E) 2.35 Civility in the Workplace or OP 145.3, ..., Anti-Harassment, and Workplace Civility, considered a Group III offence, **depending upon the nature of the violation**. (21) Violation of...OP 145.3 ... Anti-Harassment, and Workplace Civility, considered a Group III offense, **depending upon the nature of the violation**.”⁹ (Emphasis added)

OP 135.3, **Standards of Ethics and Conflict of Interest** (II)(C)(D)(G) state: (C) Employees of the DOC must conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth of Virginia. (D) Employees in DOC supervisory or managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others. (G) ... **No person connected with the DOC will use their official position to secure special privileges or advantages for themselves or others**,...”¹⁰(Emphasis added)

OP 145.3, ...**Workplace Civility** (1)(F) states: “The DOC specifically prohibits employment discrimination... to include... bullying behaviors... or other displays of inappropriate behavior towards an employee...”¹¹

OP 445.4, **Screenings and Searches of Persons** defines **Facility Unit Head [FUH]** as the person occupying the highest position in a DOC residential facility...¹²

OP 445.4 (I)(A)(1) states: “The detection of contraband through screenings and searches of **employees**... official visitors, inmates... and their visitors is imperative for the orderly operation of a correctional facility and **for the safety** and well-being of employees, the public, and other inmates...”¹³ (Emphasis added)

⁷ Agency Exh. 1, at 67

⁸ Agency Exh. 1 at 85

⁹ Agency Exh. 1, at 86

¹⁰ Agency Exh. 1 at 100

¹¹ Agency Exhibit 1 at 117

¹² Agency Exh. 1 at 184

¹³ Agency Exhibit 1 at 187

OP 445.4 (II)(A) states: “*The [FUH] has responsibility for the security and orderly operation of the facility and has the authority to determine who may enter the facility.*”¹⁴

OP 445.4 (II)(C)(1) states: “*All employees are subject to search in order to enter a DOC facility... as a condition of their employment...*”¹⁵

OP 445.4 (II)(E)(1) and (3) state: “*(1) Searches of official visitors will be under the same conditions as searches of employees; however, the [FUH] has the discretion to suspend the search requirement. (3) Employees must refer any official visitor who refuses to submit to a search to the [FUH] or assistant [FUH], in the [FUH’s] absence, who will determine if the official visitor will enter the facility.*”¹⁶

OP 445.4 (II) allows the [FUH] to determine who may enter the facility. But the concept of *expressio unius est exclusio alterius* would seem to control when determining who would be allowed to bypass the full body security screening device (FBSD). The FUH can determine who can enter the facility, but by this OP 445.4 (II)(E), he is limited to only suspending such a search for “official visitors.” There is no similar language that allows a waiver for “employees,” including wardens or other high-ranking employees.

OP 445.4 (IV)(B)(1) states “*At facilities using the [FBSD], all employees... and official visitors will be required to submit to a screening by a cell phone detector and the [FBSD] unless...*”¹⁷ The facility where Grievant worked uses a (FBSD). There are 3 medical exceptions to this OP 445.4 (II)(E), none of which applied to Grievant.

This matter commenced on August 19, 2023, when LT1 was notified by a corrections officer that Grievant had waived himself past a FBSD. LT1 looked at the logbook entry made by the corrections officer and found “*per [Grievant] body scanner ~~X-ray~~ machine waived for entry.*”¹⁸

Because of prior issues at this facility, a review of FBSD usage by Grievant and other high-ranking officers was performed. The author of this report, while conceding that the methodology used by the facility to record FBSD totals was flawed, found that over the period of approximately August 2022-August 2023, 2 of the majors used the FBSD 160 times for one and 334 for the other. From October 2022-July 2023, Grievant used the FBSD 22 times.¹⁹ All of the evidence before me is that Grievant waived himself past the FBSD more than once.

A Due Process meeting took place on September 7, 2023. ERM was present and took notes. She testified and confirmed her notes. Regarding the body scanner issue, she recorded Grievant saying “*I thought I could waive a search since I am the Chief of Security... If the line was long, I would go around, but if the line was short, I would go through the scanner.*”²⁰

Agency presented as evidence a short video from August 19, 2023. After viewing this video, the Agency and Grievant entered a stipulation that Grievant, on this date, waived

¹⁴ Agency Exhibit 1 at 188

¹⁵ Agency Exhibit 1 at 188

¹⁶ Agency Exhibit 1 at 188

¹⁷ Agency Exhibit 1 at 191

¹⁸ Agency Exhibit 1 at 32

¹⁹ Agency Exhibit 1 at 29,30

²⁰ Agency Exhibit 1 at 33

himself from having to submit to a FBSD. He is seen walking around and not through the FBSD.

SM testified that he is knowledgeable regarding the use of the FBSD. He stated that it is more likely to discover contraband or weapons than relying on a body search, coupled with a metal detector. This assertion was not denied by any of Grievant's witnesses. He knew of no language in DOC OP 445.4 that allowed Grievant, as Chief of Security, to waive having to go through the FBSD when entering the facility.

RA was the author of the Group III Written Notice. He testified Grievant was the Chief of Security for this facility and, as such, was expected to be fully aware of all policies regarding security. RA referenced the Employee Work Profile for Grievant. *Under Work Description (15), it states "...To ensure adherence to established security policies and procedures, (17) Comprehensive knowledge of Corrections' security policies, procedures, and guidelines..."*²¹ RA stated Grievant did not have the authority to waive himself through the FBSD. Only the Facility Unit Head had that authority. RA also affirmed that just one violation of this security OP 445.4 (II)(E) (failing to use the FBSD) could place those at the facility in danger.

RA also testified regarding Security Post Orders 69, 70, and 71. At (9), each of these Post Orders states in similar language *"Persons who may routinely enter/exit the facility through the sally port are; Inmates and officers attending transportation appointments, those assigned to work gang detail within the perimeter, warehouse staff delivering supplies, Enterprise truck drivers, Pharmacy personnel delivering medication/ supplies, and maintenance staff performing inside work duty. Unless specifically authorized, all other employees ... must enter the facility through the main entrance search area."*²²

Unless Grievant was performing one or more of the exceptions, he was not authorized to enter the facility through the sally port. Because of his rank, it is not likely that he would be performing any of the duties set forth in the exceptions. Security Post Order 72-73, at (16) states *"All staff entering the facility will have to clear the body scanner unless they have medical documentation that states they cannot be exposed to the radiation produced by the body scanner..."*²³ RA testified that he knew of no Post Order that would allow Grievant to **not** go through the FBSD.

SOM was the FUH at the facility on August 19, 2023. He testified that he often went through the FBSD to set an example. He stated that as the FUH, he was the only person with authority to waive going through the FBSD. He stated that W1 and W2 could waive the need to go through the FBSD if he was not present or could not be disturbed because of a meeting. He never authorized the Grievant to **not** use the FBSD. He first learned of this issue with Grievant from LT1.

SOM came to the facility in May 2022. W1 came at the same time. SOM testified that they both observed many people using the sally port as their entrance into the facility. If the line at the front entrance was long, people would use the sally port. **This was a violation of OP 445.4 (II)(E).** This was a violation Grievant should have been aware of and he should have either stopped or reported for discipline those who were not following OP 445.4 (II)(E). Of course, SOM or W1 could have done the same.

²¹ Agency Exhibit 1 at 45

²² Agency Exhibit 1 at 137,148,161

²³ Agency Exhibit 1 at 175

W1 testified that this facility was unique in having 3 wardens. She also testified that SOM gave her authority to waive going through the FBSD. **This was a violation of OP 445.4 (II)(E)** and contradicted the testimony of SOM. She was questioned about certain logbook entries. As there were several hundred pages, Grievant and the Agency stipulated that the logbook confirmed Grievant did not go through the FBSD at pages 4, 25, 37, 109, 170, and 399. On December 28, 2022, W1 issued Grievant a Group 1 Written Notice which is still active.

W2 testified that he would go through the FBSD perhaps twice a month. Indeed, he testified that he waived his own FBSD every day. **This was a violation of OP 445.4 (II)(E).**

CO, the person who noted in the logbook that Grievant did not go through the FBSD on August 19, testified that this put him in “a pickle.” He knew OP 445.4 (II)(E) and he knew that Grievant was violating OP 445.4 (II)(E), but Grievant was the Chief of Security. He also testified the other wardens waived themselves in on a regular basis. **This was a violation of OP 445.4 (II)(E).**

LT2 testified she entered the facility using the sally port and that W2 does so with a backpack. M1 testified that she saw majors and wardens enter the facility through the sally port and no one was disciplined prior to the grievance before me. She stated that she saw people using the sally port who we not covered by any post order, and she did not report anything to anyone. **All of these are violations of OP 445.4 (II)(E).** She expected Grievant to let her know if she was violating OP 445.4 (II)(E). M2 testified that he had violated OP 445.4 (II)(E) by entering through the sally port and he witnessed wardens doing the same. **This was an acknowledged violation of OP 445.4 (II)(E).** He also stated that the work relationship between Grievant and SOM was not good.

The Agency and Grievant entered into a stipulation that several other witnesses were prepared to testify that they observed several people using the sally port as a means of entrance into the facility, rather than going through the FBSD.

I find that Grievant violated OP 445.4 when he entered the facility in a manner to bypass the FBSD. The video, to which the Grievant stipulated, shows such a violation. Grievant’s answers in the Due Process meeting of September 7 confirm that he violated this procedure, as does the Stipulation to the 6 logbook entries. One violation of this security procedure is sufficient to warrant the Group III Written Notice. This is also a violation of OP 135.1 (XIV)(B)(16).

Regarding OP 145.3, RA testified that Grievant called SOM a liar during a meeting on August 30. The actual statement may have been “*Man, don’t sit there and lie to me.*”²⁴ SOM, the person to whom the statement was directed, testified that it was “*You do not have to lie to me.*” In so doing, RA thought Grievant was demonstrating behavior that was rude, inappropriate, discourteous, unprofessional, displayed a lack of respect, and offended others.²⁵

²⁴ Agency Exhibit 1 at 4.

²⁵ Agency Exhibit 1 at 123

W3, who was present at the meeting, testified that Grievant never raised his voice, made no untoward gestures, and did not call SOM a liar. W3 felt Grievant was just questioning SOM. W3 was not offended and indicated he thought this was a serious exchange between SOM and grievant about a serious topic.

HRO was also at this meeting. She testified that Grievant did not raise his voice and did not hit the table with his fist. On August 30, she wrote that this was the conversation. Grievant said “*you don’t have to lie to me*” and SOM responded, “*Are you calling me a liar?*” She also testified that the fact one person perceives something to be rude, inappropriate, discourteous, unprofessional, or displayed a lack of respect does not make it so for everyone.

I find that the best evidence is that these 2 high ranking officers of the Agency were having a discussion that could result in Grievant being terminated from employment. Would it have been better for Grievant to state, “I think you are misstating the facts, or I think you do not understand, or you do not have to respond to me with factually inaccurate statements? Certainly. However, this single statement does not rise to the level of a Group III offense. Indeed, I find that it is, without a raised voice or dangerous gesticulations or vulgarity, nothing more than an animated discussion between adults. An objective reasonable person would not have considered this verbal exchange to be rude, inappropriate, discourteous, unprofessional, or displayed a lack of respect.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide that 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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not

Grievant has been a valued employee during the time of his/her employment at the Agency.

Grievant held the rank of Lt. Colonel, the highest rank in the Agency that was not a warden. He was reduced in rank to Lieutenant and given a 15% disciplinary pay reduction. RA justified a 3-step reduction in rank, rather than a 1 step to the rank of Major, because a Major could be the Chief of Security at smaller Agency facilities, and he did not think Grievant should serve in that role.

W2 and M1 testified that they knew of no other Agency employee who was disciplined for failure to use the FBSD. Several other witnesses testified as to the sheer volume of Agency employees, of low and high rank, who were and seem to still be, violating the procedures of OP 445.4. In this matter, these violations were at the same facility, under the same OP, were committed by similarly high-ranking employees and their supervisors and were all contemporaneous in time. The conduct of other Agency employees was of the same character as that of Grievant.²⁶ Grievant has shown enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the Agency treated similarly situated employees differently.

Once such an inference is presented, the burden shifts to the Agency to provide a legitimate explanation for the disparate treatment. The Agency offered no evidence as to whether any other employee of the Agency was disciplined for not using the FBSD as was required by OP 445.4. The evidence presented in this matter supports the testimony of W2 and M1 that Grievant was the only employee disciplined. Pursuant to my ruling on the civility issue, the Agency, other than an active Group 1 Written Notice, offered no aggravating circumstances that would negate any mitigating circumstances.

As hearing officer, I will not freely substitute my judgment for that of the Agency on the question of what is the best penalty, but will only assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.²⁷ Based on the evidence before me, I find that choosing to only punish Grievant and not the numerous other employees who violated and appear to still be violating Agency policy regarding the use of FBSD, is outside of tolerable limits of reasonableness. Accordingly, I will mitigate in this matter because of the Agency's inconsistent and disparate discipline.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice for violation of OP 135.1 and 445.4 but has not borne its burden regarding OP 135.3. I further find that the Agency has applied inconsistent and disparate treatment to Grievant. The evidence presented by the Agency's witnesses clearly demonstrated that numerous other similarly situated employees and others of higher rank were and are continuing to violate these policies. Accordingly, I find and so order that Grievant be reduced in rank to Captain and that he incur a 7.5% disciplinary pay reduction. I find that the transfer to a new location was proper.

APPEAL RIGHTS

²⁶ EDR Ruling No. 2010-2376 n.19.

²⁷ Rules for Conducting Grievance Hearings § VI(B)(1); EDR Ruling No. 2014-3777

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 OP 445.4 (II)(E) must refer to a particular mandate in state or Agency OP 445.4 (II)(E) with that 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 where 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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: April 1, 2024

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