



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12088

Hearing Date: May 14, 2024

Decision Issued: May 29, 2024

PROCEDURAL HISTORY

On November 30, 2023, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On December 21, 2023, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and the matter advanced to hearing. On February 26, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer.

The hearing in this matter was originally scheduled to occur on April 23, 2024. At the request of the Grievant and without objection from the Agency, the Hearing Officer continued the hearing to May 14, 2024. On May 14, 2024, a hearing was held at the Department of Corrections Headquarters near Richmond, Virginia.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

An Equal Opportunity Employer

ISSUES

1. Whether Grievant engaged in the behavior described in the Group I Written Notice of disciplinary action?
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:

Grievant is a Senior Special Agent with the Agency's Special Investigations Unit. Grievant has worked for the Agency as a Special Agent for more than 10 years. No evidence of prior disciplinary action was introduced during the hearing. Grievant received an overall rating of "Highly Proficient/Exceeds Contributor" on his 2022-2023 performance evaluation.¹

Facility-S is a Department of Corrections facility that houses inmates. The grounds of Facility-S include a one-room building that is referred to by Facility-S staff as the "Processing Room." The Processing Room is located near the parking lot for Facility-S.

On June 24, 2023, Visitor came onto the grounds of Facility-S to visit Inmate-X, a resident of Facility-S. Prior to entering the front entry of Facility-S, Visitor placed a bag behind a biohazard bin located behind the Processing Room. The bag contained two cellular phones and other items. Visitor's visit with Inmate-X was terminated, her items were seized by Facility-S staff, and she was escorted out of Facility-S.

¹ Agency Ex. 13.

Officer-1 prepared an Internal Incident Report on June 24, 2023, describing the incident involving Visitor. Officer-1's Internal Incident Report identified the "Location of Incident" as "Parking Lot." Officer-1's Internal Incident Report described the incident as follows:

While returning from our lunch breaks [Officer-1], [Officer-2], and [Officer-3] saw ... [Visitor] was in front of the processing room and [Officer-1] and [Officer-3] while informing her that it's closed, and she needs to go to front entry we noticed she had a white bag in her hands. When we started walking near the stairs in front of front entry [Officer-2] returns from his break, we look around to see where she went, and we see her walk to the back of the closed processing room at that point we waited near [Officer-2's] car once she entered master control, we check the back area of the processing room and find the white bag behind the biohazard bin. [Officer-1] retrieved the bag with 2 phones, a small rag, one [piece] of candy and lip stick inside. [Officer-1] notifies the [Watch Commander].²

Officer-2 prepared an Internal Incident Report on June 24, 2023, describing the incident involving Visitor. Officer-2's Internal Incident Report identified the "Location of Incident" as "Parking Lot." Officer-2's Internal Incident Report described the incident as follows:

At approximately 1520 on June 24, 2023, when returning from break [Officer-2] had noticed the visitor for [Inmate X] was in front of the visitor processing room. [Officer-3] had informed the visitor that the processing room was closed and that she needed to go to front entry. When returning to the parking lot [Officer-1] and [Officer-3] had walked over to [Officer-2's] car noticing that the visitor had gone behind the visitor processing room with a white bag and then come back out holding nothing. After the visitor had entered the administration building [Officer-2, Officer-3, and Officer-1] went behind the building to find the white bag with two cellphones one of which was in a Ziploc baggie, a cloth, and lipstick hidden underneath a red biohazard bin. [Officer-1] had retrieved the bag and notified [Watch Commander] while [Officer-2] obtained the sallyport keys to get into sallyport to show [Watch Commander].³

Watch Commander prepared an Incident Report describing the June 24, 2023, incident involving Visitor. The Incident Report identified the "Location of the Incident" as "Parking Lot." The Incident Report described the incident as follows:

While returning from their lunch breaks [Officer-1], [Officer-2] and [Officer-3] saw . . . [Visitor] in front of the processing room. [Officer-1] and [Officer-3] while informing her that it's closed, and she needs to go to front entry noticed she had a white bag in her hands. When they started walking near the stairs in front of front entry [Officer-2] returns from his break. They look

² Agency Ex. 10.

³ *Id.*

around to see where she went, and they saw her walk to the back of the closed processing room at that point they waited near [Officer-2's] car. Once she enters front entry they waited by the back of [Officer-1's] car. Once she entered master control, they checked the back area of the processing room and found the white bag behind the biohazard bin. [Officer-1] notified the [Watch Commander]. [Officer-1] took the items labeled with the IIR attached and placed them in the evidence locker in Master Control for the Investigator.

1545 [Watch Commander] terminated the visit and escorted [Visitor] out of the facility.⁴

In his "Response to Administrative Action" Grievant noted that on June 25, 2023, Institutional Investigator emailed Grievant information regarding the incident with Visitor and requested that Grievant investigate the incident. A copy of Institutional Investigator's email was not provided, but Grievant's "Response to Administrative Action" stated that Institutional Investigator's email also included a summary of the incident which Grievant attributed to [Watch Commander] and Grievant stated the email noted the following:

While returning from their lunch breaks [Officer-1, Officer-2, and Officer-3] saw . . . [Visitor] was in front of the processing room. [Officer-1] and [Officer-3] while informing her that it's closed, and she needs to go to front entry they noticed she had a white bag in her hands. When they started walking near the stairs in front of front entry [Officer-2] returns from his break, they look around to see where she went, and they saw her walk to the back of the closed processing room at that point they waited near [Officer-2's] car. Once she enters front entry they waited by the back of [Officer-1's] car. Once she entered master control, they checked the back area of the processing room and found the white bag behind the biohazard bin. [Officer-1] retrieved the bag with 2 phones, a small rag, one piece of candy and lip stick inside. [Officer-1] notified the [Watch Commander]. [Officer-1] took the items labeled with the IIR attached and placed them in the evidence locker in Master Control for the Investigator.

1545 Watch Commander terminated the visit and escorted [Visitor] out of the facility.⁵

Grievant asked Institutional Investigator to review Inmate X's emails and phone calls to see if any evidence existed that Visitor intended to deliver the items that were found to an inmate. Institutional Investigator reported to Grievant that he did not find any such evidence. Grievant then spoke with the Warden of Facility-S regarding the available information about the incident and they agreed that the best course of action at that time would be to mail the items back to Visitor.⁶

⁴ *Id.*

⁵ Agency Ex. 3.

⁶ *Id.*

On July 5, 2023, Former Chief instructed Grievant to retrieve Visitor's cellular phones from Facility-S and apply for a search warrant for data from the phones.⁷

On July 6, 2023, Grievant obtained the cellular phones and other items belonging to Visitor from Institutional Investigator. Grievant reported in his original narrative of the incident that "after receiving the items, [Grievant] proceeded to the [City] Magistrate's Office to obtain a search warrant for both cellular phones."⁸

The Affidavit for Search Warrant applied for by Grievant for cellular data for Visitor's Samsung phone was dated July 6, 2023. The form used to apply for the Affidavit for Search Warrant stated that "The undersigned Applicant states under oath" and then provided space for the Applicant, in this case Grievant, to provide information supporting the application for a search warrant. In the space on the form for "The place, person or thing to be searched is described as follows . . ." Grievant provided the following information:

A black Samsung smart cellphone that was found in the back area of the processing room behind the biohazard bin in a plastic bag with other items. The cellphone will be searched at [Warehouse Address] at the [Agency's Warehouse] off [Road] in [City], Virginia⁹

In the space on the form for "The material facts constituting probable cause that the search should be made are:", Grievant provided the following information:

On June 24, 2023 at [Facility-S], [Visitor] was observed by correctional staff entering a closed area (the processing room) with a plastic bag. This room was checked by correctional staff and the bag she was holding was found behind the biohazard bin in the back of the room. The bag was found to contain two cellular phones (Iphone and Samsung) a piece of candy, lipstick, and a cloth (used for cleaning glass surfaces). Evidence has not been uncovered that [Visitor] intended to bring these items to a specific inmate. [Visitor] contends that she had no intention of bringing the items illegally to an inmate but rather had no other alternative other than hiding the items due to not having a car. Inmates have access to the processing room during weekdays for cleaning. . . .¹⁰

Grievant also noted on the affidavit that he

was advised of the facts set forth in this affidavit, in whole or in part, by one or more other person(s). The credibility of the person(s) providing this information to me and/or the reliability of the information provided may be determined from the following facts: [Officer-1] is a sworn correctional officer at [Facility-S]. Upon finding the cellphone, he relinquished it to the Watch

⁷ Agency Ex. 3 and 10.

⁸ Agency Ex. 10 and Hearing Recording at 1:27:02-1:28:51, 2:11:20-2:12:01.

⁹ Agency Ex. 12.

¹⁰ Agency Ex. 12.

Commander [], it was later retrieved by the Institutional Investigator's Office.¹¹

The Affidavit for Search Warrant applied for by Grievant for cellular data for an Apple iPhone was dated July 6, 2023. The form used to apply for the Affidavit for Search Warrant stated that "The undersigned Applicant states under oath" and then provided space for the Applicant, in this case Grievant, to provide information supporting the application for a search warrant. Under "The "place, person or thing to be searched is described as follows . . ." Grievant provided the following information:

A black Apple iPhone smart cellphone that was found in the back area of the processing room behind the biohazard bin in a plastic bag with other items. The cellphone will be searched at [Warehouse Address] at the [Agency's Warehouse] off [Road] in [City], Virginia¹²

In the space provided on the form for "The material facts constituting probable cause that the search should be made", Grievant provided the following information:

On June 24, 2023 at [Facility-S], [Visitor] was observed by correctional staff entering a closed area (the processing room) with a plastic bag. This room was checked by correctional staff and the bag she was holding was found behind the biohazard bin in the back of the room. The bag was found to contain two cellular phones (Iphone and Samsung) a piece of candy, lipstick, and a cloth (used for cleaning glass surfaces). Evidence has not been uncovered that [Visitor] intended to bring these items to a specific inmate. [Visitor] contends that she had no intention of bringing the items illegally to an inmate but rather had no other alternative other than hiding the items due to not having a car. Inmates have access to the processing room during weekdays for cleaning. . .¹³

Grievant also noted on the affidavit that he

was advised of the facts set forth in this affidavit, in whole or in part, by one or more other person(s). The credibility of the person(s) providing this information to me and/or the reliability of the information provided may be determined from the following facts: [Officer-1] is a sworn correctional officer at [Facility-S]. Upon finding the cellphone, he relinquished it to the Watch Commander [], it was later retrieved by the Institutional Investigator's Office.¹⁴

Former Chief testified that he reviewed the affidavits prepared by Grievant and that he questioned Grievant about the recitation of facts indicating that the phones were found inside, because Former Chief recalled that the Warden for Facility-S had described the phones as being found in a location on the outside. According to Former Chief, Grievant

¹¹ Agency Ex. 12.

¹² Agency Ex. 12.

¹³ Agency Ex. 12.

¹⁴ Agency Ex. 12.

responded that the phones were found in a room, so Former Chief did not question Grievant further.¹⁵

A magistrate issued two search warrants, one for each of the cellular phones, based on the information provided in the affidavits prepared by Grievant.¹⁶

The Agency later realized that Grievant had included inaccurate information in his affidavits for search warrants for data from Visitor's cellular phones.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include 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 require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."¹⁷

Unsatisfactory job performance is a Group I offense.¹⁸ In order to prove unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties in a manner that met with the Agency's expectations. This is not a difficult standard to meet.

Department of Corrections Operating Procedure 030.4, Special Investigations Unit sets forth the expectation that:

After receiving an assignment, Special Agents will, in a timely manner, conduct a complete, thorough, and independent investigation, prepare necessary reports, and as required, present evidence in a Court of law or Departmental hearing.¹⁹

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

There was no dispute that the facts included in the July 6, 2023, affidavits prepared by Grievant to obtain search warrants for data from Visitor's cellular phones included inaccurate information. Among the material facts, Grievant stated that.

On June 24, 2023, at [Facility-S], [Visitor] was observed by correctional staff entering a closed area (the processing room) with a plastic bag. This room

¹⁵ Hearing Recording at 1:25:11-1:26:06.

¹⁶ Agency Ex. 12.

¹⁷ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁸ See Virginia Department of Corrections Operating Procedure 135.1, Procedure XII.B.5.

¹⁹ Virginia Department of Corrections Operating Procedure 030.4, Procedure XV.D.

was checked by correctional staff and the bag she was holding was found behind the biohazard bin in the back of the room.²⁰

This information was not factually correct because Visitor was not observed “entering a closed area.” Correctional staff did not “check[]” a room and did not find the bag containing the cellular phones behind a biohazard bin that was “in the back of the room.”

Both Acting Chief and Former Chief credibly testified that the Agency would expect a Special Agent to interview witnesses and/or make sight observation to verify the accuracy of information and facts the Agent was including in an affidavit supporting an application for a search warrant.²¹ Such an expectation is consistent with the requirement of Operating Procedure 030.4 that a Special Agent in a timely manner, conduct a complete, thorough, and independent investigation.

Grievant argued that there was some urgency to obtaining the search warrants and there was no time for a more detailed investigation until after he applied for the search warrants. Former Chief credibly testified, however, that, although there was a priority placed on obtaining those search warrants, if Grievant had indicated he needed additional time to investigate or verify information prior to obtaining the search warrants, then Former Chief would have allowed him the time he needed “to get it done right.”²²

Grievant argued that his behavior should be evaluated based on the information available to him at the time rather than through the benefit of hindsight. Grievant did not testify and did not provide evidence as to why he did not verify information with any of the witnesses to the incident before including information as facts in the affidavits for the search warrants. Grievant argued that he was unfamiliar with Facility-S and that he based the information he included in the affidavits on Institutional Investigator’s email and Watch Commander’s Incident Report and that he had no reason to believe the information was inaccurate or that references to the “Processing Room” referred to a building rather than a room inside a building. Beyond Watch Commander’s Incident Report which Grievant used to question Agency witnesses, Grievant did not provide additional information as to what, if any, verbal or written information he relied upon to prepare the affidavits. Grievant referenced an email from Institutional Investigator in his “Response to Administrative Investigation” dated November 4, 2023, but the portion of the email that Grievant referenced appeared itself to “provide[] an emailed summary of an incident written by [Watch Commander]”²³ and the language appeared to be that from Watch Commander’s Incident Report. Based on the information set forth in the affidavits, it appeared that Grievant also relied on information from Officer-1, one of the witnesses to the incident with Visitor. Taken alone, the references to the location where the cellular phones were found in relation to the “Processing Room” in Watch Commander’s Incident Report and in Officer-1’s Internal Incident Report could lead to confusion about the fact that the term “Processing Room” referred to a building rather than a room. The information that Grievant had available to him at the time he prepared the affidavits also included the June

²⁰ Agency Ex. 12.

²¹Hearing Recording at 20:16-25:06, 1:30:25-1:34:36.

²² *Id.* at 1:34:38-1:35:17.

²³ Agency Ex. 3.

24, 2023, Internal Incident Report of Officer-2. Officer-2 was identified as a witness to the incident involving Visitor by both Watch Commander's Incident Report and Officer-1's Internal Incident Report. The Internal Incident Report prepared by Officer-2 clearly stated that "When returning to the parking lot [Officer-1] and [Officer-3] had walked over to [Officer-2's] car noticing that the visitor had gone behind the visitor processing room with a white bag and then come back out holding nothing" and "... [Officer-2], [Officer-3], and [Officer-1] went behind the building to find the white bag with two cell phones ... hidden underneath a red biohazard bin."²⁴ That an Incident Report and Internal Incident Reports of the incident were available did not relieve Grievant of his responsibility to thoroughly investigate the incident and to verify information he was including in an affidavit for a search warrant. But, if Grievant had read the available Internal Incident Report of Officer-2, he would have realized that his assumptions about the Processing Room may be mistaken. Further, Former Chief credibly testified that Grievant went to Facility-S to retrieve the cellular phones from Institutional Investigator before going to the magistrate to obtain the search warrant. Grievant had only to ask Institutional Investigator to take him to the Processing Room and show him where the cellular phones were found in order to verify (or correct) the information he was about to state under oath in the affidavits. Grievant appeared to suggest in his questioning of Former Chief that Grievant did not need to retrieve the cellular phones from Facility-S prior to obtaining the search warrants. However, Grievant did not testify, and the unrefuted testimony of Former Chief appeared to be corroborated by the information set forth in Grievant's "Original Narrative" of the incident in his investigative report.²⁵

Grievant argued that Former Chief reviewed the affidavits before Grievant applied for the search warrants. Former Chief, however, credibly testified that he asked Grievant about the references to the cellular phones being found in a location that was inside, rather than outside, as the Former Chief had believed he understood from the Warden of Facility-S. Former Chief accepted Grievant's response confirming Grievant's understanding that the cellular phones were found inside based on Former Chief's reasonable expectation that Grievant had investigated the facts. Grievant did not testify or provide any other evidence to suggest that Former Chief's recollection of that discussion was incorrect.

The Agency's expectation that Grievant would verify the information he included in an affidavit for a search warrant was reasonable and consistent with the expectations for Special Agents set forth in Operating Procedure 030.4. The Agency has met its burden of proving by a preponderance of the evidence that by failing to take reasonable measures to verify the information he included in his affidavits for search warrants for Visitor's cellular phone data, Grievant's work performance was unsatisfactory.

Whether the Agency's discipline was consistent with law and policy

Group I offenses "include acts of minor misconduct that require formal disciplinary action."²⁶ Unsatisfactory work performance is a Group I offense.

²⁴ Agency Ex. 10.

²⁵ Hearing Recording at 1:27:02-1:28:51, and see Agency Ex. 10.

²⁶ The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant noted through the testimony of Former Chief that Grievant received a performance evaluation that gave him an overall performance rating of “Highly Proficient/Exceeds Contributor” which was signed by Former Chief, as the reviewer on October 10, 2023, and then signed by Grievant on October 11, 2023.²⁷ Grievant appeared to suggest that if there had been concerns about his performance during the performance period the Agency could, and should, have addressed or noted those performance issues in the performance evaluation. Former Chief credibly testified, however, that the Agency was still in the process of investigating the issues associated with search warrants that Grievant applied for on July 6, 2023, and that Former Chief’s experience was that a matter that is the subject of an on-going, but not yet concluded, investigation should not be “held against” an employee in their performance evaluation.²⁸ The undisputed testimony of Former Chief indicated that the misinformation included in the July 6, 2023, Affidavits for Search Warrant prepared by Grievant came to light as a result of settlement discussions associated with litigation, that is, at some point after Grievant prepared the affidavits and applied for the search warrants. The evidence in the record showed that on October 27, 2023, Grievant received an Administration of Employee Discipline: Due Process Notification²⁹ setting forth the charges the Agency was considering and providing him with an opportunity to respond indicating that the Agency’s consideration of whether and what discipline may be appropriate was still under consideration at that time which was after the performance evaluation had been completed and delivered to Grievant.

Grievant also appeared to suggest that the fact that the First Step Respondent in the grievance process did not speak with Grievant to clarify his understanding or misunderstanding of certain information may have denied him due process. The hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments he wished during the hearing.

The Agency’s discipline was consistent with law and policy.

Mitigation

Virginia 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....”³⁰ 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

²⁷ Agency Ex. 13.

²⁸ Hearing Recording at 2:04:33-2:06:36.

²⁹ Agency Ex. 2.

³⁰ Va. Code § 2.2-3005.

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 Grievant of a Group I Written Notice of disciplinary action 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.

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.³¹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³¹ 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.