

DECISION OF HEARING OFFICER

IN RE: CASE NO. 11942
HEARING DATE: 10-4-2023
DECISION ISSUED: 1-10-2024

PROCEDURAL HISTORY

The events of **fraternizing and failure to report incidences** were noted in the Written Notice received by Grievant as occurring in December of 2022. A Written Notice was issued on January 18, 2023.¹ Grievant filed for hearing in February of 2023. A hearing officer was appointed on March 7, 2023.

The first prehearing conference was scheduled for March 15, 2023, and was rescheduled. There were various other phone conferences and hearing dates changes. A phone conference was scheduled for May 16, 2023. The hearing was scheduled for May 25, 2023, and rescheduled. There was a Motion to protect information requested by the Agency. Numerous emails were exchanged. A phone conference was scheduled for June 13, 2023, the hearing officer's opinion on the Motion was issued on June 19, 2023. The hearing scheduled for June 13, 2023 was rescheduled. There was a phone call on July 24, 2023. A hearing was scheduled for September 21, 2023, and cancelled. A hearing was scheduled for October 4, 2023, to which all parties attended the [REDACTED] prison facility. The hearing was continued to November 16, 2023, as a virtual hearing. The hearing officer advised when the hearing was set for November that the hearing officer would be unavailable most of December and to expect a decision in January 2024.

APPEARANCES

Agency Advocate
Agency representative as witness
Three (3) additional agency witnesses
Grievant's advocate
Grievant as witness
Three (3) additional Grievant's witnesses

ISSUES

- 1) Whether Grievant violated Operational Procedures 135.1 XIII B1²
- 2) Operational procedures 135.1 XIV (31)³

¹ Grievant's Exhibit 1 – Written Notice

² Agency Exhibit 7 – failure to follow established policy

³ Agency Exhibit 7 – extent of time limit to prohibit fraternizing with an Inmate.

- 3) Operational procedures 135.2 section II⁴
- 4) Operational procedures 135.2 IV⁵
- 5) Written notice codes #55 and # 13⁶
- 6) Whether Grievant's actions meet the definition of fraternization.
- 7) Whether the Grievant's actions met the definition of failure to report.
- 8) Whether a Group 3 discipline with termination was an appropriate discipline.
- 9) Whether there were mitigating circumstances.
- 10) Whether disciplinary action was taken in the proper venue.

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 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.

⁴ Agency Exhibit 2 – a. creating a healing environment; b. maintaining professional appearance and avoiding behaviors that could led to perception of fraternizing; c. helping and supporting inmates provided personal and professional identities are not blurred; d. employees are encouraged to interact with inmates.

⁵ Agency Exhibit 2 – fraternization is prohibited, and all such situations are to be reported on the same or next day.

⁶ Grievant's Exhibit 1 – Written Notice with attachments. #55 Fraternization with inmates; #13 Failure to follow instructions or policy.

FINDING OF FACTS

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

Grievant was a correctional officer hired at the [REDACTED] Prison in [REDACTED] Virginia. Grievant was relocated under a relocation agreement to [REDACTED] Correctional Facility. The actions described in the written notice were actions that occurred at the [REDACTED] Correctional Facility. The written notice was issued by her home post of [REDACTED] Prison. Grievant signed a relocation contract with the Department of Corrections. This document never designated a jurisdiction or venue location for a dispute of this contract.⁷

Grievant's post at [REDACTED] was a raised enclosed area above the inmate open room. The Inmate in question had a cleaning job that permitted him to spend additional time in the inmate open room. Inmate often stopped to talk to Grievant. Grievant stated she listened to Inmates' concerns and would respond sometime with talk of religion or her family's activities. Grievant stated Inmate made other overtures to her but Grievant stated she did not respond to any suggestions or phone calls on Inmate's part.⁸

Grievant stated Inmate did call her phone, but she never answered. Grievant stated she did not know how Inmate had her phone number. Grievant stated she did not give the phone number to him. Grievant did not report this action of Inmate to her superior.

Grievant stated Inmate gave her a written document Inmate described as a poem. Grievant stated she did not read the document and she put it in the trash. Grievant did not report this action of the Inmate to her superior.

Grievant stated Inmate suggested plans for a bright future and that Grievant could talk to Inmate's mother. Grievant stated she was not interested and did not ever attempt to call Inmate's mother. Grievant did not report this action of the Inmate to her superior.

Grievant stated Inmate offered her a second phone. Grievant did not respond to this offer. Grievant did not report this action of Inmate to her superior.

The investigative report contained statements of Grievant made to the investigator, copies of phone records from the prison to Grievant's cell number (no phone call was answered) and redacted statements of the Inmate. Agency was able to ascertain that Grievant did not report any of Inmate's boundary violations but had no concrete evidence Grievant responded to Inmate.⁹

None of the many exhibits presented by either the agency or the Grievant offered any more complete evidence than that of Grievant's testimony. The investigative report either restated Grievant's statements or speculated on the findings.

Witnesses were called by the Grievant to state in their opinion that male Correctional Officers were permitted more leeway in conversing with Inmates than Female Officers.¹⁰

⁷ Grievant's Exhibit 2 – Employment Contract

⁸ Grievant's testimony at hearing, Agency Exhibit 1. SIU report. Agency Exhibit 8 Employee response, Grievant's Exhibit 3 rebuttal statement.

⁹ Agency Exhibit 1 – SIU report.

¹⁰ Witness statements in Grievant's case.

OPINION

Agency has attempted to prove Grievant had a personal, unprofessional relationship with Inmate. Grievant absolutely denies such a relationship. Agency is unable to prove, by the preponderance of the evidence, that Grievant's involvement (other than Grievant's own admissions) that Grievant did more than verbally shared every day, public, family activities and religious discussion with Inmate.

What is clearly proven by Agency is that Grievant made no reports of advances made by Inmate. Apparently, she thought when she did not engage in the activities presented that they were better overlooked than reported. However, reporting, Inmate calling her phone number, offering her a second phone, and writing her a poem are all attempts of Inmate "grooming" behaviors. While Grievant perhaps withstood this attention, there could have been another Correctional Officer less resilient. Inmate's actions were important to be reported to reduce his behavior in the future. This could have caused serious public safety issues should Inmate had been able to convince a person to conduct what could have been a nefarious purpose.

The operational procedures are quite vague by encouraging a "healing environment" and conversely insisting on parties to maintain a cool, professional identity.¹¹ It does not appear Grievant's conversations about general family activities and religion went beyond creating the repour needed to create a "healing environment." What did become a problem was when Inmate attempted to take these matters to a higher level of friendship such as attempting phone calls, offering a second phone, authoring a poem, and lingering in Grievant's presence.

There is some confusion as to who or what behavior is to be reported. Grievant did not choose to engage in unprofessional behavior with Inmate. Was Grievant to report on herself for not engaging? Was Grievant to report to her superior any Inmate attempt to fraternize? Was Grievant to report fraternization in others if she observed it? It seems an improbable rule that one is to report on themselves. The only reasonable interpretation is that reporting an aggressive inmate or fraternizing behavior observed in others is what the reporting rule was intended to cover.¹² This Inmate's activities should definitely have been reported to Grievant's superior as clear infraction as an attempt to go beyond Grievant's required level of professionalism.

None of the many exhibits presented by either the Agency or Grievant offered more concrete evidence than Grievant's testimony. The investigative report either restated Grievant's statements or speculated on investigative findings. There was no new evidence proving Grievant's willingly responded to or encouraged Inmate.

Grievant's attorney has mentioned the issue of whether the written notice was issued in the proper venue for this case to be heard. Grievant had ample opportunity to explore this issue in pre-hearing discussions. This matter has taken a full year to be determined. Twice Grievant, Grievant's counsel and Grievant's witnesses as well as Agency representative, Agency's counsel, and witnesses were present for the hearing at the [REDACTED] location. Grievant was employed by [REDACTED] facility. Grievant's disciplinary actions occurred at [REDACTED] Correctional Facility. The time to decide venue in

¹¹ Agency Exhibit 2

¹² Agency Exhibit 2

this case should have been determined prior to the hearing. All parties were present at [REDACTED] Facility for hearing. The issue of venue is now moot.

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 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.¹⁹

Grievant’s attorney elicited testimony from witnesses who believed women were treated differently than men Correctional Officers in the amount of “chatting” they could do with an inmate. Grievant’s attorney produced no written evidence of other officers being differently reprimanded for the same offense of fraternizing as was Grievant. These opinions are not a convincing argument for mitigation. Grievant’s prior good record does not mitigate a serious offense.¹³

DECISION

For the reasons stated above this Hearing Officer does not find Grievant fraternized with Inmate, nor did she exhibit unprofessional contact with the Inmate. This Hearing Officer does find that Grievant made a serious error in not reporting Inmate’s behavior towards Grievant. These incidents should have been promptly reported to her superior. The Group III discipline with termination is UPHOLD.

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.

¹³ Grievant’s Exhibit 6, 7, 8 – performance records

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.