

DECISION OF HEARING OFFICER

IN RE: CASE NOS. 12034 & 12035

HEARING DATE: 2-5-24

DECISION ISSUED: 3-6-24

PROCEDURAL HISTORY

Grievant was promoted to Sergeant on April 25, 2022.¹ An incident occurred on February 4, 2023.² Notice of due process was served on February 27, 2023.³ Meetings were scheduled for March 9, 2023, and March 14, 2023.⁴

Grievant began parental FMLA on June 5, 2023. Another response meeting was scheduled for July 2023 at which time Grievant was in attendance. The Agency Representative, the Warden, was not present and therefore no meeting occurred. When Grievant arrived for work following his FMLA leave, he was issued two Group II Written Notices on August 17, 2023.⁵

Grievant grieved his discipline on September 14, 2023, and attached his statement.⁶ A Hearing Officer appointment was made November 6, 2023. The hearing was scheduled for February 5, 2024, and was heard on that date at the Agency location.

APPEARANCES

Agency Advocate

Agency representative as witness

Six (6) additional Agency witnesses

Grievance advocate

Grievant called no witnesses

ISSUES

- 1) Whether Grievant violated Policy Code 99, failure to supervise.⁷
- 2) Whether Grievant violated Operational Procedures 135.1, Section II C in failure to correct negative behavior of an employee.⁸
- 3) Whether Grievant actions were elevated as described in Operational Procedures 135.1, Section XI B 1, and 2.⁹
- 4) Whether Grievant actions were negligent as described in Operational Procedures 135.1, Section XIV B 15.¹⁰

¹ Agency Exhibit 15 – Bottom of 2nd page

² Agency Exhibit 1 – Visual disc of event

³ Agency Exhibit 16

⁴ Agency Exhibit 16 and Agency Exhibits 5a and 5b

⁵ Agency Exhibits 11 and 12

⁶ Agency Exhibit 10

⁷ Agency Exhibit 11

⁸ Agency Exhibit 9, Page 7

⁹ Agency Exhibit 9, Page 14

¹⁰ Agency Exhibit 9, Page 17

- 5) Whether Grievant violated Policy Code 13, failure to follow policy.¹¹
- 6) Whether Grievant violated Operational Procedures 430.6 regarding use of body camera.¹²
- 7) Whether Grievant violated Post Order #14 (4) regarding activation of a body camera.¹³
- 8) Whether Grievant high standard performance records were taken into account to mitigate discipline.¹⁴

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, 2020, and the Grievance Procedure Manual (GPM) effective July 1, 2020.

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:

On February 4, 2023, an inmate, in the pod to which Grievant was assigned, apparently attempted sexual activity towards a female Correctional Officer. The Inmate was removed from the pod and then led into a stairwell. After a brief time, Inmate was led down a set of stairs by Correctional Officers towards a secured area.

¹¹ Agency Exhibit 12

¹² Grievant Exhibit 1

¹³ Agency Exhibit 12

¹⁴ Agency Exhibit 11, Section IV

There was a video (although no audio)¹⁵ security camera capture of the encounter at the top of the stairwell where Inmate, two Correctional Officers and Grievant are seen. One Correctional Officer is holding inmate by one arm and Grievant is holding the inmate by his other arm. The image clearly shows that the Inmate is handcuffed behind his back. Before transversing down the stairs two other Correctional Officers appeared ascending the stairs towards the Inmate and the three Correctional Officers already present which included Grievant. One of the approaching Correctional Officers was seen acting as what appears to be verbally confronting Inmate. Grievant then loosens his arm hold on Inmate and the confronting Correctional Officer takes Grievant's place. Grievant then returns to the cell block and is not further seen. Inmate is escorted by arm holds down the stairs. Inmate shows no resistance to the Correctional Officers during the time he was at the stairwell landing nor as he started down the stairs. Because Inmate was standing with his back to the camera one could not ascertain whether Inmate made any verbal comment.

Grievant was promoted to Sergeant on April 25, 2022, but had not completed all of his training. He did have basic training when first hired as a Correctional Officer and had some, but not all, of his requirements as a Sergeant. During his time as a Sergeant, Grievant did attend an annual in-service training on March 22, 2023.¹⁶ Grievant was scheduled for his final supervision training on July 17, 2023, but did not take that training. Training is scheduled intermittently so not readily available for reschedule.¹⁷

Grievant was charged with not properly supervising the Inmate's transport by ignoring the behavior of the Officer seen confronting the Inmate and with failure to turn his body camera on to record the event.

The Correctional Officers present during the time Grievant was on the scene were not called as witnesses. They did give oral statements to the Investigator.¹⁸ The oral statements, including Grievant's statement, were not completely consistent but all stated that one Correctional Officer made verbal statements, possibly using profanity, to verbally express himself to Inmate. Grievant did testify at this hearing that the Correctional Officer who escorted Inmate down the stairs did make verbal statements to Inmate and was "a little irate."¹⁹

DISCUSSION

The entire situation is based on the actions or inactions that occurred at the top of the stairwell. The Hearing Officer considers anything that happened before or after that time is irrelevant to the actions for which Grievant received discipline. No witness other than Grievant testified as actually present during the situation in the stairwell. It could be seen from the video that a Correctional Officer was verbalizing to Inmate and at one

¹⁵Agency Exhibit 1

¹⁶ Agency Exhibit 7

¹⁷ Agency Exhibit 6

¹⁸ Agency Exhibits 2 and 13 – Investigative Reports

¹⁹ Grievant's testimony when called as an adverse witness

point, shook his finger at Inmate. The Correctional Officer did appear adamant about what he was saying to Inmate. Grievant observed this behavior and had to know this was not expected or required behavior of a Correctional Officer called to transport an Inmate.

Grievant, as a Sergeant, was the highest ranked person at the scene and therefore had the duty to control the situation. Instead, Grievant left the scene with no further concern or instruction to the Correctional Officers making the transport.

Grievant was additionally charged with not activating his body camera at the time of the situation. Grievant claimed it was not a situation that called for activation of a body camera. It is difficult to believe Grievant did not have any clue a body camera should have been activated. Inmate was clearly in handcuffs and being escorted out of the pod because of Inmate's misbehavior. That in itself is an "incident," an uncommon occurrence of the day. Policy requires body cameras be activated when an "incident" occurs.²⁰

Grievant contends that he was not properly trained and that a more seasoned supervisor was not with him to instruct Grievant on proper protocol.²¹ Testimony of Witness stated that the Policy did not require a mentor to be constantly by Grievant's side.²² Evidence was presented that all employees of the Department of Corrections from Correctional Officers to top officials had basic understanding and training upon being hired by the Department of Corrections. Grievant did have specific training on use of his body camera.²³

Grievant had received an outstanding performance on his previous performance evaluation which document Grievant did sign. This indicates Grievant was well versed in what was expected of himself and all other Officers.²⁴

OPINION

Policies are written to avoid negative occurrences or situations. It is irrelevant whether a negative outcome does or does not happen. The policy and discipline for not following that policy stand alone.

Rules (policies) are established by an enterprise for the purpose of the operation running smoothly. For instance, if the rule is, "Always lock the front door at the shop," it does not make any difference if the owner walks in and finds the door unlocked or a thief comes in and robs the store. Either way, the rule is broken.

To find that a policy has not been followed and the discipline warranted, four (4) conditions must be found:

- 1) The party is aware or has a duty to be aware of the policy.

²⁰ Agency Exhibit 1 – Operational Procedures 430.6

²¹ Grievant's Testimony

²² Witness Testimony #2 and #7

²³ Witness Testimony #2 and #7 and Grievant's Testimony

²⁴ Agency Exhibit 8

- 2) The situation is one where the policy applies.
- 3) The policy was breached.
- 4) The severity of the possible outcome for the breach is considered.

Grievant had to realize he was the highest ranked person at the incident. There was an Inmate in handcuffs being removed for his behavior. There was a Correctional Officer escalating the situation. Grievant was in charge and left the scene.

Testimony of witnesses stated Grievant had at least basic training on use of his body camera. Policy states that a body camera should be used during an incident. Grievant did not activate his body camera as per policy. Had Inmate reacted to the Correctional Officer's comments, clearly one or more persons could have been injured on the set of stairs.

While Grievant had not completed his Sergeant training, he had enough knowledge of policy to react differently than he did.

According to Operational Procedure 135.1, Section IV B 1, and 2. Agency could have issued Group III disciplines due to the severity of the matters that could occur when not properly supervising employees.

Grievant violated Policy Code 99 and Operational Procedures 135.1, Section II C and XI B 1 & 2, as he failed to supervise a Correctional Officer who was acting in an unusual way. Grievant violated Operational Procedures 135.1 Section XIV B15 in that injury could have occurred on stairs. Grievant failed to follow Policy Code 13 and violated Operational Procedure 430.6 and Post Order #14 (4) in failure to activate a body camera when an incident was occurring.

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

The Agency took Grievant's high performance record into account and issued two Group II disciplines. This was appropriate mitigation of the discipline that could have been issue.

DECISION

For the reasons stated above this Hearing Officer does finds Grievant did not properly supervise an Inmate's transport by ignoring the behavior of a Correctional Officer. Further, the Hearing Officer finds Grievant failed to turn on his body camera when an incident occurred. This Hearing Officer does find that Grievant made a serious error by not following policy. The two Group II disciplines with demotion and salary reduction with termination are UPHELD.

Sondra K. Alan
Hearing Officer