



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12095

Hearing Date: June 10, 2024

Decision Issued: July 19, 2024

PROCEDURAL HISTORY

On January 24, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for failure to follow instructions and policy. The Agency described the offense as:

Violation of OP135.1 Standards of Conduct Violation of OP 135.4 (DHRM Policy 1.05) Alcohol and Drug Testing. On 1/15/2024, [Grievant] was alerted on by the canine officer and his K-9 during a search of the vehicles. [Grievant] refused to comply with Supervisor's instructions regarding the search procedure/process. [Grievant] also failed to provide a statement regarding his refusal to submit to a strip search and the search of his vehicle. [Grievant] was instructed by supervision to wait in the lobby, he refused to wait and then proceeded to his vehicle to use his cell phone to call the watch commander. [Lieutenant 2] arrived in the parking lot and advised [Grievant] to exit the premises, he hesitated to do so. The [County] Sheriff's Department was called to the scene but [Grievant] had left the premises before they arrived. The Sheriff's Department was called back and was informed that the employee had exited the premises, and they were no longer needed.

On February 15, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 25, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer.

An Equal Opportunity Employer

The hearing in the matter was originally scheduled to occur on May 21, 2024. At the request of the Agency, and without objection from the Grievant, the Hearing Officer continued the hearing to June 10, 2024, to allow time for the Agency to determine the status of another grievance filed by Grievant. On June 10, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice?
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:

Prior to his dismissal, Grievant was a Correctional Officer at a Department of Corrections Facility. Grievant was first employed by the Agency in 2018 and described having a break in service from sometime in 2020 to sometime in 2022. Grievant began working as a Correctional Officer at the Facility in September 2023. Grievant had one active Group I Written Notice of disciplinary action for unprofessional conduct.

In January of 2024, the Facility was experiencing a high volume of drugs entering the compound resulting in multiple inmate overdoses. The Facility took various steps to try to identify the source or sources of the drugs coming into the Facility, including using drug detection dogs to screen employees and their vehicles.¹

On January 15, 2024, the Facility was using a drug detection dog to screen employees as they entered the Facility. Lieutenant 1 testified that she worked with a Facility unit head to identify random dates to use drug detection dogs to conduct screening of Facility employees for drugs and drug residue. Lieutenant 1 testified that, during the screenings, if a dog detected illegal drugs or drug residue on an employee, the dog would “alert” its handler of its detection of drugs and the handler would notify Lieutenant 1 that the dog had “alerted” on the employee.² Lieutenant 1 testified that when a drug detection dog “alerts” on an employee, the standard operating procedure is to request that the employee consent to a search of their person (strip search) and their vehicle.³

On January 15, 2024, Grievant arrived to work late. Because Grievant was late for the start of his shift, he was the only employee to be screened at the time of his arrival. Before Grievant entered the Facility from the parking lot, he was subject to screening by the drug detection dog. According to Lieutenant 1, the dog handler notified Lieutenant 1 that the dog “alerted” on Grievant.⁴ After Lieutenant 1 learned that the dog had “alerted” on Grievant, Lieutenant 1 escorted Grievant to her office and asked him to sign forms to consent to a search of his person (a strip search) and a search of his vehicle. Grievant responded to Lieutenant 1 that he would not complete the forms to consent to the searches. Lieutenant 1 then asked Grievant whether he intended to sign the forms to consent to the searches, and Grievant confirmed that he would not sign the forms. Lieutenant 1 then advised Grievant “you can have a seat out there, I’ll be with you in a second.”⁵ When Lieutenant 1 advised Grievant that he could have a “seat out there,” she was referring to the front lobby area of the Facility.⁶ Grievant did not ask the Lieutenant or anyone else about the process for the search or who would perform the searches if he were to consent. Grievant did not advise the Lieutenant that he wished to speak to the Watch Commander, a human resources representative, or any other personnel at the Facility at that time.⁷

Grievant then walked away from the Lieutenant toward the front lobby area of the Facility. Grievant, however, did not have a seat in the lobby area and wait for Lieutenant 1 as instructed. Instead, Grievant exited the Facility, walked across the parking lot, and

¹ Hearing Recording at 2:06:27-2:08:47.

² Hearing Recording at 38:09-40:21.

³ Hearing Recording at 40:56-41:09.

⁴ Hearing Recording at 1:32:42-1:33:00.

⁵ Hearing Recording at 40:21-40:40; see also Agency Ex. 17, Body camera video 2024-01-15 819.

⁶ Hearing Recording at 45:33-46:38, 3:13:40-3:14:32.

⁷ Hearing Recording at 40:21-40:40-3:13:40-3:14:32; see also Agency Ex. 17, Body camera video 2024-01-15 819.

entered his vehicle.⁸ Grievant testified that he went to his vehicle so that he could use his cell phone to call the Watch Commander.⁹

When Lieutenant 1 realized that Grievant had not waited in the front lobby area, she also exited the Facility and walked out to Grievant's vehicle in the Facility parking lot. Lieutenant 1 asked Grievant if he would write a statement indicating his refusal to consent to the searches. Grievant told Lieutenant 1 that he was going to wait until [Lieutenant 2] or [a Facility Captain] came down. Grievant told Lieutenant 1 that he was not "refusing" and that he felt like "every time he came here it was something." Lieutenant 1 advised Grievant that if he was "not refusing," then he should come into the Facility and comply with the request for his consent to the searches. Lieutenant 1 told Grievant to leave his phone in his vehicle and come inside to comply. Grievant then exited his vehicle. As Grievant and Lieutenant 1 walked back toward the Facility entrance, they continued to discuss whether Grievant would consent to the searches. Grievant again told Lieutenant 1 that he would not consent to the searches.¹⁰

The video recording of the exchange between Grievant and Lieutenant 1 was difficult to hear. However, Lieutenant 1 testified that she then asked Grievant to leave and Grievant responded that he was "not going to leave the yard," indicating that he would not leave the Facility's premises.¹¹ Grievant testified that when Lieutenant 1 asked him to leave, he responded that he was "not going to leave the yard" until he had an opportunity to speak with the Watch Commander.¹² Lieutenant 1 then left the parking lot area and re-entered the Facility. Grievant remained in the parking lot area near the entrance to the Facility.

At the Warden's instruction, Facility personnel contacted a local law enforcement agency and requested that they come to the Facility to assist the Facility in getting Grievant to leave the premises.

Approximately eight minutes after Lieutenant 1 left Grievant in the parking lot area, Lieutenant 2 came out to the parking lot area and advised Grievant that if he was not going to consent to the searches, he needed to leave the premises. Grievant asked Lieutenant 2 what would happen after he left, and Lieutenant 2 advised Grievant that the Warden would call Grievant.¹³ Grievant then left the Facility premises.

Because Grievant left the Facility premises, Facility personnel contacted the local law enforcement agency and advised them that the Facility no longer needed their assistance.

⁸ Hearing Recording at 40:38-40:45, 45:33-46:38, 3:13:40-3:16:09.

⁹ Hearing Recording at 3:14:40-3:16:09.

¹⁰ Agency Ex. 17, Body camera video 2024-01-15 823 at 0:01-4:27.

¹¹ Hearing Recording at 1:14:03-1:15:06.

¹² Hearing Recording at 3:14:32-3:15:54.

¹³ Agency Ex. 17, Body camera video 2024-01-15 823 at 13:01-13:24.

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."¹⁴

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

The Agency argued that Grievant's refusal to consent to searches of his person and his vehicle violated Operating Procedure 135.4, Alcohol and Drug Testing. The Agency did not point to any particular provision of Operating Procedure 135.4 that it alleged Grievant had violated. Operating Procedure 135.4 sets forth the Agency's policies related to testing employees for alcohol and drug use.¹⁵ Operating Procedure 135.4 also makes clear that "[e]mployees who refuse to submit to alcohol and/or drug testing will be terminated for failure to follow a direct order which could endanger the public safety, internal security, or affect the safe and efficient operation of the DOC."¹⁶ A search of a person or a vehicle for drug possession is not a test for alcohol or drug use. There was no evidence that Grievant refused to submit to an alcohol test or a drug test as contemplated by Operating Procedure 135.4. Agency witnesses asserted that Grievant violated Agency policies that may require an employee, under certain conditions, to consent to searches of their person or their property, but the Agency did not present any policies that set forth the conditions under which an employee may be subject to search or the parameters or processes for conducting searches. Although the Warden, Lieutenant 1, and Grievant all testified to their understanding that Agency policy required an employee who was "alerted" on by a drug detection dog to consent to a search of their person and their vehicle, there is insufficient evidence in the record to establish the requirements and parameters for such searches and to determine that Grievant's failure to consent in this case was a violation of an explicit Agency policy.

Although there is insufficient evidence for this Hearing Officer to determine whether Grievant violated Agency policy, the preponderance of the evidence does show that Grievant failed to follow the instructions he was given by Lieutenant 1.

Grievant admitted that as a Lieutenant and a superior officer to Grievant, Lieutenant 1 could give instructions to Grievant that Grievant was expected to follow. Grievant admitted that he did not follow Lieutenant 1's instruction to him to wait in the front lobby area of the Facility after he first declined to consent to the searches. Grievant testified that, instead of waiting in the lobby as instructed, he exited the Facility and went out to his vehicle in the Facility's parking area. Lieutenant 1's instruction to wait in the lobby was not insignificant. At the time the instruction was given, Lieutenant 1 was

¹⁴ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁵ See Virginia Department of Corrections Operating Procedure 135.4.

¹⁶ Department of Corrections, Operating Procedure 135.4, Alcohol and Drug Testing, Procedure, III.C.

attempting to address a situation where a drug detection dog appeared to have detected drugs or drug residue on an employee. Any instructions to Grievant were to help ensure the integrity of the process and any potential future investigation.

Grievant also admitted that he did not follow Lieutenant 1's later instruction to leave the Facility premises and that he instead responded that he would not "leave the yard" until he was provided an opportunity to speak with the Watch Commander. As Grievant admitted during the hearing, Lieutenant 1 was a superior officer to Grievant who could give Grievant instructions that he was expected to follow. Although Grievant testified that he understood that he was expected to follow her instructions, he repeatedly refused to follow the instructions she gave to him on January 15, 2024. Again, Lieutenant 1's instruction to Grievant was not insignificant. Once he had declined the searches, it was appropriate for Lieutenant 1 to instruct him to leave.

Grievant argued that he repeatedly requested to speak to the Captain or Lieutenant 2 (who would have supervised his work shift that day) and that had he been allowed to speak to them, things may have gone differently that day. Grievant, however, did not dispute that Lieutenant 1 was responsible for overseeing the screening of employees with the drug detection dogs that day and that he was required to follow instructions from Lieutenant 1. When Lieutenant 2 arrived in the parking lot area and told Grievant that he needed to leave the Facility premises, Grievant left, just as he could and should have done when Lieutenant 1 gave him that instruction. Grievant did not, at that point, raise with Lieutenant 2 any of the issues he raised during the hearing regarding his concern about having a male security officer available to conduct the search of his person or about his concern that he was being "targeted." Indeed, based on the evidence, Grievant's primary reason for not following instruction from Lieutenant 1 appeared to be that the instruction came from Lieutenant 1, even though, as Grievant testified, he understood that he was required to follow instructions from Lieutenant 1.

During the hearing, Grievant argued that he felt that he had been "targeted" by Facility personnel and appeared to suggest that the request that he consent to the searches on January 15, 2024, and this disciplinary action were part of that "targeting." Grievant, however, offered no evidence to show that the actions he considered to be "targeting" of him were retaliatory or discriminatory or were otherwise a violation of law or policy. Based on the evidence presented, the actions that Grievant "felt" were "targeting" appeared to be Agency management and personnel managing the operations of the Facility.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when he failed to follow Lieutenant 1's instructions.

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

Failure to follow instruction is a Group II offense.¹⁷ Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher-

¹⁷ Department of Corrections, Operating Procedure 135.2, Standards of Conduct, Procedure XIII.B.1.

level offense due to aggravating circumstances. The Agency charged Grievant with a single, Group III offense.

The Agency argued that Grievant's actions and his initial refusal to leave the Facility premises were a risk to safety, resulted in a weakening of security, and were sufficiently disruptive to the workplace to rise to the level of a Group III offense. The Agency primarily argued that the number of Facility personnel involved during the incident with Grievant, including the Warden weakened security and was disruptive because those personnel were taken away from their other security duties while they dealt with Grievant. Based on the evidence, it appeared that Lieutenant 1 and a special investigation unit officer with a body camera were both engaged with Grievant throughout the incident, approximately 15 minutes. The Warden was not at the Facility at the time, but Lieutenant 1 called him repeatedly to apprise him of the situation. Lieutenant 2 also was involved in the incident with Grievant because he was called by Lieutenant 1 to assist with the situation with Grievant. Beyond making the argument, the Agency did not provide any evidence as to how security was weakened, or safety risked for the approximately 15 minutes the two lieutenants onsite were engaged with Grievant. The Agency also pointed to the fact that Facility personnel contacted a local law enforcement agency when Grievant initially refused to leave the Facility premises. The Agency argued that the Facility contacted local law enforcement because they could not wait for the situation with Grievant to escalate and potentially get out of control. This Hearing Officer will not dispute an Agency's discretion to take precautionary measures; however, for the purposes of determining the appropriate level of discipline, the evidence shows that the situation with Grievant did not escalate and that after Grievant spoke with Lieutenant 2, as he had requested, Grievant left the Facility premises without the need for intervention by local law enforcement.

The Agency has not met its burden of proving that Grievant's misconduct rose to the level of a Group III offense. The preponderance of the evidence shows that Grievant's misconduct was a Group II offense.

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...."¹⁸ 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

¹⁸ 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 Group III Written Notice with termination is **reduced** to a Group II Written Notice with a 10-day suspension without pay.

Because a Group II Written Notice does not support termination by accumulation of disciplinary action under DHRM Policy 1.60, the Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if that position is filled, to an equivalent position. The Agency is directed to provide **back pay** less the 10-day suspension without pay and less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.¹⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹⁹ 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.