



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 11947

Hearing Date: September 19, 2024

Decision Issued: November 13, 2024

PROCEDURAL HISTORY

On February 10, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for fraternizing with the family member of an inmate.¹

On March 2, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 21, 2023, the Office of Employment Dispute Resolution assigned this matter to a hearing officer. The hearing of this matter appeared to have been delayed during 2023 and then scheduled and rescheduled during the spring and summer of 2024 for reasons related to a separate criminal proceeding as well as reasons related to evidentiary matters and other matters related to this case. During this time the hearing officer originally assigned to hear this matter became unavailable to hear the case. On July 29, 2024, the Office of Employment Dispute Resolution re-assigned this appeal to this Hearing Officer. Although the hearing with the previous hearing officer had been scheduled to be held on September 10, 2024, due to a conflict with this Hearing Officer's schedule, the Hearing Officer held a pre-hearing conference call with the parties and the hearing was rescheduled to a date when this Hearing Officer was available. Both parties agreed to the rescheduled hearing date and no objections were raised to moving forward with hearing the case at that time. On September 19, 2024, a hearing was held at the Facility.

¹ Agency Ex. at 1-4.

APPEARANCES

Grievant
Grievant's Advocate
Agency Legal Advocate
Agency Party Designee
Agency Observer²
Witnesses

ISSUES

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

Prior to his termination, Grievant had been a Corrections Officer at the Facility. Grievant had been employed by the Agency for more than three years. No evidence of prior disciplinary action was introduced during the hearing. Prior to the events associated

² The Agency requested that an Agency employee be allowed to observe the proceeding for training purposes. Because the Grievant did not object to an Agency employee observing the hearing, the Hearing Officer allowed the Agency employee to observe the proceeding for training purposes.

with this disciplinary action, the evidence suggested that Grievant's performance had been satisfactory to the Agency.³

Inmate X is an inmate who was incarcerated at the Facility during December of 2022. Witness X is the mother of Inmate X.

In December 2022, Witness X met Grievant in the parking lot of the Hardware Store. Witness X testified that the purpose of the meeting was for Witness X to deliver a package to Grievant. Witness X had been instructed to deliver the package to Grievant by Inmate X and according to Witness X, Inmate X had been involved, at least in part, in arranging the meeting. Witness X described the package she delivered to Grievant as a box that contained shoes and what appeared to be little pieces of paper.⁴

Grievant had not reported having a prior existing relationship with Witness X to the Agency. Grievant did not report his meeting with Witness X to the Agency.⁵

CONCLUSIONS OF POLICY

Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships, "establishes rules of conduct that employees will observe when interacting with inmates/parolees under the supervision of the Virginia Department of Corrections."⁶ The operating procedure prohibits fraternization or non-professional relationships between employees and inmates and probationers/parolees.⁷ The operating procedure provides an exception for incidental encounters between employees and inmates or probationers/parolees or members of the inmate's family that occur in a public setting where professional boundaries are maintained, but in all situations, the employee must report such contact to their supervisor or Organizational Unit Head on the same or next business day.⁸ Fraternization is defined as:

[e]mployee association with inmates/probationers/parolees, their family members, or close friends of inmates/probationers/parolees, outside of employee job functions, that extends to unacceptable, unprofessional and prohibited behavior; examples include non-work related visits between inmates/probationers/parolees and employees, non-work related relationships with family members or close friends of inmates/probationers/parolees, inmates/probationers/parolees, and engaging in romantic or sexual relationships with inmates/probationers/parolees.⁹

³ See Hearing Recording at 2:08:35-2:09:25, and Agency Ex. at 43.

⁴ Hearing Recording at 1:16:11-1:33:01.

⁵ Hearing Recording at 2:14:22-2:31:55.

⁶ Virginia Department of Corrections Operating Procedure 135.2., Purpose.

⁷ Virginia Department of Corrections Operating Procedure 135.2., Procedure IV.A.1.

⁸ Virginia Department of Corrections Operating Procedure 135.2., Procedure IV.A.

⁹ Virginia Department of Corrections Operating Procedure 135.2., Definitions.

The Operating Procedure further provides that non-job related visitations between employees and inmates or families of inmates are only permitted upon showing a good cause with the explicit written permission of the Regional Operations Chief of the region(s) involved.¹⁰ Further, as long as an inmate is under the custody, care, or supervision of the [Agency], any unexpected, incidental, non-work related contact with inmates or their families should be reported to the Organizational Unit Head promptly and documented as necessary.¹¹

Fraternization is a Group III offense. Failure to comply with the reporting requirements of Operating Procedure 135.2 “will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and may be subject to disciplinary action up to and including termination.”¹²

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

Witness X credibly testified that she met Grievant in the parking lot of the Hardware Store and that she delivered a package to Grievant as Inmate X had instructed her to do and consistent with arrangements made by Inmate X.¹³

Grievant’s advocate questioned the credibility of Witness X by pointing out that she was nervous and appeared to be upset by the end of her testimony suggesting that showed that Witness X was “scared to death.” Witness X did appear to be nervous and upset by the end of her testimony. Based on the circumstances, including that there is a related criminal proceeding, it was not unreasonable for Witness X to be nervous or upset. That does not make her testimony untrue. When Witness X had trouble remembering a detail or answering a question, she said so. Witness X, however, did not appear to be uncertain in her testimony as to her recollection that it was Grievant that she met in the Hardware Store parking lot and that it was Grievant to whom she delivered the package as instructed by her son, Inmate X.¹⁴

Grievant appeared to have concerns with the Agency’s methods for confirming with Witness X that it was Grievant with whom she met and to whom she delivered the package, however, Grievant had the opportunity to cross-exam Witness X and did not elicit testimony calling into question her identification of Grievant as the individual with whom she met at the Hardware Store parking lot and to whom she gave the package.¹⁵

Grievant’s advocate argued that the Agency’s investigation into the matter was flawed.

¹⁰ Virginia Department of Corrections Operating Procedure 135.2., Procedure IV.E.1.

¹¹ Virginia Department of Corrections Operating Procedure 135.2., Procedure IV.E.3.

¹² Virginia Department of Corrections Operating Procedure 135.2., Procedure V.A.

¹³ Hearing Recording at 1:16:11-1:33:01.

¹⁴ Hearing Recording at 1:16:11-1:33:01.

¹⁵ Hearing Recording at 1:16:11-1:33:01.

With respect to the Agency's investigation, the Agency offered the testimony of Special Agent and Lieutenant.

This Hearing Officer found Special Agent's testimony to be generally not probative of the material issues in this matter because at various points during his testimony on direct examination and cross examination, he refused to provide information or answer questions based on his determination that such information related to the associated criminal investigation. Special Agent also was defensive and hostile when answering questions on cross-examination. Special Agent made reference to a history with Grievant's advocate which may have contributed to his defensiveness and hostility. Because Special Agent's testimony was largely not probative, this Hearing Officer did not rely on the testimony of Special Agent in reaching her decision.

Grievant also argued that Lieutenant was an unreliable witness who had "targeted" Grievant. This Hearing Officer did not allow Grievant's advocate to question Lieutenant regarding her personal life as part of his effort to impeach her credibility. Grievant's advocate suggested that Lieutenant had some sort of grudge against the Grievant related to her personal life. As a result of those interactions, Grievant argued that he was being "targeted" by Lieutenant.¹⁶ Although this Hearing Officer did not find Lieutenant's personal life to be relevant to these proceedings, she also did not find Lieutenant's testimony to be particularly probative of the issues to be decided in this matter. Lieutenant, like Special Agent, would not provide information that she believed was related to the associated criminal proceeding. With respect to the questions she did answer, Lieutenant testified that she was not present during an unrecorded meeting when, according to Lieutenant, Inmate X initially identified Grievant as the individual that met with Witness X. Lieutenant generally did not appear to recall many details of the investigation indicating that a lot of time had passed since the investigation. She also seemed to have trouble recalling details related to a meeting with Inmate X in March 2024 when the Agency obtained a written statement from Inmate X. This Hearing Officer also did not find Lieutenant's testimony to be probative and did not rely on the testimony of Lieutenant in reaching her decision.

The unwillingness or inability of Special Agent and Lieutenant to testify as to the details of the Agency's investigation made it difficult for this Hearing Officer to rely on the Agency's investigative materials in determining the facts of this case.

The key evidence for this Hearing Officer was the unrefuted testimony of Witness X.

Grievant did not testify and Grievant did not provide evidence to refute the testimony of Witness X. Based on the information provided by Grievant in his grievance materials and Grievant's argument during the hearing, it appeared that Grievant would have asserted that his meeting with Witness X was incidental. Based on the information provided, Grievant would have asserted that at the time of these events his wife was using social media sites to sell items. The parking lot of the Hardware Store was a location

¹⁶ See also Grievant's Ex. 5, 7 and 8.

where Grievant asserted in his grievance materials that he would meet individuals to deliver the items his wife had sold. Thus, it appeared that Grievant would have asserted that any meeting or interaction by Grievant and Inmate X's mother would have been in the context of Grievant being in the Hardware Store parking lot to deliver an item his wife had sold.¹⁷ Grievant, however, provided no evidence to support such assertions or to refute Witness X's testimony that she met Grievant in the parking lot of the Hardware Store for the purpose of delivering a package to Grievant as she had been instructed to do by her son, Inmate X.

Based on the unrefuted testimony of Witness X, the preponderance of the evidence showed that Grievant met Witness X in the Hardware Store parking lot to receive a package from her consistent with instructions of, and arrangement by, Inmate X. Grievant had not made the Agency aware of a pre-existing relationship with Witness X in order to receive permission to meet with Witness X due to a pre-existing relationship. The meeting between Witness X and Grievant was not accidental or incidental. It was arranged, at least in part, by Inmate X and the purpose of the meeting was for Witness X to deliver a package to Grievant. When Grievant met with an inmate's family member to receive a package pursuant to arrangements made, in part, by the inmate, Grievant was engaging in prohibited fraternization.¹⁸

Whether the Agency's discipline was consistent with law and 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."¹⁹

Fraternization is a Group III offense.²⁰ This type of behavior is a serious violation of policy because a correctional officer purposefully meeting with an inmate's family member to receive a package, or anything even of minimal value, from that inmate or inmate's family member would at a minimum create the appearance of a conflict of interest and undermine that officer's ability to perform his job duties and potentially compromise the safety and security of the Facility.²¹

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

¹⁷ Grievant's Ex. 5 at 5-6, Grievant's Ex. 6 and Ex. 7.

¹⁸ See Virginia Department of Corrections Operating Procedure 135.1 and 135.2, and see Hearing Recording at 2:14:22-2:31:55.

¹⁹ See Virginia Department of Corrections Operating Procedure 135.1.

²⁰ Virginia Department of Corrections Operating Procedure 135.1, Procedure XIV.B.

²¹ See Virginia Department of Corrections Operating Procedure 135.1 and 135.2, and see Hearing Recording at 2:14:22-2:31:55.

Due Process

Grievant argued that there were deficiencies in the Agency's due process procedures. To the extent that there may have been deficiencies in the pre-disciplinary due process, the hearing process cures any such deficiency. Grievant had the opportunity to present his evidence and arguments during the hearing.

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...."²² 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 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 III Written Notice of disciplinary action with termination 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.

²² Va. Code § 2.2-3005.

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.²³

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²³ 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.