



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12161

Hearing Date: October 1, 2024

Decision Issued: November 20, 2024

PROCEDURAL HISTORY

On July 10, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination. In the Written Notice, the Agency described the nature of the offense as:

On June 16th, 2024, at around 8:50 am, [Unit Manager] was conducting rounds at [Hospital]. [Unit Manager] walked into [Hospital Room] and [Grievant] was sitting and on his personal cell phone. The [Watch Commander] was notified of the incident.¹

On July 17, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 12, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On October 1, 2024, a hearing was held at the Facility.

APPEARANCES

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

¹ Agency Ex. at 1-2.

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.

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 removal, Grievant was a Lieutenant at a Department of Corrections Facility. Grievant was employed by the Agency for more than 8 years.

On June 16, 2024, Grievant arrived to work at the Facility as scheduled. Grievant entered the Facility and then learned that he would be going out on a transportation security post to the Hospital. Grievant did not carry his personal cell phone into the Facility because employees are not allowed to bring their personal cell phones into the secured areas of the Facility.³

After learning that he would be on a transportation security post at the Hospital, Grievant had to turn in equipment he had been assigned for use in the Facility and retrieve the Facility-issued equipment that he was required to carry for his security post at the Hospital. Among the equipment Grievant was required to carry while on post at the Hospital was an Agency-issued cell phone.⁴

³ Hearing Recording at 1:05:23-1:06:29, 1:12:19-1:15:17, and see Agency Ex. 10 and Ex. 11.

⁴ Agency Ex. 9 at 6-7, Hearing Recording at 1:09:40-1:10:21.

Grievant and the other officer assigned to the security post at the Hospital were provided a Facility vehicle for their travel to and from the Hospital.

At some point prior to departing for the Hospital, Grievant went to his personal vehicle and retrieved his personal cell phone. Grievant carried his personal cell phone with him to the Hospital.

At the Hospital, Grievant was assigned to a security post in the Hospital Room and was responsible for monitoring an inmate-patient receiving treatment at the Hospital.

Unit Manager was the Facility's administrative duty officer on June 16, 2024. As the administrative duty officer, one of Unit Manager's responsibilities was to conduct rounds at the Hospital to ensure that Facility security personnel at the Hospital were on post and complying with the requirements of their posts. Unit Manager testified that when she entered the Hospital Room, she observed Grievant "on his cell phone" by which she meant that she observed him looking at a personal cell phone which he was holding in his hand.⁵

When Unit Manager entered the Room, Grievant put his cell phone in his pocket.⁶

Unit Manager did not say anything to Grievant about her observation of him "on his cell phone." Unit Manager notified her supervisor, Chief of Housing and Programs, as well as the Facility Watch Commander that she had observed Grievant "on his cell phone" while on a security post in the Hospital Room.⁷

CONCLUSIONS OF POLICY

Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. A hearing officer is not a "super-personnel officer." Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.

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

On June 16, 2024, Grievant was on duty on a security post at the Hospital that required him to maintain constant sight supervision of an inmate-patient in order to ensure the safety and security of the inmate and the public.⁸

The Unit Manager and Warden provided consistent and credible testimony that following an inmate's escape from a hospital in August of 2023, the Agency and the Facility had taken measures to ensure that Facility personnel on security posts at a hospital remained vigilant in their duties. According to the testimony at the hearing, this

⁵ Hearing Recording at 51:13-52:50, 55:53-56:07.

⁶ Hearing Recording at 51:13-52:50, 55:53-56:07, 1:07:20-1:07:44.

⁷ Hearing Recording at 51:13-52:50, 55:53-56:07, and see Hearing Recording at 9:33-11:19.

⁸ See Agency Ex. 9 and 12.

included generally instructing staff that they were not allowed to have their personal cell phones with them while they were on duty at a hospital and that they were to limit their use of Facility-issued cell phones to specifically authorized uses.⁹

Grievant admitted that he knew that he was not supposed to have a personal cell phone on his person while he was on post at the Hospital.¹⁰

Grievant asserted that he carried his personal cell phone with him to the Hospital because the Facility-issued cell phone “did not work” well and often would not have a signal at the Hospital. Grievant considered the unreliability of the Facility-issued cell phone to be a risk to safety.¹¹ Grievant testified that the issues with the Facility-issued cell phone had been reported to the Facility, but to his knowledge those issues had not been resolved.¹² It was not clear to this Hearing Officer whether the problems Grievant described were with a particular Facility-issued cell phone or with all of the Facility-issued cell phones that were issued to personnel when they were on security posts at the hospitals. Grievant did not request, and had not received, authorization to use his personal cell phone in lieu of a Facility-issued cell phone for communicating with the Facility while he was on a security post at the Hospital.¹³ Although Grievant described not having a working Facility-issued cell phone as raising a security concern, he did not testify regarding any specific issues he experienced with the Facility-issued cell phone that would have required him to use his personal cell phone or to have his personal cell phone out of his pocket when Unit Manager entered the Hospital Room.

Grievant admitted that he had his personal cell phone with him while he was on duty in the Hospital Room and that he had his cell phone out of his pocket while he was on duty in the Hospital Room.¹⁴ Grievant denied that he was “on” or using his cell phone when Unit Manager entered the Hospital Room. According to Grievant, his personal cell phone was not in his hand as Unit Manager described but was face-down and resting on his leg. Grievant testified that when Unit Manager entered the room, Grievant was looking down at the floor and was not looking at his cell phone.¹⁵ Grievant agreed with the testimony of Unit Manager that when Unit Manager entered the Hospital Room, Grievant put his cell phone in his pocket.

This Hearing Officer found the testimony of Unit Manager to be credible. Unit Manager testified that she observed Grievant on his cell phone and when asked to clarify what she meant by that, she testified that Grievant was looking at his cell phone which she described as being in his hand. Grievant and Unit Manager both testified that Grievant put the cell phone in his pocket when Unit Manager entered the room. Grievant had no work-related reason to use his personal cell phone when Unit Manager entered the room

⁹ Hearing Recording at 20:41-22:29, 34:42-37:25, 52:55-53:40, and see Hearing Recording at 11:39-12:14, 42:50-45:52 and Agency Ex. 12 at 5.

¹⁰ Hearing Recording at 1:08:22-1:08:30.

¹¹ Hearing Recording at 59:40-1:00:19.

¹² Hearing Recording at 1:07:44-1:08:10.

¹³ Hearing Recording at 1:08:10-1:08:22.

¹⁴ Hearing Recording at 58:14-59:22.

¹⁵ Hearing Recording at 58:14-59:16.

and Grievant did not offer any other reason for his personal cell phone to be out of his pocket at that time.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when he carried his personal cell phone with him to a security post at the Hospital and then used his personal cell phone while on that security post at the Hospital.

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."¹⁶

The Agency charged Grievant with a Group III offense. The Agency's standards of conduct provide that this level of offense is appropriate for offenses that, include but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws. Negligence on the job that results (or could have resulted) in the death, or serious injury of persons ... or the escaping/absconding of inmates is a Group III offense.

The Lead Warden, Warden, and Chief of Housing and Programs all testified that security personnel are not allowed to have cell phones while they are on post because using a cell phone can distract officers from their duties. When security personnel are distracted and are not aware of their surroundings while on post, it presents the opportunity for an inmate to escape and puts the public at risk.¹⁷

The Lead Warden testified that he considered Grievant's misconduct a significant neglect of duty that potentially put the public in grave danger. This is because the public is most vulnerable when an inmate is at a hospital because the only security measures in place at the hospital are the officers assigned to observe the inmate-patient. Unlike a correctional facility, a hospital does not have fences, towers, and roving patrols, and other measures, to prevent escape and protect the public.¹⁸ According to the Lead Warden that is why security personnel on duty at the hospitals are not allowed to have books, magazines, personal cell phones, or anything else that may distract them from their duties. When security personnel engage in activities that may distract them from their duty of monitoring the inmate-patient, like using a cell phone, they put the inmate, themselves, Hospital visitors and staff, and the public at risk of serious harm.¹⁹

¹⁶ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁷ Hearing Recording at 11:08-12:14, 20:41-22:29, 42:50-45:52, 46:56-48:44.

¹⁸ Hearing Recording at 42:50-45:52.

¹⁹ Hearing Recording at 42:50-45:52.

The Lead Warden also testified regarding the incident in August of 2023 when an inmate escaped from Agency custody while at a hospital. The Lead Warden testified that the incident eroded the trust that hospitals and the public have in the Agency. As a result, the Agency has taken steps to try to build back that trust by implementing additional security measures at the hospitals to prevent another escape. When hospital staff observe Agency security personnel looking at or using their cell phones rather than paying attention to the inmate-patient they are supposed to be observing, it undermines the Agency's efforts to build back that trust.²⁰

Based on the preponderance of the evidence, the nature of Grievant's misconduct was serious because when Grievant was using his cell phone, he was not performing his duty to observe the inmate-patient, but was instead putting himself in a position to be distracted by his cell phone which put at potential risk the safety and security of the inmate-patient, Grievant, Hospital staff and visitors, and the public.

Grievant argued that the Agency failed to engage in progressive discipline. Although agencies are encouraged to engage in progressive disciplinary action, agencies are not required to do so. The Agency elected to issue Grievant a Group III Written Notice and has presented sufficient evidence to support its decision.

The Grievance Form A that Grievant submitted to initiate this grievance, included assertions by Grievant suggesting that Grievant also believed that the Agency's disciplinary action was retaliatory. Grievant did not argue that the Agency's actions were retaliatory during the hearing and no evidence was presented at the hearing regarding retaliation.²¹

The Agency has met its burden of proving that the discipline it issued to Grievant was consistent with law and policy.

Due Process

Grievant argued that the Agency did not afford him with sufficient due process prior to issuing discipline in this matter. Grievant argued that the Agency did not provide him with sufficient opportunity to respond to the allegations against him because, according to Grievant, the Agency did not relieve him of his work duties in a manner that would have allowed him to attend a meeting to respond to the allegations. The Warden asserted that Grievant had been provided with relief from his duties to allow him to attend the meeting, and that if there had been some misunderstanding in the schedule, Grievant never made the Agency aware of the issue in a manner that would have allowed them to provide another opportunity for the meeting. Based on the testimony during the hearing, it was unclear to this Hearing Officer what may have been communicated regarding the meeting in question, however, to the extent there may have been issues with the Agency's process, this hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments he wished during the hearing.

²⁰ Hearing Recording at 46:56-48:44.

²¹ Agency Ex. 4.

Mitigation

Grievant asserted that preferential treatment was rampant at the Facility and suggested that more well-liked employees did not receive the same discipline as less favored employees. Grievant testified that other employees had been found in possession of their personal cell phones while on post at a hospital, but those employees had not been disciplined in the same manner as Grievant because, according to Grievant, those other employees were more well-liked than Grievant.²² Grievant, however, did not provide any details of the specific situations or provide evidence demonstrating that employees similarly situated to Grievant received less or no discipline for the same or a similar infraction.²³

Grievant appeared to argue that the Agency inappropriately considered a Group I written notice of disciplinary action issued on August 14, 2023, as an aggravating factor for not mitigating the discipline in this case. The Agency included among its exhibits a Group I written notice of disciplinary action that the Agency asserted had been issued to the Grievant on August 14, 2023, for unsatisfactory performance related to conducting the count.²⁴ Grievant, however, argued that he never received the Group I written notice. The Group I written notice was not signed by Grievant. The written notice includes a box that is checked indicating that Grievant refused to sign the written notice and also indicating that it was initialed by two witnesses on August 14, 2023. There was limited evidence presented regarding the issuance of the Group I written notice or Grievant's receipt of the written notice. Even in the absence of prior discipline, however, the issuance of a Group III Written Notice in this case does not exceed the limits of reasonableness.

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...."²⁵ 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.

²² Hearing Recording at 1:00:19-1:02:00, 1:10:21-1:12:19, 1:16:47-1:18:22.

²³ Hearing Recording at 1:00:19-1:02:00, 1:10:21-1:12:19, 1:16:47-1:18:22.

²⁴ Agency Ex. at 11. The Group I written notice was not signed by Grievant. The written notice includes a box that is checked indicating that Grievant refused to sign and indicating that it was initialed by two witnesses on August 14, 2023.

²⁵ Va. Code § 2.2-3005.

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.

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.²⁶

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²⁶ 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.