

Issue: Group III Written Notice with Termination (violation of IT security);
Hearing Date: 11/28/16; Decision Issued: 12/16/16; Agency: DOC; AHO:
Sondra K. Alan, Esq.; Case No. 10903; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10903
HEARING DATE: November 28, 2016
DECISION ISSUED: December 16, 2016

PROCEDURAL HISTORY

On September 16, 2016 Grievant was issued a Group III Written Notice.¹ The Notice was based on an observation made by an Investigator reviewing the cell phone records of another employee. The evidence was submitted to Agency on April 6, 2016 relating to an incident of cell phone use by Grievant on February 7, 2016. Sometime after February Grievant had surgery and was off work 5 ½ months. This accounts for the time lapse from the incident in February and the Written Notice in September.

Grievant made a timely request for review. On November 7, 2016 a Hearing Officer was appointed. A Pre-Hearing Conference was scheduled for November 10, 2016 but Agency's advocate was unavailable and the Pre-Hearing Conference was rescheduled for November 14, 2016. At that time no motions were presented. The hearing was scheduled by agreement for November 28, 2016 at the facility.

APPEARANCES

Agency Advocate
Agency Representative as witness
2 additional Agency witnesses
Grievant Advocate
Grievant as witness
1 Grievant witness

ISSUES

1. Whether Greivant's actions warranted discipline based on disregard of Operational Procedures 310.2, 135.2, 411.1, 022.2 and Post Order date February 5, 2016?
2. Whether mitigation was properly considered in issuing a Group III discipline?

¹ Agency Exhibit 3

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.

FINDING OF FACTS

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

Grievant had been in service with Agency for 9 ½ years. He had good or exemplary records during that time with no prior disciplines.

On February 7, 2016 Grievant was working the day shift, 7:30 am to 4:00 pm, as a Correctional Officer. Grievant stated in testimony that he had hoped he could leave early that day to watch a sports event with friends. Grievant admitted he had made no prior formal request for a half day off. Rather than being able to take a half day break on February 7, 2016, Grievant was called upon to ride in an ambulance with an inmate. The inmate was being transported from a local hospital to the [hospital], a trip of several hundred miles.

Grievant took his personal cell phone with him and had it on his person during the ambulance transport. Grievant stated the inmate was conscious part of the duration of the ride but also fell asleep during the trip. Grievant wished to let his friend, who was also employed by the Agency, know that he would likely not be back for the sports event. In order to make this communication Grievant used his private cell phone. Grievant's text was "Headin to [hospital] thanks to smitty" ("Smitty" was Grievant's superior). He also attached to this message a photo he took of the sleeping, critically ill inmate.²

Grievant's friend, to whom he texted the message, was under investigation by the Agency. This person had given the Agency Investigator permission to go through his texts. On or about April 6, 2016 the Investigator found the above described text and photo. The Investigator suspected this may be misconduct and reported it to the Agency. On April 7th Grievant was called in for an interview at which time he admitted to taking and sending the inmate's photograph along with a text to his friend. When the Investigator completed his investigation³ he sent a written report to the Chief of Corrections Operations in Richmond.

² Agency Exhibit 1 Grievant Written Statement and Agency Exhibit 2

³ Agency Exhibit 1

Grievant did not receive a Group III Written Notice with termination until September 16, 2016. The delay occurred because Grievant had surgery and was on an extended leave until September.

Grievant requested the Hearing Officer consider mitigation. This Hearing Officer did note Grievant's long and satisfactory record of 9 ½ years of service. Oral evidence was also presented by Grievant that he felt he was being terminated as retaliation for being friends with the person to whom he sent the text.

APPLICABLE LAW AND POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2014 and the Grievance Procedure Manual (GPM) effective July 1, 2014.

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.

Grievant was charged with several Operational Procedure infractions.

OP 310.2 INFORMATION TECHNOLOGY SECURITY⁴ did not specifically enumerate types of technology until July 11, 2016 which was after the date of Grievant's actions. Nor was “Information” described until after Grievant's actions. While “texting by cell phone” was not listed as an example of technology, section VI, B, 11(u)⁵ mentions “texting” in the context of a form of electronic communication. Section VI, B, 10h(iv)⁶ gives “...examples of what should not be published, posted or displayed... Photos, videos, or audio recordings taken in the work environment without written permission of the Director. Section VI, B, 11(s)⁷ prohibits use of electronic communications to post photos, videos, or audio recordings taken in the work environment without permission. Section VI, B, 10h(v)⁸ prohibits references “...[that] interfere with the DOC's mission, reputation, or the effectiveness or efficiency of the DOC's activities”.

⁴ Agency Exhibit 6

⁵ Agency Exhibit 6 Page 11

⁶ Agency Exhibit 6 Page 10

⁷ Agency Exhibit 6 Page 11

⁸ Agency Exhibit 6 Page 10

OP 411.1 OFFENDER TRANSPORTATION⁹ provides by Section XIII, G, 7¹⁰ that a personal cell phone is specifically prohibited when in transit with an inmate. Section XIII, G, 3¹¹ requires any communication to be professional.

OP 135.2 (formerly 130.1) RULES OF CONDUCT GOVERNING EMPLOYEES RELATIONSHIPS WITH OFFENDERS¹² provides by Section VI, B that employees must exercise professional conduct when dealing with offenders to insure the integrity of the correctional process. Section IV, B, 4¹³ considers medical information or private affairs of offenders to be used for official use only. Section VI, B, 7¹⁴ requires employees to be respectful in their interaction with offenders.

OP 135.1 STANDARDS OF CONDUCT¹⁵ describes the disciplinary process. Section V, A(d)¹⁶ describes the Agency's ability to discipline activities that exceed Agency norms. Section IV, E¹⁷ states that examples of misbehavior are not to be considered all-inclusive and discipline may be based on the severity of the offense. Section IV, D(z)¹⁸ considers it a Group III action when behavior is in opposition to OP 135.2 (formerly 130.1).

OP 401.1 Security POST ORDER¹⁹, dated February 5, 2016 under the heading of "Personal Electronic Devices" specifically prohibits private cell phones on any security post.

OP 022.2 OFFENDER ACCESS TO THE MEDIA²⁰ while listed by Agency as a possible concern for discipline, refers to offenders' access to media and does not state prohibitions directed to employees. It is, however, illustrative of the Agency's concern for publication of inmates' images.

OPINION

It is clear from the sections above cited that Grievant was prohibited from having his cell phone with him on the inmate transport. In order for many of the above Operating Procedures quoted to be effective as to Grievant's further actions, definition of

⁹ Agency Exhibit 4

¹⁰ Agency Exhibit 4 Page 13

¹¹ Agency Exhibit 4 Page 13

¹² Agency Exhibit 5

¹³ Agency Exhibit 5 Page 2

¹⁴ Agency Exhibit 5 Page 2

¹⁵ Agency Exhibit 9

¹⁶ Agency Exhibit 9 Page 7

¹⁷ Agency Exhibit 9 Page 3

¹⁸ Agency Exhibit 9 Page 3

¹⁹ Agency Exhibit 8

²⁰ Agency Exhibit 7

his use of a cell phone to text would be required. This Hearing Officer does consider a cell phone to be an “electronic communication” which makes Grievant’s actions subject to the many prohibitions above.

Further, The Agency is not bound only by examples defined. Lists are not intended to be inclusive. The Agency has been given the authority to discipline actions that exceed the norm.

It is almost inconceivable that Grievant could fit so many prohibitions into one 30 second action. While the Hearing Officer is confident Grievant would like to take back those 30 seconds he should have known his behavior was forbidden for all of the many above reasons. He was clearly prohibited from even having a cell phone let alone using it in such an unprofessional manner as well as infringing on the dignity of an inmate and compromising the integrity of the Agency.

MITIGATION

Grievant requests the Hearing Officer consider such mitigating factors as his 9 ½ years of good services and a belief he was singled out for punishment because of his friendship with a former employee. There was no factual evidence presented that supported Grievant’s association theory. Grievant did present evidence of his exceptional service record. However by Rules of Conduction Grievance Hearings VI, B, 2 a Hearing Officer has no authority to second guess the Agency’s consideration unless it exceeds the limits of reasonableness. This Hearing Officer finds nothing unreasonable about disciplining such thoughtless behavior where the facts admitted fall into so many prohibited policies.

DECISION

For the reason stated above the Group III discipline with termination is UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.²¹

Agencies must request and receive prior approval from EDR before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

²¹ 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.