COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11946

Hearing Officer Appointment: March 21, 2023
Hearing Date: June 12, 2023
Decision Issued: June 19, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance on January 19, 2023, of a Group III Written Notice with termination (violations of Written Notice Offense Codes 11, 13, 37 and 99) by a facility (the "Facility") of the Virginia Department of Corrections (the "DOC" or the "Department" or the "Agency").

Pursuant to the Written Notice, the Grievant's employment was terminated as a Group III Written Notice offense violation effective January 19, 2023.

The Grievant has raised the issues specified in his Grievance Form A and is seeking reversal of the termination and reinstatement.

FIRST PREHEARING CONFERENCE CALL & DECISION:

The Grievant, the Agency's advocate and the hearing officer participated in a first prehearing conference call at 3:00 pm on March 24, 2023. The Agency's advocate said she was not available for a hearing until June 12. 2023. The Grievant objected to the long delay in holding the hearing.

Section III (B) of the *Rules for Conducting Grievance Hearings* provides in part:

Generally, the hearing should occur within 35 calendar days after the hearing officer is appointed. However, the hearing officer in their discretion may grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request. If a party objects to the request, the hearing officer may only grant extensions of time or just cause – generally circumstances beyond a party's control. If any extensions are granted, the reasons for each extension should be stated in the written decision.

For circumstances within a party's control, the hearing officer should accommodate the party's scheduling wishes as flexibly as possible, but preferably within the 35-calendar day period. For example, because mediation and/or settlement are generally within the control of the parties, failure to resolve the dispute through either of those processes may not constitute just cause for an extension of the hearing date depending on the facts of the case. Thus, for instance, if settlement is being considered, the hearing date should be docketed as late within the 35-day period as possible to allow time for settlement negotiations. However, the hearing officer should advise the parties that absent an intervening event over which the parties have no control (e.g., the agency and the employee have reached a proposed settlement, but are awaiting any necessary Cabinet approval; accident; illness; death in family), the hearing will be conducted on the docketed date and that the parties should decide whether to settle before that date.

If one or more of the parties do not respond in a timely manner to the hearing officer's requests to schedule a pre-hearing conference and/or the hearing, the hearing officer has the authority to set a reasonable hearing date. The parties must be notified of the scheduled date and any other associated deadlines provided in a scheduling order, if applicable…

The hearing officer shall issue a written decision as promptly as possible after the conclusion of the hearing or the expiration of any period allowed for the receipt of additional evidence or briefing (i.e., the closing of the evidence).

The Agency's advocate stated that the Agency is presently inundated with an overload of grievance hearings to be handled by the Agency's two part-time hearing officers and one full-time hearing officer. The Agency is addressing the issue with EDR in an effort to rectify the situation. The hearing officer has spoken to EDR and confirmed the problem. In part, the problem has been exacerbated by internal changes at EDR.

Accordingly, the hearing officer decided that the Agency's advocate must communicate with the Agency to check whether the other two advocates have any availability for a hearing in

April or May. The Agency's advocate was required and did report back to the hearing officer and the Grievant by 5:00 pm on March 31, 2023.

Because the Agency could not provide another advocate for April or May, the hearing officer found just cause for an extension and the hearing was scheduled for a one-day hearing at 10:00 am on Monday, June 12, 2023.

Section 6.1 of the Grievance Procedure Manual (the "Manual") provides in part:

"§ 6.1 General

From the time that a grievance is initiated until the hearing decision becomes final, a party or a hearing officer may fail to comply with a provision of the grievance procedure. A party may challenge such noncompliance to EDR, which is authorized to issue final, nonappealable rulings on compliance challenges.

A challenge to EDR will normally stop the grievance process temporarily. The grievance process will resume when EDR issues its ruling on the challenge."

Section 6.4 of the Manual provides:

"§ 6.4 Hearing Officer Noncompliance

In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance statutes, this Manual, and the Rules for Conducting Grievance Hearings promulgated by EDR. If the hearing decision is out of compliance, a party may challenge the decision to EDR. [Footnote omitted] If the noncompliance arises **in pre-hearing matters** or in the conduct of the hearing, the hearing officer's noncompliance may be remedied as follows:

1. An objection should be made to the hearing officer at the time the noncompliance occurs;
2. A ruling from EDR must be requested in writing and **received by EDR** within 15 calendar days of the date of the hearing decision; and
3. If EDR finds that the hearing officer has failed to comply with the grievance procedure, the sole remedy is an order by EDR that the hearing officer correct the noncompliance."

(Emphasis supplied)

Section IV (E) of the Rules for Conducting Grievance Hearings (the "Rules") provides, in part:

"All parties to the grievance, including the employee who initiates the grievance, may testify at hearing. The hearing officer is responsible for limiting the number of witnesses called by either party whenever the testimony would be merely cumulative. The purpose of this authority is to ensure the speedy and efficient conduct of the hearing. However, when limiting the number of witnesses, the hearing officer should be careful not to exclude testimony that may be of greater weight or probative value than that already presented.

If any witness testifies by phone and/or other electronic communication means, the hearing officer should confirm that the witness is at a location that is free of interruptions and distractions, and that there are no third parties present who might overhear or influence their testimony. The hearing officer should also make the witness aware that they are not permitted to record any part of their participation in the hearing without approval from the hearing officer…

The matter before the hearing officer may involve an individual who is not under the control of either party, such as a discharged patient or a customer of the agency. If the party has made a good faith effort to produce the witness, or if there are sound reasons for not requesting the presence of the witness, the hearing officer may admit any recorded statement or official report previously made by the unavailable witness."

Section IV (F) of the Rules provides:

"The Grievance Procedure Manual does not require the use of affidavits or sworn statements at hearing. However, the formality of a recorded statement may affect the evidentiary weight that the hearing officer accords to the statement. If the hearing officer prefers a certain formality to recorded statements used in lieu of testimony, they should so inform the parties during the pre- hearing conference and should explain to the parties how formality could affect the weight that will be given to such statements.

Personally identifiable information regarding individuals not party to the proceeding is often deleted from investigative notes or agency records. If a party objects to such deletions, or if the hearing officer deems that the deleted information is essential for a fair process to determine the merits of the grievance, the hearing officer should work with the parties to obtain the information in a format that does not violate the privacy rights of non-parties. If this is not feasible or fair, the hearing officer should seek to preserve confidentiality when non-party records, especially medical records, are exchanged or admitted into evidence, for example, by issuing a protective order.

A party's failure to comply with the grievance procedure or an order of EDR or the hearing officer regarding documents may result in the hearing officer ordering sanctions against that party. See supra § III(E); infra § V(B)."

EDR stresses the desirability of case decisions on the merits. See, e.g., Rules Section IV (F) ("If a party objects to such deletions, or if the hearing officer deems that the deleted information is essential for a fair process **to determine the merits of the grievance**, the hearing officer should work with the parties to obtain the information) and Rules Section V(C) ("The decision must resolve the grievance **on the merits** of the substantive issue(s) qualified and not on procedural issues.")

There was no compliance challenge by the Grievant. Accordingly, the hearing was scheduled and held at the Facility on June 12, 2023. Following the first prehearing conference call, the hearing officer entered his Scheduling Order of April 18, 2023, incorporated herein by this this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

The parties all agreed that email is acceptable as a sole means of written communication.

At the hearing, the hearing officer received various documentary exhibits into evidence, namely all exhibits in the Agency's black exhibit binder.[1]

The hearing officer recorded the hearing.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

[1] References to the agency's exhibits will be designated AE followed by the exhibit page number. The Grievant did not offer any exhibits.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in a secure Facility as a Corrections Sergeant. Amongst other duties, the Grievant worked as a supervisor, supervising other Correctional Officers ("C/Os"), inmates and other Facility personnel such as school officers, in the yard or "Boulevard".
2. On Wednesday, December 7, 2022, at approximately 3:15 P.M., upon exiting the DCE hallway on the Boulevard, the Grievant gave an inmate ("Inmate A") a direct order to return to his assigned housing.
3. Inmate A refused to comply with the Grievant's order.
4. The Grievant proceeded to chest bump Inmate A. This action was intentional on the part of the Grievant.
5. The Grievant's chest bump provoked Inmate A, who proceeded to assault the Grievant.
6. Another inmate, Inmate B, also joined in on the assault against the Grievant.

7. Several Facility staff ran to rescue the Grievant from the assault and Oleoresin Capsicum (OC) spray and physical force was necessary to regain control of the situation.

8. One of the staff members suffered serious exacerbation of a pre-existing injury requiring subsequent surgery as a result.

9. In the Grievant's Internal Incident Report, the Grievant misleadingly and intentionally ommitted to state that it was in fact the Grievant who had initiated the aggressive physical contact by the chest bump.

10. When the initial aggression by the Grievant was revealed by camera footage and discovered and reviewed by the Institutional Investigator, the Warden, HR personnel and other senior staff, the subject Written Notice was issued for the enumerated offenses.

11. The Grievant performed a vital function for the Facility as an experienced supervisor with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties.

12. The Facility is a high security Level 5 institution and the Grievant's role in maintaining the safety of security of inmates, staff and the public is paramount.

13. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards his supervisory functions.

14. Despite this critical need, Grievant committed serious violations of the Agency's security policies and protocols when Grievant initiated the physical contact with Inmate A, materially and adversely affecting Agency operations.

15. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

16. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

17. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

18. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant did not follow the applicable state and agency policies.

Specifically, the Grievant committed the following disciplinary infractions which were reasonably classified by management, as a Group III offense. Each offense is expressly listed in the SOC as a Group III offense and a first Group III normally results in discharge. AE 16.

Violation of Operating Procedure 135.1, Section XIV (B) (2), (16) and (17) for:

2. Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports statements, insurance claims, time records, leave records, or other official state documents…
16. Refusal to obey instructions that could result in a weakening of security
17. Physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of inmates/probationers/parolees

Violation of OP 135.2, for: Section (I), (A) and (F), for:

A. All persons who are paid by the DOC on an hourly, salaried, or contractual basis, or who are paid by another state agency for working in a position within a DOC unit, and volunteers who provide services to inmates and probationers/parolees are expected to provide a positive role model for inmates and probationers/parolees, and a safe, secure, healing environment for employees, inmates and probationers/parolees by acting in accordance with this operating procedure.

F. Interactions

1. While performing their job duties, employees must model a professional, healing, and supportive relationship when interacting with persons under DOC supervision, which involves respecting the rights of inmates and probationers/parolees as individuals, acting in a trustworthy and responsible manner, helping and supporting inmates, probationers/parolees, and other staff members to the extent possible and ensuring that the employee's conduct does not harm others.
2. Employees must work towards the goal of improved public safety and the successful transformation and reintegration of those entrusted to the Department's care, while maintaining a suitably professional detachment to ensure that personal and professional identities are not blurred.
3. Employees are encouraged to interact with inmates and probationers/parolees on an individual and professional level while maintaining and reinforcing appropriate professional boundaries to promote and accomplish DOC goals.

Violation of OP 135.3, Section II, (C), (D), and (E) for:

C. Employees of the DOC must conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth of Virginia.

D. Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they

may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others.

E. The DOC expects all employees, contract personnel, consultants, volunteers, interns and any other person providing services to inmates/probationers/parolees offenders to conform to a high professional, ethical, and moral standard of conduct.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's attorney that the various offenses are appropriately classified at the Group III level, as designated, with the Agency appropriately exercising the discipline and ending the Grievant's employment due to a Group III Written Notices.

Additionally, while contested by the Grievant and not necessary for the termination decision, on the evidence presented, the hearing officer finds that the prior Group II Written Notice issued to the Grievant (AE 23) is still active.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations each rose to the level of a Group III.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the assault on the Grievant; and
5. the shortage of staff at the Facility.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it

relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policies are important to the proper functioning, appearance and reputation of the Agency, and the Grievant held an important position where management of necessity relied on him to attend work and to perform his duties in strict conformity with Agency policies, as he had undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

While the Grievant argues that the Agency did not make available to him the footage from a second camera, the Grievant never requested an order for documents from the hearing officer which could have ordered this.

Similarly, the Grievant's arguments about Agency failures in the due process procedures are not warranted. The essence of pre-disciplinary due process is "notice" and an "opportunity to respond"; the process need not be elaborate and need only serve only as an "initial check against mistaken decisions." e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). Such pre-disciplinary procedures stand in stark contrast to those afforded by the full administrative post-disciplinary hearing offered in the grievance process, before which the grievant receives notice of all of the agency's evidence with the ability to present his own evidence and witnesses and cross-examine the witnesses of the agency.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to

> determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 and 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.[1]

ENTER 6/19/ 2023

John Robinson

John V. Robinson, Hearing Officer

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

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).