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

DIVISION OF HEARINGS

In the matter of: Case No. 11913

Hearing Officer Appointment: January 24, 2023
Hearing Date: August 17, 2023
Decision Issued: August 21, 2023

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance by the Virginia Department of Corrections (the "DOC" or the "Department" or the "Agency") on November 2, 2022, of a Group III Written Notice with termination. The Grievant's employment was terminated for falling asleep as a Correctional Officer ("C/O") on multiple occasions while on post at one of DOC's Correctional Centers (the "Facility"), during his shift on the night of August 29, 2022 into the morning of August 30, 2022 (violations of Written Notice Offense Codes 11, 13 and 71).

Pursuant to the Written Notice, the Grievant's employment was terminated as a Group III Written Notice offense violation effective October 31, 2022.

The Grievant has raised the issues specified in his Grievance Form A and is seeking reversal of the termination and a more suitable sanction based on mitigating circumstances.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Grievant's advocate, the Agency's advocate and the hearing officer participated in the first prehearing conference call at 1:00 pm on February 2, 2023. The hearing was initially scheduled for March 28, 2023, as reflected in the Scheduling Order of February 14, 2023, incorporated herein by this reference.

INITIAL DOCUMENT PRODUCTION ISSUES:

Pursuant to the Commonwealth of Virginia's *Grievance Procedure,* § 2.2-3000 *et seq.* of the Code of Virginia, at the request of the Grievant, on February 14, 2023, the hearing officer ordered the Facility to produce to the Grievant certain documents.

Documents were ordered to be produced in accordance with § 8.2 of the *Grievance Procedure Manual.*

By email dated February 15, 2023, the Facility, by its advocate, objected to certain of the above document production orders. Accordingly, the parties and the hearing officer held a second prehearing conference call on February 23, 2023, principally to discuss certain EDR Compliance Rulings and the concomitant hearing officer decisions.

On March 5, 2023, the hearing officer issued his decision concerning the contested document order provisions (the "Hearing Officer's First Document Decision") and attached a revised Order for Production of Documents conforming to such decisions, both documents incorporated herein by this reference.

GRIEVANT'S MOTION TO DISQUALIFY AGENCY'S ADVOCATE:

By email dated March 7, 2023, the Grievant, by his advocate, argued that the Agency's advocate is not authorized by law to represent the DOC. Amongst other things, the Grievant points to Va. Code § 54.1-3900, which deals with the authorized and unauthorized practice of

law and seeks to remove the Agency advocate from this proceeding. The parties both briefed the issue.

By Decision of March 21, 2023, incorporated herein by this reference, the hearing officer decided that the Agency's advocate could act in such capacity.

Accordingly, the hearing officer decided that all references in this administrative grievance proceeding (including in the Protective Order) shall be read to refer to the Agency's advocate proceeding in the capacity of, and as, the DOC's advocate or technically, in the wording of the Manual, its "lay advocate."

FURTHER DOCUMENT PRODUCTION ISSUES:

By email of March 21, 2023, the Grievant complained that the Agency had not complied with the hearing officer's Order for Production of Documents to the Agency dated March 5, 2023, and moved that "the written notice be rescinded in its entirety and [the Grievant] be awarded his job back with full back pay and otherwise be made whole." The hearing officer and the parties held a third prehearing conference call on March 23, 2023, to discuss the issues raised. The call was recorded.

During the conference call, it became clear that an Agency representative had sent emails, via drop box, to incorrect email addresses for the Grievant and the Grievant's advocate. Accordingly, the Grievant and the Grievant's advocate had no access to the documents produced by the Agency on February 21, 2023. The Agency's advocate confirmed this by email of March 24, 2023.

The Grievant, by his advocate, sought to introduce evidence of document production failures by the Agency in other cases not before this hearing officer as proof of the Agency's alleged bad faith. The hearing officer denied the motion as he has no subject matter jurisdiction

over such alleged systemic failures. While acknowledging the Grievant's frustration regarding the production errors by the Agency, the hearing officer also denied the Grievant's motion for complete relief.

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.")

Concerning the categories of documents ordered to be produced, the Agency asserts that the February 21 production contains all the sought written reports; accessible video has been provided of the material parts in the February 21 production (and the Agency is working on the REM issue – *See* Agency advocate's March 24 email); all sought emails have been produced; there are no documents concerning informal discipline. The hearing officer previously ordered that spread sheet format was acceptable concerning prior discipline for the offense of falling asleep on duty, etc., and the hearing officer holds to that decision (the "Hearing Officer's Second Document Decision").

As described above, on March 5, 2023, the hearing officer issued his first decision concerning the contested document order provisions and attached a revised Order for Production of Documents conforming to such decisions.

Documents were ordered to be produced in accordance with § 8.2 of the *Grievance Procedure Manual*. Accordingly, the Agency documents should have been provided to the Grievant on or before March 10, 2023: "Upon receipt of such a request, a party shall have a duty

to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided **within five workdays of receipt of the request**." *Manual*, §8.2 (Emphasis supplied).

While not excusing the Agency's failure, the Grievant could have called the opposing Agency advocate earlier to address the matter, as asserted by the Agency's advocate. Further, the *Rules* provide concerning possible sanctions by the hearing officer:

> Sanctions: The hearing officer has the authority to take necessary and appropriate action, including the authority to order sanctions against a party for the misconduct of the party or the party's advocate (for example, failure to comply with an order, discussing testimony with witnesses during the hearing, undue disruption of the hearing) during the hearing process to the extent such misconduct materially prejudices the opposing party's case at hearing or otherwise undermines or disrupts the integrity of the pre-hearing or hearing process.[4] Permissible sanctions might include, for example,
>
> 1) Ordering the exclusion of related evidence or arguments;
> 2) Drawing an adverse inference (*see* § V(B));
> 3) Disqualifying an advocate from continued representation of a party;
> 4) Ejection from the hearing.
>
> The hearing officer does not have the authority to order monetary penalties as sanctions**. In considering any order of sanctions, the hearing officer should take into account, as appropriate,**
> **1) whether a party is pro se or represented by an attorney or other experienced representative, and**
> **2) the seriousness of the conduct, such as, for instance, whether the conduct was in bad faith rather than a simple mistake. The severity of any order of sanctions must be commensurate with the conduct necessitating the sanction. The ordered sanction and supporting reasons must be included in the hearing decision.**

Rules, ¶ III(E) (Emphasis supplied).

The hearing officer decided that the delay in the hearing was about 2 weeks and would also allow adequate time for the Grievant to prepare his exhibits, which the hearing officer ordered sent to the hearing officer and Agency by 5 pm on April 5, 2023. The Agency's motion for a continuance was granted by the hearing officer's Continuance Decision & Status Report of March 27, 2023, incorporated herein by this reference. The Grievant's motion for complete relief was denied.

DECISION GRANTING AGENCY'S MOTION FOR CONTINUANCE:

By email of Friday, March 24, 2023, the Agency moved for a continuance of the scheduled hearing, while working to rectify certain document production issues (and with the Grievant still needing to exchange exhibits and witness list).

The Agency's motion for a continuance was granted by the hearing officer's Continuance Decision & Status Report of March 27, 2023, previously incorporated herein by reference.

The hearing was rescheduled to April 13, 2023. *See*, Continuance Decision & Status Report of March 27, 2023.

GRIEVANT'S MOTION FOR COMPLETE RELIEF OF MARCH 26, 2023:

By email of Sunday, March 26, 2023, the Grievant by his advocate again moved for complete relief, asserting the Agency's document production and other violations in this case and in other cases not before this hearing officer: "We are once again asking that the discipline be rescinded and [Grievant] awarded full back pay and benefits in light of the DOC's habitual misconduct, especially that in the present case."

The hearing officer denied this motion in his decision of March 27, 2023, previously incorporated herein by reference.

GRIEVANT'S MOTION TO RECONSIDER WHETHER AGENCY'S ADVOCATE CAN REPRESENT AGENCY BEFORE THIS TRIBUNAL:

On March 27, 2023, Grievant by his advocate again challenged the Agency's choice of its advocate, who is a member of the Virginia State Bar, to represent it before this tribunal.

In his Reconsideration Decision & Amended Scheduling Order of March 29, 2023, incorporated herein by this reference, the hearing officer again decided that nothing prevents the Agency's advocate from his representation of the Agency. Accordingly, the Grievant's motion to reconsider and for "full relief" and any other relief was denied.

The Grievant has made other demands, arguments, claims, assertions, allegations, etc. (collectively, "Assertions") in his motion to reconsider (*e.g.,* "Grievant fully expects that HO Robinson will kowtow to the EDR Director and fail to fulfill his statutory duty to act as an impartial arbiter under VSGP.") To the extent that the Assertions concerned the hearing officer and required any response, the hearing officer denied and rejected any negative Assertions and connotations. Any motions for relief or other motions were denied.

The hearing officer reminded all parties of the *Principles of Professionalism* (Scheduling Order of February 14, 2023, at 5 and below and attached), incorporated again herein, which govern all participants in this proceeding.

GRIEVANT'S REQUEST FOR COMPLIANCE RULINGS:

On March 29, 2023, the Grievant, by his advocate, requested a compliance ruling from EDR (the "Grievant's Initial Request for Compliance Ruling") to overturn the hearing officer's above reconsideration decision. The Grievant also requested from EDR:

"a second compliance ruling limiting the evidence that the DOC may introduce at the hearing as that specifically listed on the *Administration of Employee Discipline: Due Process Notification* form. The form states "Below are the offenses you are being charged with, the Department's evidence in support of those charges, and the disciplinary actions that may result." The only evidence listed by the department is "supervisor report." The Correctional Officer Procedural Guarantee Act exists to prevent the DOC from gathering evidence post disciplinary action. The DOC is violating Va. Code § 9.1-508 *et seq* and [Grievant's] due process rights when it seeks to introduce new evidence after the issuance of disciplinary action."

By Compliance Ruling Number 2023-5541 dated April 17, 2023, incorporated herein by this reference, EDR ruled that EDR found no basis to disqualify the agency's advocate in this case, to limit his ability to represent the agency, or to disturb the hearing officer's ruling in this regard. *Ruling* at 5.

Concerning the second compliance ruling requested by Grievant regarding the limitation of the Agency's evidence, EDR essentially ruled that the request was premature. *Ruling* at 5-6.

SECOND CONTINUANCE:

While the parties waited for the ruling from EDR, the Grievant, by email of his advocate of April 5, 2023, requested a halt to all timelines until conclusion of the compliance ruling from EDR. The Agency, by email of its counsel of April 10, 2023, also moved for a further continuance of the hearing.

In his Continuance Decision of April 12, 2023, incorporated herein by this reference, the hearing officer found just cause to grant the continuance. The hearing officer had hoped to avoid a general continuance and by email of April 6, 2023, had asked the parties to provide potential new hearing dates. None were then provided. Accordingly, by force of circumstance, the hearing was continued generally.

GRIEVANT'S ADDITIONAL DOCUMENT CHALLENGES, REQUEST TO LIMIT EVIDENCE, ETC.

(1) First, by email of March 27, 2023, the Grievant requested the Supervisor Daily Activity Report ("SDAR") from the August 29-30, 2022, shift where the Grievant was allegedly caught sleeping. As stated above, under the Manual, a party has a duty to produce documents that are relevant to the matter grieved. ***See*** **Manual, § 8.2 Documentation**

Relating to a Grievance. However, the Agency had not produced that document because the Agency asserted that it is not relevant to this proceeding.

Pursuant to § III (E) of the *Rules,* hearing officers are instructed:

> "In considering a party's request for an order for the production of documents, hearing officers should bear in mind that under the grievance statutes, absent just cause, all documents, **as defined in the Rules of the Supreme Court of Virginia** [Footnote omitted], relating to actions grieved "shall be made available" upon request from a party to the grievance, by the opposing party. EDR's interpretation of the mandatory language "shall be made available" is that absent just cause (e.g., legal privilege, undue burden, compelling security reasons), all relevant grievance-related information *must* be produced under the grievance statutes."

Rule 4:9(a) of the Rules of the Supreme Court of Virginia, which deals with the definition of "documents", provides in part:

"Any party may serve on any other party a request (1) to produce and permit the party making the request or someone acting on his behalf to inspect, copy, test, or sample any designated documents… which constitute or contain matters within the scope of Rule 4:1(b), and which are in the possession, custody, or control of the party upon whom the request is served…"

Rule 4:1(b) of the Rules of the Supreme Court of Virginia, in turn, provides in part:

"It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought **appears reasonably calculated to lead to the discovery of admissible evidence."**

(Emphasis added)

In his Decisions & Second Amended Scheduling Order of May 2, 2023, incorporated herein by this reference, the hearing officer decided that the Agency must produce the SDAR. Even if it does not mention the alleged sleeping, that is relevant. At the very least, the request "appears reasonably calculated to lead to the discovery of admissible evidence."

(2) Second, by email of April 6, 2023, the Grievant, by his advocate, requested a copy of any discipline issued to a named person at a different facility. The hearing officer's First

Document Decision of March 5, 2023, and related Order for Documents, had already conveyed that only discipline concerning the subject Facility, namely [NAME INTENTIONALLY OMITTED PURSUANT TO EDR POLICY] Correctional Facility, can be obtained by Grievant for a three-year lookback period. This is in keeping with long standing EDR precedent. *See, e.g., EDR Compliance Rulings 2023-5500 and 2023-5504.* The Grievant offered no new authority for his request, which was denied.

(3) Third, the Grievant asserted that the Agency's evidence must be limited to items specifically listed on the due process notice issued in this case. The Grievant asserted that such notice states: "Below are the offenses you are being charged with, the Department's evidence in support of those charges, and the disciplinary actions that may result." The notice cites to a "supervisor report."

The Grievant proceeded to argue that the Agency's evidence at the grievance hearing must be limited to only the supervisor's report. The Grievant further argued that the Corrections Officer Procedural Guarantee Act (the "COPGA") "exists to prevent the [Agency] from gathering evidence post disciplinary action."

Accordingly, the Grievant asserted that the Agency violates both the COPGA and the Grievant's due process rights by seeking to introduce "additional evidence post discipline."

However, there is nothing in the grievance procedure that would limit an agency's introduction of evidence at the hearing to items identified at the time of the due process notice in a disciplinary case. COPGA provides no limitation either. COPGA is entirely consistent with the requirements of pre-disciplinary due process and does not include a provision that requires an agency to produce all evidence at the time of pre-disciplinary due process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 545-46 (1985).

Similarly, Virginia Code Section 9.1-509 provides that a "correctional officer shall be notified in writing of all charges, the basis therefor, and the action that may be taken." Accordingly, the Code does not require the production of all of the Agency's evidence at such an early stage.

Accordingly, the Grievant's motion to limit evidence supporting the Written Notice to the "supervisor report" was denied.

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."

GRIEVANT'S "REQUEST FOR INDEFINITE CONTINUANCE/REQUEST FOR REMOVAL OF HO":

The Grievant's advocate, by email of August 14, 2023 to the hearing officer and related Sworn Affidavit to the Executive Secretary of the Supreme Court of Virginia, both incorporated herein by this reference, sought an indefinite continuance of the grievance and "the removal of Hearing Officer Robinson for allowing the DOC to violate Virginia Code with its representation."

By email of August 15, 2023, incorporated herein by this reference, the hearing officer denied the request of the Grievant's advocate for an indefinite continuance for the reasons provided.

By email of August 15, 2023, the Grievant's advocate asked the Director of EDR to overrule the hearing officer and to grant the requested indefinite continuance.

By email of August 16, 2023, the Director of EDR declined the request of the Grievant's advocate, stating in part:

"My understanding from the correspondence below is that the hearing in this case is scheduled for tomorrow. As we do not have sufficient time to complete a formal ruling, we will not do so here. A hearing officer's decision as to whether to grant a continuance is within the hearing officer's discretion and we see no abuse of discretion here. Further, we do not see a valid reason to delay the hearing and, therefore, choose not to open a ruling that would disrupt the hearings process. Instead, I am responding to the request to overrule the hearing officer's denial of an indefinite continuance and/or removal in this email.

While [Grievant's Advocate] asserts that the hearing officer assigned to this case is not impartial, there is nothing in the submission that supports this contention. I do not see a valid concern at this time that suggests the hearing officer is not able to serve as an impartial decision-maker. Both parties will have the opportunity to address this type of issue on administrative review to EDR following the hearing and issuance of the hearing decision in this case. Thus, our determination is not made with finality here, but we do not see a concern that justifies disrupting the hearing so close to the scheduled date. I would observe that EDR ruled on the issue of DOC's choice of advocate and their role in the case back in April. Yet, this current request was not raised to the Office of the Executive Secretary (OES) until now. While the OES can certainly be notified about concerns with a hearing officer's performance of their duties and request that a hearing officer be removed from the OES list, there is not a basis for EDR to delay this hearings process for the OES to consider removal of the hearing officer in the case in which EDR has appointed him to serve. Mr. Robinson's service as hearing officer is not appointed pursuant to Va. Code 2.2-4024, but rather under DHRM/EDR's authority under Va. Code 2.2-1202.1 and 2.2-3005. Accordingly, the provisions of Va. Code 2.2-4024.1 on disqualification do not appear to apply directly. Further, even if they did, this provision makes clear that hearing officers who are not appointed pursuant to Va. Code 2.2-4024 must make a decision on a disqualification request on the record, which the hearing officer has done, and that such determinations, while subject to judicial review, are not subject to interlocutory review by OES. (As the OES has been copied on correspondence by the parties, I am hopeful that if we have misconstrued anything we will be so advised by the OES.)

As Mr. Robinson's appointment as hearing officer is pursuant to DHRM/EDR's authority under the grievance statutes and procedure, EDR has authority to address the hearing officer's conduct, including whether they are impartial. As already stated, at this phase we have no basis to question that. However, such matters may be addressed on administrative review and, if determined to be a matter of law, in an appropriate appeal to the circuit court following a final hearing decision."

GRIEVANT'S FURTHER REQUEST FOR CONTINUANCE:

At 4:28 pm on August 16, 2023, the day before the hearing, the hearing officer's email Inbox received an email from the Grievant's advocate stating: "Mr. Robinson, [Grievant] seemed to have meant to send this to you, but only sent it to me." The forwarded email from the Grievant went on to state: "Mr. Robinson, I the grievant would like to request a continuance or reschedule, because I started a new job recently and I'm scheduled to work tomorrow. They may not be able to give me tomorrow off for the hearing because of being short staffed, so I would need to reschedule for another date please."

The Grievant did appear at the hearing the next day. The Grievant's advocate did not appear.

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 white 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.

APPEARANCES

Representative for Agency
Grievant
Advocate for Agency
No Advocate for Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in a Level 3 secure Facility as a Correctional Officer

[1] References to the agency's exhibits will be designated AE followed by the exhibit tab and/or page number. The Grievant offered certain exhibits but the hearing officer did not admit them because they were irrelevant.

("C/O"), safeguarding inmates and other Facility personnel in, amongst other places, the Facility's Restorative Housing Unit ("RHU").

2. The RHU houses inmates who must be safeguarded by C/Os with especial vigilance, having been removed from the general population because of problematic issues such as being on suicide watch, facing disciplinary charges, etc.

3. The Grievant was required to be vigilant and alert while on post of the floor of the SHU during his whole shift on the night of August 29, 2022 into the morning of August 30, 2022. The Grievant's supervisor reminded the Grievant at approximately 0150 hours "that there is a 15 Minute special watch in RHU, that he has missed several rounds, and that he will be written up for it." AE 16.

4. Instead, between 2349 hours on August 29, 2022, and 0150 hours on August 30, 2022, the Grievant fell asleep on multiple occasions. The Grievant also did not make all his required rounds.

5. The Grievant performed a vital function for the Facility as a C/O 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.

6. The Facility is a high security Level 3 institution and the Grievant's role in maintaining the safety and security of inmates, staff and the public is paramount, particularly when the Grievant was assigned to the RHU.

7. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's duties pertaining to the RHU.

8. Despite this critical need, Grievant committed serious violations of the Agency's security policies and protocols when Grievant fell asleep while on post. The Grievant's supervisor and other C/Os were distracted from their assigned tasks in the control booth and elsewhere, in trying to rouse the Grievant, materially and adversely affecting Agency operations.

9. 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.

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

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

12. 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 POLICY, 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.

Additionally, Agency Operating Procedure 135.2 ("Policy No. 135.2") provides that "Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures." AE 21.

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. While not required, each offense is expressly listed in the SOC as a Group III offense and a first Group III normally results in discharge. AE 20.

Violation of Operating Procedure 135.1, Section XIV (B) (7), (8) and (25) for:

7. Violating safety rules where there is a threat of physical harm
8. Sleeping during working hours…
25. Violation of Operating Procedure 135.2

AE 20.

Violation of OP 135.2, for: Section (II), (C), for:

1. Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures.

AE 21.

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 advocate 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 not necessary for the termination decision, on the evidence presented, the hearing officer finds that the prior 2 Group I Written Notice issued to the Grievant (AE 18 & 19) are 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. *See,* AE 9.

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. AE 9.

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 AE 9, 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; and
4. past performance evaluation history: 2020 & 2021 Contributor.

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.

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 8/21/ 2023

John Robinson

John V. Robinson, Hearing Officer

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

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