

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

**DIVISION OF HEARINGS
FINAL HEARING OFFICER DECISION**

In the matter of: Case No. 11978

Hearing Officer Appointment: May 22, 2023
Hearing Date: August 4, 2023
Decision Issued: August 7, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance on December 28, 2022, of a Group I Written Notice (violations of Written Notice Offense Code 11 – Unsatisfactory Performance) by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the "Agency").

The Grievant has raised the issues specified in his Grievance Form A and is seeking the relief requested in his Form A, including reversal of the discipline.

FIRST PREHEARING CONFERENCE CALL:

The Grievant, the Agency’s advocate and the hearing officer participated in a first prehearing conference call at 1:00 pm on June 2, 2023. Following the first prehearing conference call, the hearing officer entered his Scheduling Order of June 7, 2023, incorporated herein by 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 white exhibit binder.¹ For security reasons, the Agency has retained possession of the photograph behind Exhibit Tab 13. The hearing officer also attaches the Protective Order signed by the parties and entered by the hearing officer.

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
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 Chief of Security for the Facility. Amongst other duties, the Grievant worked as a supervisor, supervising other

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

Correctional Officers (“C/Os”), inmates and other Facility personnel. The

Grievant’s duties include:

- Conducts inspection and tours of units providing direction and supervision to ensure compliance with departmental and unit policy procedures.
- Ensures that physical plant problems, safety, and security violations are reported in a timely manner for correction with follow-up actions and proper documentation as required.
- Conducts facility audits and inspections, initiate and/or directs appropriate follow-up in accordance with DOC policy standards. Maintains appropriate documentation.
- Develops, implements and monitors facility security procedures in accordance with DOC standards and policy. Conducts tours of the institution as required on an on-going basis.
- Prepares the facility's Security Department for Annual Security Readiness Assessments, scheduled ACA Audits, and any other security inspections/audit that may apply.

(AE 9)

2. Amongst other duties, the Grievant is required to effectively communicate, both orally and in writing, the job tasks of the position. *Id.*
3. The Grievant is required to complete specific duties as assigned and in accordance with his supervisors’ directions. The Grievant must also ensure compliance with all safety and sanitation regulations and procedures delineated the for life, safety and health of himself and others. *Id.*
4. In short, the Grievant performs 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.
5. The Facility is a large Security Level 3 institution and the Grievant’s role in maintaining the safety of security of inmates, staff and the public is paramount.

6. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards his supervisory functions.
7. On June 1, 2022, the grievant was notified via email that the tool room in the DOC Electrical classroom was out of compliance for various regulatory and safety violations, including tool board shadowing, painting, and storage. The Grievant was instructed to correct the violations immediately.
8. On June 10th, the Grievant sent an email to Warden F informing her that the Grievant and Lt. M were coming in on Sunday, June 12, 2022, to correct the issues noted in the original email.
9. On June 12th, the Grievant noted in the logbook of this area:
“[Grievant] and [Lieutenant M] conduct inspection and correct tools, standard boards and paint.” AE 6.
10. On September 13, 2022, during a Security Vulnerability Assessment (“SVA”), Warden F inspected this area and discovered that the shadows had not been corrected, items were still on the floor and an inmate was inside of the tool room coloring in the shadows. This was not an appropriate task for an unsupervised inmate.
11. Furthermore, the tool room had not been inspected since the day Grievant and Lt. M entered on June 12, 2022.
12. The need for accounting of tools is extremely important in the Facility as inmates can use tools (or fashion tools) as weapons, posing a dire security threat to staff and inmates alike.

13. Despite this critical need, Grievant committed serious violations of the Agency's security policies and protocols when Grievant failed to ensure that immediate remedial action was completed concerning the subject tool room.
14. 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.
15. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
16. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
17. 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 at least a Group I offense. Each offense is expressly listed in the SOC as a Group I offense, or higher. AE 11.

Violation of Operating Procedure 135.1, Section XIV (B) (2) 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

Violation of Operating Procedure 135.1, Section XII (B) (5) for:

5. Inadequate or unsatisfactory job performance.

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.

Violation of Operating Procedure concerning Tool, Culinary, and Medical Equipment Control:

The Grievant did not adequately perform his duties concerning tool identification and storage.

While the Grievant accepts some responsibility, the Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline at too severe a level. However, the hearing officer agrees with the Agency's attorney that the various offenses are appropriately classified at the Group I level, as designated, with the Agency appropriately exercising the discipline, after mitigation deemed appropriate by the Agency.

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 Operating Procedure 135.1 and that the violations each rose to the level of at least a Group I.

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 exemplary 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, and did in fact mitigate, in disciplining the Grievant.

The Grievant has asserted that the discipline was too harsh and 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 28-year tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's lack of prior formal discipline; 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 he delegated completion of the task to Lieutenant M, he did not present convincing evidence of this delegation at the hearing and the Grievant did not satisfactorily explain why he did not confirm such completion.

The hearing officer finds that the Warden reasonably read the Grievant’s log entry to mean that the Grievant had completed the task.

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.

The Grievant did not present any evidence at the hearing concerning the affirmative defense of retaliation.

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 8/7/ 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.