

# **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 11956**

**Hearing Date: August 24, 2023**

**Decision Issued: September 13, 2023**

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## **SUMMARY OF DECISION**

The Agency had found Grievant violated the rules of conduct due to failing to follow instructions and/or policy; violating safety rule, and sleeping during work hours. The Agency then issued Grievant a Group Three Written Notice with removal. The Hearing Officer found Grievant engaged in the conduct alleged, the conduct constituted misconduct. Further the discipline was not contrary to policy or law. Accordingly, the Hearing Officer upheld the discipline.

## **HISTORY**

Grievant timely grieved her discipline and requested reinstatement to her employment with the agency, back pay, and an apology. (A Exh. A at 1).

EDR appointed the undersigned as the Hearing Officer in this matter effective July 21, 2023. The Hearing Officer held a virtual prehearing conference (PHC) on July 28, 2023. Thereafter, by order issued July 28, 2023, the Hearing Officer scheduled an in-person grievance hearing for August 24, 2023, to commence at 10:00 a.m. and conclude by 2:00 p.m.<sup>1</sup> This order also noted other rulings made and matters discussed during the PHC.

On the date of the hearing and prior to the witnesses testifying, the Hearing Officer granted the parties an opportunity to present matters of concern to the Hearing Officer. They presented none.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

The Hearing Officer notes that there were no objections during the hearing to parties' respective exhibits. Accordingly, the Hearing Officer has admitted the Agency's Exhibits A through J, as well as Agency's Witness list, Timeline, and Table of Contents. Moreover, the Hearing Officer has admitted Grievant's exhibits; that is, Grievant's Exhibits A through G, as well as the copy of the scheduling order and Table of Contents submitted with Grievant's Exhibits. The Hearing Officer does note that Grievant referenced an Exhibit H in her exhibit binder and table of contents. Grievant indicated that this exhibit was a video showing an employee sleeping. After carefully reviewing Grievant's Exhibits and the entire contents of her binder submitted, the Hearing Officer has determined Grievant did not submit a video. Accordingly, Hearing Officer has not admitted as evidence any video.

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<sup>1</sup> The parties agreed to the scheduled times for PHC and grievance hearing.

During the proceeding, the Agency was represented by its advocate. Grievant represented herself.

### APPEARANCES

Advocate for Agency  
Witnesses for the Agency (5 witnesses)  
Grievant  
Witness for Grievant (2)<sup>2</sup>

### ISSUE

Was the written notice with removal warranted and appropriate under the circumstances?

### BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### FINDINGS OF FACT

After reviewing all the evidence presented and determining the credibility of the witnesses, the Hearing Officer makes the following findings of fact:

1. Grievant was employed by Agency as a Public Safety Officer (PSO) in 2021. She was one of several PSOs in the Agency’s Department of Public Safety. The agency terminated her employment on February 22, 2023, due to an incident occurring on January 19, 2023. This incident is discussed in other facts below. (A Exh. A).
2. Grievant’s work position required Grievant to provide security services. Grievant’s job description notes that she was a supervisor. Among other tasks, Grievant was to act in a capacity of essential personnel during emergency/crisis situations; think quickly and independently during an emergency situation; and stand and walk for entirety of shift to patrol to ensure unit coverage as well as maintain security presence on the unit. Grievant’s position is considered essential personnel and is noted as a “Safety Sensitive Position.” A core responsibility of a PSO is to assist in crisis management. As needed, a PSO’s responsibility could also include performing tasks associated with a “special assignment” as dictated by administration. (A Exh. G; CEO’s Testimony).

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<sup>2</sup> Grievant testified on her behalf. One additional witness testified on Grievant’s behalf, Grievant’s Witness 1. This witness testified by telephone without objection. Grievant had identified three other individuals as potential witnesses. Grievant did not request witness subpoenas for those witnesses. In addition, they were not current employees of the Agency. The three additional individuals did not appear to testify. Grievant stated she was ready to proceed without those individuals.

3. The Agency had given the Department of Public Safety a special assignment prior to January 19, 2023 due to a problem with patients escaping or attempting to escape from the Agency. Such escapes caused safety concerns for Agency and surrounding community. The special assignment entailed PSOs providing 24/7 watch on certain areas of Agency where escapes had occurred. One of those areas was Building, particularly the exterior area of Building where doors to Units 3A and 4B opened to the outside. The outside of Building and the units, at the time of the assignment, was not surrounded by fencing which could have prevented escapes. The special assignment became necessary because Agency had experienced several inmates escaping from the building through the outside doors of the units.

4. Housed in Unit 3A/4B are some patients who are inmates that have been transferred from jail to Agency for treatment. Some inmates have been charged with serious crimes such as murder. At least one inmate housed in Unit 3A/4B had recently escaped for a period before being caught. This most recent activity underscored the significance of the special assignment and the duty of the PSOs assigned to provide security and safety at Agency and to the community. Under the special assignment, that security and safety would be provided in part by PSOs watching the area 24/7, to include having a PSO at all times stationed in proximity of the units' outside doors. In such a position, the PSOs could significantly help thwart escapes.

All PSOs, including Grievant were made aware of the escapes and the Department of PSO special assignment. (Testimonies of CEO, Officer, Chief; A Exh. F).

5. On January 19, 2023, Grievant had been assigned to work from 7:00 a.m. to 3:00 p.m. Grievant's assignment during this shift, was in an area that had been designated as part of the special assignment area. She was to sit outside in Agency van and watch the exterior doors of Units 3A/4B during her work shift to assist in providing security and preventing patients from escaping. (CEO's and Lt's Testimonies; A Exh. D).

6. On January 19, 2023, at about 10:51 a.m., a staff member of Agency reported to PSO 1 that a vehicle (van) was parked on the sidewalk on Road across from Building, housing Units 3A and 4B of the Agency. The reporting staff person also informed PSO 1 that the individual in the van appeared to be a PSO, and this PSO was slumped over or passed out in the vehicle. The reporting staff person did not report the incident as a medical emergency. PSO 1 was on another assignment and did not observe what was reported to him. However, PSO 1 was familiar with the area where the incident was reported to be occurring. He was aware that the area where the incident was reported to be occurring was part of the area to be kept under surveillance on a 24/7 basis under the special assignment. With this insight, PSO 1 reported what he had been informed of to his superior, Chief. (Testimony of PSO 1; A Exh. C).

7. When the incident was reported to Chief, he was in a meeting with Lt. Chief and Lt. then responded immediately. They drove to the area where the vehicle was parked. They drove in front of van and observed Grievant. They saw Grievant sitting in the van in the driver seat with her head leaned back, mouth open, and her eyes closed. Her chest was rising and falling, but she made no other movements. They then parked their vehicle behind the van. Lt. approached the vehicle from the rear on the passenger side. Chief approached from the rear on the driver side. Grievant appeared to be sleeping. After several minutes, Chief opened the van's door. At that

time Grievant's eyes opened. She appeared disoriented or startled. (Testimonies of Chief and Lt.; A Exhs. D and F).

8. Grievant looked tired and as if she had just awakened. (Chief's Testimony).

9. Chief then asked Grievant if she was okay. Grievant replied that she was okay. Grievant did not mention she was having a medical emergency to either Chief or Lt. (Chief's and Lt's Testimonies; A Exhs. D and F).

10. Chief relieved Grievant of her assignment and assigned another PSO in her place. Chief directed Grievant to the Public Safety Office where Chief met with Grievant about his observations. While meeting with Chief, Grievant stated that she did not remember falling asleep and that she had not gone to sleep until 2:00 a.m. that morning. Grievant did not state she had a medical emergency. Neither did she state she was on medications for anxiety or depression. Grievant was in tears during the meeting and asked if she would be fired. Chief instructed Grievant not to drive the remainder of the day. (A Exhs. D and F; Chief's Testimony).

11. On or about February 1, 2023, Grievant received a due process letter from Agency noting that the Agency was considering disciplining Grievant for violations of failing to follow instructions and policy, being less than alert, and neglect of work, and failing to support efforts that ensure a safe and healthy work environment. Normally a response to the due process letter is due in 24 hours of a grievant receiving it. Grievant requested an extension of this time. Grievant was granted until February 9, 2023, at 4:00 p.m. to respond. (A Exh. B; G Exhs. A and B).

12. In her February 8, 2023 response, Grievant denied she was sleeping. Grievant also stated that she had been on medications on the day of the incident and that her medications had side effects. Grievant also stated that she suffered from anxiety, depression, mood disorder, and Type II Diabetes and that the reason she did not go to sleep until late the morning before her shift started was due to her anxiety. Grievant included in her response a list of medications she is taking. (G Exhs. A and B).

13. Grievant's Witness 1 could not recall if Grievant submitted a list of medications she was taking. (Grievant's Witness 1).

14. The evidence is insufficient to show that Grievant provided her supervisor with a list of medications she was taking prior to the starting of her shift on January 19, 2023. Grievant had not informed her supervisor that she was diabetic until after the January 19, 2023 incident. (Chief's Testimony and Lt. Testimony).

15. The evidence is insufficient to show Grievant completed the "Employee Medication Notification List" and provided it to her supervisor or human resource. (Grievant's Witness 1; Testimony of Chief; Testimony of Benefits Manager).

16. Grievant received a Group III Written Notice with termination on February 22, 2023. Agency noted as the offense categories failure to follow instructions, safety rule violation, and sleeping during work hours. The group notice described Grievant's offense as follows:

On January 19, 2023, [Grievant] was observed by her supervisor, and other staff, to be in a less than alert state, while on her assigned duty to be on watch between Units 3A & 4B, in an [Agency] Public Safety vehicle, after an earlier elopement event that morning, violating [Agency] Policy 1.60, Standards of Conduct. Being in a less than alert state as a public safety officer creates a significant threat to staff and patient safety,, as well as the local community, and is considered a neglect of duty.

(G Exh. F; A Exh. A at 1 - 3).

17. Grievant had an active Group I at the time the administration issued her the Group III Notice with termination. (Chief's Testimony; A Exh. H).

18. Per Grievant's testimony, she was on a medication on the day the incident occurred that caused side effects. Per Grievant's testimony only after the incident did she find out about the side effects of the medication she was taking. (Grievant's Testimony).

19. Per Grievant's testimony, she submitted a list of medications to Agency, but Agency is contending it did not receive it. Grievant did not follow up to determine if the list of medications she contends she submitted was received.

20. On February 1, 2023, Grievant obtained a medical note stating that she is being treated for anxiety and mood disorder (G exh. C).

21. Grievant's health care provider diagnosed her with sleep apnea after the January 19, 2023 incident (G Exh. G).

22. Although Grievant's listing of exhibits indicates she submitted a video of an employee sleeping, none was submitted.

23. Hearing Officer finds Chief, and PSO 1 testimonies are consistent with statements they wrote close in time to the January 19, 2023 incident which is the subject of the grievance.

24. Hearing Officer finds Lt's testimony and written statement are consistent.

25. Hearing Officer finds Chief, PSO 1, Lt., CEO, PSO 1 and Benefits Manager credible witnesses.

26. Hearing Officer finds Grievant's Witness 1 credible. However, he did not recall if Grievant turned in the medication list.

27. Hearing Officer did not find Grievant's testimony regarding submitting the medication list convincing.

28. Evidence is sufficient to show Grievant was asleep on the job on January 19, 2023.

29. Evidence is insufficient to find Grievant experienced a medical emergency when she was found asleep on January 19, 2023, during work. This is the case because the description of her appearance by LT. and Chief indicates she was asleep. She did not go to sleep until 2:00 a.m. when her shift started at 7:00 a.m. Grievant did not report having a medical emergency on January 19, 2023.

### **Policies**

30. Agency Policy 053-032 provides in pertinent part that it is the Agency's policy to provide a safe, healthy, and productive work environment that is free of alcohol and drug use. In addition, under this policy:

employees are required to notify their supervisor before beginning work when taking any medication or drug, prescribed or non-prescribed that, by indication on the prescription packaging, may interfere with the safe and efficient performance of duties or the operation of a state vehicle or equipment.

(A Exh. I at 3-4).

31. Also Agency Policy 1.60 provides a listing of conduct that is expected of Agency employees. The list is not all-inclusive. However, the list does include the following expectations:

Perform assigned duties and responsibilities with the highest degree of public trust;

Devote full effort to job responsibilities during work hours;

Support efforts that ensure a safe and healthy work environment;

Meet or exceed established job performance expectations; and

Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

(A Exh. J at 4-5)

### **DETERMINATIONS AND OPINION**

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/her 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 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.<sup>3</sup>

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 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On February 22, 2023, Agency issued Grievant a Group III Written Notice with removal. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

## **I. Analysis of Issue(s) before the Hearing Officer**

Issue: Whether the discipline was warranted and appropriate under the circumstances?

### **A. Did the Grievant engage in the conduct? If so, was the behavior misconduct?**

The Agency contends that on January 19, 2023, Grievant was sleeping during work hours, failed to follow instructions or policy, committed a safety rule violation. The Hearing Officer finds Grievant engaged in the behaviors alleged by Agency.

The evidence shows Grievant was assigned to work from 7:00 a.m. to 3:00 p.m. on January

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<sup>3</sup> Grievance Procedural Manual §5.8

19, 2023. Chief and Lt. testified that at about 10:51 a.m. on January 19, 2023, they observed Grievant for several minutes in Agency van parked across from Building, Units 3A and 4B with her head leaned back in the van, her eyes closed, and her only movement being her chest moving up and down from breathing. They approached the van. Chief opened the van's door. Only then did Grievant open her eyes. She was startled. Lt. and Chief wrote statements consistent with their testimony of their observations mentioned here. The evidence shows Chief wrote his statement on the same day of the incident. The Hearing Officer had an opportunity to observe the demeanor of Chief and Lt. as they testified. Hearing Officer finds them credible witnesses.

Hearing Officer finds Grievant was sleeping on January 19, 2023, during her working hours. Further, Grievant's sleeping was a violation of safety rules as she was supposed to be alert on the job.

Moreover, the Hearing Officer finds Grievant failed to follow Agency policy or instruction. The evidence demonstrates that the Department of Public Safety was given a special assignment by the Agency. This special assignment was due to recent escapes and elopements at Agency. As part of that special assignment, Grievant as a PSO was instructed to watch Building, Units 3A and 4B, particularly the exterior doors which had recently been used by a patient to escape the facility. During the time Grievant was sleeping she was not providing the surveillance of the area that she had been instructed to provide. Accordingly, she violated instructions. As noted previously, this violation was a grave breach of Grievant's duty to maintain or assist in providing safety to Agency and community. Of particular note, the very area Grievant was assigned to watch was an area where a patient had just recently escaped from the Agency.

In making the findings noted above, Hearing Officer cognizant of Grievant's claim that she was not asleep, but confused as to why Chief had appeared at her work station. Grievant's assertion is self-serving and not convincing especially considering Grievant told her supervisor that she had only gone to sleep at 2:00 a.m. on the morning of January 19, 2023, when her work shift started at 7:00 a.m.

Moreover, the Hearing Officer is not persuaded by Grievant's argument that she had medical conditions on January 19, 2023, that could have caused her to fall asleep or be drowsy during her assigned work hours. Grievant asserts that she has been suffering from anxiety and a mood disorder and that this condition predates January 19, 2023. She claimed to have provided a list of medications to Human Resource or her superior prior to January 19, 2023, making them aware of the side effects from the medications. She argues that her medical conditions during the incident also included her being a diabetic. Moreover, she presented evidence that postdates the January 19, 2023 incident showing a diagnosis of sleep apnea.

Agency Policy 053-032 provides in pertinent part that it is the Agency's policy to provide a safe, healthy, and productive work environment that is free of alcohol and drug use. (A Exh. I at 3). In addition, under this policy:

employees are required to notify their supervisor before beginning work when taking any medication or drug, prescribed or non-prescribed that, by indication on the prescription packaging, may

interfere with the safe and efficient performance of duties or the operation of a state vehicle or equipment.

*Id.* at 4.

The evidence does not demonstrate that Grievant notified her supervisor before beginning work on January 19, 2023, that she was taking medications that caused her drowsiness. The evidence does not show that Grievant informed her superiors and human resource that she was suffering from any medical conditions noted until after the fact. Further, the evidence fails to show that Grievant provided any list of medication she was taking prior to the January 19, 2023 incident. Assuming Grievant was on medications as she asserted she was on January 19, 2023, during her shift, Grievant violated yet another agency policy by not reporting these medications prior to beginning her work shift.

In essence, Grievant's arguments that her behavior on January 19, 2023, should be excused because of her medical issues are not supported by the evidence of record. They are not persuasive.

Also Agency Policy 1.60 provides a listing of conduct of that is expected of Agency employees. The list is not all-inclusive. However, the list does include the following expectations:

Perform assigned duties and responsibilities with the highest degree of public trust;

Devote full effort to job responsibilities during work hours;

Support efforts that ensure a safe and healthy work environment;

Meet or exceed established job performance expectations; and

Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

(A Exh. J at 4-5

Under Policy 1.60 the first occurrence of a Group III offense normally warrants termination due to the severity of the offense. The policy continues by stating that offenses which endanger others at the work place and offenses that are deemed a significant neglect of duty are group III offenses. Examples of Group III Offenses include, among others, safety/health infractions that endangers the employees and/or others.

As noted above, the evidence shows Grievant was asleep on the job. Thus, she was "less than alert." This conduct was contrary to her assigned task, to watch the outside on units 3A and 4B. Sleeping certainly was not devoting full effort to her job responsibility and severely compromised the safety of the Agency, especially considering the very recent escape. Her sleeping put others at risks at Agency and in the surrounding community. Grievant's sleeping on the job did not meet her job expectations.

## **B. Was the Discipline Consistent with Policy and Law?**

Under Agency Policy 1.60, Group III offenses normally warrant discharge. Here, not only did Grievant engage in a Group III offense(s), but the evidence shows she also had an outstanding Group I on her active disciplinary record. Accordingly, the Hearing Officer finds the Agency's discipline is consistent with policy and law.

## **II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>4</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>5</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds discipline if it is within the limits of reasonableness.

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice. And further, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the Agency's discipline was unreasonably.

Hearing Officer has considered all the evidence whether specifically mentioned or not. This consideration also includes a review of Grievant's claim that she was on medications that had side effects on January 19, 2023, and notes from health care providers that post date the day of the incident. Hearing Officer finds the conduct of Grievant aggravating considering the Agency had experienced multiple escapes or elopements. One occurring within 24 hours prior to the incident. There was a special assignment to provide 24/7 surveillance of the area where at least some of the escapes had occurred and Grievant had been made aware of it.

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<sup>4</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(A)

After careful consideration of all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline reasonable.

### DECISION

Hence, for the reasons stated here, the Hearing Officer upholds the agency's discipline.

### 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

Entered this 13<sup>th</sup> day of September, 2023.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative  
Grievant  
EDR's Director of Hearings