

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11989

Hearing Date: November 9, 2023  
Decision Issued: November 10, 2023

**PROCEDURAL HISTORY**

On May 17, 2023, Grievant was issued a Group III Written Notice and, pursuant to a current active Group III Written Notice<sup>1</sup>, was terminated effective May 17, 2023.<sup>2</sup> The grievance was assigned to this Hearing Officer on July 5, 2023. A Hearing was held on November 9, 2023.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Witnesses

**ISSUES**

Did Grievant violate Agency policy by his unsatisfactory performance in the matter before me, by failure to follow Agency policy, and by committing a safety rule violation?<sup>3</sup>

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance Hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

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<sup>1</sup> Agency Exhibit 1, page 013

<sup>2</sup> Agency Exhibit 1, page 001

<sup>3</sup> Agency Exhibit 1, pages 002-004

<sup>4</sup> See Va. Code § 2.2-3004(B)

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented, I make the following findings of fact:

The Agency submitted 1 notebook containing pages 1 through 170. The notebook contained a DVD-R disk with a video. The notebook was accepted in its entirety as Agency Exhibit 1.

Grievant did not attend the Hearing, did not submit any documentary evidence, and no witnesses testified on Grievant’s behalf.

Several Department of Corrections Operating Procedures are relevant to this matter:

**Operating Procedure 411.1 (Inmate Transportation)** sets forth the policy that must be followed by Agency employees when inmates are being transported from one location to

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<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

another. §411.1(X)(D) states: *Corrections Officers must maintain custody and visual observation of inmates at all times.*<sup>9</sup>

**Operating Procedure 411.1(XIII)(A)(1)(a)** sets forth policy for Medical Transportation of an inmate and states: *Transportation of an inmate to a DOC or non-DOC medical facility will be handled in the same manner as transfer to another institution with the exception that no personal property will be allowed.*<sup>10</sup>

**Operating Procedure 411.1(XIII)(E)(1) & (4)** state: (1) *At no time will the inmate be out of the Transportation Officer's direct line of sight observation...* (4) *Transportation Officers have the responsibility to check the security of treatment and medical facility rooms, ensure that windows and doors are secure. An inmate must not be left unattended and must be escorted everywhere while in the medical facility*<sup>11</sup>

**Operating Procedure 425.2 (Medical facility Security)** defines *Constant Sight Supervision* as *each offender is continually under the observation of a trained staff member, i.e., Corrections Officer, DOC foreman, supervisor...*<sup>12</sup>

**Operating Procedure 425.2(V)(A)(1)** states: *all offenders must be maintained under constant sight supervision at all times.*<sup>13</sup>

**Operating Procedure 425.2(IX)(G)(1)** states: *a Corrections Officer of the same gender must accompany the offender to the toilet and maintain constant sight supervision of the offender during toileting. The Corrections Officer should search the toilet and surrounding area for contraband before the offender enters.*<sup>14</sup>

On March 14, 2023, several inmates were transported from the Agency facility to a medical facility for physical therapy. The Warden who issued the Written Notice before me testified that Grievant was a Transportation Officer. All of the inmates were searched prior to entering the vehicle that took them to the medical facility. None had any contraband at that time. Upon arrival at the medical facility, Grievant and another correction officer (XY) became responsible for inmate A. While at the medical facility, A asked to go to the bathroom. The 2 officers decided that Grievant would be responsible for this and he and A left and were out of sight of XY. They returned in approximately 5 minutes and A was in their combined continuous sight until they returned to the Agency facility. While being searched on the return to the Agency facility, various items of contraband were discovered in the lining of A's Agency issued jacket.<sup>15</sup> The contraband consisted of 2 SIM cards, 1 pack of cigarettes, 1 TLC phone charger and 1 TLC track phone.<sup>16</sup>

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<sup>9</sup> Agency Exhibit 1, page 150

<sup>10</sup> Agency Exhibit 1, page 153

<sup>11</sup> Agency Exhibit 1, pages 155,156

<sup>12</sup> Agency Exhibit 1, page 163

<sup>13</sup> Agency Exhibit 1, page 167

<sup>14</sup> Agency Exhibit 1, page 169

<sup>15</sup> Agency Exhibit 1, pages 27,28

<sup>16</sup> Agency Exhibit 1, page 026

In addition to Agency Operating Procedures, the corrections officers involved in this transportation were governed by the Security Post Order (PO), dated October 1, 2022.<sup>17</sup> This PO, at (8) states: *Thoroughly inspect and search the transport vehicle(s) for contraband or any article that might aid in an escape attempt prior to placing an inmate(s) in the vehicle.*<sup>18</sup> Witnesses testified that this was done. The PO at (26) states in part: ... **At no time will the inmate(s) be out of the view of the Transportation Officers. Transportation Officers will retain custody and control of the inmate(s) at all times.**<sup>19</sup>

XY testified. He stated that he and Grievant were responsible for A. A was wearing an Agency issued jacket. The only time the jacket was out of XY's sight was when Grievant took A to the bathroom. It was Grievant's duty to search the bathroom. He and A were gone for about 5 minutes. XY stated that was not enough time to properly search the bathroom prior to A using it.

Another corrections officer (WM) testified that he put the jacket around Grievant's shoulder as he was leaving the Agency on his way to the medical facility. There was no contraband in the jacket at that time.

A member of the Security Response Team (MN) testified. When Grievant returned to the Agency facility from the medical facility, I was handed the jacket to search. It was heavy on one side, and I asked that the jacket be scanned. An object was seen on the scan, and I searched the jacket and found the contraband items.<sup>20</sup>

Finally, I heard from the H.R. Analyst who typed the Disciplinary Meeting Notes.<sup>21</sup> She stated that Grievant never denied that he was in charge of and responsible for A.

The evidence before me is overwhelming that A had no contraband when he left the Agency facility for his trip to the medical facility. When he returned, he was in the possession of multiply items of contraband. As one of 2 corrections officers who were in charge of and responsible for A, Grievant clearly failed to keep A under his constant sight and supervision, otherwise he would have seen A acquire the contraband. It is most likely, and within the preponderance of evidence standard, that the contraband was in the bathroom that A used at the medical facility and that Grievant did not search it, did not search it adequately, and did not accompany A into the bathroom. Regardless of when the contraband was acquired after leaving the Agency facility, Grievant failed to follow Agency Operating Procedures and the Post Order that are intended to prevent such acquisition of contraband. The Warden testified regarding the danger that contraband could cause harm to staff, other inmates, or to the community at large.

Accordingly, from the testimony that I heard and from the documents in Agency Exhibit 1, it is clear that Grievant violated Operating Procedures 411.1(X)(D), 411.1(XIII)(A)(1)(a), 411.1(XIII)(E)(1)(4), 425.2, 425.2(V)(A)(1), 425.2(IX)(G)(1) and the Security Post Order.

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<sup>17</sup> Agency Exhibit 1, page 074

<sup>18</sup> Agency Exhibit 1, page 077

<sup>19</sup> Agency Exhibit 1, page 081

<sup>20</sup> Agency Exhibit 1, page 021

<sup>21</sup> Agency Exhibit 1, pages 023,024

## MITIGATION

*Va. Code § 2.2-3005(C)(6)*, authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide 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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the Hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

Grievant had an active Group III Written Notice prior to the issuance of the Group III Written Notice that is before me. I find there is no reason for me to mitigate the termination of Grievant’s employment from the Agency.

## DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and the issuance of the Group III Written Notice, with termination, was proper.

## 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 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].

*William S. Davidson*  
William S. Davidson, Hearing Officer

Date: November 10, 2023

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