

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12005

Hearing Date: November 1, 2023
Decision Issued: November 6, 2023

PROCEDURAL HISTORY

On June 23, 2023, Grievant was issued a Group II Written Notice and, pursuant to a current active Group III Written Notice, was terminated effective June 23, 2023.¹ The grievance was assigned to this Hearing Officer on August 14, 2023. A Hearing was held on November 1, 2023.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate Agency policy by utilizing Agency resources, including CORIS, without authorization, to procure evidentiary documentation for use in her defense in prior grievance Hearing, Case #11876?²

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.³ 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:

While the Hearing Officer is not a "super personnel officer" and shall

¹ Agency Exhibit 1, page 001

² Agency Exhibit 1, page 007

³ See Va. Code § 2.2-3004(B)

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.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

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

The Agency submitted 2 notebooks containing pages 1 through 588. Grievant stated that she received this evidence from the Agency Advocate in electronic form on the date ordered by the Hearing Officer. Both parties to this matter agreed on the pre-Hearing telephone conference to exchange documentary evidence electronically. Grievant said she did not know how to access this evidence in this form but Grievant further stated that she did not seek assistance from either the Agency Advocate or anyone else as to how to open the file sent to her. She stated she was familiar with the evidence contained in these notebooks as much of it was redacted copies of evidence she had submitted in her prior grievance (Case #11876), DOC Operating Procedures, or DHRM Compliance Rulings or Review Decisions of which she already had copies. Grievant did not object to any of the evidence contained in these 2 notebooks. The notebooks were accepted in their entirety as Agency Exhibit 1.

Grievant did not submit any documentary evidence.

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Several Department of Corrections Operating Procedures and sections from the Grievance Procedure Manual are relevant to this matter:

Operating Procedure 310.2 (Information Technology Security) at (III)(B)(10)(z) states: *Certain activities are prohibited when using the Internet, electronic communications, and IT systems. These include but are not limited to... Unacceptable, inappropriate, or unauthorized access, use, disclosure, alteration, manipulation, destruction or misuse of DOC data or information.*⁸

Operating Procedure 135.3 (Standards of Ethics and Conflict of Interest) at (III)(B)(4), Prohibited Conduct, states: *No employee is permitted to: access or use any confidential information acquired due to their position, but that is not available to the public, for their personal benefit or that of another party.*⁹

Operating Procedure 135.2 (Rules of Conduct Governing Employees Relationships with Inmates...) at (II)(E)(1) & (2) states: *(1) Information pertaining to the record, offense, personal history, medical or mental health information, or private affairs of inmates... is for official use only. (2) Employees will seek to obtain such information only as needed for the performance of official DOC duties, will not access, or discuss such information except as required in the performance of official duties, and will take necessary precautions to protect the security and confidentiality of inmate... records and information.*¹⁰

Operating Procedure 145.4 (Employee Grievances) at (IV)(C) states in part: *... the DOC will use the Employee Grievance Procedure developed by the EDR to ensure that employees have an effective procedure for grievances to be reviewed fairly and objectively. (IV)(C)(3) states in part: The Employee Grievance Procedure confers certain rights and responsibilities on both parties to request and provide documentation and information related to a grievance...*

Operating Procedure 310.2 (Information Technology Security) at (III)(E)(4)(a) and (c) state in part: *... DOC has no tolerance for employees... who use DOC Internet services and IT (personal computers, smart devices, networks, etc.) for unacceptable, inappropriate, and unauthorized purposes... Specific unacceptable, inappropriate, and unauthorized uses of Internet services include, but are not limited to (i) violation of federal or state laws or violation of state or DOC policies or procedures.*¹¹

Windows User Information Security Agreement states in part: *... I further acknowledge the data contained in and accessed using the information systems and network of DOC and the information systems of the Virginia Information Technology Agency (VITA) are the property of the Commonwealth of Virginia. This includes all systems and data used to conduct the business of the DOC, regardless of where the system or data resides. I will not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of the DOC to whom such disclosure is authorized. Such disclosure will be in confidence for purposes specifically related to the business of the DOC and the Commonwealth of Virginia.*¹²

⁸ Agency Exhibit 1, pages 333,334

⁹ Agency Exhibit 1, page 310

¹⁰ Agency Exhibit 1, page 297

¹¹ Agency Exhibit 1, page 337

¹² Agency Exhibit 1, page 248

Grievance Procedure Manual §5.7(3) states in part: ...*Hearing Officers have the authority to... Issue orders for... the production of documents...*¹³

Grievance Procedure Manual §8.2 states in part: ...*Documents pertaining to non-parties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance... If a party's document request is denied by the other party prior to the appointment of a Hearing officer, then the requesting party may seek relief from EDR pursuant to the rules for party compliance... After a Hearing officer was appointed, relief should be sought from the Hearing officer.*¹⁴

The genesis of this grievance is documentation that Grievant produced as evidence in Grievance Case # 11876. A brief chronology of Case # 11876 is needed.

On January 5, 2023, the Hearing Officer for that matter entered an Order compelling the Agency to produce certain documents.¹⁵ In his Order, the Hearing Officer stated: *In accordance with Va. Code § 2.2-3003(E), absent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon requests from a party to the grievance, by the opposing party. Documents pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.*¹⁶ As a part of this Order, the Agency was ordered to produce all similar Written Notices (by offense codes) **from the Eastern Region** issued to Unit Managers/Captain and above issued for three years prior to the date of the Written Notice. Names and other personal identifying information may be redacted to preserve privacy.¹⁷ (Emphasis added)

On January 26, 2023, the Agency sought a Compliance Ruling from the Director of EDR limiting the scope of the Hearing Officer's Order to Compel Production.¹⁸

On February 9, 2023, the Director issued Compliance Ruling #s 2023-5502 and 2023-5503.¹⁹ In this Compliance Ruling, the Director set forth that: *Absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.*²⁰ Regarding disciplinary actions issued to other employees of the Agency, the Director limited Grievant's request for production as follows: *the Agency is only required to produce information about discipline that is similar to the conduct for which the grievance was specifically disciplined. Grievant's request is also overly broad as to the question of similarly situated employees. Records for the entire Eastern Region would be too broad as employees at different*

¹³ Agency Exhibit 1, page 407

¹⁴ Agency Exhibit 1, page 416,417

¹⁵ Agency Exhibit 1, pages 451,452

¹⁶ Agency Exhibit 1, page 451

¹⁷ Agency Exhibit 1, page 452

¹⁸ Agency Exhibit 1, pages 453-456

¹⁹ Agency Exhibit 1, pages 457-462

²⁰ Agency Exhibit 1, page 458

facilities would not be similarly situated. Therefore, the Agency need only produce information about discipline occurring at Grievant's facility.²¹ (Emphasis added)

On March 9, 2023, Grievant's Advocate submitted to the Agency's Advocate exhibits for Case #11876.²² That Agency Advocate testified before me in this matter and stated that the exhibits consisted of approximately 700 pages. After reviewing their contents, she testified that she was concerned that much of the information was privileged, confidential, and posed possible security risks for the Agency. As such, on March 13, 2023, she sent an email to several of the Agency's senior management, including the relevant Wardens, questioning if Grievant or her Advocate had proper access to these materials.²³

On March 14, 2023, one of the Wardens responded and concurred with the Advocate's concerns and set forth 29 examples of documents that were unrelated to the Case #11876 and/or were obtained in a manner that violated Agency policy.²⁴

The Hearing in Case #11876 took place on March 15, 2023, and Grievant entered into evidence the questioned materials.²⁵ A decision in favor of the Agency was issued on June 20, 2023.²⁶

On March 22, 2023, the Special Investigations Unit (SIU) was asked to determine if Grievant violated Agency policy in the production of these documents.²⁷ SIU completed its investigation, and its findings were that Grievant did violate Agency policy.²⁸

Grievant requested that EDR review the Hearing Officer's decision. EDR issued an Administrative Review Ruling # 2024-5589 on August 8, 2023.²⁹ The Director, in the Administrative Review, stated: *...As such, this matter is remanded for consideration of the issues with production of documents, whether any adverse inferences are warranted to resolve any disputed factual matters, and any resulting impact on the ultimate findings in the Case.*³⁰

As the original Hearing Officer was no longer employed by DHRM, a new Hearing Officer issued a Reconsideration Decision on September 12, 2023.³¹ The new Hearing Officer ruled that *...nothing in this Hearing Officer's review changes the outcome of the grievance that the Agency discipline is upheld.*³² Grievant requested EDR review the second Hearing Officer's decision.

The Director issued a Second Administrative Review Ruling # 2024-5621 on October 11, 2023. He found that *the Hearing Officer considered each category of documents and determined that (1)*

²¹ Agency Exhibit 1, page 460

²² Agency Exhibit 1, page 449

²³ Agency Exhibit 1, page 449

²⁴ Agency Exhibit 1, page 450

²⁵ Agency Exhibit 1, page 001

²⁶ Agency Exhibit 1, pages 468-475

²⁷ Agency Exhibit 1, page 022

²⁸ Agency Exhibit pages 022-239

²⁹ Agency Exhibit 1, pages 476-489

³⁰ Agency Exhibit 1, pages 488,489

³¹ Agency Exhibit 1, pages 490-506

³² Agency Exhibit 1, page 505

there was no indication that the Agency had failed to produce records that existed, (2) the omission of one page of record was an oversight and corrected on remand, and (3) it was unclear whether one record was produced but it was nevertheless in evidence and considered. Therefore, the Hearing Officer determined that no adverse inferences were warranted. EDR has thoroughly reviewed the Reconsideration Decision and finds that the Hearing Officer's consideration of these matters was consistent with EDR's directives on remand and the grievance procedure. Thus, EDR has no basis to find that the Hearing Officer has failed to adhere to the grievance procedure such that further remand of this matter is warranted. This Ruling by the Director resulted in a Final Hearing Decision for Case #11876.

Following this brief chronology of Case #11876, focus now shifts to Case #12005, the Group II Written Notice that is before me. Agency Exhibit 1 contained a redacted version of much of the evidence Grievant introduced in Case #11876. On September 28, 2023, the Agency was instructed by me to bring to the Hearing an unredacted copy of the SIU report in order that I be able to determine if Grievant should be able to use some portion of the unredacted report as evidence in this grievance. On October 2, 2023, Grievant, by email to me, stated: *I have no objection to the proposed evidence being submitted in-camera with the right to object during the Hearing if it contains any evidence that I did not submit during my previous initial Hearing.*

Keeping in mind that ***Absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals***, the following are some examples of a violation of this concept regarding the evidence Grievant introduced in Case #11876.

Unredacted Offender Face Sheets were introduced.³³ These documents contained a photograph of the offender, his DOC#, current location, DOB, SSN, FBI#, Medicaid#, hair color, height, weight, color of eyes, race, gender, marital status, whether or not he was a sex offender, alias names, mental health codes, and his emergency contact numbers. This document was taken from CORIS on October 31, 2022, as noted in the date stamp in the upper right-hand corner. The date stamp also included an identifying code for the person who requested the document. That code was "xam90847." That was the code assigned to Grievant. Grievant confirmed this was her code at the Hearing.

The following language is found at the bottom of Offender Face Sheets: ***This document contains confidential information. Unauthorized dissemination may result in civil or criminal penalties.*** (Emphasis added)

Unredacted Disciplinary Actions were introduced.³⁴ This document contained the offender's location, offense date, offense description, penalties, and appeal status. This document was taken from CORIS on October 31, 2022, and was identified with Grievant's identifying code. It also contained the following language: ***This document contains confidential information. Unauthorized dissemination may result in civil or criminal penalties.***

³³ Agency Exhibit 1, page 029

³⁴ Agency Exhibit 1, page 031

Also introduced were the following forms: Institutional Classification Authority Hearing,³⁵ Health Service Consent to Treatment, Refusal,³⁶ Notice of Postponement Report, Health Services Complaint and Treatment Form, and Staff Behavioral Observation and Referral Form to Mental Health Department, Internal Incident Report, Disciplinary Offense Report, Incident Summary Reports.³⁷ These also contained confidential information regarding other individuals. Also introduced were Incident Summary Reports, All Regions, All DOC Locations.³⁸

Grievant introduced unredacted evidence that was outside the bounds of the Hearing Officer's Order of January 5, 2023, and the Director's Compliance Ruling of February 9, 2023. In addition, Grievant's evidence included photographs of the inside of one of the Agency's facilities. For obvious reasons, the Agency does not permit such photographs to be in the public domain.

The Warden who issued the Written Notice testified. He stated that he had reviewed the SIU Report and concluded that it contained housing unit #s for offenders, their medical records, their identifying codes, and photographs of the layout of the facility. He stated that none of this data can be used without permission and that Grievant never sought his permission to use such documents. He testified that these documents were not obtained for Grievant's official duties at the Agency. In issuing the Group II Written Notice, he considered mitigation. He stated that as there was an active Group III Written Notice, he found no reason for mitigation in this matter.

The Assistant Director of Human Resources for VADOC testified. He became aware of the issues with Grievant's document production for Case #11876 when he received an email from the Agency's Advocate for that grievance. He reviewed the documents and found that they contained the floor plan for an Agency housing unit, inmate's FBI #, face page of offender, place of birth, height, weight, whether or not the offender was a sex offender, offender disciplinary actions, medical codes, mental health codes, housing unit the offender was in, Health Service Consent to Treatment forms, and Incident Summary Report of Multiple Facilities. Much of this data was extracted from CORIS.

CORIS is an online platform where the Agency places all data about offenders. This platform is protected by both Federal and Commonwealth laws. He testified that Grievant had access to CORIS only for official business purposes.

The Warden of the Agency facility where Grievant worked when the Written Notice for Case # 11876 was issued testified that Grievant produced documents that were not requested from DOC. She created an extensive list of the documents that she felt were either unrelated to the grievance or were obtained in a manner that appeared to violate policy.³⁹

The Agency Advocate for Case #11876 testified. She stated that Grievant produced documents that the Hearing officer and the Director of EDR specifically said did not need to be produced. Finally, the Information Security Officer for VADOC testified. He stated that Grievant had participated in

³⁵ Agency Exhibit 1, pages 035-037

³⁶ Agency Exhibit 1, page 038

³⁷ Agency Exhibit 1, pages 039-040; 044-045; 046; 055-056,061; 099-100; 105-153

³⁸ Agency Exhibit 1, pages 105-153

³⁹ Agency 1, page 450

DOC-Annual Security Awareness Training 2022.⁴⁰ He also stated that Grievant had signed the Windows User Information Security Agreement on July 25, 2022.⁴¹ This Agreement states in part: *... I have been granted access to automated systems, including licensed software, hardware, and data of DOC....I will not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of the DOC to whom such disclosure is authorized. Such disclosure will be in confidence for purposes specifically related to the business of the DOC and the Commonwealth of Virginia... I understand and agree that all computer resources and equipment are the property of the DOC and must be used for official business only.... I agree that my obligations with respect to the confidentiality and security of all information disclosed to me will survive the termination of any agreement, relationship, or employment with the DOC... I will take all appropriate action, whether by instruction, agreement, or otherwise, to ensure the protection, confidentiality, and security of information of and automated systems, to satisfy my obligations under this Agreement. I will report all violations or suspected violations of information security immediately to my supervisor and the Information Security Officer.*

Grievant attempted to call one witness. It had been previously agreed that he would testify telephonically. When called, the phone was not answered. Grievant did not testify. After brief closing statements, the Hearing was closed.

Grievant provided me with a list of 9 potential witnesses that she wished for me to compel their attendance. She provided an email address for 1 witness. For 1 witness, she simply provided a name with no other information. For 3 other witnesses, she provided a name and a title and nothing more. For the remaining witnesses, she provided a title and a phone number.

Both Grievant and Agency Advocate, during the pre-Hearing phone conference were told that I would need the name of the HR person to whom an Agency employee reports, that HR person's email address and phone number. For non-Agency witnesses, I would need their home address and an email, if possible. Grievant was reminded of this in multiple emails. Grievant never requested from the Agency the needed information for Agency employees nor did she request that I compel the Agency to provide her such information.

Of the 9 potential witnesses, only 1 was compelled and was not available when the call was made, 5 were called by the Agency and testified, for 1 no information was provided other than a name, and the remaining 2 were the Director of EDR and a Human Resources employee. For all the witnesses who testified, Grievant either asked 1 or 2 questions or asked none. Grievant did not proffer what any of the witnesses who were not present would offer nor did she offer any evidence to contradict the testimony of the witnesses that the Agency called.

Grievant produced no documentary evidence in this matter. Grievant did not testify. Grievant called 1 witness who was not available. Grievant did not illicit any testimony from any Agency witness, that she indicated she wished to call on her behalf, that in any way benefitted her or was detrimental to the Agency's allegations in the Group II Written Notice before me. Grievant did not challenge the accuracy or authenticity of any of the documents in Agency Exhibit 1.

⁴⁰ Agency Exhibit 1, page 256

⁴¹ Agency Exhibit 1, page 248

Accordingly, from the testimony that I heard and from the documents in Agency Exhibit 1, it is clear that Grievant violated Operating Procedures 310.2(III)(B)(10)(z), 135.3 (III)(B)(4), 135.2 (II)(E)(1) and (2), and 310.2 (III)(E)(4)9(a) and (b).

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 II 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 II 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 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]

[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 6, 2023

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