

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

DIVISION OF HEARINGS

In the matter of: Case No. 12020

Hearing Officer Appointment: October 10, 2023

Hearing Date: December 5, 2023

Decision Issued: December 17, 2023

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance on September 20, 2023, of a Group III Written Notice (violations of Written Notice Offense Code 71 –sleeping during work hours) 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.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Warden, the Agency’s advocate and the hearing officer participated in the first prehearing conference call at 11:00 am on October 13, 2023. The hearing was scheduled for and held December 5, 2023, as reflected in the Scheduling Order of October 17, 2023, incorporated herein by this reference.

The parties all agreed that email is acceptable as a sole means of written communication.

At the hearing, the hearing officer received various documentary exhibits into evidence, namely all exhibits in the Agency's white exhibit binder.¹

The hearing officer recorded the hearing.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

APPEARANCES

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

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in a Level 2 secure Facility as a Correctional Officer ("C/O"), safeguarding inmates and other Facility personnel in, amongst other places, rehabilitation hospitals to which inmates are taken for medical treatment.
2. The associated so-called transportation posts are posts which require C/Os to exercise especial vigilance, as the inmates are outside the Facility, the C/Os are required to carry firearms and there is a heightened safety risk. This was

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

especially the case under the circumstances of this case because the preceding weekend, an inmate had escaped from a nearby medical facility when a different C/O from the Facility fell asleep on transportation post, resulting in a manhunt.

3. The Grievant was required to be vigilant and alert while on transportation post at the rehab hospital from 6 pm to 6 am during his whole shift on the night of August 21, 2023 into the morning of August 22, 2023.
4. Instead, at around 0555 hours on Tuesday morning of August 22, 2023, the Grievant was sleeping while on duty at the rehab hospital.
5. The Grievant performed a vital function for the Facility as a C/O with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties.
6. The Facility is one of two institutions in the Commonwealth which receives inmates from maximum security facilities who need medical treatment. The Grievant's role in maintaining the safety and security of inmates, staff and the public is paramount, particularly when the Grievant was assigned to the transportation post.
7. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's duties pertaining to any transportation post.
8. Despite this critical need, Grievant committed serious violations of the Agency's security policies and protocols when Grievant fell asleep while on post. The Grievant admitted to the Assistant Warden that he had been caught asleep on post

by a Captain from another facility who had been tasked with making inspections at the rehab hospital.

9. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
10. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
11. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
12. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE POLICY, LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, *Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides,

in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Additionally, Agency Operating Procedure 135.2 ("Policy No. 135.2") provides that "Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures." AE 14 at 61.

The Grievant did not follow the applicable state and agency policies.

Specifically, the Grievant committed the following disciplinary infractions which were reasonably classified by management, as a Group III offense. While not required, each offense is expressly listed in the SOC as a Group III offense and a first Group III normally results in discharge. AE 13 at 49.

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

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

AE 13 at 50.

Violation of OP 135.2, Section (II) (C) (1), for:

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

AE 14 at 61.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's advocate that the various offenses are appropriately classified at the Group III level, as designated, with the Agency appropriately exercising the discipline and ending the Grievant's employment due to a Group III Written Notice.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations each rose to the level of a Group III.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency. *See*, AE 9.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant. AE 1.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in AE 1, 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 74 months of tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past performance evaluation history: last 5 performance ratings of Contributor and Exceeds Contributor (2021);

5. no active prior discipline;
6. his very hard work for the Facility;
7. the fact the inmate was in restraints;
8. the long hours worked by the Grievant; and
9. 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.

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 12/17/2023

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.