

Issue: Group III Written Notice with Termination (failure to follow policy and safety rule violation); Hearing Date: 01/30/18; Decision Issued: 02/19/18; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 11127; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 03/05/18; Outcome pending.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EQUAL EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11127

**Hearing Date: January 30, 2018
Decision Issued: February 19, 2018**

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice with termination on October 5, 2017 citing Written Notice Offense Codes 13 and 14 (Failure to follow instructions and/or policy and Safety rule violation) and alleging violations of:

- OP 030.1, *Evidence Collection and Preservation*,
- OP 038.1, *Reporting Serious or Unusual Incidents*, and
- OP 135.1, *Standards of Conduct (for a safety rule violation)*.

The policy violations relate to matters concerning a white powdery substance discovered by security staff in a search on 6/24/17 at Facility and the Written Notice alleged:

The unknown white powdery substance potentially could possibly have been an illegal or unauthorized drug.

The evidence collection protocol was not observed as required in OP 030.1.

Grievant improperly instructed Sgt. to discard the unknown substance in the trash as Grievant assumed the substance was most likely to be baby powder.

By discarding the powder in the trash, staff and offenders could potentially have been exposed to harm.

The possible drug evidence was neither secured in an evidence locker nor turned over to Intel for confirmation testing in violation of evidence collection protocol.

The OLU was not notified of a "suspected" drug and an Incident Report was not completed as required in OP 038.1.¹

On October 27, 2017 Grievant grieved issuance of the Group III Written Notice with termination and matters were qualified for a hearing. Undersigned was appointed Hearing Officer effective November 21, 2017. The parties waived the 35 day period for a hearing to be held and a hearing was held, by agreement, on January 30, 2017 at Facility.

¹ A. Tab 1; G. Tab 1.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

HEARING

The following appeared at the grievance hearing:

- Grievant (who was a witness)
- Grievant's advocate
- Agency Party Representative at Hearing (who was a witness)
- Agency advocate
- Witnesses

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant was employed by Agency from about June of 1998 until his termination on October 5, 2017. At time of his termination from employment Grievant was employed as a Captain at Facility, a

² *Grievance Procedure Manual*, Sections 5.8 and 9.

Correctional Unit. Grievant has one active Group II Written Notice issued on November 8, 2016 for failure to comply with policy.³

02. On June 24, 2017 two inmates at Facility had an altercation, were removed from their cell, and escorted to Segregation. Correctional Officers then conducted an inventory/search of their property within their cell. During the inventory/search a number of items were discovered, including a white powder substance found in a folded piece of paper in the spine of an offender's Bible .⁴

03. On June 24, 2017 C/O L released custody of the white powder substance to Sgt. who released custody of it to Grievant. No chain of custody or documentation of the time the white powder substance was received or released was made by Grievant or any other employee.⁵

04. Grievant was told by Sgt. the white powder substance was found in the spine of an offender's Bible. After observing and smelling the white powder substance Grievant decided it was baby powder and ordered Sgt. to dispose of it by placing it in a trash can in the Watch Office. The trash can used for disposal was accessible to staff and offenders.⁶

05. Prior to ordering its disposal, the white powder was not tested and no request for testing was made.⁷

06. The white powder substance was never placed in an evidence bag and was never secured in an evidence locker. No field tests or any other tests were ever conducted on the white powder substance to determine what it actually was.⁸

07. Grievant did not report the white powder substance up his chain of command and did not complete or file an Incident Report. OLU was not notified concerning the white powder substance.⁹

08. Warden received a report that Suboxen may have been found in a search conducted on 6/24/17 but was thrown away without charges being filed or drug testing being conducted. On June 28, 2017 Warden referred matters to SIU for investigation and SIU Investigator conducted an investigation into matters. During the investigation matters related to Grievant and others were brought to the attention

³ A. Tab 7 and Testimony.

⁴ A. Tab 6.

⁵ A. Tab 6 and Testimony.

⁶ Testimony.

⁷ Testimony.

⁸ Testimony.

⁹ A. Tab 6 and testimony.

of Agency and ultimately gave rise to Grievant being issued a Group III Written Notice with termination of employment.¹⁰

CONCLUSIONS

OP 135.1¹¹

Pursuant to Va. Code §53.1-10, the Department of Corrections has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The Standards of Conduct (Operating Procedure Number 135.1, Effective Date: October 1, 2015) divide unacceptable behavior into three groups. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant termination.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.”

Included in OP 135.1 as examples of Group III offenses are “Violating safety rules where there is a threat of physical harm” and “Gross negligence on the job that results (or could have resulted) in the escape, death, or serious injury of a ward of the State or death or serious injury of a State employee”.

Additionally, § IV. E. of OP 135.1 provides the list of offenses contained therein is illustrative and not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

Gross negligence is not defined in OP 135.1. Virginia law recognizes three levels of negligence, (1) ordinary or simple, (2) gross, and (3) willful, wanton and reckless. Ordinary or simple negligence is the failure to use “that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another.”¹² Gross negligence is defined as “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness.”¹³

¹⁰ A. Tab 1 and A. Tab 6.

¹¹ A. Tab 3.

¹² *Griffin v. Shively*, 227 Va. 317, 32, 315 S.E.2d 212-213 (1984).

¹³ *Griffin*, 227 Va. at 321, 315 S.E. 2d at 213, quoting *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).

OP 445.1¹⁴

OP 445.1 VII.E provides that whenever contraband is found during a search of an offender, it shall be handled according to applicable State laws and operating procedures covering offender discipline, offender property, and contraband. OP 445.1 requires questionable items discovered in offender property should be forwarded to the Institutional Investigator or Gang Specialist for review to determine proper disposition.

OP 030.1¹⁵

OP 030.1 provides policy and protocol for the proper collection, documentation, control, preservation and disposal of evidence within Agency and applies to all units operated by Agency. The term “contraband” is defined in OP 030.1 as, “Any unauthorized item prohibited or excluded by law, rules, regulations, conditions, instructions, or any authorized in excess of approved amounts”.

OP 030.1 also provides contraband seized from an offender or found on DOC property is one of six listed principle types of evidence and provides, “Any contraband discovered, such as weapons, ammunition, explosives, illegal drugs, evidence of gang activity, and other materials involved in an official investigation should be considered evidence.” As used therein, the term “such as” does not, as Grievant contends, place a limitation that only illegal drugs can be considered “contraband” or are subject to OP 030.1.

Any officer or other employee discovering contraband in a Facility is required, per OP 030.1, to immediately contact the Shift Commander, who, is required to contact the designated Evidence Manager. The Special Investigations Unit is also required to be notified, in accordance with OP 038.1, when drugs are found.

When an item of physical evidence is discovered, OP 030.1 requires the individual employee discovering the item to document the date, time, and location the evidence was discovered and the employee who originally discovers the item of evidence should maintain complete control of the item. This OP also provides the discovering employee shall not pass the item of evidence to another employee for inspection but it shall remain in the possession or control of the discovering employee at all times until it is turned over to the appropriate investigator or other authority. If the employee discovering the evidence needs to transfer the evidence to another individual, the discovering employee is required to document the transfer on an *Evidence Custody Report* with the date, time, and signature of the receiving individual in the Chain of Custody section.

Safety is addressed in OP 030.1 which provides, “Employees should handle evidence with extreme care to prevent evidence from becoming contaminated and to prevent injury. When practical, gloves should be worn to handle evidence and evidence should not be moved until a proper evidence container is available.”.

¹⁴ Hearing Exhibit 2.

¹⁵ A. Tab 5; G. Tab 4.

Procedures required for the disposal of evidence are set forth in OP 030.1 which indicates as follows:

1. The court assumes possession and control of any evidence entered during a trial.
2. Moneys taken as contraband are credited to a Fund.
3. For all other items of evidence, excluding controlled substances, the Evidence Manager is required to get approval for disposal from the Chief of Security and disposal shall be witnessed by the Chief of Security or designee.
4. Requests for disposal of controlled substances are made through the local Commonwealth Attorney and its disposal and documentation are required to be in accordance with instructions from the Commonwealth's Attorney and the appropriate Court.

OP 038.1¹⁶

OP 038.1 addresses reporting of serious or unusual incidents and requires all incidents shall be reported. The term "Incident" is defined in OP 038.1 as an actual or threatened event or occurrence outside the ordinary routine that involves, among other matters listed therein, the life, health and safety of employees or offenders, and disruption or threats to security, good order, and discipline of a facility or organizational unit.

Serious and unusual incidents as defined in the operating procedure are required to be reported by telephone to the OLU Operations Center and, unless directed otherwise in the OP, incidents, notifications, and actions taken shall be documented using an Incident Report and submitted in VACORIS by noon on the next working day.

OP 038.1 provides, among other matters, possible felonies committed by offenders on DOC grounds and seizure of drug or paraphernalia are classified as a Class II incident. Additionally a Class II incident is required to be reported to the OLU Operations Center by telephone or email as soon as practicable, but no later than 4 hours following an incident. The telephone notification to the OLU Operations Center is required to be followed by submission of the *Incident Report* in VACORIS by noon on the next working day.

SIU Investigation:

Management received reports Suboxen may have been found as a result of a 6/24/17 cell search but was thrown away without charges being filed and without any drug testing being conducted. As a result, on June 28, 2017, Warden requested SIU investigate these reports.

SIU conducted an investigation which included interviewing, among others, C/O L, C/O P, Sgt., Grievant, and two Offenders. On August 4, 2017 SIU Investigator filed a final Report of Investigation which found, among other matters:

On 6/24/17 C/O L seized an unidentified white powder in an piece of paper from inside an offender's Bible.
C/O L released custody of the white powder to Sgt.
Sgt. released custody of the white powder to Grievant.
No chain of custody by any employee was completed for the white powder.

¹⁶ A. Tab 4; G. Tab 5..

No employee documented the time they received or released custody of the powder to another employee. Grievant authorized Sgt. to dispose of the white powder in the trash believing it smelled and looked like baby powder.

The white powder was never field tested.

The area where the white powder was discarded was accessible to employees and offenders which could have resulted in unintended drug exposure.

No disciplinary charges were filed against an Offender for the white powder.

No reports were submitted on Virginia CORIS about the suspected drug seizure.

The OLU was not notified.

Offender D told investigator the white powder recovered from his Bible was Elavil.¹⁷

Inventory/search:

An inventory/search of two offender's cell was conducted on 6/24/17 after they were moved to Segregation for getting into an altercation. Several items of contraband were found in their cell including, razor blades, tattoo paraphernalia (tattoo needles, candle, and ink), and a white powder substance which C/O L found in a folded piece of paper in the spine of a Bible.

C/O L discovered the white powder substance but did not smell or touch it. C/O L called Sgt., his Supervisor, on the radio concerning what was found in the cell. On arrival at the cell, Sgt. asked what was found and was told it was out on the table in the pod. Sgt. was also informed it was thought drugs had been found.

Sgt. was concerned the white powder substance, which was wrapped in a plastic/latex glove, had been left unattended on a table in the pod. Sgt. did not know what the substance was but took it to Grievant, who was on duty in the Watch Commander's Office.

Sgt. gave the white powder substance to Grievant. He also told Grievant it was found in the spine of an offender's Bible. Grievant, on the basis of viewing and smelling the white powder substance, believed it to be baby powder. Grievant then ordered Sgt. to dispose of the white powder substance by putting it in a trash can in the Watch Office.

The chain of custody was not maintained and was not documented concerning the white powder substance. No employee documented the time the white powder was discovered, received, or released to the custody of another employee.

White powder:

Grievant indicated he determined, based on smelling and looking at the white powder substance in the Watch Office, it was baby powder. However, other individuals were not of the same belief or had different conclusions as to what the white powder substance appeared to be. When Sgt. responded to the radio call that contraband had been found and went to the cell, he was told the white powder substance found was thought to be drugs. C/O P thought it appeared to be a crushed pill.¹⁸ Offender D stated to SIU Investigator the white powder found inside his Bible was Elavil.

¹⁷ A. Tab 6.

¹⁸ A. Tab 6.

Offender A also told SIU Investigator the powder found inside Offender D's Bible was probably his Elavil medication and he had given Offender D some Elavil.¹⁹ Offender A's medical records indicated he had an Elavil prescription.

Grievant later told SIU Investigator he was not 100% sure the white powder substance was baby powder. Grievant was not trained in the identification of unknown substances/drugs. Grievant had never seen a number of drugs including cocaine, crack, or heroine. He also stated this to SIU Investigator when asked about his training/qualifications to determine what the white powder substance was.

Grievant did not contact the Institutional Investigator, Evidence Manager, place the white powder substance in an evidence container, or secure it in the evidence locker. The white powder substance was never tested or analyzed due it being disposed of at Grievant's order. His ordering its disposal denied Agency the ability to further investigate and, if warranted, pursue matters and take appropriate actions once testing determined what the white powder substance actually was.

Grievant's actions made it impossible to determine if the white powder substance found was suboxone, elavil, some other drug or substance, baby powder, or mixture of drugs, substances, and/or baby powder. Testimony indicated there are a number of substances with the appearance of a white powder which could cause harm, injury, or even death to individuals upon their being exposed to the substance or having contact with the substance.

Disciplinary Offense Reports:

Disciplinary Offense Reports for matters occurring on 6/24/17 were issued offenders for fighting and for the possession of tattooing paraphernalia. The white powder found on 6/24/17 was not mentioned in any Disciplinary Offense Report and no offender was subjected to disciplinary action at Facility for the white powder and no legal charges were brought.

A Disciplinary Offense Report addressed the 6/24/17 search/inventory but only indicated the finding of various tattoo paraphernalia, including 5 needles, 3 razor blades, 2 broken ink pen shells (needle tube), 1 headphone cord, 1 home made candle, 1 spork (which the end was melted to make a tube), and 1 container of grease which contained material consistent with ink.²⁰

Grievant:

Grievant does not contest he received the white powder substance from Sgt. and, by look and smell, believed it to be baby powder. He does not contest, believing/determining it to be baby powder, he ordered it to be disposed of in a trash can which was accessible by offenders and staff. He also does not contest it was never tested, no reports were made concerning it, no Incident Report was filed, and the Institutional Investigator, Evidence Manager, and OLU were not contacted.

¹⁹ A. Tab 6.

²⁰ A. Tab 6 (I & J).

Grievant contends:

- Policy was not violated as policy only addresses illegal drugs and not suspected drugs. He also contends and there is no established procedure for how to proceed with a suspected substance.
- As he determined the white powder to be baby powder, it was not a suspected drug and, as no testing was done, it is purely speculative if the white powder was a drug/suspected drug.
- Reporting of suspected drugs is not required as reporting requirements for a Class II incident address seizure of drugs or paraphernalia and does not mention or require reporting of suspected drugs.²¹

Contraband is defined by policy as any unauthorized item prohibited or excluded by law, rules, regulations, conditions, instructions, or any authorized item in excess of approved amounts.²² Offenders at Facility may have baby powder in its original container but baby powder kept out of the original container is considered contraband.²³ The white powder substance, even if it were to be found to be baby powder, would still be considered by policy to be contraband.

Contraband seized from an offender or found on Agency property is considered evidence by policy. Also contraband seized from an offender or found on Agency property is listed under the title of "Principle types of evidence" in OP 030.1.

There is insufficient evidence to find, as contended, policy only addresses illegal drugs and not suspected drugs. There is insufficient evidence to find there is no procedure for how to proceed with a suspected substance. OP 030.1 sets forth requirements for the preservation, control, and disposition of evidence and states any contraband discovered should be considered evidence.²⁴ The

²¹ G. Tab 3 and testimony.

²² A. Tab 5, OP 030.1.

²³ Testimony Sgt.

²⁴ A. Tab 5. (OP 030.1 IV. (B.)(1.)); G. Tab 4.

white powder substance would thus be subject to the provisions of OP 030.1 which provides protocols for the preservation, control and disposition of all physical and other evidence obtained in connection with a violation of law, facility rules, or conditions of supervision.

OP 030.1 IV.(B.)(1) also provides, "Any contraband discovered, such as weapons, ammunition, explosives, illegal drugs, evidence of gang activity, and other materials involved in an official investigation should be considered evidence." The term "such as" does not, as Grievant argues, place a limitation that only "illegal drugs" or one of the other specifically enumerated items can be considered "contraband" and thus considered evidence.

Timely and accurate reporting of incidents is stated by OP 038.1 to be essential for immediate response, investigation, and further action. Grievant's actions limited the ability of Agency to respond, investigate, or take further action. Grievant didn't report the white powder substance to his Supervisor or to others above him in the chain of command. He didn't secure the white powder substance in an evidence container or place it in the evidence locker, request the Institutional Investigator to conduct a field test, contact the Evidence Manager, or report matters to OLU.

Agency was not given timely notice of the finding of the white powder substance. Grievant's actions denied Agency the ability to test the white powder substance, determine what it actually was, and, if warranted, take appropriate action upon determining what the substance actually was.

OP 030.1 requires incident reporting for any situation or event that involves the life, health, or safety of employees and offenders and situations that have the potential of subjecting the agency to public comment. Policy requires an *Internal Incident Report* by an employee observing or having knowledge of an incident affecting the safe, orderly operation of a unit. Policy requires the reporting of serious or unusual incidents by telephone to the OLU followed up with an *Incident Report* being submitted. Upon evidence presented at hearing, the staff's finding of a white powder substance folded in paper in the spine of a Bible belonging to an offender is a serious or unusual incident requiring reporting to OLU and a Incident Report being submitted as required by OP 030.1.

As per OP 030.1, any employee discovering contraband in a Facility is required to immediately contact the Shift Commander, who, is required to contact the designated Evidence Manager. The Special Investigations Unit is also required to be notified, in accordance with OP 038.1, when drugs or weapons are found.

Disposal and Safety:

As discussed above, the white powder substance was, by policy, evidence and Grievant is charged under policy with handling evidence with extreme care to prevent injury. Without a field test or other testing of the white powder substance, he chose to smell the substance and, on the basis of merely looking at and smelling the white powder substance, take the further step of ordering its disposal in a trash can in violation of policy. The white powder substance was evidence found in the search/inventory of a cell and procedures for the disposal of evidence are set out in OP 030.1 which provides:

The court assumes possession and control of any evidence entered during a trial.

Money taken as contraband are credited to a Fund.

For all other items of evidence, excluding controlled substances, the Evidence Manager is required to get approval for disposal from the Chief of Security and disposal shall be witnessed by the Chief of Security or designee. and

Requests for disposal of controlled substances are required to be made through the local Commonwealth's Attorney and its disposal and documentation are required to be in accordance with instructions from the Commonwealth's Attorney and the appropriate Court.

OP 030.1 charges employees with handling evidence with extreme care to prevent injury. Management express concern with safety issues related to Grievant actions both to himself and to others. Concern was expressed with his deciding what the white powder substance was by its look and its smell and then choosing to order its disposal in a trash can accessible to staff and offenders.

Management expressed strong concern certain drugs and substances could cause harm, injury, or even death when exposed to. Without testing, it was impossible to determine what Grievant ordered be put in the trash can. Without testing it was impossible to determine if the substance actually was Elavil, baby powder, a prescribed drug, an illegal drug, a substance that was or was not dangerous, or a mixture of these items.

The evidence indicates exposure to certain substances with a white powder appearance could cause serious injury or even death to an individual. Putting an untested white powder substance which was found in the spine of an offender's bible during a cell search into the trash not only violated policy but risked physical injury. Grievant's actions could have caused physical injury to staff and offenders who could have come into unintentional contact with the substance. Additionally,

individuals could even have intentionally removed the substance from the trash and ingested/smoked/or otherwise used such substance.

In viewing the totality of the evidence and the totality of Grievant's actions, the evidence indicates Agency has met its burden of proof, by a preponderance, that Grievant violated safety rules where there is a threat of physical harm.

Policy violated:

As more fully discussed above, Grievant's actions and decisions on June 24, 2017 violated OP 030.1, OP 038.1 and OP 135.1. He failed to follow policy for how the white powder substance was to be collected, handled, reported, tested, and disposed of and he violated safety rules where there is a threat of physical harm.

Grievant was a Corrections Captain, and Supervisor at Facility. He claims, as Officer In Charge, he properly used his discretion in determining the white powder was baby powder and in ordering its disposal in a trash can. However, while Grievant may have discretion, he is still required to comply with policy in his actions and has a duty to maintain a safe environment for staff and offenders.

Concern is expressed with Grievant deciding he could determine what the unknown white powder substance was by merely looking at and smelling it. Although he thought it to be baby powder another employee thought the white powder substance looked like a crushed pill.

Upon taking into consideration the circumstances and the totality of the evidence in this case, the evidence indicates Grievant acted with gross negligence. Policy and protocols in place for the proper collection, documentation, control, preservation, and disposal of evidence (*OP 030.1*), were disregarded. An unknown white powder substance was found in a search of a cell within a piece of paper placed in the spine of an offender's Bible was presented to him and Sgt. told Grievant where it was found. Grievant chose to not have the substance placed in the evidence locker or tested. He chose to make a determination himself as to what the substance was based on how it looked and smelled to him.

Additionally, Grievant chose, on the basis of his belief of what the substance was, to order the white powder substance discarded in a trash can which offenders and staff had access to. His actions made it possible for others to be exposed to the substance unintentionally. His actions also

made it possible for an individual to have opportunity to intentionally go through the trash and retrieve and even use the substance discarded therein. Grievant's actions on the job could have resulted in the death or serious injury of a ward of the State or of a State employee.

Agency has met its burden of proof, by a preponderance, that Grievant's actions constituted gross negligence (as defined above) on the job that could have resulted in the death or serious injury of a ward of the State or of a State employee.

Mitigation or Aggravation.

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The Rules for Conducting Grievance Hearings at § VI (A.) provide that "a hearing officer is not a 'super-personnel officer'" and that "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." The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). If the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the Grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Three employees were subject to discipline due to their actions on 6/24/17. Grievant was issued a Group III with termination, Sgt. was issued a Group II, for failure to follow policy, and C/O L was issued a Group I. No evidence was admitted that either C/O L or Sgt. had any active Written Notices. Furthermore, Grievant was the senior officer in the chain of command, was a Supervisor, and it was he who made the decision to dispose of the untested white powder substance in the trash can.

Consideration was given to the totality of the evidence in this case, to Grievant's approximately 20 years of employment, his having one active Group II Written Notice, his being a Supervisor and a Captain, and, as a Captain and Supervisor, his being held by Agency to a higher degree of accountability for his actions.

Upon review of all evidence admitted in this cause, as more fully discussed above, the Hearing Officer finds that Grievant engaged in the behavior described in the Group III Written Notice, his behavior constituted misconduct, and Agency's discipline was consistent with law and policy.

Upon consideration of all the evidence presented in this cause, the Hearing Officer does not find, under the record evidence, that the discipline exceeds the limits of reasonableness. Mitigation is not found to be warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group III Written Notice with termination is ***Upheld.***

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal 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.

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

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant's Advocate
Agency's Advocate
EDR