

**COMMONWEALTH OF VIRGINIA  
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 11481

Hearing Officer Appointment: January 7, 2020

Hearing Date: July 30, 2020

Decision Issued: August 26, 2020

**PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING**

The Grievant was until recently a Corrections Lieutenant at a maximum security prison (the “Facility”). The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice with termination issued on November 19, 2019 by management of the Virginia Department of Corrections (DOC), as described in the Grievance Form A dated December 16, 2019.

In her Grievance Form A, the Grievant admits she “was unprofessional as a result of the argument/behavior between her and [Lt. E].” However, the Grievant asks for leniency/mitigation reducing the discipline to reinstate her back to the position of a Lieutenant and/or a demotion.

The Grievant also asserts her job performance during six years of employment with no discipline as reasons, amongst other things, for the disciplinary charges against her to be dismissed and for her to be reinstated.

The hearing officer issued an Amended Scheduling Order entered on July 29, 2020 (the “Scheduling Order”), which is incorporated herein by this reference. The Parties agreed, in the context of the Commonwealth’s State of Emergency due to the COVID-19 pandemic, to hold the hearing remotely (audio only).

At the hearing, the Grievant was represented by her attorney and the Agency was represented by its attorney. 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. The hearing officer also received various documentary exhibits of the Grievant and the Agency into evidence at the hearing<sup>1</sup>.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

### **APPEARANCES**

Representative for Agency  
Grievant  
Witnesses for Agency

### **FINDINGS OF FACT**

1. The Grievant was formerly employed by the Agency as a Corrections Lieutenant (“Lt.”) in a state prison facility (the “Facility”).

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<sup>1</sup> References to the Agency’s exhibits will be designated AE followed by the page number. The Grievant’s exhibits are designated GE followed by the page number. The hearing officer admitted all the Grievant’s exhibits except GE 34-52. The hearing officer admitted all the Agency’s exhibits except AE 6, the Rapid Eye video.

2. Accordingly, civility in the workplace, appropriate behavior, orderly conduct and discipline by staff are critical.
3. During the period relevant to this grievance (the "Period"), Grievant as a Lieutenant provided first line supervision to Correctional Officers and supported the Administration of the Facility. GE 53.
4. Grievant's direct supervisor was Captain J, whose employment has since been terminated by the Agency.
5. Captain C supervised a different shift during the Period.
6. At approximately 4:00 p.m. on October 21, 2019, the Grievant went to see the Warden to lodge various complaints concerning Captain J and her fellow Lieutenant E.
7. Recognizing the friction between the protagonists and the frustrations exhibited by the Grievant, the Warden told the Grievant to go home and take the rest of the day off.
8. The Grievant went to the Lieutenants' officer on the Watch Office to retrieve her coat and also to inform Captain J of her early departure. Captain J's office adjoined the Watch Office.
9. The Grievant found Lieutenant E in the Watch Office behind Lieutenant E's desk and a verbal and physical altercation ensued.
10. The Grievant admits that she asked Lieutenant E words to the effect "Why are you acting like a bitch?" CD at 3:15; GE 1.
11. Captain C was in the Watch Office in front of the Grievant's desk.
12. A verbal altercation ensued with both Lieutenants getting louder.
13. Lieutenant E said words to the effect: "I am quiet but I will put my hands on you." GE 1.
14. The Grievant walked towards the door but threatened Lieutenant E "I'm gonna whip your ass if you put your hands on me." CD 3:19.
15. The Grievant admitted she was wrong for saying this.
16. Matters escalated and a physical altercation between the two Lieutenants followed.

17. Captain J had been called into the small office by Captain C because of the escalation and Captain J put himself between the two Lieutenants in an effort to limit the fight. However, Lieutenant E managed to punch the Grievant in the face. The Grievant pushed off Captain J to get to Lieutenant E.
18. The fight spilled into the hallway and both Captain J, a big man, and Captain C had to restrain the Grievant who admits she was still trying to get to Lieutenant E, who continued to taunt the Grievant. CD 3:27.
19. Finally, Captain C walked the Grievant to her car and she left the facility.
20. The Grievant admits her disciplinary infractions warrant discipline but contends she should not have been terminated, arguing that reassignment, suspension or even demotion would be more appropriate.
21. After an investigation, on November 19, 2019, the Agency issued a Group III Written Notice with termination specifying:

Operating Procedure 135.1 Standards of Conduct states “Acts of physical violence or fighting” may result in being issued up to a Group III and termination and violation of policy 135.5 Workplace Violence “Prohibited conduct includes, but is not limited to: A). Injuring another person physically. B) Engaging in behavior that creates a reasonable fear of injury to another person. C). Engaging in behavior that subjects another individual to extreme emotional distress.” Therefore, a Group III and termination is warranted.

GE 3.

22. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

### **ADDITIONAL FINDINGS, APPLICABLE 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.

Pursuant to DHRM Policy No. 1.60 and Agency policy, the Grievant's conduct on October 21, 2019 could clearly constitute a Group III offense, as asserted by the Agency, which warranted a Group III Written Notice to maintain discipline at the Facility, as asserted by the Agency's attorney. In this instance, the Agency appropriately determined that the Grievant's violations of its policies constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's disciplinary infractions justified the Group III Written Notice and termination of employment by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights.

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

The *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." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

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.

The Grievant did specifically raise mitigation and 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 in the Form A, those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's years of service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the lack of any prior discipline;
4. the friction between the two Lieutenants earlier in the day;
5. the lack of leadership from Captain J;
6. the grievant's most recent overall performance rating of "Exceeds Contributor"
7. the taunting of Lieutenant E; and
8. the punch in the face.

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 policy is important to the proper functioning of the Agency and the Grievant was also a supervisor, must set an example and, accordingly, is held to a higher standard. EDR Case No. 9872. 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 (4<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

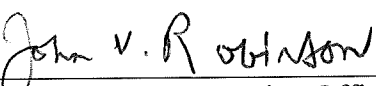
or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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>

ENTER: 8/26/2020

  
\_\_\_\_\_  
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).

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