

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 12105

Hearing Officer Appointment: March 25, 2024

Hearing Date: May 7, 2024

Decision Issued: May 12, 2024

**ISSUES:**

The Grievant requested an administrative due process hearing to challenge the issuance on February 27, 2024, by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the "Agency" of (1) a Group II Written Notice (violation of Written Notice Offense Code 13 – failure to follow instructions and/or policy concerning appropriate language); (2) a Group II Written Notice (violation of Written Notice Offense Code 13– failure to follow instructions and/or policy concerning information technology (“IT”); (3) a Group III Written Notice (violation of Written Notice Offense Code 74– falsifying records concerning performance evaluations); and (4) a Group III Written Notice (violation of Written Notice Offense Code 55 – fraternization with a former inmate). For ease of reference, the above written notices are referred to as Written Notices 1-4. The Grievant’s employment was terminated effective February 27, 2024.

The Grievant has raised the issues specified in her Grievance Form A and is seeking the relief requested in her Form A, including reversal of the discipline.

### **PROCEDURAL HISTORY & BACKGROUND:**

The Grievant's advocate, the Agency's advocate and the hearing officer participated in the first prehearing conference call at 2:00 pm on March 29, 2024. The hearing was scheduled for and held May 7, 2024, as reflected in the Scheduling Order of March 31, 2024, 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.<sup>1</sup>

The hearing officer recorded the hearing.

At the hearing, the Grievant's advocate represented the Grievant 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  
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 the Food Services Director.

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<sup>1</sup> 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.

2. The Grievant was required to strictly adhere to all applicable Agency policies and procedures.
3. As Food Services Director, Grievant was responsible for supervising numerous subordinates, including both Agency employees and inmates who worked under her in the kitchen.
4. The Grievant, as a supervisor, is held to a higher standard when it comes to compliance with Agency policies and procedures and is expected to set an example to her subordinates.
5. The Grievant performed an important vital function for the Facility as Food Services Director, with significant and substantial training invested in the Grievant by the Agency in all aspects of her employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all her duties and responsibilities.
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 was paramount, particularly when the Grievant was assigned to the Food Services Director post.
7. Certain policy violations by Grievant, specified below, opened the door to possible inmate coercion and blackmail of the Grievant, as asserted by the Warden.
8. 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 Food Services Director post.

9. Despite this critical need, Grievant committed serious violations of the Agency's policies and protocols as specified below.
10. 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.

**Written Notice 1 (Inappropriate Language)**

11. Grievant "trash-talked" in the kitchen, called inmates perverts, cussed out inmates and used profanity in the kitchen.
12. In her SIU audio interview, Grievant admitted that she cussed out inmates (AE 11 @ 4"); used profanity in the kitchen (AE 11 @ 5" & 30"); talked trash (AE 11 @ 32"); and called the inmates perverts (AE 11 @ 33").

**Written Notice 2 (IT)**

13. Grievant allowed inmates to use her VITA tagged computer.
14. In her SIU audio interview, Grievant admitted that she allowed an inmate who functioned as a clerk to use her computer (AE 11 @ 26-28"); and Grievant admitted this was not right (AE 11 @ 16").
15. Inmates could have used these basic policy violations to blackmail or coerce the Grievant.

**Written Notice 3 (Falsification)**

16. Grievant admits that she allowed clerks to proofread and correct grammar concerning performance evaluations on DOC employees.

17. The Department, however, did not carry its burden to prove that these actions constituted falsification of records within the meaning of the policy, as analyzed in greater detail below.

**Written Notice 4 (Fraternization)**

18. Agency policy prohibits fraternization or non-professional relationships with inmates or probationers/parolees who are within 180 days of the date following their discharge from DOC custody or termination from supervision (the Prohibited Period).
19. Grievant spoke on her telephone to a former inmate subject to the Prohibited Period (MH). AE 11 @ 22-23”.
20. Grievant also participated in 3-way telephone conferences with MH.
21. Grievant discussed Facility gossip with MH in these calls.
22. In her SIU audio interview, Grievant at first denied any such 3-way conference calls (AE 11 @ 7-8”) but later admitted to the same (AE 11 @ 20-23”).
23. Grievant allowed inmates access to and to read confidential DOC employee performance evaluations.
24. In her SIU audio interview, Grievant admitted permitting certain inmates to access, read and correct these evaluations (AE 11 @ 14-16”).
25. In her SIU audio interview, Grievant admitted that this was not right.
26. Inmates could have used these basic policy violations to blackmail or coerce the Grievant.
27. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

28. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
29. 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.

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 II or a Group III offense, as indicated. While not required, each offense is expressly listed in the SOC as a Group II or a Group III offense and cumulation of two active Group II offenses or a single first Group III normally results in discharge. AE 21 at 18-19 (Bates #s 162-3).

**Violation of Operating Procedure 135.1, Sections XIII (B)(1) and (11) <Second Group Offenses> & XIV (B)(23) <Third Group Offenses> for:**

1. Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure.

11. Violation of DHRM Policy 2.35 Civility in the Workplace ... is considered a Group II offense depending upon the nature of the violation...

23. Violation of Operating Procedure 135.2, Rules of Conduct Governing Relationships with Inmates

AE 21 at 18-20.

The Agency did not meet its burden concerning the asserted falsification of records offense. Group III Offenses under OP 135.1 include falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents. AE 21.

“Falsifying” is not defined by the DOC Standards of Conduct (OP 135.1), but the hearing officer interprets this provision to require proof of an intent to falsify by the employee for the falsification to rise to the level of a Group III and/or justifying termination. This interpretation is less rigorous but consistent with the definition of “Falsify” found in *Black’s Law Dictionary* (6<sup>th</sup> Edition) which provides:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition: to tamper with, as to falsify a record or document. ...

The hearing officer’s interpretation is also consistent with *New Webster’s Dictionary and Thesaurus* which defines “falsify” as:

to alter with intent to defraud, to falsify accounts, to misrepresent, to falsify an issue, to pervert, to falsify the course of justice.



Accordingly, the gravamen of “falsification” in the policy contemplates unwarranted alteration, not the proofreading and grammatical correction under supervision of the Food Director performed by the clerk.

Operating Procedure 135.2, states in part:

- Except for preexisting relationships, fraternization or non-professional relationships between employees and offenders are prohibited, including when the offender is within 180 days following discharge from DOC custody or termination from supervision, whichever occurs last.
- At all times, employees should be respectful, polite, and courteous in their communication and interaction with inmates and probationers/parolees, as well as with citizens and other employees.
- No profane, demeaning, indecent, insulting, threatening, harassing, or discriminatory conduct (verbal, written or physical) will be tolerated.

AE 22.

OP 310.3, states in part:

- Inmates/probationers/parolees will only be permitted to use IT resources to perform approved job assignments, educational, instructional, research, and specific CTE duties as defined in this operating procedure.
- All DOC employees and inmates/probationers/parolees will be responsible for complying with DOC IT system usage procedures as well as any applicable laws, ...

- DOC employees are responsible for the appropriate use of technology by inmates/probationers/parolees and may be held accountable for the misuse or technology, which may result in disciplinary action in accordance with Operating Procedure 135.1, *Standards of Conduct*.
- Inmates/probationers/parolees are prohibited from using computers assigned to a specific employee, computers used for general administrative purposes, or any technology resources tagged with VITA/NG/COV identification, i.e., computers, laptops, tablets, printers.

AE 30.

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, other than the unproven asserted falsification violations, the various offenses are appropriately classified at the Group II or Group III level, as designated, with the Agency appropriately exercising the discipline and ending the Grievant's employment due either to the upheld Group III Written Notice or the accumulation of the subject Written Notices.

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, with the exception of the falsification charge, the violations each rose to the level indicated.

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).

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 1-4.

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 1-4.

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 1-4, the Written Notices, 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 tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past favorable performance evaluation history;
5. no active prior discipline;
6. her very hard work for the Facility;
7. the Grievant's excellent evaluations;
8. the death of the inmate's brother;
9. the long hours worked by the Grievant; and
10. 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 supervisory position where management of necessity relied on her to attend work and to perform her duties in strict conformity with Agency policies, as she 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.

Grievant supervised Facility inmates and employees. EDR has consistently held supervisors, such as Grievant in this case, to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." *See, also*, DHRM Ruling 2015-3953:

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.

DHRM has previously determined that “agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees.”

The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the agency determined that the Grievant’s misconduct was more severe based, in part, on her position as a supervisor. Policy permits the agency to hold supervisory employees to a higher standard than non-supervisory employees, and accordingly the hearing officer defers to the agency’s weighing of that factor.

Similarly, Agency Operating Procedure 135.3 stresses:

“Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others.”

AE 23.

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 each of the offenses specified in the upheld written notices (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 notices and concerning all issues grieved in this proceeding (other than Written Notice 3) 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>

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

ENTER 5/12/2024

*John Robinson*

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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).