

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 12104

Hearing Date: June 24, 2024  
Decision Issued: July 1, 2024

PROCEDURAL HISTORY

On February 16, 2024, Grievant was issued a Group III Written Notice of disciplinary action, with job termination. The offense codes listed were failure to follow instructions or policy, safety rule violation, and violation of DHRM Policy 1.05, *Alcohol and Other Drugs*,<sup>1</sup> occurring January 4, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action. The matter advanced to hearing. On March 25, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was originally scheduled for May 10, 2024; for good cause shown, the hearing was continued and rescheduled to June 14, 2024. Because of witness unavailability, on the parties' joint motion, and for such good cause shown, the grievance hearing was again rescheduled to June 24, 2024. On June 24, 2024, the hearing was held via online video, with the parties and witnesses convened in-person at the Agency's facility.

The Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency Exhibits or Grievant Exhibits, respectively. The Agency was allowed to submit an Agency procedure post-hearing as rebuttal, and the record closed June 28, 2024.<sup>2</sup> The hearing officer has carefully considered all evidence and argument presented.

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<sup>1</sup> This DHRM policy was neither specifically addressed in the Written Notice nor the evidence presented.

<sup>2</sup> The Agency submitted post-hearing Operating Procedure 445.4, *Screenings and Searches of Persons*. The procedure submitted noted two amendments after the offense date. The nature of the procedure amendments was not established and the Grievant objected. Only the procedure in effect on the offense date may be considered, and I am unable to discern from the proffered procedure what was in effect on the date of alleged offense. Thus, I must refuse consideration of the proffered procedure.

## APPEARANCES

Grievant  
Advocate for Grievant  
Agency Representative  
Counsel for Agency  
Witnesses

## ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline 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 a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual (GPM) § 5.8.* However, § 5.8 states “[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.” A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Operating Procedure 445.4 (Attachment 2) lists allowable items in the facilities, including:

- **Medication** - One-day dose of prescription medications in a container that is clearly marked with the employee's name and prescription sheet or bottle.

Agency Exh. 14.

Under Operating Procedure 135.1, *Standards of Conduct*, Group III offenses specifically include:

- Introducing or attempting to introduce contraband into a facility or to an inmate/probationer/parolee, or possession of contraband in the facility.

Agency Exh. 15.

Under Operating Procedure 135.4, *Alcohol and Drug Testing*,

- Manufacturing, distributing, possessing, or using unlawful drugs, illegal drugs, or controlled substances without a valid prescription is prohibited by state law. . . . Violations will result in termination of employment.

Agency Exh. 13.

### The Offense

The Group III Written Notice, issued by the warden on February 16, 2024, detailed the facts of the offense, and concluded:

#### Violation of OP 135.1 Standards of Conduct:

Introducing or attempting to introduce contraband into a facility or to an inmate/probationer/ parolee, or possession of contraband in the facility.

#### Violation of OP 135.4 Alcohol and Drug Testing:

any/all use, possession, distribution, sale, etc. of illegal drugs; or unlawful use of controlled substances.

Employees should notify their supervisor if they are taking a medication that could adversely affect their job performance; security employees must take this notification to their supervisor and Human Resource Officer.

#### Explanation of Evidence:

On 1/4/2024 [Grievant] went through front search. As the front search officer searched [Grievant's] belongings, they found a tightly wrapped toboggan [a knitted cap] with a prescription bottle containing medication. At that time, Captain [D] was called to come to front search. When Captain [D] arrived, he activated his BWC #22 and asked [Grievant] what was going on. [Grievant] said that he has had a long day, was flustered, and just stuck the pills in his pocket. [Grievant] also stated that the medication in the bottle was pain pills, muscle relaxers, and antibiotics.

Statement from Front Search Officer [P], [Grievant] and Captain [D].

Pictures of medication bottle and pills.

Agency Exh. 1. For circumstances considered, the Written Notice stated, "Two years of DOC service."

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

The Agency employed the Grievant as a corrections officer, without other active disciplinary actions.

The facts are mostly not in dispute. The Grievant usually leaves his medication in his car, but on this date he had his medication wrapped in his knit hat in his coat pocket. During the entry search, the searching officer found the medications in the coat pocket and called the security supervisor. The undisputed facts are that the medications were prescribed for the

Grievant, and he combined one day's doses in one prescription bottle.<sup>3</sup> The prescription bottle used was for acetaminophen/hydrocodone (a controlled drug).

The manner of carrying the medications reasonably raised suspicion by the Agency, which is charged with controlling and preventing contraband coming into the facility.

### Analysis

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 (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

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 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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has 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.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

*Rules* § VI(B).

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<sup>3</sup> The medications were six pills of acetaminophen/hydrocodone (for pain), two pills of Baclofen (muscle relaxant), and two pills of Gabapentin (for pain). Agency Exh. 7.

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant's admissions, I find that the Agency has not proved the misconduct charged in the Written Notice.

The facts do not establish the charged violation of OP 135.1, *Standards of Conduct*. While contraband is understood to be items forbidden for entry, possession, or removal from a corrections facility, applicable policy specifically allows employees to bring into the facility one-day's dose of prescribed medication. Here, the evidence supports the conclusion that the Grievant had no more than a one-day's dose of three medications prescribed for him. There is also no evidence that the Grievant was attempting to provide his medications to an inmate/probationer or parolee.

The facts do not establish the charged violation of OP 135.4, *Alcohol and Drug Testing*. There is no indication that the Grievant was attempting to distribute or sell his medications. Regardless, the medications were not "illegal drugs." The Grievant's possession or use of his prescribed medications was not "unlawful use of controlled substances."

As for the precatory suggestion that security employees "should notify" their supervisor and Human Resource Officer if they are taking a medication that could adversely affect their job performance, the only evidence on the subject is the Grievant's denial that his medication adversely affected his job performance. The Grievant testified, however, that he had provided notification of these medications.

The Agency reasonably considered the Grievant's conduct of possessing his medications inside his coat pocket, wrapped in a knitted hat, to present a suspicious incident requiring inquiry and investigation. The ultimate facts, however, viewed *de novo* during the grievance hearing, show that the Grievant's action of possessing his medication in the facility was not a breach of applicable policy. The bottle containing the prescription medication was legitimately the Grievant's. While combining other prescription pills in the same bottle added to the Agency's suspicion, such conduct is not expressly prohibited by applicable policy or procedure. The Grievant had a "one-day dose of prescription medications in a container that is clearly marked with the employee's name and prescription sheet or bottle." OP 445.4 (Attachment 2), Agency Exh. 14. All the pills were prescribed for the Grievant and contained in the Grievant's prescription bottle.

Based on the factual findings, I find that the Agency has not met its burden of showing the Grievant's misconduct as charged in the Written Notice. The Grievant's conduct does not violate identified policy and procedure. Accordingly, I find that the Group III discipline, with termination, is not consistent with policy.

### Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at \*18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM].” The Agency’s Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. 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. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Given the findings above, mitigation is only addressed contingently. Should the Agency contend that policy prohibits the Grievant’s combining his prescription medications in one prescription bottle, I find the policy does not express that understanding. While such a policy could be viewed as reasonable, such interpretation would spring from ambiguity in the existing policy. For this reason, there would be lack of adequate notice and, thus, basis for mitigation.

### DECISION

For the reasons stated herein, the Agency’s Group III Written Notice, with job termination, must be and is rescinded. The Grievant is reinstated to his former position or, if occupied, to an equivalent position; full back pay, from which interim earnings must be deducted; and restoration of full benefits and seniority.

### APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management

101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

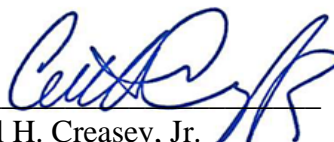
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.<sup>4</sup>

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

  
Cecil H. Creasey, Jr.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.