

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case Nos: 12160

Hearing Date: November 7, 2024  
Decision Issued: November 7, 2024

**PROCEDURAL HISTORY**

On March 5, 2024, Grievant was issued a Group III Written Notice.<sup>1</sup> The offense date was January 17, 2024,<sup>2</sup> On April 2, 2024, Grievant filed a grievance challenging the Agency's actions.<sup>3</sup> The grievance was assigned to this Hearing Officer on August 12, 2024. A hearing was held on November 7, 2024.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Grievant Advocate  
Grievant  
Witnesses

**ISSUES**

Did Grievant violate VADOC Operating Procedures 135.1 and 135.3?

**AUTHORITY OF HEARING OFFICER**

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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

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<sup>1</sup> Agency Exh. 1, at 1

<sup>2</sup> Agency Exh. 1 at 1

<sup>3</sup> Grievant Exh. 1, at 1

<sup>4</sup> See Va. Code § 2.2-3004(B)

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. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

### **FINDINGS OF FACT**

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact. Agency submitted a notebook containing pages 1 through 56. Grievant objected to page 56. Neither Grievant nor the Agency used page 56 in the presentation of their evidence. The notebook, with the exception of page 56, was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 31. The Agency objected to pages 26 - 31. Neither Grievant nor the Agency used pages 26 - 31 in the presentation of their evidence. The notebook, with the exception of pages 26 - 31, was accepted as Grievant Exhibit 1.

Several Operating Procedures (OP) are relevant to this matter.

OP 135.1(XIV)(A), **Third Group Offenses** states: *"These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include, but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or law"*<sup>8</sup>

OP 135.1(XIV)(B)(37), states that Group III offenses include but are not limited to: *"Violation of Operating Procedure, 135.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment in the Workplace, **including but not limited to failing to report an intimate or romantic relationship**, relationship of a sexual nature, or attempt to initiate the same with a subordinate."*<sup>9</sup> (Emphasis added)

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<sup>5</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>6</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>7</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>8</sup> Agency Exh. 1 at 28

<sup>9</sup> Agency Exh. 1 at 30

OP 135.3 (II)(A) **General Conduct**, states: “*This operating procedure applies to all employees...*”<sup>10</sup>

OP 135.3(VIII)(F) states: “*Employees involved in a romantic or sexual relationship with a co-worker, **regardless of each party’s level** of seniority, rank, or position, must disclose the existence of a sexual or romantic relationship to the Organizational Unit Head.*”<sup>11</sup> (Emphasis added)

OP 135.3(VIII)(F)(3), states: “*Failure to promptly report the relationship could result in disciplinary action under Operating Procedure, 135.1, Standards of Conduct.*”<sup>12</sup>

The parties entered into an Agreed Stipulation prior to any witness testimony. Grievant and Agency agreed that Grievant and a fellow employee (CE) entered into a consensual sexual relationship sometime in October 2023. Neither reported this to the Operational Unit Head (OUH) until January 17, 2024, when CE made such a report to the Warden, the OUH.

Subsequently, the Warden, who testified before me, questioned both the Grievant and CE individually. On January 23, 2024, Grievant provided a written statement stating: “*I [Grievant] was involved with [CE], which started in October and ended in December. We had a consensual romantic/sexual relationship, and I am currently pregnant.*”<sup>13</sup>

Grievant, in the Agreed Stipulation and in her written statement acknowledges the relationship and her failure to report it. Her brief testimony also acknowledged her failure to report. Grievant’s advocate seemed to indicate that the reason for this grievance was Grievant’s belief that she had been punished more severely than CE, a higher-ranking employee. The Warden’s uncontradicted testimony was that both Grievant and CE received Group III Written Notices and that normally the result would have been termination, a demotion, a transfer, a reduction in pay, or a combination of any of these. None of these consequences happened to either CE or the Grievant. Because the Warden found them to be valued employees, there was no further consequence other than receiving a Group III Written Notice.

### **MITIGATION**

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the

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<sup>10</sup> Agency Exh. 1 at 42

<sup>11</sup> Agency Exh. 1 at 50

<sup>12</sup> Agency Exh. 1 at 50

<sup>13</sup> Agency Exh. 1 at 9

Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter beyond the Warden's mitigation.

### **DECISION**

I find that the Agency has borne its burden of proof in this matter and the issuance of the Group III Written Notice was proper.

### **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](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 that 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 where the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</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].

*William S. Davidson*  
William S. Davidson, Hearing Officer

Date: November 7, 2024,

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