

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12152

Hearing Date: August 26, 2024
Decision Issued: August 27, 2024

PROCEDURAL HISTORY

On June 6, 2024, Grievant was issued a Group III Written Notice with termination.¹ On July 1, 2024, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on July 22, 2024. A hearing was held on August 26, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant Advocate
Grievant
Witnesses

ISSUES

Did Grievant violate Operating Procedures 135.1 and 430.2?

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.³ 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 de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct,

¹ Agency Exh. 1, at 1

² Agency Exh. 1, at 26

³ See Va. Code § 2.2-3004(B)

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.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

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 99. During the course of the hearing, Grievant objected to pages 25, 52 and 53 and the objection was sustained. The remainder of the notebook was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 12. Without objection, it was admitted as Grievant Exhibit 1. Six witnesses, in addition to the Grievant, testified.

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

OP 135.1, **Standards of Conduct**, “...applies to all units operated by the Virginia Department of Corrections.”⁷

OP 135.1(I)(F)(6), **Procedure**, states: “Enable the DOC to fairly and effectively discipline, and/or terminate employees... where the misconduct and/or unacceptable performance is of such a serious nature, that a first offense warrants termination.”⁸

OP 135.1(XIV)(B)(7), **Third Group Offenses**, states such offenses include but are not limited to: “violating safety rules, where there is a threat of physical harm.”⁹

OP 135.1(XIV)(B)(15), **Third Group Offenses**, states such offenses include but are not limited to: “Negligence on the job, that results, or could have resulted in the death, or injury of persons, including, but not limited to, employees, supervisors, volunteers, inmates...”¹⁰

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁷ Agency Exh. 1 at 73

⁸ Agency Exh. 1 at 78

⁹ Agency Exh. 1 at 92

¹⁰ Agency Exh. 1 at 92

OP 135.1(XIV)(C)(3), **Procedures for Issuing a Group III Notice**, states: *“Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employees transfer to an equivalent position in a different work area with no change in salary; disciplinary suspension without pay of up to 30 workdays (240 hours for non-exempt employees); demotion; or transfer to a position with reduced responsibilities and a disciplinary salary action.”*¹¹

OP 430.2, **Tool...Control** defines **Class A Tools** as *“Tools that are considered extremely hazardous to the security of a facility are designated as Class A Tools. Class A tools must be stored outside the security perimeter. For emergency purposes, limited Class A tools may be kept in secure control centers that are staffed 24 hours per day. In addition to the tools listed below, facilities may identify other tools that require the highest level of control:...hacksaw blades...”*¹²

OP 430.2(I)(A) and (D) state: *“(A) All staff... **must comply** with the requirements of this operating procedure governing the use and storage of tools on facility grounds. (D) All staff issuing, using, and storing tools, **must do so** in a manner consistent with the security level and mission of the facility, and in accordance with this operating procedure.”*¹³ (Emphasis added)

OP 430.2(III)(B) states: *“All tools must be returned to their assigned storage location when not in use and accounted for at the end of each day.”*¹⁴

Grievant was a Buildings and Grounds (B&G) Supervisor. As such, he worked with various tools daily to fulfill his job requirements. On May 20, [REDACTED] and others performed a search of Grievant’s desk and *“The following items were found in the desk: T-27-bit, Phillips head screwdriver, three broken drill bits, Porta-Band blade (approximately 12-14 inches long), which is a Class A tool, eight pairs of leather gloves without numbers,... three packs of welding rods, and 10 loose welding rods...”*¹⁵ A picture of the items found includes a strip of razor wire, a concrete nail, a threaded rod and other items.¹⁶

[REDACTED] testifies that most of these items could be weaponized by the inmates should they gain possession. There was a secure tool room within approximately 5 feet of Grievant’s desk and that is where these items should be kept. Inmates had access to the area where the desk was located, although Grievant testified that the inmates were always under the supervision of some Agency employee. If Grievant was in the secure tool room, he would be in a position where inmates would not be visible to him. Grievant testified that an inmate would **never** have the opportunity to take something from or off of his desk. This assertion seems highly unlikely, thus the need for secure and locked tool rooms.

[REDACTED] testified as to missing tools.¹⁷ Her testimony adds nothing to the Group III regarding the possibility of death or serious injury to anyone.

¹¹ Agency Exh. 1 at 93

¹² Agency Exh. 1 at 66

¹³ Agency Exh. 1 at 67

¹⁴ Agency Exh. 1 at 69

¹⁵ Agency Exh. 1 at 23

¹⁶ Agency Exh. 1 at 11

¹⁷ Agency Exh. 1 at 14, 24

■■■, the B&G Director, testified that he took part in the search of Grievant's desk. He stated that the welding rods were on top of the desk and that they were easily made into shanks. The Porta-Band (hacksaw) blade, along with drill bits and the section of razor wire were in the drawer. He stated that leaving such tools, on, in, or under the desk was negligence. He said that searches such as this were random and were not announced in advance. He also pointed out the close proximity of the secure tool room to Grievant's desk and, if Grievant was in the tool room, he would have blind spots in trying to keep his desk under observation.

■■■, prior to the events that led to this grievance, was a B&G Supervisor B (Senior Supervisor.) He was Grievant's supervisor. He was present when Grievant's desk and area were searched. He confirmed that the items were from Grievant's desk. He testified that with the possible exception of the gloves, all of the items could be dangerous. He testified that the Porta-Band was a Class A tool. He did not think Grievant was foolish enough to leave such an item in his desk drawer, implying that someone put it there other than Grievant. He also testified that people have inspected this area in the past. He stated that he received a Group III Written Notice as a result of this investigation. He was demoted one grade and had a 5% reduction in pay. He was not terminated. ■■■ was called as a witness by both the Agency and Grievant.

■■■ testified on behalf of Grievant. He had a T-25 tool bit and approximately \$5 in a plastic bag in his toolbox when he had an accident at work and was taken to the hospital. Ordinarily, he took the plastic bag home with him, as it contained his meal funds. Because he was at the hospital, another Agency employee needed to secure the toolbox and discovered the unauthorized tool bit and money. He received a verbal instruction from the Warden. This comparator is so radically different from the case at hand that it is of no value. However, he did testify that tool checks are made often.

■■■ testified on behalf of the Grievant. He was the Grievant's supervisor from 2012 through 2019. He has not worked with Grievant since 2019. He said he had never heard of anyone being fired for having tools on or in their desk and that it was common practice, while he was in this position, to do so. On cross examination, he did concede that his Class A Tools, and Class B tools were properly secured at the end of every day.

Grievant testified that he was aware that there were policies concerning tools as found in OP § 430.2. However, he felt it was common and acceptable practice to leave tools in, on and around his desk, contrary to explicit written policy. It was common practice to have unauthorized items. What I did is what I was taught and what I learned. He testified that he was treated unfairly and that he felt he was set up. I never placed the Porta-Band in my drawer. I find this assertion, based on the evidence presented, to not be creditable. Grievant testimony clearly showed that he felt that, because it was common practice to leave tools as he did, that practice superseded written policy.

Grievant felt he was retaliated against because of a complaint he made in January and again on May 10 regarding co-workers being allowed to clock in using their cell phones.¹⁸ While Grievant made a compliant and shortly thereafter his desk was searched for tools, it should be noted that the entire area, including 2 other desks were searched.

¹⁸ Agency Exh.1 at 28

Grievant, on January 25, received an email stating “... *The wardens came through and checked S1. A special thanks to you guys and everything was great. **They will start making random checks of all areas.***”¹⁹ (Emphasis added)

On November 30, 2023, Grievant received an email stating: “***Follow all policies and procedures, pertaining to shops and tools. No inmates allowed in tool rooms. All tools need to be checked and chitted out before you leave the tool room. You are to always have an inventory of all tools in your possession.***”²⁰ (Emphasis added)

On September 8, 2023, Grievant received an email stating: “... *Check desk and shelves in your shop for **anything that should not be there.***”²¹ (Emphasis added)

This Agency houses people who inherently pose a risk to themselves and others. Grievant should not and cannot be surprised that security is a high priority and that includes being certain that all employees are complying with policy. He was on notice that random searches would be made and that he was expected to comply with policy. And, when policy and common practice conflicted, he was specifically told to follow policy. Grievant has not borne his burden of proof regarding his claim of retaliation.

I find that Grievant has violated OP 135.1(XIV)(B)(7) (15) and OP 430.2. Negligence is defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.²² A reasonably prudent person would not leave tools or anything else on their desk, in their desk, or around their desk that could be used by those in custody to harm themselves or others.

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 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

¹⁹ Agency Exh. 1 at 42

²⁰ Agency Exh. 1 at 44

²¹ Agency Exh. 1 at 49

²² Black’s Law Dictionary, 10th Addition

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.

█ testified that he knew of no other Agency employee who was disciplined for having tools on, in, or around their desk. █, Grievant's supervisor, received a Group III Written Notice, arising from the circumstances surrounding this matter. He was demoted and received a 5% pay reduction. He was not terminated. The Agency offered no evidence to attempt to differentiate this grievance and the reason for the different punishment given to █ or to rebut █'s testimony regarding his grievance. The author of Grievant's Written Notice did not testify as to her thinking regarding termination.

In this matter, these violations were at the same facility, under the same OP, were committed by higher and lower ranking employees, with the lower-ranking employee being terminated and the higher-ranking employee being demoted. Grievant has shown enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the Agency treated similarly situated employees differently.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the Agencies treatment of other similarly situated employees."²³ As with all affirmative defenses, the Grievant has the burden to raise and establish any mitigating factors.²⁴ The Grievant with must show enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the Agency treated similarly situated employees differently.²⁵ Once such an inference is presented,... the burden shifts to the Agency to provide a legitimate explanation for the disparate treatment.²⁶

The *Rules* provide that while it is the burden of the Grievant to raise and establish mitigating circumstances, the Agency bears the burden of demonstrating aggravating circumstances that might negate any mitigating circumstances.²⁷ Therefore in making a determination whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees positions (including their positions within the organization and whether they have the same supervisors or work in the same unit, and crucially, the stated explanation for why the employees are allegedly treated disparately.²⁸

²³ Rules for Conducting Grievance Hearings § VI(B)(1)

²⁴ Grievance Procedure Manual § 5.8; Rules for Conducting Grievance hearings § VI(B)(1)

²⁵ EDR Ruling No. 2024-5636 n.64

²⁶ EDR Ruling No. 2024-5636 n.66

²⁷ Rules for Conducting Grievance hearings § VI(B)(2)

²⁸ EDR Ruling No. 2024-5636, p.15

Once such an inference is presented, the burden shifts to the Agency to provide a legitimate explanation for the disparate treatment. The Agency offered no evidence as an explanation for the disparate treatment. The evidence presented in this matter supports the testimony of ■■■ that Grievant was the only employee disciplined with termination

As hearing officer, I will not freely substitute my judgment for that of the Agency on the question of what is the best penalty, but will only assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.²⁹ Based on the evidence before me, I find that choosing to only punish Grievant with termination, and his higher ranking supervisor with a demotion, is outside of tolerable limits of reasonableness. Accordingly, I will mitigate in this matter because of the Agency's unexplained and unjustified inconsistent and disparate discipline.

Though it is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline, EDR also acknowledges that certain circumstances may require this result.³⁰ Here the Agency has knowingly and intentionally treated similarly situated employees differently. Worse, it has favored the supervisor and disproportionately punished his subordinate.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice for violation of OP 135.1 and 430.2 was proper. I further find that the Agency has applied inconsistent and disparate treatment to Grievant. The evidence presented by the witnesses clearly demonstrated that a higher ranking employee was given far more lenient punishment, with no evidence as to why. Accordingly, I find and so order that Grievant be demoted and that he incurs a 5.0% disciplinary pay reduction.

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 14th St., 12th Floor
Richmond, VA 23219

²⁹ Rules for Conducting Grievance Hearings § VI(B)(1); EDR Ruling No. 2014-3777

³⁰ EDR Ruling No. 2022-5355 n.57 (when an Agency has knowingly and intentionally treated similarly situated employees differently)

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 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.^[1]

[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: August 27, 2024

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12152

Hearing Date: August 26, 2024
Decision Issued: August 27, 2024

EDR Request for Reconsideration Received: October 10, 2024
Response to Request: October 12, 2024

Reconsideration Decision

The Director stated in part as follows: “...EDR will not disturb the hearing decision on the basis of the appropriate level of discipline assessed by the hearing officer... EDR remands the decision for the hearing officer to (1)reconsider and re-clarify the parameters of the Grievant’s demotion... (2)also consider the issue of providing back pay and benefits...(3)because the initial hearing decision is being remanded for further consideration, the hearing officer may consider reasonable attorneys’ fees via a fee addendum following the remand decision.”¹

Regarding demotion, Grievant was a Supervisor A.² Presumptively, this means he supervised someone. The intent of the demotion was to move Grievant to a position where he was being supervised and to remove all supervisory authority from him. Grievant argues that he is currently at the lowest level of his position, and accordingly, cannot be demoted. The Director states: “... *the Grievant has raised a valid assertion of their not being an easily identifiable position lower than his current supervisory role, and **the Agency has not provided any counter evidence or communication to clarify the name of the new position...***”³ (Emphasis added)

Neither the Grievant nor the Director have offered any authority holding that once an employee is at the lowest level of one position, they are now exempt from demotion. That said, EDR sent Notice of Receipt of Administrative Review Request to the Agency on September 10, 2024. That notice stated in part: “*If a party wants to provide EDR with information... not previously provided with the ruling request, they must contact EDR **immediately** ...to advise that additional information will be forthcoming. Any such information must be provided within five workdays of receipt of this memo....*” As approximately 30 days have elapsed since September 10, the Agency is time barred from now defining a new position for Grievant.

Regarding back pay and benefits, I assumed it was obvious that by mitigating the Grievant’s matter to be similar to his supervisor, who was never terminated, that the Agency understood that the Grievant was being return to work as of the date of his termination. Obviously, I was incorrect in my assumption. Further, Operating Procedure 135.1(A) states as follows: “Reinstatement for Removal by Hearing Officer’s Decision, (A) Unless otherwise stated in the Hearing Officer’s Decision, the DOC is obligated to reinstate employees with full benefits.”⁴ Subject to the terms of the Reconsideration Decision below, The Agency is ordered to provide full back pay and benefits to the Grievant.

Regarding attorney’s fees, the Director stated in part: “... A Grievant’s counsel may only be entitled to reasonable attorneys’ fees if the case at hand involves a discharge, and it is found that the

¹ Administrative Review Ruling 2025-5757, October 10, 2024, at 8, 9

² *Id.* at 8

³ *Id.* at 8

⁴ Virginia Department of Corrections Operating Procedure 135.1

*Grievant substantially prevails... For such an employee to ‘substantially prevail’... the Hearing Officer’s decision must contain an order that the Agency reinstate the employee to their former (or an equivalent) position.*⁵ In my Decision, I did not consider attorneys’ fees appropriate as I was not returning the Grievant to his former position. He was demoted. The Agency, by its silence to the Grievant’s assertion that there is no position to which he can be demoted, apparently adopts Grievant’s position on demotion. Accordingly, I find demotion not an option and I amend my original Decision.

Reconsideration Decision

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice for violation of OP 135.1 and 430.2 was proper. I further find that the Agency has applied inconsistent and disparate treatment to Grievant. The evidence presented by the witnesses clearly demonstrated that a higher ranking employee was given far more lenient punishment, with no evidence as to why. Accordingly, I find and so order that Grievant be suspended without pay for 30 days, and subject to the 30-day suspension without pay, the Agency is ordered to provide full back pay and benefits to the Grievant.

As the Grievant has been returned to his original position, I find his counsel is entitled to reasonable attorney’s fees. In Grievant’s Request for Administrative Review by EDR of the Hearing Decision Issued August 27, 2024, counsel included a Petition for Reasonable Attorney’s Fees. This was received by the Hearing Officer within 15 days of issuance of the initial decision. The Agency has not objected in any manner to this Petition. I have carefully considered this petition and find the claim for 32 hours at the rate of \$131.00 to be reasonable and, accordingly, I approve and order the Agency pay counsel \$4,192.00 in attorney’s fees.

APPEAL RIGHTS

You may request an administrative review by EDR of the Hearing Officer’s Reconsidered Opinion within **15 calendar days of the date the Reconsideration Decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the Reconsideration Decision was issued.**

Please address your request to:

Office of Employment 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.

William S. Davidson
William S. Davidson, Hearing Officer

Date: October 12, 2024

⁵ *Id.* at 9

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12152

Hearing Date: August 26, 2024

Decision Issued: August 27, 2024

EDR Request for Reconsideration (Ruling #2025-5757) Received: October 10, 2024

Response to Request: October 12, 2024

EDR Request for Second Reconsideration (Ruling #2025-5782) Received: November 14, 2024

Response to Second Request: December 19, 2024

Second Reconsideration Decision

In Ruling #2025-5757, The Director stated in part as follows: “...EDR will not disturb the hearing decision on the basis of the appropriate level of discipline assessed by the hearing officer... EDR remands the decision for the hearing officer to (1)reconsider and re-clarify the parameters of the Grievant’s demotion... (2)also consider the issue of providing back pay and benefits...(3)because the initial hearing decision is being remanded for further consideration, the hearing officer may consider reasonable attorneys’ fees via a fee addendum following the remand decision.”¹

Regarding demotion, Grievant was a Supervisor A.² Presumptively, this means he supervised someone. The intent of the demotion was to move Grievant to a position where he was being supervised while remaining in his current reporting line. Grievant argues that he is currently at the lowest level of his position, and accordingly, cannot be demoted. The Director states: “... the Grievant has raised a valid assertion of their not being an easily identifiable position lower than his current supervisory role, and **the Agency has not provided any counter evidence or communication to clarify the name of the new position...**”³ (Emphasis added)

Neither the Grievant nor the Director offered any authority holding that once an employee is at the lowest level of one position, they are now exempt from demotion. That said, EDR sent Notice of Receipt of Administrative Review Request to the Agency on September 10, 2024. That notice stated in part: “If a party wants to provide EDR with information... not previously provided with the ruling request, they must contact EDR **immediately** ...to advise that additional information will be forthcoming. Any such information must be provided within five workdays of receipt of this memo....” As approximately 30 days have elapsed since September 10, the Agency is time barred from now defining a new position for Grievant.

Regarding back pay and benefits, I assumed it was obvious that by mitigating the Grievant’s matter to be similar to his supervisor, who was never terminated, that the Agency understood that the Grievant was being returned to work as of the date of his termination. Obviously, I was incorrect in my assumption. Further, Operating Procedure 135.1(A) states as follows: “Reinstatement for Removal by Hearing Officer’s Decision, (A) Unless otherwise stated in the Hearing Officer’s Decision, the DOC is obligated to reinstate employees with full benefits.”⁴

¹ Administrative Review Ruling 2025-5757, October 10, 2024, at 8, 9

² *Id.* at 8

³ *Id.* at 8

⁴ Virginia Department of Corrections Operating Procedure 135.1

Regarding attorney's fees, the Director stated in part: "... A Grievant's counsel may only be entitled to reasonable attorneys' fees if the case at hand involves a discharge, and it is found that the Grievant substantially prevails... For such an employee to 'substantially prevail'... the Hearing Officer's decision must contain an order that the Agency reinstate the employee to their former (or an equivalent) position.⁵ In my Decision, I did not consider attorneys' fees appropriate as I was not returning the Grievant to his former position. He was demoted.

In Ruling No. 2025-5782, the Director states that Grievance Procedure Manual §7.2(e) should be read as follows: "A Grievant's counsel may only be entitled to reasonable attorneys' fees if the case at hand involves a discharge, and it is found that the Grievant substantially prevails... For such an employee to 'substantially prevail'... the Hearing Officer's decision must contain an order that the Agency **reinstate** the employee ...⁶ (Emphasis added)

Accordingly, the Director found: "In both the original hearing Decision, and the Reconsideration Decision, the Grievant's termination was rescinded. Thus, Grievant substantially prevailed, and his counsel is entitled to reasonable attorneys' fees. For the foregoing reasons, EDR declines to disturb the Reconsideration Decision with respect to the issue of attorneys' fees.⁷

Second Reconsideration Decision

In my Reconsideration Decision, I ruled the Agency was time barred from introducing evidence as to positions available for demotion. The Director disagreed and directed this Second Reconsideration. He stated: "*However, the particulars of the position for appropriate demotion is a necessary consideration in these situations, both to ensure that such a position is available and that **it is consistent with the hearing officer's remedy**. While it would be within the discretion of agency management to determine an appropriate position into which to place a demoted employee, because this relief is part of a reduction of a disciplinary action, there is necessarily a portion of this determination that is within the purview of the hearing officer. Thus, accepting and considering information from the agency (and any additional input from the grievant in response) is needed for the hearing officer to properly assess whether a demotion is an appropriate remedy as mitigation. For example, **in most cases a demotion to a position down one level in the employee's reporting line would seem to be the most common result**, but EDR has no basis to know whether such a result is appropriate in this case or consistent with the hearing officer's intended mitigation remedy. The hearing officer should hear from both parties on this issue before deciding.*"⁸ (Emphasis added)

The Agency was given 18 days to speak to this issue and Grievant was given 14 days to respond.

At this point, it is settled that Grievant will be reinstated, and that attorneys' fees may be ordered. The sole issue in this Second Reconsideration is to determine if there is a position to which Grievant may be demoted consistent with my intended mitigation remedy.

In my initial ruling in this matter, I found that the Agency had borne its burden of proof in the issuance of a Group III Written Notice for violation of OP 135.1 and 430.2. I further found that the Agency had applied inconsistent and disparate treatment to the Grievant and therefore, I mitigated by ordering the Grievant be demoted, and that he incur a 5% disciplinary pay reduction. My intent **was**

⁵ *Id.* at 9

⁶ Ruling No. 2025-5782 at 3, footnote 15

⁷ *Id.* at 3

⁸ *Id.* at 3

for a demotion to a position down one level in the employee's reporting line.

Subsequently, based on Ruling #2025-5757, a question arose as to whether such a position existed, and if not, whether there was a position to which the Grievant could be demoted that would comply with the intent of my original Decision.

On December 2, the Agency, by letter, filed its response regarding possible demotion positions that would be suitable for the Grievant. They were as follows: (1) Office Services Specialist (Treatment), (2) Office Services Supervisor (Mailroom Supervisor), (3) Postal Assistant, (4) Corrections Officer, and (5) Food Operations Supervisor.⁹

Grievant's position prior to termination was **Buildings & Grounds Supervisor**.¹⁰ His Employee Work Profile (EWP) for **Purpose of Position** states: "*Performs hands on repair and maintenance services in areas of the building trades, including electrical systems, plumbing, mechanical, and related structural systems. Trains and supervises inmates that perform their assigned work in a safe and efficient manner. Maintains all required documentation to include work orders, purchase orders maintenance schedules.*"¹¹

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: "*Valid Driver's license. High school diploma or equivalent. Progressively responsible work experience in one of more trade's specialties. Prior work experience organizing and completing work assignments with minimal guidance from others. Skill in the use of hand and power tools and other equipment to complete work assignments. Ability to perform a wide variety of skilled repair and maintenance tasks in the trades and utilities area; to perform heavy manual labor, to work from heights, to assign, inspect and lead the work of others, to understand and follow oral and written instructions. Ability to comprehend and follow building code, practices, and safety... Demonstrated skill in the use of Microsoft Office to include Word and Excel.*"¹²

(1) For the position of **Office Services Specialist (Treatment)**, the EWP for **Purpose of Position** states: "*Provides mid-level administrative and clerical support to the treatment team, while maintaining individual production requirements, in support of the unit and agency mission. Updates and maintains records, files, and in automated databases. Provide clerical assistance for the Institutional Program Manager and Corrections, Institutional Rehab Counselors. Records counselor caseload assignments, compiles inmate listing and records minutes of meetings. Types and distributes Institutional Classification Committee dockets and other paperwork..."¹³*

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: "*High School Diploma or equivalent. Considerable recent experience, providing customer and administrative support to include composing letters, memos, word-processing, data entry, filing and other related duties in [a] professional setting. Recent experience, using office equipment, (computers, printers, copier, fax machine, and other multi line communication system) demonstrated skill to use Microsoft Office to include Word and Excel. Ability to organize work, meet deadlines and complete task in a timely manner. Skilled in communicating with customers, employees, and other individuals to answer questions, disseminate, or explain information. Demonstrated ability to set up and maintain, automated and manual filing systems."¹⁴*

⁹ Letter dated December 2 at 2,3

¹⁰ Id. at 37

¹¹ Id. at 37

¹² Id. at 38

¹³ Id. at 1

¹⁴ Id. at 1

(2) For the position of **Office Services Supervisor (Mailroom Supervisor)**, the EWP for **Purpose of Position** states: “To provide mail services for inmates and staff in compliance with departmental policies and U.S. Postal Service requirements.”¹⁵

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: “Demonstrated skill in the use of Microsoft Office to include Word and Excel to accomplish office support requirements. Ability to organize work, meet deadlines and complete tasks in a timely manner. **Preferred:** Some knowledge of postal and shipping regulations, basic office practices, and procedures, and mail sorting systems. Ability to keep mailing records, lift mail bags, and packages, and follow General oral and written instructions.”¹⁶

(3) For the position of **Postal Assistant**, the EWP for **Purpose of Position** states: “Processes all mail, both internally and externally, for staff and inmates. Receives and inspects in all incoming and outgoing inmate mail for contraband. Receives and distributes departmental mail on a daily basis in compliance with applicable federal, state, and departmental regulations and procedures. Develops, updates, and maintains all related documentation and reports. Assist operations department with maintaining ACA standards and required documentation.”¹⁷

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: “Working knowledge of basic office, practices and procedures. Demonstrated skill in the use of Microsoft Office to include Word and Excel. Demonstrated ability to read, interpret and apply written, policies, and procedures. Ability to organize and complete work assignments with minimal guidance from others. Ability to interpret, understand, and follow oral and written instructions. Ability to communicate both orally and in writing. Must be able to lift bags and bulk packages weighing up to 35 pounds, place and retrieve documents/packages from shelves approximately 6 feet high. Must be able to push a wheeled carrier with mail bags and packages not exceeding 50 pounds. Must be able to stand, walk and sit for extended times and distances.”¹⁸

(4) For the position of **Corrections Officer**, the EWP for **Purpose of Position** states: “Corrections officers contribute to the public safety mission by providing for the safety and security of the public, staff, and inmates by ensuring effective and safe, custody and control, along with compliance with policy and procedure... Officers provide security over adult inmates at the institution, and while in transport; supervise the daily activity of inmates, while observing and recording their behavior and movement to ensure their safe and secure confinement.”¹⁹

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: “High school diploma or a GED equivalent. Valid Driver’s License. Demonstrated ability to read and comprehend workplace policies and procedures, and to prepare workplace reports and documentation. Ability to lawfully possess a firearm in the Commonwealth of Virginia. Ability to successfully complete all pre-employment requirements, which include medical screening, background check, and drug testing to include screening for marijuana use.”²⁰

(5) For the position of **Food Operations Supervisor**, the EWP for **Purpose of Position**

¹⁵ Id. at 9

¹⁶ Id. at 10

¹⁷ Id. at 13

¹⁸ Id. at 13

¹⁹ Id. at 21

²⁰ Id. at 21

states: *“Position supervises the activities of inmates in the preparation and serving of meals for the population and staff. Trains inmates in all kitchen policies, and procedures. Maintains a high standard of food safety, sanitation and quality in a cost-efficient manner.”*²¹

The EWP further defines minimum **Knowledge, Skills, Abilities or Competencies** as: *“Demonstrated ability to read and comprehend policies, and procedures. Demonstrated ability to monitor and supervise the work of others...Working knowledge of food safety, sanitation, cost controls and operating and repairing food service equipment. Basic knowledge of Microsoft Office to include [Outlook.]”*²²

The Human Resources Officer (HRO) for the Agency provided an Affidavit stating: *“No additional education is required for these positions.”*²³ At best, this statement is disingenuous. Based on the verbiage that I have underlined from the EWPs for these 5 positions, the Grievant would need to acquire an entirely new base of knowledge to perform any of these 5 positions. It is hard to glean from Grievant’s former EWP that he possessed mid-level administrative and clerical support skills, recorded minutes at meetings, composed letters, memos, word processing, used multi line communication systems, communicated with customers, maintained automated filing systems, understood US Postal requirements, had knowledge of postal and shipping regulations or mail sorting systems, could assist with maintaining ACA standards, could lawfully possess a firearm, knew how to maintain a high standard for food safety and sanitation, had a working knowledge of food safety, sanitation and cost controls, etc.

These 5 proposed positions are far from Grievant’s **Knowledge, Skills, Abilities or Competencies** as a Buildings and Grounds Supervisor. The amount of new training that would be necessary clearly indicates that to demote Grievant to any of these positions is a recipe for failure.

Grievant argued that the pay band for 4 of these positions was such that a 5% reduction in Grievant’s pay would be impossible. Should there be a finding that Grievant could be demoted to one of these positions, the 5% reduction is based on his former salary, regardless of the pay band for any of these proposed positions.

Second Reconsideration Decision

I find none of the 5 proposed positions satisfies the intent of my original decision **for a demotion to a position down one level in the employee’s reporting line**. All of these suggested positions require skills that the Grievant, based on his prior position, does not currently possess, and all are significantly outside of the former reporting line of Grievant. Accordingly, I again find and so order Grievant be suspended without pay for 30 days, and subject to the 30-day suspension without pay, the Agency is ordered to reinstate Grievant to his former position with full back pay and benefits.

Counsel for Grievant has provided both a petition for reasonable attorneys’ fee request and a supplemental request. The Agency may contest the fees petition by providing a written rebuttal to the hearing officer. §7.2(e) of the Grievance Procedure Manual provides that the Hearing Officer should issue the fees addendum within 15 calendar days of the issuance of the last administrative review decision, or, if ordered, any related revised hearing decision. Should there be no further request for administrative review, 15 calendars days will commence today. A further administrative review

²¹ Id. at 29

²² Id. at 29

²³ Id. at 37

request will toll that time period.

APPEAL RIGHTS

You may request an administrative review by EDR of the Hearing Officer's Reconsidered Opinion within **15 calendar days of the date the Reconsideration Decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the Reconsideration Decision was issued.**

Please address your request to:

Office of Employment 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.

William S. Davidson
William S. Davidson, Hearing Officer

Date: December 19, 2024