

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

DIVISION OF HEARINGS

In the matter of: Case No. 12225

Hearing Officer Appointment: January 25, 2025
Hearing Date: March 24, 2024
Decision Issued: April 14, 2024

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance on December 5, 2024, by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the "Agency") of a **Group III Written Notice** for violation of Written Notice Offense Codes 11 (unsatisfactory performance); 13 – failure to follow instructions and/or policy; and Offense Code 36 — obscene or abusive language.

The Grievant has raised the issues specified in his Grievance Form A and is seeking the relief requested in his Form A, including reinstatement to his former Corrections Sergeant position, back pay and attorney’s fees.

At the hearing an attachment to the Written Notice was introduced, which further provided:



Nature of Offense

12/5/2024

On October 9, 2024 you were in violation of:

Excessive Force: During your entry into the housing unit, it is alleged that you employed excessive force in your interaction with an inmate. Such behavior not only violates our use of force policies but also poses a significant risk to the safety and well-being of both inmates and staff.

Verbal Abuse and Threats: You used profane language directed at the inmate, which included cursing and making verbal threats. This type of communication is deemed unprofessional and is in direct violation of our code of conduct, (including PREA), which emphasizes the importance of maintaining a respectful and dignified environment for all individuals, regardless of circumstance.”

PROCEDURAL HISTORY & BACKGROUND:

The Grievant’s attorney, the Agency’s advocate and the hearing officer participated in the first prehearing conference call at 1 pm on January 27, 2024.

The parties consented to written communication by email alone.

The hearing was originally scheduled to be held on February 26, 2026. However, due to the illness of the Agency’s advocate, the parties agreed to reschedule the hearing to March 24, 2025, when it was held.

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 and Grievant’s white exhibit binders.¹

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.

¹ References to the agency’s exhibits will be designated AE followed by the exhibit tab and/or page number. The Grievant’s exhibits are designated GE followed by the exhibit tab and/or page number.

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 as a Corrections Sergeant, an important supervisory position within the facility.
2. The Grievant was required to strictly adhere to all applicable Agency policies and procedures.
3. As Corrections Sergeant, amongst other duties, Grievant was responsible for supervising and controlling numerous subordinates, including both Agency employees and inmates assigned to the Restorative Housing Unit ("RHU") of the facility.
4. The RHU houses inmates who must be safeguarded by Correctional Officers ("C/Os") with especial vigilance, having been removed from the general population because of problematic issues such as being on suicide watch, facing disciplinary charges, etc.
5. 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 his subordinates.

6. The Grievant performed an important vital function for the Facility as essentially the officer in charge of RHU, with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment.
7. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties and responsibilities.
8. The Facility is a high security level institution and the Grievant's role in maintaining the safety and security of inmates, staff and the public is paramount, particularly when the Grievant was assigned to the RHU.
9. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's supervisory duties pertaining to the RHU.
10. On October 9, 2024, Grievant went to retrieve contraband from Inmate A, and in the process committed serious violations of the Agency's policies and protocols.
11. Grievant went into Grievant's RHU cell alone – policy mandates at least two C/Os enter a cell in RHU unless there is an immediate danger to inmate safety. During the hearing, the Grievant admitted that he should have called for another C/O. Tape; AE 9.
12. Grievant verbally abused and threatened Inmate A and another inmate, Inmate B.
13. Grievant admits calling Inmate A a “faggot ass bitch” and in any event all the Grievant's verbal comments of a sexual nature to the inmates, including demeaning references to gender, obscene language, etc., within the meaning of sexual harassment as defined in Operating Procedure 038.3 (PREA), are captured the body camera footage of the incident. AE 1; GE 1; and Tape at 23”-25”.

14. For example, the Grievant says on camera, “Shut your bitch ass up” and threatens, “throw you to the wolves.”
15. However, the Agency presented no credible evidence of Grievant using excessive force, as argued by his attorney. Inmate A’s account is not in the least credible, and the body camera footage is inconclusive.
16. 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.
17. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
18. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
19. 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 III offense, as indicated. While not required, each offense is expressly listed in the SOC as a Group III offense and a single first Group III normally results in discharge. AE 11.

Violation of Operating Procedure 135.1, Sections XIV (B) (7), (15), (18), (23) & (24) <Third Group Offenses> for:

7. Violating safety rules where there is a threat of physical harm.

15. Negligence on the job that results (or could have resulted) in the death, or serious injury of persons, including, but not limited to, employees, supervisors, volunteers, inmates/probationers/parolees, visitors, and/or students, or the escaping/absconding of inmates/probationers/parolees.

18. Physical abuse, inappropriate, unauthorized, or excessive use of force, or other abuse, either verbal or mental, which constitutes recognized maltreatment of inmates/probationers/parolees.

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

24. Sexual misconduct with inmates/probationers/parolees. Any behavior of a sexual nature between employees and inmates/probationers/parolees under the DOC supervision is prohibited; see Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Inmates and Probationers/Parolees. Sexual misconduct includes but is not limited to conversations or correspondence that suggests a sexual relationship between an inmate/probationer/parolee by an employee, volunteer, contractor, visitor, or agency

representative. A violation of Operating Procedure 135.3, Standards of Ethics and Conflict of Interest, relating to consensual personal relationships/sexual harassment in the workplace may also constitute sexual misconduct.

AE 11 at 102.

As found above, the Agency did not meet its burden concerning the asserted excessive force offense.

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.

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 excessive force violations, the various offenses are appropriately classified at the Group III level, as designated, with the Agency

appropriately exercising the discipline and ending the Grievant's employment due to the upheld Group III Written Notice.

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 excessive force 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 (4th 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*, GE 21-47.

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.

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, the Written Notice, 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. the racial slurs and threats of Inmate A to Grievant;
6. his very hard work for the Facility;
7. the Grievant's excellent evaluations;
8. the bad behavior of the Inmates;
9. the long hours worked by the Grievant;
10. the shortage of staff at the Facility; and
11. the stressful work.

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 Grievant has an active Group I Written Notice (AE 4), 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 him to attend work and to perform his duties in strict conformity with Agency policies, as he 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 his 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."

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 (4th 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 EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts de novo to determine whether the

disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

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 upheld offenses specified in the upheld written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written 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 14th St., 12th 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.^[1]

ENTER 4/14/2025

John Robinson

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).

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