

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

DIVISION OF HEARINGS

In the matter of: Case No. 12244

Hearing Officer Appointment: February 24, 2025
Hearing Date: March 25, 2025
Decision Issued: April 2, 2025

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice which was issued on September 25, 2024, by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the “Agency”). The Group I Written Notice was for violation of Written Notice Offense Code 11 (Unsatisfactory Performance). AE 1-1.

The Grievant has raised the issues specified in his Grievance Form A and is seeking the relief requested in his Form A, including reversal of the discipline. AE 5.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Grievant’s advocate, the Warden, the Agency’s advocate and the hearing officer participated in the first prehearing conference call at 11 am on February 28, 2025. The hearing was scheduled for and held March 25, 2025, as reflected in the Scheduling Order of February 28, 2025, incorporated herein by this reference.

The parties all agreed that email is acceptable as a sole means of written communication.

At the hearing, the hearing officer received various documentary exhibits into evidence.¹

The Grievant did not appear at the hearing and because of the Grievant's absence, his advocate withdrew the Grievant's request for a hearing. Accordingly, on this basis, the hearing officer dismisses the case with prejudice. At the hearing, the Grievant and the Agency were represented by their respective advocates.

While arguably not required, the hearing officer also renders a decision on the documentary evidence accepted from the Agency.

APPEARANCES

Representative for Agency
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 at the Facility, holding the rank of Sergeant. AE 2-4.
2. On August 14, 2024, Sgt. ■■■, the Grievant and Officer ■■■ transported two inmates to a dental facility in Danville, Virginia.
3. At approximately 9.45 am, while escorting the inmates across the parking lot to the door of the facility, an unidentified female and a minor child walked across the parking lot. As the transportation team got closer to the door, the child ran up

¹ References to the agency's exhibits will be designated AE followed by the exhibit tab and/or page number. No exhibits from the Grievant were admitted into evidence.

to Inmate D and hugged him. The female and child were later identified as Inmate K's mother and daughter. AE 2-4.

4. The Grievant proceeded to take appropriate steps to secure the inmates, moving them inside the dental facility to get them in the most secure area possible. AE 7-15.
5. Sgt. ■ kept surveillance on the parking lot to see if there was any other activity that would present an immediate threat.
6. Concurrently, an unidentified vehicle the team had observed in the parking lot earlier had returned and parked beside the transportation van. AE 9-20.
7. At approximately 10.30 am, Officer ■ reported the incident to the Watch Commander, Capt. ■. AE 2-4.
8. The Grievant was not the one who initiated the call to the Capt. ■, nor did he instruct Officer ■ to do so. AE 7-14.
9. Capt. ■ informed Officer ■ to call the police. The police were called and arrived soon after. AE 3-6.
10. The Grievant eventually allowed the inmate to proceed with the medical appointment. AE 6-14.
11. The Grievant's Internal Incident Report did not state that there was an unidentified vehicle that circled the parking lot and parked beside the van. AE 6-14; 11-24.
12. The investigation conducted by the Department was thorough and impartial. The conclusions reached were reasonable.

13. The efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency.
14. Despite this critical need, Grievant committed a serious violation of the Agency's policies and protocols by not reporting the incident with Inmate K' movements of the unidentified vehicle.
15. 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.
16. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
17. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

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 I offense.

Operating Procedure 038.1, Reporting Serious or Unusual Incidents, Section I (A) provides:

“Timely and accurate reporting of incidents that occur in the Virginia Department of Corrections (DOC) is essential for immediate response, investigation, and further action and support in the event of a critical incident involving any employee/contractor/volunteer, visitor, inmate, probationer/parolee, or DOC property.” AE 13-33.

Here, the Grievant failed in timely reporting the unusual incident to the Watch Commander. In the end, Officer ■■■, on his own accord, reported the incident, instead of the Grievant.

Additionally, according to Operating Procedure 038.1 Section VI (B) (1), each person observing an incident should complete an Internal Incident Report to document their observations. AE 13-42.

However, all the parties involved in the incident submitted identical Internal Incident Reports. Accordingly, the report submitted by the Grievant was a collective observation, rather than the Grievant’s own, and had left out the critical information of the suspicious vehicle. AE 7-15.

According to Policy No. 135.1 Section XIII (B) (1), “[f]ailure to follow ... or otherwise comply with applicable established written policy” is a Group II offense. AE 14-65. Not reporting an unusual incident promptly and failing to capture all the relevant details of the incident in his Internal Incident Report would constitute a failure to follow established written policy. AE 2-3.

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 the offense is appropriately classified at the Group I level as designated. The Agency exercised the appropriate discipline pursuant to the Group I 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 the violation rose to the level of a Group I.

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. Accordingly, though failure to follow policy is categorized as Group II, the disciplinary action was mitigated to the current Group I offense of Unsatisfactory Performance. AE 1-1; 14-64.

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 1-1.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis of all the mitigating factors below, the hearing officer considered several factors, including those specifically referenced in AE 1-1, the Written Notice, the Form A, 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 Grievant's past favorable performance evaluation history;
4. his very hard work for the Facility;
5. the long hours worked by the Grievant; and
6. the shortage of staff at the Facility.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policies are important to the proper functioning, appearance and reputation of the Agency, and the Grievant held an important 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.

Additionally, the Grievant is a supervisor and as such is held to a higher standard and is expected to set an example. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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 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 the offense specified in the 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 notice and concerning all issues grieved in this proceeding 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 4/2/2025

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.