

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12250

Hearing Date: April 21, 2025
Decision Issued: April 22, 2025

PROCEDURAL HISTORY

On February 20, 2025, Grievant was issued a Group III Written Notice with termination.¹ On February 27, 2025, Grievant filed a grievance challenging the Agency's action. The grievance was assigned to this Hearing Officer on March 10, 2025. A hearing was held on April 21, 2025.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate DOC Operating Procedures 135.1 and 135.2?

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.² 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, 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 evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.³ It 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

¹ A. Ex. 1, at 1

² See Va. Code § 2.2-3004(B)

³ Greivance Procedure Manual § 9

have happened.⁴ By definition, a preponderance of evidence requires only evidence, which shows that what is intended to be proved, is more likely than not, or evidence that is more convincing than the opposing evidence.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, considering their motive, potential bias, and corroborating or contradictory evidence, I make the following findings of fact. The Agency submitted a notebook containing pages 1 through 63. Without objection it was accepted as Agency Exhibit 1 (A Ex.). Grievant did not submit any documentary evidence. During the course of the hearing, at Grievant's request, a short video was introduced and made part of the record. Prior to the hearing, Grievant requested her recent EWP's from the Agency, as well as documentation that set forth courses she had taken. They were provided to her, but she did not introduce them as evidence, nor did she offer what these documents might have provided in her testimony.

The following people testified at the hearing:

Warden = W

Master Special Agent = SP

Corrections Officer = CO

Grievant

4 Character Witnesses for Grievant = CW

DOC OP 135.2 defines **Fraternization** as: Employee association with inmates/probationers/parolees ... outside of employee job functions, that extends to unacceptable, unprofessional and prohibited behavior; examples include non-work related visits between inmates/probationers/parolees and employees, non-work related relationships with family members or close friends of inmates/probationers/parolees, connections on social media, discussing employee personal matters (marriage, children, work, etc.) with inmates/probationers/parolees, and engaging in romantic or sexual relationships with inmates/probationers/parolees.⁸

DOC OP 135.2(IV)(A)(1)(2) state in part as follows: (1) Except for preexisting relationships ... fraternization or non-professional relationships between employees and inmates and probationers/parolees are prohibited, including when the inmate or probationer/parolee is within 180 days following discharge from DOC custody or termination from supervision, whichever occurs last. (2) This action should normally be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct, unless surrounding circumstances and mitigating factors are present that warrant a reduction in the disciplinary action.⁹

DOC OP 135.2(V)(A) "Employee and Supervisory Reporting Responsibilities" states: Failure to comply with the **reporting requirements** of this operating procedure will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and **may** be subject to disciplinary action **up to** and including termination.¹⁰ (**Emphasis added**)

DOC OP 135.2(V)(B) "Employee Responsibilities" states: In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any staff or inmate/probationer/parolee boundary violations and any

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

⁵ Administrative Review Ruling Number 2024-5660, March 8, 2024, at 5

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

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

⁸ A Ex. at 30

⁹ A Ex. at 34

¹⁰ A Ex. at 35

conduct that violates this procedure or behavior that is inappropriate or compromises safety of staff, inmates, probationers/parolees, or the community.¹¹

DOC OP 135.1(XIV)(A) defines Group III Offenses as: 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 laws.¹²

DOC OP 135.1(XIV)(A)(23) includes as a Group III Offense: Violation of Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Inmates.¹³

On February 20, 2025, Grievant was a Program Support technician at location 2 of the Department of Corrections. She was a corrections officer at location 1 from March 10, 2022, until January 25, 2023, when she was transferred to location 2.¹⁴ On December 9, 2024, as part of a Four Way Operation, Grievant's car was searched.¹⁵ CO testified that he found, in the bottom of the console between the front seats, under many other things, a note believed to have been written by an inmate.¹⁶ The note was folded closed. This matter was given to SP and he filed an Investigative Report.¹⁷

SP found that the author of the note had been housed at location 1 from April 6, 2022, through August 30, 2023, his release date.¹⁸ Grievant was a corrections officer at this location for the over lapping time frame of April 6, 2022, through January 25, 2023, or approximately 9 months. SP found no evidence that suggested Grievant contacted the inmate in any way or that she did any of the things requested in the note. The Agency offered no evidence that Grievant has ever been in contact with this inmate in any way other than this note. The Agency's evidence is that it had no evidence that Grievant responded to the note in any way.

W testified that fraternization is always a Group III Offense with termination.

CW collectively testified that they had never seen Grievant act in an inappropriate or non-professional way with any inmate and they all thought she was a good employee and a good person.

The Grievant did not dispute that the note in question was found in her car. There was no dispute that it was written by an incarcerated offender. There was no dispute regarding the number of times that employees of this Agency are trained on the concept of fraternization. The sole argument of the Grievant was that she had no idea that the note was in her car. Grievant testified that she had driven many people to various places and at various times over the nearly 23-month time frame from January 2023, when she left location 1 and December 9, 2024, when the note was discovered. She stated she used this center console as a "lost and found" container where she just dropped things that others left in her car. The video showed that SP asked her for the names of such people. Grievant provided none. Subsequently, Grievant was again asked to provide names and she did not.

EDR has stated that the relevant Agency policy (Operating Procedure 135.2) prohibits fraternization between employees and probationers/parolees. The policy defines **fraternization**, in relevant part, as "[e]mployee association with inmates/probationers/parolees ... outside of employee job functions, that

¹¹ A Ex. at 35

¹² A Ex. at 55

¹³ A Ex. at 56

¹⁴ A Ex. at 12

¹⁵ A Ex. at 10,11

¹⁶ A Ex. at 22

¹⁷ A Ex. at 10 - 22

¹⁸ A Ex. at 11,14

extends to unacceptable, unprofessional and prohibited behavior.” Examples of fraternization include “connections on social media.” EDR’s review of this policy language does not reveal an explicit requirement that an employee must know the individual with whom they are fraternizing is in a prohibited category. However, it is a reasonable interpretation of the policy that an employee cannot be viewed as violating the policy unless they knew or should have known of the individual’s status.¹⁹

Here, Grievant admits that she knew the author of the note to be an inmate while serving as a corrections officer at location 1. No evidence was introduced to suggest that this note was given to her while she served in location 1. No evidence was introduced to show Grievant had any association with inmates/probationers/parolees ... outside of employee job functions, that extended to unacceptable, unprofessional and prohibited behavior. Indeed, there was no evidence as to how, when and by whom this note was placed in the center console.

In Administrative Review Ruling 2025-5737, at footnote 14, EDR states: The policy also appears to require employees to report certain contacts, including “[i]ncidental encounters,” to their supervisor or Organizational Unit Head by the next business day. For such a violation, it is a reasonable interpretation that an employee cannot report such contacts unless they **know** a violative contact has occurred. Thus, unless an employee knows they have had contact with a known probationer/parolee, it would be difficult to find that an employee has a duty to report the contact. (**Emphasis added**)

EDR has also opined as follows: We question whether mere possession – without evidence of knowledge or, at a minimum, negligence – can or should constitute an “offense” under DHRM Policy 1.60, Standards of Conduct. However, we need not reach such a question. Although the Agency describes its policy as one of “strict liability,” we do not find language in the Agency’s policy supporting such a construction... The Agency’s submission provides no insight as to what policy standard the Grievant might have violated by his unintentional possession...²⁰ The Grievant, in this matter, stated: “*he found a gel pen which was forbidden for inmates to have. Grievant confiscated the pen but chose to keep it for his personal use.*” Several weeks later, as Grievant was subject to a normal front desk search, the gel pen was opened and a white powdered substance spilled out from the pen. Grievant stated he had no knowledge that drugs were hidden within the pen.

EDR has also held as follows: The Grievant contends that his offense did not merit discipline at the Group III level because it **lacked intent**. Under Policy 1.60, Group III offenses are generally appropriate for “acts of misconduct of a most serious nature that severely impact agency operations,” such as acts that “endanger others in the workplace” or constitute “neglect of duty” or “other serious violations of policies, procedures, or laws.” ... Although Group III offenses include certain willful or reckless conduct, DHRM Policy 1.60 does **not require an element of intent** for discipline at this level, which covers a range of serious misconduct.²¹

As SP found no interaction between Grievant and the inmate author of the note, the issue here is did the Grievant violate DOC OP 135.2(V)(A) “Employee and Supervisory Reporting Responsibilities” by failing to comply with the reporting requirements of this operating procedure? If so, such will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and **may** be subject to disciplinary action **up to** and including termination.

I find that it is more likely than not that Grievant placed the note in her center console. From the evidence before me, it is mere speculation that some third party placed the note in her car.

Attachment 2 to Operating policy 135.1 states:

Group III: This level generally includes acts of misconduct of a most serious nature that **severely impact** agency operations.

¹⁹ Administrative Review Ruling 2025-5737, August 5, 2024, at 3

²⁰ Administrative Review Ruling 2025-5809, February 14, 2025, at 7,8

²¹ Administrative Review Ruling 2021-5252, June 3, 2021, at 11

Examples: Absence in excess of three workdays without authorization; falsification of records and/or any misuse or unauthorized use of state records; disruptive behavior; willfully or recklessly damaging state records/property; theft or unauthorized removal of state records/property; abuse or neglect of clients; gambling on state property or during work hours; physical violence; threatening others; violating safety rules (where threat of bodily harm exists); sleeping during work hours, participating in work slowdown; unauthorized possession of weapons; criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to agencies' duties to the public or to other state employees.

First Offense: Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action. If the employee is not discharged upon the issuance of the Group III Written Notice, the employee should be advised that any subsequent Written Notice during the active life of the Written Notice may result in discharge.

The Agency has offered no evidence as to how this note, or the failure to report, severely impacted Agency operations, particularly considering that it may have been in the car for several years. Indeed, the Agency's best evidence is that there never was nor is there now any contact between Grievant and the inmate and the Agency has not been impacted in any manner. The Agency has offered no reason for why it automatically terminates employees and never considers the language: *Failure to comply with the **reporting requirements** of this operating procedure will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and **may** be subject to disciplinary action **up to** and including termination.* "May" and "up to" either have meaning or they are merely cosmetic additions to the Operating Procedure.

While I find that the Agency has met the preponderance of the evidence burden as to how the note was placed in the car, I find that it offered no evidence, other than "this is what we always do," as to why termination was the first and only chose. Regarding fraternization, the Grievant has only violated **DOC OP 135.2(V)(A)**. Complete disregard for the language of its own Operating Procedure (may and up to) exceeds the limits of reasonableness.

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 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 mitigate this matter to a 30-day suspension without pay based on my findings above.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of the Group III Notice was proper. I find the Agency did not adequately consider DOC OP 135.2(V)(A) and I reduce the punishment to a 30-day suspension without pay. After the 30-day suspension is completed, Grievant shall be re-instated to her former position or an objectively similar position, with all back benefits.

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

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: April 22, 2025

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

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
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EDR Request for Reconsideration Received: May 29, 2025

Response to Request: June 4, 2025

Reconsideration Decision

In his Request for Reconsideration, the Director stated: *EDR observes that the grounds cited by the hearing officer for mitigating the grievant's termination (essentially, the lack of evidence about the severity of the misconduct and any impact on the agency's operations) appears to be more relevant to the question of what level of discipline (e.g., Group II or Group III) the grievant's behavior should be categorized at. The agency argues that evidence about "the degree to which the misconduct disrupted Agency operations" is not part of the agency's burden of proof. However, **the agency does have the burden to demonstrate that a disciplinary action is consistent with policy. Therefore, the agency must present evidence demonstrating that a Written Notice is properly categorized at the appropriate level under state and agency policy.*** EDR's review of the record in this regard finds somewhat conflicting evidence.

The hearing officer records in the decision that the warden "testified that fraternization is always a Group III Offense with termination." However, as stated above, it does not appear that the grievant was found to have engaged in fraternization, but rather a failure to report the letter. **EDR is unable to locate evidence in the record as to whether the agency "always" treats a failure to report as a Group III Offense with termination.** As a basic principle, a failure to follow a written policy can be categorized as a Group II offense under DHRM Policy 1.60, Standards of Conduct. Elevating such a Group II offense to a Group III would require evidence of aggravating factors or, for example, other unique impact in the absence of applicable policy language. Thus, the hearing officer's consideration of the severity of the offense and any impact on agency operations would appear to be a relevant and important consideration to the resolution of this case.

The agency's standards of conduct policy (Operating Procedure 135.1) also offers potentially conflicting evidence in this regard. On the one hand, the policy lists violations of Operating Procedure 135.2 (where the failure-to-report provision resides) as a Group III offense. **However, Attachment 2 to the same policy suggests that violations of Operating Procedure 135.2 "may, depending on the nature of the offense, constitute a Group I, II, or III offense."** DOC Operating Procedure 135.2 certainly identifies some types of misconduct that are properly categorized as Group III offenses. For example, the policy provides language on sexual misconduct and fraternization. However, even with fraternization, the policy states that fraternization should normally be treated as a Group III offense "unless surrounding circumstances and mitigating factors are present that warrant a reduction in the disciplinary action." Furthermore, Operating Procedure 135.2 identifies other types of misconduct that do not so clearly fall within the normal parameters of a Group III offense, such as abuse of employment status, vigilance, professional appearance, and courtesy and respect. To find that such types of misconduct were Group III offenses would necessarily involve consideration of the particular circumstances of the misconduct and any impact on agency operations. Failure to report would appear to be in a similar type of category.

The hearing officer's decision does not contain a discussion as to why the Written Notice was upheld as a Group III offense. On remand, based on the discussion above, the hearing officer must consider whether the disciplinary action at issue is properly categorized as a Group II or a Group III offense. If the hearing officer upholds the Written Notice as a Group III, then the mitigating factors cited do not support a determination that termination exceeds the limits of reasonableness for a Group III offense, for which termination is a presumptively reasonable outcome. However, if the hearing officer finds that the record evidence supports upholding the Written Notice only at the Group II level, then requisite findings as to the maximum level of suspension should be made. EDR would also point out that the agency has stated on appeal that

*“uncontested facts” were presented at hearing as to the impact on agency operations. The hearing officer must consider such evidence on remand in the resulting analysis, as well.*¹ (Emphasis added)

Grievant was accused in the Group III Written Notice of violations of OP 135.1 for fraternization and 135.2 for failing to report an inmate’s attempt at soliciting fraternization.²

I found there was no evidence indicating that Grievant fraternized with anyone being held by the Agency. OP 135.2 defines Fraternization as: Employee **association** with inmates/probationers/parolees ... outside of employee job functions, that extends to unacceptable, unprofessional and prohibited behavior... The Agency offered no evidence that Grievant associated with the author of the letter in any manner while he was incarcerated or since his release. (Emphasis added)

I found that Grievant violated OP 135.2(V)(A) “Employee and Supervisory Reporting Responsibilities”: Failure to comply with the **reporting requirements** of this operating procedure will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and **may** be subject to disciplinary action **up to** and including termination. (Emphasis added)

The Agency, through the testimony of W, stated that it consistently terminated anyone found guilty of fraternization. Here, the Agency’s evidence did not show that Grievant fraternized with any inmate. Indeed, Agency evidence established that Grievant did not fraternize with anyone. The Agency’s best evidence was that Grievant had a handwritten note in her car for several years and did not report it to Agency management. The reason EDR was unable to locate evidence in the record as to whether the Agency “always” treats a failure to report as a Group III Offense with termination is because none was presented. The focus of Agency evidence was that Grievant was guilty of fraternization for failure to report the letter, not that she actually fraternized with an inmate.

OP 135.1(XIV)(A)(23) includes as a Group III Offense violation of OP 135.2. The Agency treated a violation of OP 135.2 as a Group III offense based on OP 135.1(XIV)(A)(23). Because I found Grievant had violated OP 135.2 by failing to report the letter, and because OP 135.1 includes such failure as a Group III, I stopped my analysis as to level of offence there. What I did not consider was Attachment 2 to OP 135.1. As the Director stated, *Attachment 2 to the same policy (DOC 135.1) suggests that violations of Operating Procedure 135.2 “**may, depending on the nature of the offense**, constitute a Group I, II, or III offense.* (Emphasis added)

Unfortunately, I find that I failed to consider how Attachment 2 impacts this matter.

The Grievant testified that she had never read the letter. SP, in his Investigative Report, stated Grievant claimed not to have read the letter and she did not ask as to what it contained.³ SP testified that his conclusion for **fraternization** was justified. He testified that when confronted about the letter, Grievant’s actions and statements indicated to him that she had indeed read the letter. He did not address the issue of a failure to report, where there was no conduct that fell under the definition of fraternization. He testified that he searched Grievant’s phone records, her Facebook records and all other sources available to him and could find no indication that Grievant fraternized with the inmate. In answer to a question from the Advocate for the Agency, he testified that he found nothing between the inmate and Grievant other than the letter. I find that it more likely than not that Grievant read the letter and then deposited it into the console in her car, which served as a trash can.

The Agency offered no evidence as to prior performance or disciplinary issues with Grievant. There was no evidence of prior Written Notices, Notice of Improvement forms, etc.

In Administrative Ruling 2025-5089, EDR has opined as follows: *We question whether mere possession – without evidence of knowledge or, at a minimum, negligence – can or should constitute an “offense” under*

¹ Administrative Review Ruling 2025-5888 at 3,4

² A Ex. at 1,3

³ A Ex. at 11

*DHRM Policy 1.60, Standards of Conduct. However, we need not reach such a question. Although the Agency describes its policy as one of “**strict liability**,” we do not find language in the Agency’s policy supporting such a construction... The Agency’s submission provides no insight as to what policy standard the Grievant might have violated by his unintentional possession...⁴ (Emphasis added)*

The Grievant, in that Ruling, stated: “*he found a gel pen which was forbidden for inmates to have. Grievant confiscated the pen but chose to keep it for his personal use.*” Several weeks later, as Grievant was subject to a normal front desk search, the gel pen was opened and a white powdered substance spilled out from the pen. Grievant stated he had no knowledge that drugs were hidden within the pen.⁵ Here we had an Agency employee removing contraband from an inmate, keeping it as his own, not reporting it, and later upon discovery, being terminated.

In the matter before me, we have an Agency employee in possession of a letter, written by an inmate, not reporting it, and later upon discover years after the fact, being terminated. In both cases, the Agency terminated the employee using a policy of strict liability. In the matter at Ruling 2025-5809, the disciplinary action by the Agency was rescinded.

DHRM Policy 1.60, Standards of Conduct, at 11, states that failure to follow a written policy is a Group II offense. OP 135.1(B)(1) states that failure to comply with established written policy is a Group II offense.⁶ Attachment 2 to OP 135.1 also states that failure to comply with written policy is a Group II offense. For a first such offense, the Agency has the option of suspending the employee without pay for up to 10 days. In this matter, the evidence is that Grievant failed to follow a written policy rather than fraternize with inmate.

Here the Agency claims it is being completely consistent with a very simple strict policy. OP 135.1 states that violations of OP 135.2 are Group III violations and the Agency, based on its strict policy on fraternization, always terminates. The problem is that Attachment 2 to OP 135.1 clearly contemplates that violations of OP 135.2 may, depending on the nature of the offense, constitute a Group I, II, or III offense. Here the Agency appears to take the position that the failure to report is synonymous with fraternization, it always terminates for fraternization, therefor the Grievant was terminated. At the hearing, no one, including me, addressed the concept of the evidence proving a failure to report and simultaneously proving there was no fraternization.

In his request for an Administrative Ruling in the matter, the Advocate for the Agency stated: *As noted in the Warden’s testimony, if this letter was reported as required by policy, “the inmate [would] be placed in some kind of detention while an investigation takes place... if the staff member presents it at the time the inmate would also gets (sic) charged for violating facility regulations.” This could result in a criminal charge and extended sentence for the inmate. Instead, the inmate was released, has outstanding warrants for his arrest, and is an Absconder from his probation. The Grievant’s failure to report directly contributed to this, yet the AHO states despite this evidence that the Agency’s operations were not severely impacted.*

The Warden’s testimony is that the inmate could have been severely impacted. He offered no testimony as to how this failure to report severely impacted the operation of the Agency, most likely because it did not.

As an aside, I can find nothing in the evidence before me that requires an Agency employee to read or even look at a piece of paper given to them by an inmate. Had the letter simply been disposed of in the garbage, there would have been no difference in result for the Agency. The most likely scenario here is the Grievant read the letter, disregarded its contents, and threw it into her automotive “trash can.”

OP 135.2 (H) states that employees should be respectful, polite, and courteous in their communication and interaction with inmates...⁷ OP 135.1(I)(9) states that employees should create and maintain a Healing

⁴ Administrative Review Ruling 2025-5809, February 14, 2025, at 7,8

⁵ Administrative Review Ruling 2025-5809, February 14, 2025, at 7,8

⁶ A Ex. at 54

⁷ A. Ex. at 32

Environment by treating...inmates...with respect, courtesy, dignity...⁸ Where an employee disposes of a letter without reading it, rather than refuse receipt, so as to not be disrespectful to the inmate, is that a violation of the reporting standard?

The violation here is a failure to follow the policy to report. Presumptively, the Agency is the author of OP 135.1, OP 135.2 and Attachment 2 to OP 135.1. As such, it is bound by the language that it chose to use when creating these documents. It could have simply written that all violations of these Operating Procedures would result only in termination. However, it chose to use the words “**may** be subject to disciplinary action **up to** and including termination, and **may**, depending on the nature of the offense, constitute a **Group I, II, or III** offense.” As in Ruling 2025-5809, where the Agency described its policy as one of “strict liability,” I do not find language in the Agency’s policy in this matter that would support only termination for a violation of OP 135.2 failure to report.

While the Advocate for the Agency properly argued that the Hearing Office is not a super personnel officer, the Hearing Officer must review the facts *de novo* and determine if the Agency has made a decision that is consistent with law and policy. I find that the Agency has simply read its Operating Policies to mean termination is the sole remedy for fraternization and/or for failure to report the receipt of any writing from an inmate. This is not what the Agency’s policy states. Here, Grievant’s failure to report should have resulted in a Group II Written Notice with a suspension of 10 workdays without pay.

Reconsideration Decision

I find that the Agency has not borne its burden of proof in this matter regarding fraternization and the issuance of a Group III Written Notice with termination for violation of OP 135.1 and 135.2. was not proper. I further find that the Agency has borne its burden of proof in that Grievant violated Op 135.2 in failing to report the letter and that such failure is a failure to comply with written policy, a Group II violation. I find and so order that Grievant be suspended without pay for 10 workdays, and, subject to the 10-workday suspension without pay, the Agency is ordered to provide full back pay and benefits, after the 10-workday suspension, to the Grievant.

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: June 4, 2025

⁸ A Ex. at 43