

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

DIVISION OF HEARINGS

In the matter of: Case No. 12264

Hearing Officer Appointment: April 7, 2025
Hearing Date: May 30, 2025
Decision Issued: June 3, 2025

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I and a Group III Written Notice which were issued on February 12, 2025, 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 Offence Codes 39 – Violation of DHRM Policy 2.35, *Civility in the Workplace*. The Group III Written Notice was for violation of Written Notice Offence Codes 39 – Violation of DHRM Policy 2.35, *Civility in the Workplace*; and 99 — DOC Operating Procedure 135.5, *Workplace Violence*. AE 1, 4.

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.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Grievant’s advocate, the Agency’s advocate, and the hearing officer participated in the first prehearing conference call at 4.30 pm on April 10, 2025. The hearing

was scheduled for and held May 30, 2025, as reflected in the Scheduling Order of April 13, 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

At the hearing, the Grievant and the Agency were represented by their respective advocates. 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.

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 at the Facility as a Corrections Officer/Canine Handler.
2. On December 27, 2024, five K9 officers, including the Grievant and Officer C, were doing paperwork in the K9 Office Trailer. The Grievant took exception to comments regarding a conversation about deer hunting and a former employee of the Facility, whom both the Grievant and Officer C knew. AE 3.

¹ References to the agency's exhibits will be designated AE followed by the exhibit tab and/or page number. References to the Grievant's exhibits will be designated GE followed by the exhibit tab and/or page number. References to the recorded tape of the May 30, 2025 hearing will be designated Tape 1A.

3. The Grievant suddenly began calling Officer C a liar and told him to show the Grievant his personal phone to prove something related to the hunting conversation.
4. Officer C refused to do so, but the Grievant continued to ask, increasingly insistently, to see his personal cell phone. AE 10.
5. The supervising Sergeant (the “Supervisor”), a Security Supervisor at the Facility, who was also doing paperwork in the K9 Office Trailer in a different office, heard the argument. He told them to separate and for one of them to go to the Kennels to calm down. AE 13.
6. However, the two continued arguing. Officer C told the Grievant that “[he did not] have anything to prove” to which the Grievant responded “[c]ause you[’]r[e] a bitch.”
7. The Grievant continued to berate and antagonize Officer C, trying to get him to fight the Grievant. AE 11.
8. The Grievant stated “you[’]r[e] a pussy bitch.”
9. Officer C told him to leave him alone, but the Grievant replied “no[, he does not] like pussies[,] stand up and fight, Bitch.” AE 12.
10. The Supervisor again told the two to stop and break it up. AE 13.
11. The Grievant then stood up and shook his keys in Officer C’s face, telling Officer C to go to the Kennels with him. Officer C refused to do so. AE 12.
12. The Grievant started to leave the general area. *Id.*
13. However, the Grievant instead turned around to walk behind Officer C’s chair, grabbed him by the shirt collar, and forcibly pulled him out of the chair. Officer C

then shoved the Grievant against the wall out of self-defense, before moving away from the wall to the table. *Id.*

14. The two actively engaged, shoving each other and having a firm grip on the front of each other's shirts. AE 13.
15. The Supervisor finally intervened to separate the two officers. AE 12.
16. The remaining officers present in the particular office in the K9 Office Trailer, which comprised Officer L, Officer B, and Officer F, had to step in as well to break up the fight. AE 10.
17. The Supervisor told Officer C to go outside. AE 12.
18. The Supervisor had to physically step in front of the Grievant, who wished to continue the fight, as Officer C was attempting to leave the office.
19. The Grievant kept telling the Supervisor to "[k]eep [his] fucking hands off me." AE 14.
20. Meanwhile, Officer C readily complied with the Supervisor's orders and tried to avoid the Grievant.
21. Officer L and Officer B took Officer C outside where he stated to them that he had no idea why the Grievant was acting so belligerent. AE 11.
22. The Grievant then exited the room to continue antagonizing Officer C, telling him to fight the Grievant like a man in the parking lot. AE 12.
23. The Supervisor finally told Officer C to go home, which he promptly did. *Id.*
24. The Supervisor told the Grievant to remain in the room. AE 10.

25. The Grievant was then brought to the Warden Center to speak with the Warden. The Warden asked the Grievant what had happened, but he insubordinately responded to the Warden that “it wasn’t any of his fucking business.” Tape 1A.
26. The Grievant continued to act insubordinately and belligerently by calling the Warden man and “dude”, by removing his shirt and continuing to argue in derogatory terms, telling the Warden that “I don’t give a fuck about your title”, and that the Warden was a nobody and “did not mean shit.” Tape 1A.
27. The Grievant also stated, words to the effect, “Fuck it – I quit” before retracting this, and the Grievant admitted during the hearing that he should not have talked to the Warden that way. Tape 1A.
28. While the Grievant was not written up for his interactions with the Warden, his behavior was emblematic of the severe lack of restraint he exhibited throughout the whole episode.
29. Ultimately, the Warden sent the Grievant home. AE 13.
30. As Officer C got home, he retrieved messages from the Supervisor on his cell phone (cell phone reception at the Facility is notoriously bad), who had called him to ask him to return to the Warden Center to write his Incident Report. AE 12.
31. The Grievant readily complied within about an hour from when he had left the Facility.
32. The investigation conducted was thorough and impartial. The conclusions reached were reasonable.
33. The orderly and efficacious performance of Grievant’s work is critical for the orderly and efficient functioning of the Agency.

34. Despite this critical need, Grievant committed serious violation of the Agency's policies and protocols by instigating and continuing the verbal and physical assault on his fellow canine officer. Despite being given multiple opportunities by Officer C and the Supervisor to de-escalate, the Grievant continued to be the aggressor.
35. By contrast, Officer C responded in self-defense, seeking to avoid conflict and exercising commendable restraint.
36. 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.
37. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
38. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
39. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. While there may have been minor discrepancies in perception such as whether the protagonists were in headlocks versus gripping their respective shirtfronts, on the major points, such as the Grievant being the aggressor, the versions were in alignment. 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.

In general, Policy No. 135.1, *Standards of Conduct*, Section I provides:

“G. Personal Conduct - DOC staff members are employed to fulfill certain duties and fulfill expectations that support the mission and values of the DOC and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance. Employees who contribute to the success of the DOC mission:

...

9. Create and maintain a Healing Environment within the DOC by **treating coworkers**, supervisors, managers, subordinates, inmates/probationers/parolees, and other stakeholders with **respect, courtesy, dignity, and professionalism**; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork.

10. Demonstrate **respect for the agency and toward agency coworkers**, supervisors, managers, subordinates, and customers, etc.” AE 49-50 (emphasis added).

Specifically, the Grievant committed the following disciplinary infractions, which were reasonably classified by management, as a Group I and Group III offense respectively.

For the Group I offense, Operating Procedure 145.3, *Equal Employment Opportunity, Anti-Harassment, and Workplace Civility*, Section IV specifically provides:

“B. Managers, supervisors, and other persons of authority have a duty to promptly take action to eliminate **harassment, bullying, discrimination, threatening or violent behaviors, retaliation, and other displays of inappropriate behavior** from the work environment once a situation comes to their attention by doing the following:

...

D. Any employee who engages in conduct determined to be harassment, discrimination, retaliation, cyber-bullying, bullying, and/or other inappropriate behavior, or who encourages or ignores such conduct by others will be subject to **disciplinary action under Operating Procedure 135.1, Standards of Conduct**, which may include **termination from employment.**” AE 34-35 (emphasis added).

Accordingly, Policy No. 135.1, *Standards of Conduct*, Section XII provides:

“A. First group offenses include types of behavior less severe in nature, have relatively minor impact on business operations, but require correction in the interest of maintaining a productive and well-managed work force.

B. Group I offenses include, but are not limited to:

...

4. Use of **obscene or abusive language**; considered a Group I depending on the severity, harshness, and impact of the language.” AE 60 (emphasis added).

Here, the Grievant was rightfully issued a Group I Written Notice for his verbal misconduct. DHRM Policy 2.35, *Civility in the Workplace*, prohibits (a) swearing, or using obscene language or gestures toward another person; and (b) humiliating others. AE 3. The Grievant had shown extremely disrespectful behavior towards his fellow officer, having called Officer C a plethora of insulting and embarrassing names which could be overheard by his fellow officers and the Supervisor, just because Officer C refused to show the Grievant his phone. Additionally, despite multiple instructions from the Supervisor to stop, the Grievant persisted in insulting Officer C, even exiting the office to continue the insults after the Supervisor had separated them. Accordingly, the Grievant had violated DHRM Policy 2.35. While, as the Grievant’s advocate pointed out, there is some overlapping language in the 2 written notices, this does not suffice to negate the Group I because the DOC clearly justified and articulated the charge of the Group I as a distinct offense by the conclusion of the hearing.

For the Group III offense, Operating Procedure 135.5, *Workplace Violence*, Section I provides:

“C. Employees are expected to refrain from fighting, "**horseplay**", and any other conduct that could **endanger the safety** of others in the workplace.

D. Prohibited conduct includes, but is not limited to:

1. **Injuring another person physically.**
2. Engaging in behavior that creates a **reasonable fear of injury to another person.**” AE 41 (emphasis added).

Additionally, Operating Procedure 135.5, *Workplace Violence*, Section II provides:

“A. Employees violating these procedures will be subject to **disciplinary action under Operating Procedure 135.1, *Standards of Conduct*** up to and including **termination**, and may include criminal prosecution, based on the situation.

B. Violent or inappropriate acts of employees occurring outside the workplace may be grounds for disciplinary action, up to and including termination. Circumstances must reflect that the **violent or inappropriate conduct** adversely impacts the employee’s ability to perform their assigned duties and responsibilities, or that the **conduct undermines the DOC’s mission or reputation**, or the employee’s ability to perform their job duties.” AE 41 (emphasis added).

Accordingly, Policy No. 135.1, *Standards of Conduct*, Section XIV provides:

“A. [Group III] offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. ...

B. Group III offenses include, but are not limited to:

...

20. **Violation of DHRM Policy 2.35** *Civility in the Workplace* or **Operating Procedure 145.3**, *Equal Employment Opportunity, Anti-Harassment, and Workplace Civility*, considered a Group III offense, depending upon the nature of the violation." AE 62-63 (emphasis added).

Here, the Grievant was rightfully issued a Group III Written Notice for his physical misconduct. DHRM Policy 2.35, *Civility in the Workplace*, prohibits conduct/behavior that may include: (a) injuring another person physically; (b) engaging in behavior that creates a reasonable fear of injury to another person; (c) making threats to injure another person; and (d) assaultive behavior such as pushing, shoving, grabbing, hitting, kicking, or spitting toward another person. Additionally, DHRM Policy 1.60 Standards of Conduct, Attachment A defines "disruptive behavior" in the workplace as behaviors that interrupts or interferes with the normal flow and function of work, business operations and communications. Verbally or written disruptive behaviors may include (but are not limited to), abusive communications that serve to challenge or resist managerial/supervisory authority; gas-lighting colleagues or leaders through gossip, insults, rudeness, and criticisms to berate, intimate, or denigrate; or non-verbal behaviors that include (but are not limited to) physical aggression. AE 6.

It is thus quite clear, from multiple witness testimony, that the Grievant had started the fight whilst Officer C was sitting passively in his chair. The Grievant physically assaulted Officer C. Officer C acted only in self-defense, as Officer C was constantly attempting to disengage from the Grievant instead of escalating the situation further.

Indeed, as Officer C was attempting to leave the office, the Grievant continued to advance toward him, forcing the Supervisor to physically step in front of the Grievant.

Accordingly, the Grievant had displayed the levels of aggressive disruptive behavior which were violations of both Operating Procedure 135.5 and DHRM Policy 2.35. As clearly provided by policy, the Group III Written Notice warranted the Grievant's termination from employment, especially in light on the severity of his unwarranted aggression towards Officer C.

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 offenses are appropriately classified at the Group I and Group III level as designated. The Agency exercised the appropriate discipline pursuant to the Group I and Group III Written Notices.

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 Group I and Group III respectively.

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.

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, 4.

The Grievant argues that the Group I Written Notice should be “amalgamated” with the Group III Written Notice, as there is “no different allegation” made in the Group I Written Notice, that was not already made in the Group III Written Notice.

Firstly, the Group I Written Notice focuses on the verbal misconduct of the Grievant, while the Group III Written Notice focuses on the physical misconduct of the Grievant. Thus, there is no overlap as alluded to by the Grievant.

Secondly, and more importantly, Grievant's argument implicitly suggests that he should only receive one Group III Written Notice and thus receive a reduced disciplinary action. However, as stated above, “[Group III] offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.” Policy No. 135.1, *Standards of Conduct*, Section XIV(A). Accordingly, even if the Agency were to issue only one Group III Written Notice, this does not mean that the Grievant is spared from termination. Moreover, as has been shown above, the Grievant has been rightfully issued two separate Written Notices for two separate acts of misconduct carried out by him.

The Grievant alleged that there was inconsistent discipline by the Agency and thus there should be mitigation.

Section VI(B)(2) of the *Rules for Conducting Grievance Hearings* provides that mitigating circumstances may include “whether the discipline is consistent with the agency’s treatment of other similarly situated employees.” As with all affirmative defenses, the Grievant has the burden to raise and establish any mitigating factors. *Grievance Procedure Manual*, § 5.8; *Rules for Conducting Grievance Hearings*, § VI(B).

In EDR Case No. 2020-5052, the Grievant was issued a Group I Written Notice for failure to follow instructions, having reviewed video footage without approval in violation of the Manager’s instruction. The Grievant brought up three comparators. The first comparator was a probationary employee, who received a probationary evaluation about the incident from the Manager, and later resigned. The matter would have resulted in termination if it had progressed and he had not resigned. The second comparator received a Group I Written Notice that was mitigated to a formal counseling. He had reported to the Grievant, was present during the incident for which the Grievant was disciplined, engaged in the behavior at the direction of his supervisor (i.e., the Grievant), and later acknowledged that his conduct was improper. The third comparator also reviewed camera footage but did not receive corrective action. Though he was present when the first comparator accessed the video recordings, he denied participating in the behavior himself. Indeed, he was not disciplined because he did not have notice of the policy that approval was required before reviewing video recordings. Overall, EDR found that the three comparator employees were not similarly situated to the Grievant, and thus mitigation on that basis was not warranted there.

Here, the Grievant asserted that Officer C received “preferential treatment.” However, Officer C is “not similarly situated” to the Grievant here. He was not the aggressor of this altercation. He had tried numerous times to de-escalate the situation. He did not respond to the

level of Grievant's insults with his own, he simply told the Grievant he did not want to show the Grievant his phone. When the two were fighting, Officer C only used physical force to defend himself and actively tried to disengage from the Grievant. When Officer C had exited the office, the Grievant continued to try to once again initiate conflict by goading him to fight in the parking lot. Accordingly, there is no inconsistent discipline for mitigation to be warranted.

Additionally, the Grievant asserted that the Supervisor had violated Operating Procedure 430.6 by not wearing a body-worn camera ("BWC") and activating it when a staff member (the Grievant) had become disruptive and thus received preferential treatment as the Supervisor did not face any disciplinary action. Meanwhile, the Grievant, by his advocate, argued that the Warden recently demoted and terminated a Sergeant at another facility who failed to activate his BWC in accordance with said policy.

However, because this was a different facility concerning the other Sergeant and other combined offenses were involved, it cannot be conclusively said that the Supervisor was "similarly situated" to the other Sergeant and thus received inconsistent discipline.

In any case, any alleged violation of policy by the Supervisor does not negate the fact that multiple eyewitnesses confirmed that the Grievant engaged in the alleged misconduct. Indeed, this case does not need to rely on any BWC footage, as multiple eye-witness accounts confirm that the Grievant was the instigator and aggressor. Ultimately, any assertion of an infraction by the Supervisor is independent of the Grievant's. Thus, there is no inconsistent discipline for mitigation to be warranted.

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 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 Grievant's past favorable performance evaluation history;
4. his hard work for the Facility;
5. the absence of BWC footage;
6. the long hours worked by the Grievant; and
7. 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. 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 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 Grievant alleged that the Warden did not follow Operating Procedure 135.5's notification requirements. Specifically, the Grievant alleged that there "was **no [Special Investigations Unit ("SIU") (OLES)] investigation.**" The Grievant further asserted that the policy mandates that "**SIU/OLES be notified** and that the **Director or designee and the Chief of Special Investigations Unit (OLES) will determine appropriate actions** to be taken."

Regarding the allegation that there was no OLES investigation, Operating Procedure 135.5 Section III(G) states that the "Unit Head or designee will promptly **determine the need** to implement a Safety Management Plan and **notify the Special Investigations Unit** regarding all reported acts or threats of workplace violence by employees or third parties." (emphasis added).

As the Warden testified, the Warden reported the incident to the Regional Chief of OLES, who told the Warden he could deal with the matter administratively because there were no criminal charges and no one was hurt. A safety plan was implemented when the Grievant was placed on PDL. Tape 1A.

Additionally, the Grievant alleged retaliation by the Warden “for perceived slights” during the Grievant’s initial December 27, 2024 meeting with the Warden.

In order to succeed with his retaliation affirmative defense, the Grievant must show that (1) he engaged in a protected activity; (2) he experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

If the Agency presents a nonretaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App’x 139, 140 (4th Cir. 2014).

The Grievant engaged in a protected activity because he was trying to defend himself in the meeting. Moreover, the Grievant suffered an adverse employment action because he was removed from employment. However, the Grievant has not established a nexus between his protected activity and the adverse employment action. The evidence shows that the Grievant was removed because the Grievant had violated both Operating Procedure 135.5 and DHRM Policy 2.35.

Because the Agency had non-retaliatory reasons for its recommended action, and the Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met his burden to prove the Agency's recommended action was retaliation.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notices; (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 6/3/2025

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.