

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

DIVISION OF HEARINGS

In the matter of: Case No. 12253

Hearing Date: May 1, 2025

Decision Issued: May 13, 2025

PROCEDURAL HISTORY

On February 14, 2025, Grievant was issued a Group III Written Notice of disciplinary action, with termination, for a safety violation under the Agency's Operating Procedure 135.1, Standards of Conduct. On February 18, 2025, Grievant timely filed a dismissal grievance to challenge the Agency's action. On March 17, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On May 1, 2025, a hearing was held at the Agency's office.

At the hearing, the Agency was represented by its advocate and the Grievant represented himself. The Hearing Officer received documentary exhibits of the parties into evidence at the hearing, specifically, pages 1-66 from the Agency. It was established that Grievant's proposed exhibits were encompassed within the Agency's exhibits in their entirety.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

APPEARANCES

Representative for Agency
Agency's Legal Advocate
Grievant
Witnesses

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer sets forth her findings of fact below:

1. During the time relevant to this proceeding, the Grievant was employed by the Agency as a Correctional Officer at one of its facilities. He had worked for the Agency for approximately nine years, though not consecutively at this facility.
2. Grievant had never received formal disciplinary action before this incident.
3. On January 28, 2025, the Grievant was assigned to hospital duty, which would require him to obtain a weapon and rounds from the facility prior to traveling to the local hospital.
4. Grievant "checked out" a firearm and three magazines containing seventeen rounds of ammunition each from the facility.
5. He left the facility and made at least one stop for coffee prior to reaching the hospital.
6. After arriving at the hospital, Grievant noticed that the magazine which should have been secured in his firearm was not there.
7. Grievant's account of the incident, as written in the Agency's Internal Incident Report, stated that he had "loaded three magazines, holstered two magazines and sealed one magazine in my firearm . . . at the hospital I noticed my weapon was not loaded, and the magazine was not in the weapon." Agency Ex., p. 6.
8. Grievant reported this occurrence to the Captain within approximately thirty minutes. *Id.*
9. Grievant testified consistently with this statement and took responsibility for his actions.
10. The Agency dispatched two Majors and a Warden to search for the missing magazine. However, it was never located.
11. The Institutional Training Officer testified to the extensive firearms training received by Grievant and others occupying the role of Correctional Officer. As part of his job, Grievant was required to complete annual training, which he had done at the time of the hearing. Grievant completed two separate firearms trainings in the prior year.

CONCLUSIONS OF LAW AND POLICY

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:

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.

Pursuant to § 2.2-1201 of the *Code of Virginia*, the Virginia Department of Human Resource Management ("DHRM") promulgated Policy 1.60, *Standards of Conduct*. Policy 1.60 provides a set of rules governing professional and personal conduct and acceptable standards for work performance of employees, and establishes a fair and objective process for correcting or treating unacceptable conduct or work performance.

Did the Grievant engage in the behavior, and did the behavior constitute misconduct?

The Grievant did not deny that he engaged in the behavior described on the Written Notice, specifically, checking out the firearm and ammunition and then losing one magazine of rounds. The Agency's Operating Procedure 135.1, *Standards of Conduct*, defines as a Group III offense "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..." Agency Ex., p. 45-46. Operating Procedure 135.1 also defines "negligence" as "[f]ailure by action, behavior, or response willful or not, to maintain the expected care required from a reasonable, prudent person under the circumstances." *Id.*

As the Institutional Training Officer testified, the Grievant had been thoroughly trained on the Agency's expectations regarding the handling of firearms and the importance of carefully following this procedure. Had the Grievant appropriately followed the required process, the magazine would not have been lost. The loss of the magazine undermined the Agency's mission of ensuring public safety, as testified to by the Warden. While Grievant's actions were not purposeful, the loss of the magazine constitutes negligence on the job as defined by the Agency's Operating Procedure. Despite his training on proper procedures for handling firearms and ammunition, Grievant lost ammunition which should have been securely seated in his weapon. Agency witnesses, including the Major and the Warden, testified to the severity of this offense, and the ensuing danger to the public that resulted.

The Agency has met its burden of proving that Grievant engaged in misconduct.

Was the discipline consistent with law and policy?

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

In this case, Operating Procedure 135.1 explicitly categorizes as a Group III offense "[v]iolating safety rules where there is a threat of physical harm" and "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..." Agency Ex., p. 45-46. The Agency's Operating Procedure is consistent with DHRM Policy 1.60, *Standards of Conduct* (which designates "safety/health infractions that endanger[s] the employee and/or others" as a Group III offense in its Attachment A). Accordingly, in this instance, the Agency's discipline was consistent with law and policy.

Mitigation

Va. Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies, including "mitigation or reduction of the agency disciplinary action." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. See *e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157.

Under the *Rules for Conducting Grievance Hearings* VI (A), "a hearing officer is not a 'super-personnel officer' ...[and] the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." Accordingly, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management.

A non-exclusive list of factors to consider 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, and (3) the disciplinary action was free of improper motive. While past service to the agency may be a consideration, 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 Grievant asserts that the discipline should be mitigated, primarily because he had started to take a new medication which affected his work performance, but also because he received the most severe level of discipline and had prior satisfactory performance up until this incident. The Grievant stated that he had requested to utilize personal leave on the day of the incident, but was denied. To this, one of the Agency's managers testified that he received this phone call, but the Grievant did not follow appropriate call in procedures, nor did he mention the medication or say he felt unable to perform his job duties.¹ Thus, the

¹ Hearing Recording at 26:48 – 27:29.

manager told the Grievant to report to work; but had the Grievant stated that he could not perform his duties, the conversation would have been different.² DHRM's Policy 4.57, *Virginia Sickness and Disability Program*, states that "Family/Personal Leave (F/P) may be taken at the discretion of the employee for any purpose (family, illness, attend a funeral, or other personal needs, etc.) provided the employee gives reasonable notice and his/her supervisor approves the absence." Given the manager's testimony, no policy violation occurred with respect to the denial of Grievant's requested leave.

The Warden testified that she did not have any information regarding the Grievant's medication until during the due process meeting, and that if she had that information earlier she would have considered it when issuing the discipline.³ Certainly, the Warden was in a position to mitigate the disciplinary action at the due process meeting, but nevertheless chose not to do so. The Agency could have issued a Group III Written Notice without termination and retained Grievant as an employee. However, when an agency fails to mitigate disciplinary action, the Hearing Officer's authority to mitigate arises only when the disciplinary action exceeds the limits of reasonableness. The Agency's disciplinary action in this case is consistent with the *Standards of Conduct* and does not exceed the limits of reasonableness. In light of the above standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

In summary, the hearing officer determines for the Written Notice and the offenses 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 additional mitigating circumstances justifying a further reduction or removal of the disciplinary actions.

DECISION

For the reasons stated herein, the Agency has sustained its burden of proof, by a preponderance of the evidence, and the Group III Written Notice is **upheld**.

APPEAL RIGHTS

Either party 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 from 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.

² Hearing Recording at 31:53 – 32:46.

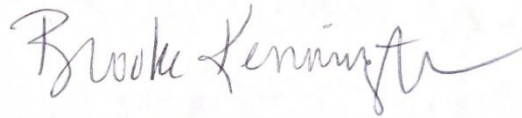
³ Hearing Recording at 01:07:11 – 01:09:44.

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 day when the decision becomes final.⁴

ENTER: May 13, 2025



Brooke S. Kennington, 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).

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.