

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

DIVISION OF HEARINGS

In the matter of: Case No. 12184

Hearing Officer Appointment: October 15, 2024
Hearing Date: January 15, 2025
Decision Issued: January 25, 2025

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance of two (2) Written Notices, both of which were issued on August 1, 2024, and subsequently amended on August 12, 2024, by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the "Agency"). The Group II Written Notice was for violations of Written Notice Offense Codes 11 (Unsatisfactory Performance), 13 (Failure to follow instructions and/or policy), and 51 (Unauthorized use of State property or records). The Group III Written Notice was for violations of Written Notice Offense Codes 11 (Unsatisfactory Performance), 39 (Violation of DHRM Policy 2.35, Civility in the Workplace), and 99 (Violating OP 135.3, Standards of Ethics and Conflicts of Interest). AE 1, 9.

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 15.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Agency's advocate and the hearing officer participated in the first prehearing conference call at 11 am on October 23, 2024. The hearing was scheduled for and held January 15, 2025, as reflected in the Scheduling Order of October 27, 2024, 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 hearing officer recorded the hearing.²

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
Advocates for Grievant
Witnesses

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.

² References to the recorded tape of the January 15, 2025 hearing will be designated Tape 1A.

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 Chief of Security with the rank of Major. AE 3 at 7.
2. An investigation was initiated as a response to a letter written by a member of the public, ■■■. ■■■ voiced her concerns that her niece was being subjected to inappropriate behavior involving the Grievant. The contents of the email also stated that the Grievant would sometimes use his state issued cell phone to contact her niece. AE 7 at 17.
3. On April 10, 2023, a search was conducted of the Grievant's phone. Before it was shut down and locked, a contact name of ■■■ was discovered. Certain contents of the chat were extracted, downloaded and made available. *Id.*
4. During the Period, ■■■ worked as a Casework Counselor at the same Facility as the Grievant. AE 3 at 7.
5. Between April 12, 2023, to April 14, 2023, multiple attempts were made to extract additional information, but all attempts were unsuccessful. AE 7 at 17.
6. On or about July 27, 2023, the Grievant was asked to provide an accurate pin number to his phone for the purpose of extracting its data. The Grievant provided

two pin numbers but both were incorrect. Further efforts to unlock the phone ultimately proved unsuccessful. *Id.*

7. The investigation conducted by the Department was thorough and impartial. The conclusions reached by the investigator were reasonable.
8. From the text messages recovered, it was clear that the Grievant and ■ were engaged in an intimate online relationship. Grievant expressed deep affection for ■ and ■ reciprocated those feelings.
9. The Grievant referred to ■ multiple times as “beautiful” and “baby” while ■ referred to the Grievant multiple times as “boo” and “babe.” *See generally* AE 13.
10. The Grievant texted ■ that “[she was] a very special lady and [he wanted] to see and have as much fun with [her] as [he] can” and that “[she was] more than [w]orth the wait.” He went on to state that he “want[ed]” her and he felt that she “want[ed]” him too. ■ reciprocated by texting “[she was] attracted to [him] too” and “[she liked] everything about [him] and what [he brought] to the table.” The Grievant responded that “[he liked] everything about [her] also. [He] saw [them] enjoying each other’s company a lot.” AE 13 at 93-95. The Grievant admitted that this was not a professional conversation between colleagues. Tape 1A.
11. The Grievant texted ■ that “[he was] not going anywhere. [She was] the person [he wanted] ... As long as [he knew she wanted him] too[, he] will be right here when [she had] time.” AE 13 at 100. The Grievant admitted that this was not a professional conversation between colleagues. Tape 1A.
12. The Grievant also expressed strong sexual desires relating to ■.

13. The Grievant texted ■ that he “noticed [she] kept opening and closing [her] legs while [she] was sitting beside [the Grievant]” and remarked that he “noticed every move [she made].” AE 13 at 31-32.
14. Furthermore, the Grievant texted ■ that it was “a good thing [he was] not around [her] right now” as “[he would not] be able to keep [his] hands off [her]”. ■ replied by texting the Grievant that “oysters are an aphrodisiac” to which the Grievant reassured her that “[he knew] who [he] want[ed] to be with so [he was] good until the time [was] right”. AE 13 at 118-119. The Grievant admitted that this was not a professional conversation between colleagues. Tape 1A.
15. Moreover, the Grievant texted ■ that “[w]hen the time is right, [he] will get a chance to give [her] a bath and dry [her] entire body off.” AE 13 at 126-128.
16. Lastly, the Grievant texted ■ that he was “more than glad to massage [her] knee for [her]” and was “going to rub [■’s knee] for [her]”. AE 13 at 138, 140.
17. Though both the Grievant and ■ stated that they had gone out together only once, and were merely friends rather than dating, a text message from the Grievant on March 19, 2023, indicated that he wanted to “plan a trip with [her]” in the future. AE 3 at 7; AE 13 at 117.
18. The Grievant indicated that he was planning to use his influence to benefit ■. He texted ■ that “[he] will tell the CHAP he better hire [her] for the position.” AE 13 at 55.
19. When questioned by the Agency’s advocate, who asked, “You would agree that let’s say, a co-worker happened to see some of these messages ... they could

perceive that there is a relationship or something going on here, can't they?", ■■■
replied, "They could, maybe, they could." Tape 1A.

20. ■■■ admitted that her interactions with Grievant could be looked at as being inappropriate. Tape 1A.
21. ■■■ admitted that certain aspects of the interactions with Grievant could be seen as an emotional display of affection and as constituting a relationship. Tape 1A.
22. Pursuant to the Group III Written Notice, the Grievant was demoted to Captain and transferred to a different facility. AE 3 at 7.
23. The Grievant had signed a Wireless Device Acceptable Use Agreement as well as a Use of the Internet & Electronic Communication Systems Certificate of Receipt, acknowledging the applicable Department policies relating to the use of his state issued cell phone. AE 9, 10.
24. The Grievant had also undergone annual training on the applicable Department policies and was fully aware of the consequences of violating them. Tape 1A.
25. The Grievant performed a vital function for the Facility as Chief of Security with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties and to comply with policy.
26. The Warden of the Facility trusted the Grievant greatly and was responsible for his promotion upon their first meeting. As the third highest ranking official in the Facility, the Grievant's role in maintaining the safety and security of hundreds of inmates and staff was paramount. His leadership role required him to enforce and

uphold the highest standards of discipline among all employees under his command at the Facility, to whom he provided an example. Tape 1A.

27. When the Warden and Assistant Warden were away from the Facility, the Grievant was effectively in charge of the Facility and its roughly 500 employees. Tape 1A.
28. Grievant was in a romantic, intimate relationship with ■■■ and did not report this relationship to management.
29. The efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency.
30. Despite this critical need, Grievant committed serious violations of the Agency's policies and protocols.
31. 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.
32. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
33. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
34. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

35. Grievant's testimony that there was nothing inappropriate concerning his interactions with ■■■, there was no romantic relationship, nothing intimate, etc., is not credible.

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.

Firstly, the Grievant's disciplinary infractions, namely the act of using the state issued cell phone to text ■■■ romantic messages, were reasonably classified by management as a Group II offense.

Operating Procedure 135.3, Section II (I) provides, in part:

"I. DOC facilities and equipment are provided for **official business use only**.

...

4. State telephones, including state-issued cellular phones, computer systems, and data are subject to monitoring which may include but is not limited to network traffic, application and data access, keystrokes, user commands, email and Internet usage, telephone usage, and message and data content; see Operating Procedure 310.2, Information Technology Security for more information." (Emphasis added) AE 18 at 187-188.

Operating Procedure 310.2 Section III (B) (10) provides, in part:

“10. Certain activities are prohibited when using the Internet, electronic communications, and IT Systems. These include, but are not limited to:

...

l. The use of language, words, or pictures that could be considered offensive to others.

...

s. Utilizing a DOC issued laptop/smart device and/or DOC issued mobile phone as one’s own **personally owned device for personal business.**

...

aa. **Any other activities designated as prohibited by the DOC.**” (Emphasis added) AE 20 at 221-222.

Policy No. 135.1, Section XIII (A) provides that Group II offenses “include acts and behaviors that are of a more serious or repetitive nature. This level is appropriate for offenses that seriously impact business operations and/or constitute a neglect of duty involving major consequences, insubordinate behaviors, and abuse of State resources, etc. An accumulation of two Group II offenses normally should warrant termination.” Subsection (B)(5) further provides that such offenses include “[u]nauthorized use or misuse of state property or records.” AE 17 at 171.

Additionally, the Grievant's disciplinary infractions, namely the act of not disclosing that there was a romantic relationship between the Grievant and ■■■, were reasonably classified by management as a Group III offense.

Operating Procedure 135.3, Section VIII (F) provides in part:

"F. Employees involved in a **romantic or sexual relationship** with a co-worker **regardless of each party's level of seniority, rank, or position, must disclose** the existence of a sexual or romantic relationship to the Organizational Unit Head.

...

3. **Failure to promptly report the relationship could result in disciplinary action** under Operating Procedure 135.1, Standards of Conduct.

...

6. Invitation of, or engagement in romantic or sexual relationships with a subordinate will not be tolerated, is a violation of Operating Procedure 135.1, Standards of Conduct, and will be treated as a Group I, Group II, or Group III offense depending on the circumstances and impact on the work environment. Romantic or sexual relationships can involve physical contact, **emotional displays of affection**, and/or virtual romantic or **sexually explicit communication via email, text message**, social media platforms, etc.

a. The evidence to substantiate the adverse effect on the work environment to support the issuance of a written notice must be documented.

b. **Failure to disclose a prohibited sexual or romantic relationship with a subordinate will be treated as a Group III offense.**" (Emphasis added) AE 18 at 194.

Policy No. 135.1, Section XIV (A) provides that Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.” Subsection (B)(37) further provides that such offenses include a “[v]iolation of Operating Procedure 135.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment in the Workplace, including but not limited to failing to report an intimate or romantic relationship, relationship of a sexual nature, or attempts to initiate the same with a subordinate.” AE 17 at 172, 174.

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 various offenses are appropriately classified at the Group II and Group III level, as designated. The Agency appropriately exercised the discipline by demoting and transferring the Grievant to a new facility pursuant to the Group II and III Written Notices.

The Grievant understood that his state issued cell phone was only meant for official use. He had signed consent forms and undergone annual training, which emphasized the importance of adhering to the policies. Despite this, he disregarded his training and used the device to send romantic text messages to ■■■.

Additionally, the Grievant was in a position of great leadership and responsibility as Chief of Security. Although ■■■ was not a member of the security staff, she was subordinate to him within the overall organizational hierarchy. The exchanged text messages between the Grievant and ■■■ were neither friendly nor casual; they were explicitly romantic and overtly sexual in nature, with both parties expressing a mutual interest in pursuing a long-term relationship. The Grievant also understood that their relationship could be perceived as favoritism by others. In fact, he expressed an intent to leverage his influence to get her hired for a

position. Fully aware of the potential consequences of the relationship, the Grievant continued to engage in it and refused to disclose its existence.

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 violations each rose to the level of a Group II and 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).

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).

The Grievant asserts that the discipline is too harsh. 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, including the Grievant's past good service to the Agency, before deciding whether to demote the Grievant to a lower rank or terminate the Grievant's employment. Ultimately, the Warden was determined to

keep the Grievant in a leadership role. Upon reviewing previous similar cases, the Warden found no discipline less severe than a Group III Written Notice for violation of Operating Procedure 135.3. Accordingly, to ensure consistency, the Grievant was given a Group III Written Notice. However, unlike other cases where the Grievants were frequently dismissed, the Grievant in this case was allowed to remain employed and retain a relatively high rank of Captain. Tape 1A.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness. However, the Department also had to account for the 2022 Group I Written Notice for unsatisfactory performance which expired in April 2024 and the 2023 Group I Written Notice for unsatisfactory performance which expires in March 2025.

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 3, the Written Notices, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the Grievant's quality of work was not compromised by his relationship with ■■■;
2. the demands of the Grievant's work environment;
3. the Grievant's tenure at the Agency;
4. the Grievant's past favorable performance evaluation history;
5. his very hard work for the Facility;
6. the long hours worked by the Grievant; and
7. the shortage of staff at the Facility.

The Grievant cited EDR Case No. 12160. There, the Grievant and a fellow employee [REDACTED] entered into a consensual sexual relationship in October 2023 which neither reported to the Operational Unit Head until January 2024. Both the Grievant and [REDACTED] each received a Group III Written Notice, which would normally result in termination, demotion, transfer, reduction in pay, or a combination of any of these. However, as the Warden found both of them to be valued employees, there was no further consequence other than receiving the Group III Written Notice.

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.

Additionally, in EDR 12160, while late, the Grievant ultimately willingly reported the relationship and acknowledged her failure to report it in the Agreed Stipulation. Conversely, in this case, throughout the Grievant has adamantly denied that he had an intimate relationship with [REDACTED], despite the text messages between the two clearly showing otherwise. Although the Grievant

admitted the text conversations were not "professional," he maintained that they were also not "intimate." Tape 1A.

However, ■■■'s own admission that the text messages could be seen as romantic and that others could perceive that there was a relationship between her and the Grievant clearly undermined the Grievant's testimony that he did not believe there was a relationship. Accordingly, this showed that the Grievant lacked any remorse or responsibility for his actions.

EDR has consistently held supervisors such as Chiefs of Security to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor, that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision."

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees." Policy Ruling of the Department of Human Resource Management, Case No. 9746, Sept. 24, 2012, at 2.

The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the Agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the Agency appears to have determined that the Grievant's misconduct was more severe based, in part, on his position as a supervisor. Because policy permits an Agency to hold supervisory employees to a higher standard than non-supervisory employees, the hearing officer defers to the Agency's weighing of that factor.

By policy, the Grievant was required, by acting in accordance with applicable operating procedures, to provide a positive role model for offenders and employees alike.

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.

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, 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 offenses specified in the written notices (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 notices 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 1/25/2025

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.