

## **DECISION OF HEARING OFFICER**

**IN RE: CASE NO: 12210**

**HEARING DATE: 3-7-25**

**DECISION ISSUED: 3-24-25**

## **PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice<sup>1</sup> on August 21, 2024, for an incident which occurred on July 18, 2024. Grievant was given a notice of due process<sup>2</sup> on July 30, 2024. Other than a Group III Notice, Grievant was not terminated nor otherwise reprimanded. Grievant did engage in the steps prior to request for hearing. A Hearing Officer was appointed on December 9, 2024. A pre-hearing conference occurred on January 6, 2025, and the matter heard on March 7, 2025.

## **APPEARANCES**

Agency Advocate  
Agency Representative as Witness  
Three (3) additional Agency Witnesses  
Grievant Advocate  
Grievant as Witness  
Five (5) additional Grievant Witnesses

## **ISSUES**

- 1) Whether Grievant violated Operational Procedure 135.1:<sup>3</sup>
  - p. 134 (a) OP135.1 XII B5 unsatisfactory performance;<sup>4</sup>
  - p. 135 (b) OP135.1 XIII B1 failure to follow orders;<sup>5</sup>
  - p. 136 (c) OP 135.1 XIV B2 falsify records;<sup>6</sup>
  - p. 137 (d) OP135.1 XIV B14 leaving post;<sup>7</sup>
  - p. 137 (e) XIV B15 negligence could result in injury;<sup>8</sup>
  - p. 137 (f) XIV B16 refusal to obey instructions could result in weakening security.<sup>9</sup>
- 2) Whether Grievant's actions met the definition of the above infractions.
- 3) Whether a Group III discipline with no consequences other than a Group III Written Notice added to Grievant's record was an appropriate discipline.

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<sup>1</sup> Agency Exhibit Tab 1 Written Notice

<sup>2</sup> Agency Exhibit Tab 1 Due Process Notice

<sup>3</sup> Agency Exhibit Tab 12 Operational Procedure 135.1

<sup>4</sup> Agency Exhibit Tab 12, p. 134, OP 135.1 XII B5 unsatisfactory performance

<sup>5</sup> Agency Exhibit Tab 12, p. 135, OP 135.1 XIII B1 failure to follow orders

<sup>6</sup> Agency Exhibit Tab 12, p. 136 OP 135.1 XIV B2 falsify records

<sup>7</sup> Agency Exhibit Tab 12, p. 137 OP 135.1 XIV B14 leaving post

<sup>8</sup> Agency Exhibit Tab 12, p. 137 OP 135.1 XIV B15 negligence could result in injury

<sup>9</sup> Agency Exhibit Tab 12, p. 137 OP 135.1 XIV B16 refusal to obey instructions could result in weakening security

- 4) Whether mitigating circumstances were considered.

### **BURDEN OF PROOF**

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.<sup>10</sup>

### **APPLICABLE POLICY**

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective January 1, 2025.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes 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 requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.<sup>11</sup>

### **FINDING OF FACTS**

After reviewing the evidence presented and observing the demeanor of each Witness the Hearing Officer makes the following findings of facts:

Grievant has been employed by this Agency for a period of three (3) years. Grievant also had previous employment at a correctional facility in Georgia. Grievant was considered an excellent employee although she did have a previous Group I for falsifying records when she relied on another officer’s statement.

On July 18, 2024, Grievant was on duty as a Transport Officer. Grievant was requested to bring an Inmate from his cell to the counseling area in order for the Inmate to speak with a counselor. Protocol was for Inmate to have his identification (ID) with him. Inmate’s ID was then to be placed where officers could observe which inmates were in counseling. This particular Inmate was upset with the counseling services and agitated. Inmate did not bring his ID. Grievant was about to return Inmate to his cell for lack of ID. However, the counselor stated it was OK to leave him with her. Grievant then left the Inmate despite his lack of ID. Grievant then went about her other business.

Before leaving at the end of her shift, Grievant signed a logbook that Grievant had made a review and all was clear. However, Grievant forgot the Inmate that she had earlier transported to counseling. The Inmate, who was agitated, remained with the counselor for an extended period of time. Grievant admitted she forgot the Inmate. The Inmate was

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<sup>10</sup> Grievance Procedure Manual, revised 1-1-2025

<sup>11</sup>Operating Procedure 135.1, revised 4-1-2023

transported by another officer. After the incident, Grievant revealed to her superior that she had been having memory problems and was under a physician's care. Also, after the incident, Grievant requested a duty change which was granted.

### **DISCUSSION**

There was no controversy as to whether Grievant committed the infractions noticed to Grievant on Grievant's Due Process Notification and Written Notice. The facts were stipulated. Further, the parties stipulated that there was no Americans with Disabilities issues as Grievant did not report Grievant's medical issues until after the July 18<sup>th</sup> incident. Soon after the incident, Grievant reported her medical issues and memory problems.<sup>12</sup> Grievant asked to be reassigned to a different position where Grievant felt more comfortable. The request was granted.<sup>13</sup> Grievant also presented evidence that Grievant is now receiving additional medical treatment which is improving Grievant's performance.<sup>14</sup>

The point of Grievant's request for hearing was to reduce her Group III discipline to a Group II discipline based on her medical issues being a mitigating factor. She also grieved that the Agency where Grievant was employed has considered her infraction to be a Group II which was then elevated by the Regional Administrator to a Group III.

### **OPINION**

A Hearing Officer is a neutral person who is expected to listen in an unbiased manner to both parties' opinions. While the Hearing Officer may agree that a matter feels unfair to the Grievant, the Hearing Officer is bound by the rules created for the Hearing Officer's decision. The Agency is given deference to be able to manage its operations and employees.

Hearing Officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.

In hearings contesting formal discipline, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and policy, the Agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness.<sup>15</sup>

Further, 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 agency management that are found to be consistent with law and policy.<sup>16</sup>

Grievant stipulated the facts of the incident. Grievant questioned why the Agency decided to change her discipline from the recommended Group II<sup>17</sup> to Group III. Testimonial evidence by the Warden stated all Written Notices needed to be approved by

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<sup>12</sup> Agency Exhibit Tab 7

<sup>13</sup> Agency Exhibit Tab 4

<sup>14</sup> Testimony of Grievant

<sup>15</sup> Grievance Procedure Manual, effective January 1, 2025. §5.9 pg 20

<sup>16</sup> Rules for Conducting Grievance Hearings, VI Scope of Relief pg 14. DeJarnette v.

Corning, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1998)("Title VII is not a vehicle for substituting the judgement of a court for that of the employer").

<sup>17</sup> Grievant Exhibit Tab 5 recommendation letter

the Western Regional Administrator.<sup>18</sup> The Regional Administrator considered the discipline based on the various levels of discipline for all the agencies in the entire western district. The Warden stated discipline needed to be relative to all employees in the western district which is why the Warden issued a Group III notice.<sup>19</sup>

Grievant produced witnesses that all stated she was a competent and reliable<sup>20</sup> employee. Grievant gave extensive testimony and produced evidence of her medical problems.<sup>21</sup> Grievant also relied on her actions being unintentional. Her counsel argued negligence implied intent. The definition of negligence<sup>22</sup> does not imply fault or lack thereof. "Failure could be intentional or not intentional".

The Agency never implied that Grievant intentionally or maliciously acted.

The Agency produced the Counselor as a witness to the incident. She stated the Inmate was agitated. She stated she felt that she could have been in grave danger with him as she waited for the Inmate's return to his cell.<sup>23</sup> The level of this danger as well as the other infractions were reported to the Regional Administrator. These concerns were considered by the Regional Administrator in his recommendation of a Group III discipline. Also, of concern was Grievant's previous Group I.

The Agency considered Grievant to be generally a valuable employee. Grievant's medical condition was certainly considered as a mitigating factor. Actually, the Agency was more than gracious given all the facts of this case to offer a Group III with no additional consequences. As stated, while the Administrative Hearing Officer heard Grievant's earnest testimony, the Hearing Officer has no power to reconstruct an Agency's discipline of their employees unless the Agency acted beyond reasonable measures.

### **MITIGATION**

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resource Management..." Under the *Rules for conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. 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:

- (1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
- (2) whether the discipline is consistent with the Agency's treatment of other similarly situated employees or
- (3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.<sup>24</sup>

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<sup>18</sup> Testimony of Warden

<sup>19</sup> Testimony of Warden

<sup>20</sup> Testimony of several witnesses including the Warden

<sup>21</sup> Grievant Exhibit: medical records

<sup>22</sup> Merriam-Webster dictionary: a.: the quality of state of being negligent. b.: failure to exercise the care that a reasonably prudent person would exercise in like circumstances.

<sup>23</sup> Testimony of Witness

<sup>24</sup> Rules for Conducting Grievance Hearings, §VI, p. 17

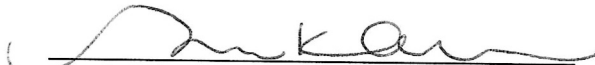
The agency appears to have given great consideration to Grievant's good work ethic and medical problems by accommodating the Grievant's request for a duty change and not terminating Grievant from employment.

### **DECISION**

For the reasons stated above:

- 1) Grievant stipulated to all the OP 135.1 actions presented.
- 2) Grievant's actions did meet the OP135.1 definitions stated.
- 3) A Group III discipline as issued was appropriate.
- 4) Mitigation was properly considered.

The Group III discipline is therefore UPHELD.



Sondra K. Alan, Hearing Officer

## **APPEAL RIGHTS**

You may request an administrative review by EDR within **fifteen (15) calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within fifteen (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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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].

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.