

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case Nos: 12224

Hearing Date: March 18, 2025  
Decision Issued: March 19, 2025

**PROCEDURAL HISTORY**

On September 25, 2024, Grievant was issued a Group I Written Notice.<sup>1</sup> On October 8, 2024, Grievant filed a grievance challenging the Agency's action.<sup>2</sup> The grievance was assigned to this Hearing Officer on January 21, 2025. A hearing was held on March 18, 2025.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Grievant  
Grievant Advocate  
Witnesses

**ISSUES**

Did Grievant violate DOC Operating Procedures 038.1 and 135.1?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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<sup>1</sup> A. Ex. 1, at 1

<sup>2</sup> A. Ex. 1, at 6

<sup>3</sup> See Va. Code § 2.2-3004(B)

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

## **FINDINGS OF FACT**

After reviewing the evidence and observing the demeanor of each witness, considering their motive, potential bias, and corroborating or contradictory evidence, I make the following findings of fact. The Agency submitted a notebook containing pages 1 through 73. Without objection it was accepted as Agency Exhibit 1 (A Ex.). Grievant submitted a notebook containing pages 1 through 32. Without objection it was accepted as Grievant Exhibit 1 (G Ex.).

The following people testified at the hearing:

Warden = W

Major = M

Captain = C

Corrections Officer = CO

Grievant

**DOC OP 038.1 defines “Incident”** in part as follows: An actual or threatened event or occurrence outside the ordinary routine that involves:

- The life, health and safety of employees, contractors, volunteers, guests, inmates, or probationers/parolees.<sup>7</sup>

**DOC OP 038.1(I)(A) “Incident Reporting”** provides in part: **Timely** and accurate reporting of incidents that occur in the Virginia Department of Corrections (DOC) is essential for immediate response, investigation, and further action and **support** in the event of a **critical** incident involving any employee/contractor/volunteer, visitor, inmate, probationer/parolee, or DOC property. (**Emphasis added**)

**DOC OP 401.1 “Transportation Officer” at Job Summary** states in part: ...The Transportation Officer will provide and maintain security, custody, and control of inmates on all transportation trips. The Transportation Officer must exercise good judgment, during stressful situations to ensure the safety of staff, inmates, and the general public at all times... Alertness, careful attention to detail, and the **ability to adhere to all VADOC Policies and Procedures** in the absence of direct supervision or essential for this post.<sup>8</sup> (**Emphasis added**)

**DOC OP 401.1 “Transportation Officer” at Emergency Procedures** states: In the event of an emergency or disturbance, inside or outside the perimeter, special attention

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

<sup>5</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> A Ex. at 56

<sup>8</sup> A Ex. at 19

should be given to the fact that this emergency disturbance may be a diversion for escape. During a disturbance or emergency, specific guidance is provided on Attachment 3.<sup>9</sup>

**DOC OP 135.1(XIII)(B)(1)** states Group II offenses include...(1) failure to follow a supervisors, instructions, perform, assigned work, or otherwise comply with applicable established written policy or procedure.<sup>10</sup>

Grievant worked at the Department of Corrections. On August 14, 2024, Grievant, another sergeant, and CO, transported 2 inmates to an offsite dental office. CO and Grievant testified regarding this transportation and their testimony was essentially identical. Upon arrival at the dental office, all five people exited the van used for the transportation. As they proceeded across the parking lot to the entrance of the dental office, an adult female and a child approached one of the inmates. The child ran forward and hugged the inmate. The child could have passed drugs or a weapon to the inmate. CO told the adult female and child that this was not allowed. CO testified that she looked to both Grievant and the other sergeant and neither said nor did anything. CO, with colorful language, expressed her surprise and chagrin at this lack of leadership. All then proceeded into the dental office. It took approximately 5 minutes from the incident with the child to become settled in the waiting area of the dental office.

CO told both sergeants that this matter should be communicated to the appropriate persons at the Facility where the inmates were housed. Grievant confirmed this statement. In approximately 10 minutes, the other sergeant took 1 inmate into the operating area of the dental office for treatment. This treatment would require that he be sedated with general anesthesia.

Grievant and CO were still in the waiting area with the other inmate. Grievant positioned herself so she could view the parking lot as she was concerned about a vehicle that kept circling the parking lot. CO again stated that this incident needed to be reported. CO and Grievant talked about this and Grievant said she would file an incident report upon return to the Facility. CO said she was going to make the call and did so.

CO called the Facility and spoke to C. She reported the incident and C said he would call M and immediately did. M called CO, told her to call the local police for assistance, and told her to return as soon as the first inmate was awake. The appointment for the second was cancelled. Local police did arrive and provided extra security. M immediately reported this incident to W.

C, M, and W all testified that the child hugging the inmate was a breach of security and was a critical incident. It created a possible danger to the child, the inmate, the officers present and the general public.

The time lapse from the incident in the parking lot and CO's call to C was between 30 and 45 minutes. At no time did Grievant make a call or order CO to make a call. The notification was solely due to CO following what she knew to be required procedure.

On the date of this incident, Grievant signed the Post Order & Emergency Procedures Review Log where she certified "prior to signing below and prior to assuming the duties of this post, I have read, discussed with my supervisor and understand the post order indicated above and my signature

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<sup>9</sup> Id. at 19

<sup>10</sup> A Ex. at 44

below confirms that I have read, reviewed and understand the expectations to be carried out in the event of any emergency.”<sup>11</sup>

Much testimony was given regarding the decision to enter the dental office rather than immediately return to the transportation van. In as much as everyone characterized this incident as “an ambush,” there was legitimate concern as to what awaited in the dental office. C, M, and W all testified that the better decision would be to return to the van and then return to the Facility. W further testified that the reason for the Group II Written Notice was the failure to notify, not the decision to go into the dental office.

Grievant testified that she could have notified the facility when she was in the waiting area of the dental office, she could have called when CO called, and she could have directed CO to call. She did none of these. Grievant acknowledged that she understood the emergency procedures set for in DOC OP 401.1. Grievant agreed that the child hugging the inmate was a breach of security and a critical incident. Grievant stated that she could have done things differently.

Grievant, during the grievance process, submitted a written statement. She wrote therein: *“Because of the complexity of this post’s responsibility, various issues may arise requiring you to take a course of action that this post order does not address. In such a case, it is essential that common sense and good judgment be exercised, and that **you confer with your supervisors for guidance.**”*<sup>12</sup> (Emphasis added) It is clear Grievant understood that calling her supervisors would allow them to assist, guide, and facilitate how to deal with the particular critical incident or emergency.

Grievant, while acknowledging that she could have done things differently, argued that this entire matter was caused by someone informing the inmate of the time and location of his visit to the dental office, thus the concept of “ambush.” An investigation was conducted, and it was determined that because this inmate would also be placed under general anesthesia, he would not be able to eat for a period prior to the dental work. He was notified, determined this was because of a dental procedure, used another inmate’s phone privileges, and called his family to arrange a meeting with his infant child. While this is interesting and caused the Facility to change some of its policies, it is not relevant to the matter before me and in no manner justifies the Grievant clearly violating the Operating Policies of DOC. Policies that are in place for the protection of the inmate, the public, and the Grievant.

Grievant took the position that no one was hurt and all returned to the Facility and, accordingly, this entire matter was not as serious as the Agency deemed. This is a specious and myopic understanding of policy. The fact that nothing untoward took place should be considered a stroke of good fortune and not a justification for the violations of policy.

Grievant also argued that this was a matter where progressive discipline should be used. She argued that a Notice of Needs Improvement was more appropriate. The Agency pointed out that her actions would normally warrant a Group II Written Notice pursuant to DOC OP 135.1(XIII)(B)(1). The Agency mitigated this to a Group I Written Notice. I find that Grievant’s lack of notification in

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<sup>11</sup> A Ex. at 18

<sup>12</sup> A Ex. at 8

this matter warranted a Group II Written Notice. The Agency mitigated and was fully justified in not mitigating beyond a Group I Written Notice.

### **MITIGATION**

*Va. Code § 2.2-3005(C)(6)*, authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the Hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

### **DECISION**

I find that the Agency has borne its burden of proof in this matter and the issuance of the Group I Notice with was proper.

### **APPEAL RIGHTS**

You may request an administrative review by EDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 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 that the Hearing decision is not in compliance. A challenge that the Hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the Hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction where the grievance arose within **30 days** of the date when the decision becomes final.<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].

*William S. Davidson*  
William S. Davidson, Hearing Officer

Date: March 20, 2025

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