

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12294

Hearing Date: July 22, 2025
Decision Issued: July 24, 2025

PROCEDURAL HISTORY

On May 9, 2025, Grievant was issued a Group III Written Notice with termination.¹ On May 13, 2025, Grievant filed a grievance challenging the Agency's action.² The grievance was assigned to this Hearing Officer on June 2, 2025. A hearing was held on July 22, 2025.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate DOC Operating Procedures 135.1, 135.2, 135.3, 401.1, 410.1 and 430.3

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.³ 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.

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 evidence which shows that

¹ A Ex. at 1

² A Ex. at 45

³ See Va. Code § 2.2-3004(B)

what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴ It 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.⁵ By definition, a preponderance of evidence requires only evidence, which shows that what is intended to be proved, is more likely than not, or evidence that is more convincing than the opposing evidence.⁶ However, proof must go beyond conjecture.⁷ In other words, there must be more than a possibility or a mere speculation.⁸

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 128, including 2 video and 1 audio recordings. Without objection it was accepted as Agency Exhibit 1 (A Ex.). Grievant submitted 7 handwritten pages of notes as her documentary evidence. They were her notes and were accepted as Grievant Exhibit 1 (G Ex.), despite objection by the Agency.

The following people testified at the hearing:

Warden = W

Lead Warden = LW

Lieutenant 1 = LT1

Lieutenant 2 = LT2

Major 1 = M1

Chief of Security = CS

Grievant

DOC OP 135.1(XIV)(A) defines **Group III Offenses as:** These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws⁹

Group III offenses include, but are not limited to:

DOC OP 135.1(XIV)(B)(15): 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... inmates... or the escaping/absconding of inmates.¹⁰

DOC OP 135.1(XIV)(B)(16): Refusal to obey instructions that could result in a weakening of security.¹¹

DOC OP 135.1(XIV)(B)(23) includes as a Group III Offense: Violation of Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Inmates.¹²

DOC OP 135.1(XIV)(B)(24): Sexual misconduct with inmates... Any behavior of a sexual nature between employees and inmates... under the DOC supervision is prohibited... Sexual misconduct

⁴ Greivance Procedure Manual § 9

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ Administrative Review Ruling Number 2024-5660, March 8, 2024, at 5

⁷ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁸ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁹ A Ex. at 66

¹⁰ A Ex. at 67

¹¹ A Ex. at 67

¹² A Ex. at 67

includes but is not limited to conversations or correspondence that suggests a sexual relationship between an inmate... by an employee...or agency representative. A violation of Operating Procedure 135.3, Standards of Ethics and Conflict of Interest, relating to consensual personal relationships/sexual harassment in the workplace may also constitute sexual misconduct.¹³

DOC OP 135.2 defines **Fraternization** as: Employee association with inmates... outside of employee job functions, that extends to unacceptable, unprofessional and prohibited behavior; examples include ...discussing employee personal matters (marriage, children, work, etc.) with inmates..., and engaging in romantic or sexual relationships with inmates...¹⁴

DOC OP 135.2(IV)(C) Improprieties: Associations between staff and inmates... that may compromise security or undermine the employee's ability to carry out their responsibilities may be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct.¹⁵

DOC OP 135.2(IV)(D) Special Privileges: Employees will not extend or promise an inmate... special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.¹⁶

DOC OP 135.3 defines **Consensual Romantic or Sexual Relationship** as: An intimate interpersonal, voluntary relationship, by two or more persons, that involves romance, physical or emotional intimacy, emotional attraction and/or sexual intimacy. Consent can be express or implied by the circumstances or the context.¹⁷

DOC OP 135.3(II)(G) states: Employees must conduct themselves and perform their duties in such a way as to avoid any appearance of, or perception of impropriety, to set a good example for inmates... No person connected with the DOC will use their official position to secure special privileges or advantages for themselves or others or engage in activities that constitute a conflict of interest.¹⁸

Grievant was aware of and acknowledged her receipt and understanding of all the policies involved in this matter.¹⁹

Agency Exhibits 20 and 21 are video recordings of events that took place in the early morning of March 30. A Ex. 20 shows that at approximately 00:51:42, Grievant enters the 400 Pod foyer through an open sallyport door. At 00:52:03, the door to the cell POD opens and Grievant steps into the POD, immediately steps back, and at 00:52:30 the door to the control room opens.²⁰ All 3 doors, the sallyport, the cell POD and the control room, are open. W testified that this is a breach of security. LW testified that having the sallyport and POD doors open simultaneously was a breach of security. CS testified that it is a breach of security to have more than one of these doors open at the same time. Grievant, in her testimony, admitted that having 2 of these 3 doors open simultaneously was a breach of security. This is a violation of **DOC OP 401.1, 410.1 and 430.3**.

This breach of security alone is a violation of both **DOC OP 135.1(XIV)(B)(15):** Negligence on the job that...could have resulted in the death, or serious injury of persons... or the escaping/absconding of inmates... and **DOC OP 135.1(XIV)(B)(16):** Refusal to obey instructions that could result in a weakening of security. Both of these are Group III offenses.

¹³A Ex. at 67

¹⁴A Ex. at 77

¹⁵A Ex. at 81

¹⁶A Ex. at 81

¹⁷A Ex. at 88

¹⁸ A Ex. at 92

¹⁹ A Ex. at 17-23

²⁰ A Ex. at 26

This concern was made very obvious in this video as an inmate (IN) comes out of the 400 cell POD following Grievant just as she is leaving the POD foyer. Grievant looked directly back as she was leaving and most certainly saw IN coming out of the cell POD.

At approximately 00:53:10, A Ex. 21 shows Grievant, and IN enter an office. The door is open. At 00:54:57, an arm, it appears to be IN, is seen closing the door. At 00:54:54, IN opens the door and then closes it. At 00:56:50, IN briefly leaves and then returns, again closing the door. At 00:58:21, IN leaves the room. At 01:00:49, Grievant leaves.

Grievant testified that she was dialoging with IN in an attempt to get him to return to his cell. There was no reason for IN to be out of his cell at this time of the morning. He was dressed in what appeared to be pajama bottoms and an open shirt. Grievant testified that she “froze” when IN closed the door. She did not attempt to use the phone in the office to call for assistance. She did not use her radio. She testified that she went to the computer in the office to make an incident report, but her account was locked. She then admitted that her account had been locked for some time prior to this and that she had attempted to have it unlocked. There was no evidence to indicate that she ever filed an incident report.

Grievant testified that she went into the office with IN because he could have hurt a staff member and she was going to talk him back to his cell. Somehow Grievant misses the fact that she may well have been the staff member who was hurt. By voluntarily placing herself in an office with IN, with the door closed at approximately 1:00 AM, Grievant clearly violated **DOC OP 135.2(IV)(C) Improproprieties**: Associations between staff and inmates... that may compromise security or undermine the employee’s ability to carry out their responsibilities may be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct.

Agency spent much time on the issue of fraternization. In an Administrative Recommendation, the Agency found as follows:

- (1) Carnal Knowledge: Unfounded
- (2) Fraternization: Substantiated²¹

The basis of the Fraternization claim (**DOC OP 135.2**), violation of Improproprieties (**DOC OP 135.2(IV)(C)**), and violation of Special Privileges (**DOC OP 135.2(IV)(D)**) is based in part on the testimony of IN. When interviewed, he stated “*he falsified the claims he had with Grievant...but he had kissed her...he acknowledged entering the office with Grievant and that they kissed.*”²² IN was not present at the hearing and was not subject to cross examination. LT2 testified that IN was angry because Grievant was in a relationship with another inmate. IN expressed this anger to M1 who subsequently notified LT2.²³ LT1 testified that Grievant granted IN special privileges by letting him out of his cell for no apparent necessity. This created a security risk for other officers.²⁴ I find that LT1 was credible and that Grievant’s denials regarding special privileges were not credible. I find Grievant did grant IN special privileges in violation of **DOC OP 135.2(IV)(D)**.

By placing herself in the office at this time in the morning and with IN dressed as he was and with the inconsistencies in her testimony, Grievant violated **DOC OP 135.3(II)(G)**: Employees must conduct themselves and perform their duties in such a way as to **avoid any appearance of, or perception of impropriety**, to set a good example for inmates... (Emphasis added)

Because of my prior findings, I do not need to deal with the issue of fraternization. While there was testimony that IN said he knew Grievant’s personal matters and that he kissed her, Grievant clearly stated that he did not know her personal matters and that they did not kiss each other. Regarding these two topics, I find that neither was particularly credible, but this issue is not determinative of my finding in this matter.

²¹ A Ex. at 44

²² A Ex. at 27

²³ A Ex. at 32

²⁴ A Ex. at 36

The Grievant argued that the Agency disciplined similarly situated employees more leniently for similar offenses. Section VI(B)(2) of the Rules provides that mitigating circumstances may include “whether the discipline is consistent with the Agency’s treatment of other similarly situated employees.”²⁵ As with all affirmative defenses, the Grievant has the burden to raise and establish any mitigating factors.²⁶ A Grievant must show “enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the Agency treated similarly situated employees differently.”²⁷ Grievant testified vaguely as to one or two other situation where she thought treatment for similar offenses was more lenient. In considering the nature of the charges, the comparability of the employees’ positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, the stated explanation for why the employees were allegedly treated disparately, I find that there was no substantially similarity between Grievant’s charges and those of the other employees that Grievant proffered.

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 III Notice with termination was proper.

APPEAL RIGHTS

²⁵ RCGH § VI(B)(2)

²⁶ GPM § 5.8; RCGH § VI(B)(1)

²⁷ *Lewis v. Dep’t of Veterans Affairs*, 113 M.S.P.R. 657, 663-64 (2010)

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 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 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.^[1]

[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: July 24, 2025

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.