

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYEE DISPUTE RESOLUTION
DIVISION OF HEARINGS

In the matter of Case No.: 12455
Hearing Date: 27 May 2026
Decision Issued: 8 June 2026

SUMMARY

For the reasons detailed herein, the Hearing Officer finds that the Group III Written Notice with Termination issued by Agency is upheld.

PROCEDURAL HISTORY

On 2 February 2026, Grievant was issued a Group III Written Notice of disciplinary action with termination. In the Written Notice, the Agency described the nature of the offense as violations of Written Offense Codes 55 [Fraternization with patient/offender/client to include but not limited to PREA violations and 99 [Other-Leaving a security post without permission during working hours.¹ Grievant was terminated effective 2 February 2026. (Agency Exhibit (“AE”) 1.)

On 28 February 2026, Grievant timely filed a Grievance Form A to challenge the Agency’s action. On 6 April 2026, the Office of Employment Dispute Resolution assigned this matter to this Hearing Officer.

On 13 April 2026, the parties participated in a pre-hearing conference call scheduled by the hearing officer. The parties agreed to communication by email alone. During the pre-hearing conference, the parties agreed to the hearing date of 27 May 2026. Thereafter, on 21 April 2026, the Hearing Officer issued his Pre-Hearing Order. (*See* Pre-Hearing Order.)

On 27 May 2025, the hearing was held in-person at the Agency’s facility. The Agency submitted documents for exhibits that were accepted into the grievance record. Grievant did not offer any documentary evidences. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

¹ “PREA” is the acronym for Prison Rape Elimination Act. There is no allegation of a PREA violation in the instant case.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action.
2. Whether the behavior constituted misconduct.
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II or III offense).
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 Grievant requested an administrative due process hearing to challenge termination of his employment at a facility (the "Facility") of the Department of Corrections ("the Agency"), effective 5 March 2025, pursuant to a Group III Written Notice issued by Management of the Agency, as described in the Grievance Form A submitted by Grievant dated 5 March 2025.

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 Grievant 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.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Prior to his dismissal, Grievant was a Corrections Officer ("CO") who had worked for the Agency since December 2023 and had worked at the Facility since May 2025. (AE 1.) Grievant had previously received a Group III Written Notice with a sanction of 90-days suspension. That prior Written Notice was still "active" for consideration as an aggravating factor. (AE 1.)

The Offense

On 11/9/2025, Grievant left his post without permission for a period of approximately one hour and eight minutes. During this period, Grievant was observed in the kitchen office with another Corrections Officer ("CO") along with an inmate watching something on the kitchen computer.

The Watch Commander testified in accordance with his 11/20/2026 email to his supervisors (the Superintendent and the Assistant Superintendent/Chief of Security). (AE 6.)

The Watch Commander stated that at approximately 0100 hours (1:00 a.m.), while watching video surveillance screens from his watch station, he noticed Grievant along with another CO and the inmate in the kitchen.² Thereafter the Watch Commander backed up the recording to see what had previously transpired and testified that he observed the following:

- 2336-2349: Grievant along with the other CO in the kitchen office talking and watching something on the computer in the kitchen office.
- At 2349: Grievant exits the kitchen office to return to his duty station to complete the count. At 2354 Grievant and the inmate depart the dormitory and walk to the kitchen office.
- 2355: Grievant leaves the dorm unsupervised and unsecured for the next 1 hour and 8 minutes. The watch commander testified that Grievant was obligated to make rounds in the dormitory every 30 minutes, so by leaving the dorm unsupervised and unsecured for over an hour, he failed to make two of his required rounds.

The Watch Commander noted that Grievant's duty station was at his assigned dormitory and not the kitchen office. The Watch Commander further noted that the inmate had no official reason to be in the kitchen office and that it was a violation of procedure for an inmate to have access to a computer.

The Watch Commander and the Chief of Security each testified that Grievant's actions were a serious breach of security. They noted that COs are assigned to their specific posts for the safety and security of the inmates as well as the other COs on duty. They further testified that any instance in which a CO is away from his or assigned post is a serious security breach that could result in the death or serious injury of inmates or Agency employees.

They Watch Commander and the Chief of Security each asserted that Grievant's actions should be considered fraternization as defined in Operation Procedure ("OP") 135.2. (*See* AE 13, p.3). OP 135.1 provides that Fraternization is a Group III Offense (*See* AE 12, p.22.) The Watch Commander and the Chief of Security further noted that Grievant's absence from his assigned security post for over 1 hour and 8 minutes and leaving the dormitory unsecured should be considered "negligence" and "leaving a security post without permission during working hours," both of which are Group III offenses. (*See* AE 12, p.21.)

Grievant's testimony

Grievant did not dispute the facts asserted by the Watch Commander in his testimony or in his 11/20/2026 email. Grievant testified that he left his duty station to accompany the inmate down to the kitchen because he wanted to keep eyes on the inmate when he was with the other CO. Grievant acknowledged that his actions could be considered abandoning his post, but he stated that it was also important to watch the inmate. He stated that he had a choice between remaining on post or following the inmate so as to provide security for the other CO and

² All clock times herein are noted using the 24-hour clock notation.

believed that watching the inmate to protect the other officer was the more important responsibility. Grievant further testified that he was aware that the inmate had no official reason to be out of the dormitory, but he understood that the other CO had wanted him to come to the kitchen and he did not want to question or interfere with the other CO.

Grievant acknowledged that he was communicating with the inmate and watching something on the computer with him but asserted that his actions should not be considered fraternization. He explained that it would be fraternization if he was communicating personal or confidential information to the inmate and he did not do that.

Additional evidence

All documentary evidence submitted by the parties was reviewed and considered. (Agency submitted documentary evidence but Grievant did not submit any documents.)

Grievant's testimony was in accordance with statements he made in the course of the Due Process meeting that took place on 12/17/2025, except that Grievant denied that he ever said that "Inmate was going to learn paperwork." (See AE p. 9.) Grievant explained that he sometimes went to the kitchen area to learn paperwork procedures from the other CO but denied saying that he was going to the kitchen to teach the inmate paperwork.

Grievant was previously awarded a Group III Written Notice with suspension. This Written Notice was still "active" and was cited by the Agency in determining the proper sanction to be awarded Grievant.

Analysis and Discussion

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 (Rules); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

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 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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *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 agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances.

Pursuant to applicable policy, management has 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.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) 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 discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Evidence presented by the Agency included the testimony of the Watch Commander who observed Grievant's behavior on video camera both in real time and then reviewing events that were recorded by the cameras. He filed a report to the Watch Commander and the Superintendent asserting that Grievant had engaged in "Fraternization" (Violation of Operating Procedure 135.2) and for "Leaving a security post without permission during working hours" (Violation of Operating Procedure 135.1- Standards of Conduct. The Watch Commander and the Superintendent reviewed the video evidence of Grievant's actions and concurred with the Watch Commander's observations.

Grievant acknowledged the behavior but denied that he should be considered Fraternization. He acknowledged that he left his security post but asserted that he did so to maintain security over the inmate who was not in the dormitory as he should have been.

In considering the evidence, I find that the Agency has proved the misconduct charged in the Written Notice. In so finding, I note that Grievant could not explain a legitimate reason for being with an inmate in an unauthorized area (i.e. the kitchen office) and, for over an hour, looking at something on a computer to which the inmate was not authorized to have access. I further find that Grievant's assertion that he had abandoned his post at the dormitory to maintain security on an inmate when the inmate was also with another CO to be poor judgment and an unsatisfactory reason for his action.

I therefore find that Grievant's behavior constitutes Misconduct as a violation of each of the Offense Codes alleged in the Written Notice, that being Written Offense Code 55 [Fraternization with patient/offender/client and 99 [Other-Leaving a security post without permission during working hours.

Accordingly, and for the reasons detailed above, I find that the instances of misconduct charged in the Written Notice constitute a significant security breach and, therefore, a Group III offense.

Mitigation

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, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM].” The Agency’s Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. 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 whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

EDR has further explained:

When an agency’s decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer “will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency noted Written Notice that information considered regarding possible mitigating or aggravation factors included that Grievant had two years of current service with the Agency, but that he also had an active Group III Written Notice for sleeping during working hours. (AE p. 1.)

The Grievant provided no evidence that would be considered proper mitigating evidence not previously considered by the Agency.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with Termination must be and is upheld.

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 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.³ [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].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



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