

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12479

Hearing Date: June 25, 2026

Decision Issued: June 29, 2026

PROCEDURAL HISTORY

On April 14, 2026, the Agency issued Grievant a Group III Written Notice of disciplinary action, with job termination. The offense was neglect of duty, sleeping, or being inattentive, during working hours on January 30, 2026.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking rescission of the Group III offense and reinstatement. The matter advanced to hearing. On May 18, 2026, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for June 25, 2026, the first available date for the parties. The hearing was held as scheduled, in person at the agency's alternative location.

The Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency or Grievant Exhibits, respectively. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual (GPM) § 5.8.* However, § 5.8 states “[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.” A preponderance of the evidence is evidence which shows that what is sought to be proved is more likely than not; evidence that is more convincing than the opposing evidence. GPM § 9.

APPLICABLE LAW AND OPINION

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 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.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer*

Serv., 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), 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.”

Under Operating Procedure 135.1, *Standards of Conduct*, Group III 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 laws. Agency Exhibit Tab 7., p. 34-36. Sleeping during work hours and negligence on the job that could have resulted in the death or serious injury are specific examples of a Group III offense.

The Offense

The Group III Written Notice, issued by the Major/Acting Superintendent on April 14, 2026, detailed the facts of the offense, and concluded:

Violation of Operating Procedure 135.1, *Standards of Conduct*. and DHRM Policy 1.60, *Standards of Conduct*, for significant neglect of duty / negligent behavior on the job that could have resulted in the death, or serious injury of persons, including, but not limited to, employees, supervisors, inmates/probationers/parolees, etc., and sleeping during working hours. On January 30, 2026, from approximately 2:05 AM to 2:40 AM, [Grievant] was observed on video at the Officers’ station in the Main Dorm repeatedly sitting with his head down, body slumped, and hands across his stomach in a manner consistent with sleeping. These behaviors occurred multiple times during the recorded time period.

Regardless of whether [Grievant] was fully asleep, his conduct demonstrates that he was not alert, attentive, or properly monitoring his assigned post for an extended period. This failure to maintain required vigilance constitutes negligent behavior and is incompatible with the responsibilities of a security officer. Such inattention directly compromises the safety and security of the facility.

[Grievant’s] actions created a significant safety risk to himself, staff, and inmates. In accordance with the provisions of Operating Procedure 135.1, regarding employee expectations, [Grievant] failed to conduct himself in a manner that supports the mission of the DOC and the performance of his duties; devote full effort to job responsibilities during work hours; and make work-related decisions and take actions that are in the best interest of the DOC. This conduct constitutes

a Group III violation of the Standards of Conduct: Unsatisfactory Performance by sleeping or giving the appearance of sleeping and/or being less than alert on a security post. Group III Level Offenses include violations of policy, or unsatisfactory performance that is of a most critical nature and significantly impacts agency services and operations. Due to the seriousness of this negligent behavior and the resulting security risk, his employment is being terminated.

Given the seriousness of this negligent behavior, the extended period of inattention, and the substantial risk created to institutional safety, a Group III offense with termination is warranted and appropriate. [Grievant's] actions represent a severe breach of duty, and termination is consistent with established disciplinary guidelines for a Group III violation of this nature.

Agency Exhibit Tab 1, p. 1. For circumstances considered, the Written Notice stated:

[Grievant] also has an active Group I Written Notice issued 5/6/25 for Unsatisfactory Performance. This fact was taken into consideration in the issuance of this Written Notice.

The evidence in this case centers on a surveillance video recorded during the early morning hours of January 30, 2026, between approximately 2:05 a.m. and 2:40 a.m. Agency Exhibit Tab 6, referenced at page 15. The video shows the Grievant and several other officers seated within the main dorm control area. Over a substantial portion of that time, the Grievant is observed with his head down, largely motionless, and exhibiting minimal responsiveness to his environment. Supervisory reviewers of the footage described his posture as slumped and his behavior as consistent with sleep or, at a minimum, a significant lack of alertness. Agency Exhibit Tab 4, pp. 10, 11.

The Acting Superintendent and Chief of Security provided detailed testimony regarding his review of the video. He explained that the incident came to his attention during an unrelated investigation, and upon reviewing the footage, he observed not just the Grievant but multiple officers in what appeared to be a non-alert state. Based on his extensive experience in correctional operations, the Acting Superintendent testified that the behavior displayed in the video—prolonged stillness, head down, and lack of situational awareness—is consistent with sleeping or a functional equivalent thereof. He emphasized that in a correctional setting, particularly in a dorm control area, the requirement of constant vigilance is paramount. In his view, any sustained failure to remain alert creates an unacceptable security risk to staff and inmates alike.

The Acting Superintendent further testified that all officers observed engaging in the same conduct during the incident were terminated, demonstrating that the Agency applied discipline consistently. He also stated that he was unaware of any medical accommodation request by the Grievant that would have permitted diminished alertness while on duty. Importantly, he clarified that while employees may engage in personal religious practices, such activity must not interfere with their ability to remain aware of their surroundings and perform their assigned duties. He acknowledged that the Grievant was otherwise a good employee. The

Written Notice itself references the Grievant's prior discipline (Agency Exhibit Tab 1, p. 1 referencing prior Group I notice; see also Tab 5, p. 12) but reflects that the present charge alone warranted Group III action.

The Lieutenant, who was directly involved in referring the matter for discipline, corroborated the Acting Superintendent's account. He testified that his own review of the footage revealed the Grievant repeatedly with his head down and appearing not to be alert. He prepared a written referral stating that the Grievant "may have been asleep" or, at minimum, was not attentive to his duties. Agency Exhibit Tab 4, p. 11. He explained that had he observed this conduct in real time, he would have intervened immediately. Although he initially addressed the matter with the Grievant verbally, he anticipated that formal discipline would follow given the seriousness of the conduct and the institutional implications.

The Grievant presented testimony in his own defense and called Officer M. as a witness. Officer M. testified that when he entered the dorm area later in the relevant timeframe, the Grievant appeared upright and awake. However, his testimony was limited to that specific moment. He acknowledged that he arrived after a portion of the time captured in the video and did not observe the earlier period during which the Grievant remained largely motionless. His vantage point was also partially obstructed, limiting his ability to observe all individuals in the area.

The Grievant testified that he was not asleep and instead was engaged in prayer. He described himself as a deeply religious individual and stated that he was "heavy praying" at the time in question. He also referenced personal health concerns, including prostate cancer and a pre-diabetic condition, and he asserted that he would never intentionally place others at risk. The Grievant further alleged that the discipline imposed on him was inconsistent with prior incidents and suggested that he had been unfairly targeted.

At the same time, the Grievant acknowledged that he had not submitted any formal request for accommodation related to his medical condition, nor had he sought approval for any modification of his duties. Moreover, his description of "heavy praying" during the time period in question confirms that he was seated with his head down and engaged in an activity that diverted his attention from his surroundings.

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

1. The central question in this case is not limited to whether the Grievant was conclusively asleep. Rather, it is whether he failed to maintain the level of alertness required for his position. The Agency's Operating Procedure 135.1 defines Group III offenses as those of a serious nature, including sleeping during working hours or engaging in conduct that demonstrates a significant neglect of duty or poses a risk to safety.
2. The weight of the evidence establishes that the Grievant was not maintaining appropriate situational awareness for an extended period of time while assigned to a security post. The video evidence, supported by consistent supervisory testimony, shows prolonged

inactivity, head-down posture, and a lack of responsiveness inconsistent with the duties of a correctional officer assigned to monitor a dormitory environment. Even if one were to assume that the Grievant was not fully asleep, his conduct clearly demonstrates a failure to remain alert.

3. The Grievant's own testimony is particularly significant. His admission that he was engaged in "heavy praying" for a sustained period corroborates the Agency's assertion that he was not actively monitoring his surroundings. While I do not question the sincerity of the Grievant's religious beliefs, the execution of that practice—head down, disengaged, and inattentive—resulted in the same operational condition as sleeping. In a correctional setting, such a lapse is unacceptable because it directly undermines safety and security obligations.
4. The testimony of Officer M. does not undermine this conclusion. His observation was limited to a single point in time and does not refute the extended period of inactivity captured on video. The Hearing Officer assigns greater weight to the continuous video evidence and the observations of experienced supervisory personnel.
5. The Grievant's arguments regarding inconsistent discipline are not supported by the record. The evidence shows that all officers involved in the same incident were disciplined similarly. Additionally, no credible evidence was presented demonstrating that similarly situated employees engaged in comparable conduct without receiving comparable discipline.
6. With respect to mitigation, the Grievant's health concerns and personal beliefs were considered. However, the absence of any formal accommodation request and the lack of evidence linking his condition to the specific conduct at issue significantly limit their mitigating value. The essential function of remaining alert cannot be waived in a correctional security position.

Analysis

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. 1998).

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. The Agency is justified in expecting its employees to adhere to established work policies. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has proved the misconduct charged in the Written Notice.

While the First Amendment and Title VII protect an employee's right to practice religion, courts consistently rule that accommodating prayer that compromises constant alertness or creates safety risks poses an "undue hardship" on a public safety employer. In *Groff v. DeJoy*, 600 U.S. 447 (2023), the Supreme Court ruled on religious accommodations. The Court held that an employer must accommodate an employee's religious practices unless doing so results in a "substantial increased cost" in relation to the conduct of its particular business. Crucially, the Court clarified that "costs" are not just financial; a burden that disrupts operations, compromises safety, or severely impacts workplace efficiency meets this higher threshold. For a corrections officer, maintaining alertness, visual awareness, and situational control are essential requirements and expectations of the job.

The Agency met its burden of proof by a preponderance of the evidence. Given the serious nature of the misconduct, the security-sensitive environment in which it occurred, and the absence of compelling mitigating circumstances, the Agency's decision to issue a Group III Written Notice with termination is both reasonable and consistent with policy. Under Operating

Procedure 135.1, such offenses normally warrant termination on a first occurrence, particularly where the safety of staff and inmates is implicated.

While I might have levied lesser discipline under these circumstances, this judgment of misconduct falls within the Agency's discretion. The Agency could have elected lesser discipline along the continuum of progressive discipline, but it is not required to exercise informal discipline in lieu of formal, or less formal discipline, when the facts support the offense. Accordingly, I find that the Group III discipline is consistent with policy.

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 has 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's mitigation decision is fairly debatable. Because I am not a "super-personnel officer," even though I may have elected lesser discipline, I lack the authority to reduce the discipline under these circumstances. The Grievant has not borne the burden of proving any retaliatory motive or disparate treatment for similarly situated employees.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with job 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.

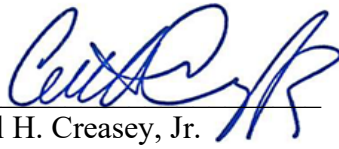
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.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].

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

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


Cecil H. Creasey, Jr.
Hearing Officer