COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11777

Hearing Date: April 11, 2022
Decision Issued: May 2, 2022

PROCEDURAL HISTORY

On October 28, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions and/or policy.

On November 27, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 21, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 11, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Representative
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

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 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:

The Virginia Department of Transportation employed Grievant as a District Bridge Engineer. He had been employed by the Agency for approximately 21 years. Grievant had prior active disciplinary action. On January 21, 2020, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions and a Group I Written Notice for unsatisfactory performance.

On August 5, 2021, the Governor issued Executive Directive 18 (ED 18) which became effective September 1, 2021. Executive Directive 18 provided:

> All Executive Branch Employees and state contractors who enter the work place or who public-facing work duties must disclose their vaccine status to the designated agency personnel.
>
> Executive Branch Employees who are not fully vaccinated or who refuse to disclose their current vaccine status, according to paragraph A, must undergo weekly COVID-19 testing and disclose weekly the results of those tests to the designated agency personnel.

On October 18, 2021, the Agency issued questions and answers addressing employee's concerns:

Am I required to be vaccinated against COVID-19 to work for VDOT?

Not at this time. Governor's Executive Directive 18 requires all Commonwealth employees to either show proof of being fully vaccinated or undergo weekly COVID-19 testing and wear a face covering. This means that employees who decline to become fully vaccinated may continue to work for VDOT, provided they complete weekly COVID-19 testing and wear face coverings according to VDOT's protocols.[1] ***

I am not fully vaccinated and do not want to undergo testing, can I just telework full-time to avoid testing?

No. Employees must be fully vaccinated or undergo testing, unless they have an approved religious or medical reasonable accommodation through VDOT's Civil Rights Division. Telework is a privilege, which may be revoked at any time. All teleworkers must be prepared to come into the office and/or engage in public-facing duties whenever requested by their supervisor. This means that employees who are teleworking must be tested each time they go into the office or perform public-facing duties, unless they have already been tested earlier that week. If you are not fully vaccinated and would like to request accommodations for testing based on your religious beliefs or medical needs, please contact your local Civil Rights office for more information.

How will testing be performed?

VDOT will conduct COVID-19 screening using over-the-counter antigen (rapid) self-tests. Most test kits include a simple nasal swab that yields results within 10-30 minutes (depending on the manufacturer's instructions). Due to the limited availability of testing supplies, there may be multiple test types and brands in circulation at any given time.

COVID-19 screening will be performed at VDOT facilities, as assigned by District/Central Office leadership. Upon arrival, each employee who is required to be tested on that day will self-administer their own minimally invasive nasal swab. Medical professionals and laboratories are not required to perform the test.

Instructions on how to perform each type of test in circulation will be available on the EBB and at all testing locations. Employees must follow the instructions to self-administer the test properly in view of their supervisor or other designated personnel and then show their result.[2]

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[1] Agency Exhibit p. 123.

[2] Agency Exhibit p. 132.

How do I report weekly test results?

After performing your test, you must report your weekly test results to your supervisor or designee as soon as possible after the 10-30 minute waiting period (depending on the type of test) has passed.

On August 20, 2021, DHRM issued Employee Testing Options for Agency Consideration which authorized agencies to use antigen testing:

Antigen testing (the so-called rapid testing) –

- Doesn't require laboratory involvement and is less sensitive than the PCR.
- Tests can be observed or self-administered, and the turnaround time runs 10/15 minutes to 30/45 minutes from administration to test results.
- There is a higher chance of false negatives with antigen testing than with the molecular (PCR) testing.
- The cost of an individual test is around $25h

DHRM concluded, "Either antigen testing or PCR testing or both meet the Directive's requirements.[3]

Grievant was not vaccinated for COVID-19. Grievant was obligated to be tested weekly for COVID-19 to comply with the requirements of Executive Directive 18.

On October 13, 2021, the Chief of Administration sent employees an email:

Dear colleagues:

Today I am sharing additional information on VDOT's statewide COVID-19 testing protocols as announced in the commissioner's Aug. 31 message. As a reminder, any Commonwealth of Virginia employee that is not fully vaccinated will undergo testing every seven days per Governor Northam's direction.

Beginning Oct. 18, VDOT employees who are not fully vaccinated or failed to report their vaccination status will start the weekly required COVID-19 testing.

While details around processes and testing locations will vary based on district and the Central Office leadership's discretion, the following are key consistencies in our statewide protocols:

[3] Agency Exhibit p. 74.

- Testing will take place during VDOT working hours
- Testing will use a self-administered over-the-counter COVID-19 antigen (rapid) self-test
- Each employee will self-administer their test in the presence of their supervisor or other designated personnel
- During the testing process and while awaiting results, employees are expected to limit their movement indoors, wear a mask and maintain a minimum of six feet of physical distance from others
- Upon display of results, employees will share the results with designated personnel who then enter the results into the secure VDOT Vaccination & Testing Record App
- Employees who test positive will be directed to self-isolate in accordance with normal quarantine protocols
- Employees who are sick or displaying symptoms of illness should stay home, notify their supervisor and not report to the communal work environment.[4]

The Agency began testing employees on October 18, 2021. Grievant was scheduled to be tested on October 22, 2021. Grievant refused to be tested for COVID-19.

On October 22, 2021, the Manager sent Grievant a memorandum to address Grievant's "failure on October 22, 2021, to comply with the COVID-19 safety guidance set in place by the Virginia Department of Transportation (VDOT) under Governor Northam's Executive Directive Number Eighteen (18) to ensure that VDOT remains a safe place to work." Grievant was informed that his refusal to be tested was a "clear violation" of ED 18. Grievant as advised, "[f]ailure to comply with and meet these expectations may result in formal disciplinary action up to and including termination of employment under DHRM Standards of Conduct Policy 1.60."[5]

Grievant was obligated to be tested on October 25, 2021. Grievant refused to be tested for COVID-19. He did not express any physical or mental condition preventing from being tested. Grievant did not allege he was refusing testing due to disability or because of a firmly held religious belief.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

[4] Agency Exhibit p. 118.

[5] Agency Exhibit p. 25.

disciplinary action."[6] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instructions is a Group II offense.[7] Grievant was not vaccinated. He was instructed to submit to weekly COVID-19 tests. Grievant refused to do so even after being counseled regarding his failure to follow instructions. Grievant refused to comply with the Agency's policies and a supervisor's instructions thereby justifying the Agency's decision to issue a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Rules for Conducting Grievance Hearings Section VI (A) provides:

> Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be. However, the hearing officer may order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy.

Grievant's first set of objections to the Agency's disciplinary action relate to discrimination. Grievant argued the disciplinary action should be reversed based on discriminatory and coercive employment practices. He argued the testing policy created two groups. The first group consisted of employees who were not vaccinated and subject to weekly testing. The second group consisted of employees who were vaccinated but not subject to weekly testing.

Grievant argued Executive Directive 18 is in violation of Va. Code § 2.2-2901.1(B) which provides:

> No state agency, institution, board, bureau, commission, council, or instrumentality of the Commonwealth shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth

[6] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[7] See, Attachment A, DHRM Policy 1.60.

> or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or military status.

Grievant asserted that targeted testing of asymptomatic employees/individuals and with the intent of determining an employees/individuals medical condition(s) is discriminatory.

Grievant argued the Agency acted contrary to 42 USC § 12112(A) which provides:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Grievant asserts the Agency's testing policy makes non-vaccinated employees appear to have a disability and is inconsistent with the statute.

Grievant argued the Agency acted contrary to 29 CFR Part 1630 – Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act. Grievant asserts the Agency's policy is not consistent with these regulations and the Agency did not consider an accommodation prior to his dismissal.

Although Grievant is correct that the Agency has created two groups, the Agency may treat those groups differently because they are based on behavior and not based on a protected status. In other words, the Agency did not create different groups based on an impermissible reason such as race, religion, etc. An agency may treat employees differently based on different behavior and that is what the Agency did in this case. Furthermore, Grievant's arguments based on discrimination fail based on EEOC guidance:

> **A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?** *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*
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> The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom

> testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.
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> Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.
>
> A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.[8]

VDOT's testing was job related and consistent with business necessity to prevent a direct threat from an employee with COVID-19. The Agency's testing was not impermissible discrimination based on disability or medical condition. The Agency's screening was consistent with CDC, DHRM guidelines, and the Code of Virginia.

Grievant's second set of objections related to the reliability of the COVID-19 testing. Grievant asserted he was not medically qualified to administer the self-test. Grievant argued that Agency staff lacked the medical qualifications necessary to proctor the employee testing. Grievant asserted there was non-uniformity in the application and review/intensity/scrutiny of proctors throughout the State. He believed it was possible proctors were not paying attention and that the tests could be "simulated."

Even if the Hearing Officer were to assume the validity of Grievant's arguments regarding the testing procedure, the Hearing Officer would not have the authority to grant Grievant relief from the disciplinary action. Grievant's objections relate to the content of State or agency human resource policies which the Hearing Officer must accept as valid unless contrary to law. The Agency did not misapply or unfairly apply its testing policies.

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[8] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Grievant's third set of arguments focus on the impact of testing and the efficacy of vaccinations. Grievant expressed concerns about the health and safety impact of continuous weekly testing. He believed the Agency had not properly considered "natural immunity of non-vaccinated employees/individuals."[9] He disputed the efficacy of vaccinations. Grievant argued that the Agency had not considered that Agency employees may interact with members of the public who have not been vaccinated and not tested. He points out that even vaccinated employees can transmit COVID-19.

Even if the Hearing Officer were to assume the validity of Grievant's arguments regarding the testing procedure, the Hearing Officer would not have the authority to grant Grievant relief from the disciplinary action. Grievant's objections relate to the Agency's decision-making regarding content of State or agency human resource policies. The Hearing Officer does not have authority to overturn the Agency's judgment with respect to the contents of its policies so long as those policies are consistent with law.

Grievant's fourth set of arguments focus on whether ED 18 was arbitrary or capricious and whether his civil liberties were violated by the testing requirement. Grievant argued that Executive Order 18 was arbitrary and capricious because ED 18 could change upon the election of another Governor[10] and that legislative and judicial employees were not covered by ED 18.[11] He argued his other civil liberties were violated by the testing requirement.

Grievant has not established the illegality of the Agency's testing procedure. The Hearing Officer cannot overturn the Agency's policy or ED 18 because they are established policies and procedures and are consistent with the Agency's exclusive right to manage the affairs of State government.

Finally, Grievant argued he should have been allowed to telework as an accommodation. He asserts that the Agency did not apply the testing requirement to employees who were teleworking and not required to have in-person contact with other employees or the public.

The Agency was not obligated to accommodate Grievant by authorizing him to telework. The Agency has discretion as to which employees may telework. The Agency did not consider Grievant's position to be one for which teleworking was appropriate prior to the COVID-19 pandemic. Grievant was not an individual with a disability as determined by the ADA and, thus, he had no right to a reasonable accommodation. Moreover, DHRM

[9] Grievant did not define or claim he had "natural immunity."

[10] ED 18 was reversed by a newly elected Governor. The Agency's decision to take disciplinary action is measured by the policies in place at the time of the disciplinary action.

[11] ED 18 does not apply to legislative and judicial agency employees because they are not part of the executive branch or otherwise required by State law to comply with ED 18.

guidance provides, "[t]elework should not be considered as an option for those who are not fully vaccinated simply to enable them to avoid weekly testing."[12]

In conclusion, Grievant refused to follow a supervisor's instruction authorized by the Agency's policies and ED 18. Grievant's failure to be tested for COVID-19 justified the Agency's issuance of disciplinary action.

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 rules established by the Department of Human Resource Management …."[13] 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 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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

[12] Agency Exhibit p. 104.

[13] Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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