



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11790**

Hearing Date: May 22, 2022  
Decision Issued: June 9, 2022

**PROCEDURAL HISTORY**

On December 2, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy.

On December 21, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 11, 2022, OEDR issued Ruling 2022-5343 narrowing the issues in dispute. On January 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 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 Fiscal Technician at one of its locations. She had been employed by the Agency for approximately 15 years.

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 September 9, 2021, Grievant disclosed to the Agency that she was not fully vaccinated for COVID-19. She acknowledged being notified of the Agency's testing requirements for non-vaccinated employees.

The Agency began mandatory testing for unvaccinated employees on October 18, 2021. Testing was to take place at an Agency facility and would be paid for by the Agency.

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.<sup>1</sup> \*\*\*

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.

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<sup>1</sup> Agency Exhibit p. 123.

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.<sup>2</sup>

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 October 25, 2021, the Civil Rights Manager sent Grievant an email:

I have attached both the medical and religious accommodation request forms if you choose to complete them and submit them for review. I can tell you up front that you will not be granted 100% telework. The ED-18 directive gives all State employees the option of getting vaccinated or tested weekly. VDOT, your employer, has the right to implement such requirements. The ED-18 directive went into effect September 1, 2021 and ED-18, testing began in the Fredericksburg District on Monday, October 18, 2021.<sup>3</sup>

On October 25, 2021, Grievant sent the Supervisor an email:

I am requesting a temporary six week accommodation to telework from home on Tuesdays as I am working with my physician on personal medical matters that will require additional time. Based on my research I have concerns with the chemicals used in testing, frequency and accuracy of the tests along with long-term effects. As I have not "received all material information regarding risks, benefits and alternatives", the definition of informed consent has not been met. Therefore, I am exercising my right to obtain all information needed before I submit to a medical experiment. Once I have all of the requested information and have thoroughly discussed with my physician, I will follow-up regarding my intentions as well as any legal action. In the event all requested information is not provided/received another request may be requested.<sup>4</sup>

Grievant's request was denied.

On October 26, 2021, Grievant submitted a request for religious exemption from the COVID-19 vaccination requirement.

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<sup>2</sup> Agency Exhibit p. 132.

<sup>3</sup> Agency Exhibit p. 21.

<sup>4</sup> Agency Exhibit p. 210.

On October 26, 2021, the Civil Rights Manager sent Grievant an email:

You are requesting a religious accommodation, to be exempt from mandatory testing for those who have not disclosed their vaccine status based upon the following: "God is my creator, healer and saviour. My faith and trust rests in him."

Please provide additional information for how this belief prohibits you from being required to follow Executive Directive 18, which became effective on September 1, 2021.<sup>5</sup>

On October 29, 2021, Grievant replied to the Civil Rights Manager, "In response to your earlier email, my sincerely held religious belief is biblically based and morally and ethically is against covid19 testing, masking and vaccination."

The Civil Rights Manager sent Grievant an email on October 29, 2021:

We have asked for a clarification regarding your request for a "reasonable accommodation" for "testing". You originally stated the following, "God is my creator, healer and saviour. My faith and trust rests in him." We have advised you that this statement is not sufficient for our office to make a determination for your request for a "reasonable accommodation" based upon your religion. The statement, "...my sincerely held religious belief is biblically based and morally and ethically is against covid19 testing, masking and vaccination." is not either.<sup>6</sup>

On November 1, 2021, Grievant was given a Counseling Memorandum:

On Tuesday, October 26, 2021, you refused to submit to weekly COVID-19 testing. This was a clear violation of the Governor's Executive Directive Eighteen (ED18), which states that "...Employees who are not fully vaccinated or who refuse to disclose their current vaccine status... must undergo weekly COVID-19 testing and disclose weekly the results of those tests to the designated agency personnel."

Your first scheduled test day was Tuesday, October 19, 2021. You called out sick that day and did not test that week because you were teleworking. On Monday, October 25, 2021 you said that your doctor was completing the paperwork for your exemption and you would have it by the end of the week. You also asked for the paperwork for a religious exemption. I advised you that you would still be required to test the next day, Tuesday, unless you had an approved exemption. At that time you requested a temporary 6 week accommodation to telework from Civil Rights. That accommodation was not

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<sup>5</sup> Agency Exhibit p. 215.

<sup>6</sup> Agency Exhibit p. 220.

approved and you were provided both the medical and religious accommodation request forms to return to Civil Rights to request an accommodation.

It continues to be my expectation that all employees adhere to all guidelines and policies set in place. It also continues to be my expectation that you are professional and respectful of the public, your management team, and co-workers. Being respectful of the safety of those around you is imperative moving forward. You are also expected to work as a team member and contribute positively to the team environment. As such, you are expected to participate in weekly COVID-19 testing on your assigned testing date and comply with all testing protocols in accordance with ED18. Absent an approved accommodation from Civil Rights, you are expected to report to Chancellor AHQ by 7 AM on Tuesday, November 9, 2021 for your weekly COVID-19 nasal swab test.

Failure to comply with and meet these expectations may result in formal disciplinary action up to and including termination of employment in accordance with the DHRM Standards of Conduct, Policy 1.60.<sup>7</sup>

On November 1, 2021, Grievant sent the Civil Rights Manager an email:

My sincerely held religious belief is biblically based and morally and ethically is against covid19 testing, masking and vaccination. My belief is that God is my creator, healer and saviour. My faith and trust rests in him. I have prayed for and asked for God's guidance, direction and for his will to be done. I have been convicted by the Holy Spirit against the testing, masking and vaccinations and I am standing by those convictions. This earthly walk is my personal journey with the one who created me and I have put my faith and trust in him. When it is my day to stand before him, I and I alone will have to give account for the life I have led, for my obedience and for my disobedience. No one will be standing beside me, not my parents, not my children, not my employer. This is my genuine and heartfelt belief and I am at peace and relying on his understanding and purpose in all things.<sup>8</sup>

On November 2, 2021, Grievant's request for religious exemption was denied.

On November 11, 2021, Grievant objected to the testing. She wrote, in part, "the vaccines, testing, and masks all have chemicals that may or may not cause immediate or future health issues. I am my own advocate for my health."<sup>9</sup>

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<sup>7</sup> Agency Exhibit p. 27.

<sup>8</sup> Agency Exhibit p. 221.

<sup>9</sup> Agency Exhibit p. 36.

On November 18, 2021, Grievant received a Group II Written Notice for failure to submit to weekly testing for COVID-19 as required by ED 18.

On November 18, 2021, the Assistant Division Administrator sent Grievant an email stating, in part:

I am also attaching VDOT's Saliva Testing guidance, which is also available to all employees on VDOT's COVID-19 page. Saliva testing is the alternative testing method available to employees with approved accommodations for medical or sincerely held religious beliefs that specifically prevent nasal testing. It is my understanding that this was not an option for you because you indicated in your request that you were unable to undergo any form of testing or masking due to your religious beliefs. Accordingly, saliva testing was not a viable option to meet your needs.<sup>10</sup>

Grievant was required to be tested for COVID-19 on November 30, 2021. Grievant refused to be tested claiming that doing so violated her sincerely held religious beliefs.

### **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 disciplinary action.”<sup>11</sup> 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.<sup>12</sup> Grievant was obligated to comply with the requirements of ED 18 by being vaccinated for COVID-19 or being tested on a weekly basis. Grievant was unvaccinated. She was instructed to be tested on November 30, 2021. Grievant refused to be tested contrary to the Agency’s policies and repeated instructions. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy and instructions. Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notices. Accordingly, the Agency has presented sufficient evidence to support its decision to remove Grievant from employment.

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<sup>10</sup> Agency Exhibit p. 66.

<sup>11</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>12</sup> See, Attachment A, DHRM Policy 1.60.

Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are “sincerely held” and the reasonable accommodation poses no undue hardship on the employer.

The EEOC stated:

Religious beliefs include theistic beliefs as well as non-theistic “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns “ultimate ideas” about “life, purpose, and death.”

Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII. (Citations omitted).<sup>13</sup>

Title VII does not protect social, political, or economic views or personal preferences. Thus, objections to a COVID-19 vaccination requirement that are purely based on social, political, or economic views or personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs, practices, or observances under Title VII. However, overlap between a religious and political view does not place it outside the scope of Title VII’s religious protections, as long as the view is part of a comprehensive religious belief system and is not simply an isolated teaching.<sup>14</sup>

Grievant argued the Agency failed to provide her with an exemption to the testing requirement because of her sincerely held religious belief. Grievant has established that she is a person who holds religious beliefs. What Grievant has not established is what tenets of her religion preclude testing. She has not cited any religious text or provided any religious interpretations that would explain how her religion precludes her from being tested.

Grievant asserted, “Executive directive 18 is not only discriminatory but illegal.” Grievant did not present any analysis to support this assertion. Section VI(A) of the Rules for Conducting Grievance Hearing states, “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.” The Hearing Officer will not address the legality of ED 18, however, the EEOC has taken the position that, “[t]he federal EEO laws do not prevent an employer from requiring

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<sup>13</sup> <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

<sup>14</sup> <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>



all employees physically entering the workplace to be fully vaccinated against COVID-19  
....”<sup>15</sup>

Grievant asserted, “the CONSTANT THREAT OF BODILY INVASION and FORCED VIOLATIONS AGAINST MY PERSON, in the form of masking, testing and vaccinating, as a condition of continued employment opened old wounds of physical, emotional and spiritual trauma as well as created new ones.” The Agency accommodated Grievant’s concerns by allowing her to be tested by spitting into a container. The Agency would not require a “bodily invasion.” Grievant declined this reasonable accommodation.

Grievant argued that she had been teleworking full time since July 2020 and should be allowed to continue doing so. Grievant’s argument is not persuasive because the option of teleworking is at the Agency’s discretion. Grievant’s position was not authorized for full time teleworking prior to the pandemic. The Agency presented evidence showing that Grievant’s presence in the office was needed to assist other employees.

Grievant objected to the Agency’s failure to test vaccinated employees. She believed since it was possible for vaccinated employees to contract COVID-19 failing to test them was discriminatory. The Agency’s decision to test only unvaccinated employees was not unlawful discrimination. The Agency believed the risk of an employee having COVID-19 was less for vaccinated than unvaccinated employees.

*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 ....”<sup>16</sup> 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**.

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<sup>15</sup> See, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>

<sup>16</sup> Va. Code § 2.2-3005.

## 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 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.<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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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