



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11802

Hearing Date: June 10, 2022

Decision Issued: June 30, 2022

PROCEDURAL HISTORY

On January 10, 2022, Grievant was issued a Group II Written Notice of disciplinary action with removal for unprofessional behavior.

On January 10, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 14, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 10, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
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 Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 14 years. Grievant had prior active disciplinary action. On May 13, 2021, he received a Group III Written Notice with suspension that was reduced to a Group II Written Notice with suspension.

Grievant brought a neck and face covering called a "gaiter" to the Facility. Several corrections officers wore gaiters over their mouths and noses in response to the COVID19 pandemic. Grievant could wear the mask around his neck and then pull it up to cover all of his face. Grievant cut "eye holes" in the mask so he could see out of the mask after pulling it up over his face and head. This gave the appearance of Grievant wearing a white hood which was not consistent with the Agency's expectations regarding wearing uniforms.

On November 14, 2021, Grievant was working in the window overseeing Pod A where inmates were in the dayroom. The window could be opened so a corrections officer could speak to inmates in the pod below. Grievant pulled the mask over his head. He put the mask on and off several times. He waived the mask over the railing. Grievant made comments to the inmates. The Agency failed to call as a witness the corrections officer sitting near Grievant, but that corrections officer wrote a statement that found Grievant's comments offensive and told the Warden he did not want to work with Grievant because

Grievant “jokes around a lot.” One of the inmates complained about Grievant’s comments and his wearing of what looked like a white hood.¹

Inmate J observed Grievant’s behavior and complained to the Unit Manager and building Lieutenant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”²

Operating Procedure 135.2 governs Rules of Conduct Governing Employees Relationships with Offenders. Section II(D) provides:

Professional Appearance. 1. All employees should maintain a professional appearance and demeanor at all times

Section II(F)(3) provides:

Employees are encouraged to interact with offenders on an individual and professional level while maintaining and reinforcing appropriate professional boundaries to promote and accomplish DOC goals.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.³ On November 14, 2021, Grievant brought a mask to work. He cut holes in the mask, pulled it over his head so he could see through the “eye holes”. He took the mask on and off and hung it over the railing as he spoke to inmates. He sought the attention of inmates. Grievant’s behavior can be described as an attempt to “entertain” inmates. Grievant did not display professional appearance as required by policy. Wearing a mask with eye holes and

¹ The Agency’s case was not adequately presented. The Agency should have called the corrections officer who overheard Grievant’s comments as a witness. Grievant attempted to have the inmates testify because the Agency relied on their statements. The Agency refused to permit the inmates to testify but offered their statements as evidence. Grievant was not able to contest the merits of the inmates’ statements. Thus, the Hearing Officer will consider that an inmate complained but not the details of the complaint or the statements of the other inmates. The inmates were convicted felons whose truthfulness cannot be assumed.

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

pulling it over his head did not display a professional appearance. Grievant exceeded professional boundaries because he was attempting to amuse offenders by displaying an unprofessional appearance. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of policy.

Upon the accumulation of two 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.

Grievant asserted he pulled the mask over his head because he was cold. The Hearing Officer does not believe this assertion because Grievant frequently removed the mask and hung it over the rail in view of inmates. If he were wearing the mask to avoid cold, he would not have removed the mask.

Grievant argued that the disciplinary action was based on a false allegation of Inmate J who was transferred shortly after the incident. Although the Agency may have based its decision to discipline on Inmate J's statements, the Hearing Officer did not give weight to Inmate J's statements. The Agency has not established that Grievant engaged in any racist behavior. The Agency has established that Grievant displayed an unprofessional appearance to draw the attention of several inmates. Grievant's actions were contrary to policy.

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 ..."⁴ 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**.

⁴ 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 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].

/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.