

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11617**

Hearing Date: December 17, 2020
Decision Issued: December 21, 2020

PROCEDURAL HISTORY

On August 25, 2020, Grievant received a Group II Written Notice for violation of VADOC Operating Procedure 135.1. Standards of Conduct for gross negligence on the job, i.e. participating in a card game with other officers for several hours while on duty and not wearing a face covering (a mandatory requirement during COVID Pandemic). The Group III Written Notice resulted in a five day suspension and a demotion from Lieutenant to Sergeant.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter upon being appointed effective October 26, 2020, conducted a pre-hearing telephone conference with the Grievant and the Agency Advocate. It was agreed that the hearing would be conducted on Thursday, December 17, 2020 beginning at 10:00 a.m. The hearing was to be conducted at the place of employment.

Due to COVID, the decision was made to conduct the hearing remotely. An email was sent to the Grievant asking the Grievant to confirm that the Grievant had received the email with the sign-in link to participate in the hearing remotely. The Grievant did not respond to the email and did not join the Hearing Officer, the Agency Representative and the Agency Advocate for the hearing. The Hearing proceeded at 10:00 a.m. with the presentation of the Agency evidence.

APPEARANCES

Agency Party Designee
Agency Advocate

ISSUES

1. Whether Grievant played cards with other staff while on duty?
2. Whether Grievant failed to wear a face covering while on duty?
3. For each instance, if any, that the Grievant acted as alleged, was such behavior a violation of Agency policy as alleged?
4. Whether the Agency's issuance of a Group III Written Notice was consistent with law and policy?
5. Whether there were mitigating circumstances justifying a reduction or removal of any 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 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Written Notice
2. Disciplinary recommendation form
3. Grievant's Form A with attachments
4. C.P. letter (9/25/20)
5. Second resolution step Grievant's response
6. B.J. letter (10/16/20)
7. Still photos
8. Watch commander security post order number 2
 - a. Watch commander post order review log
9. Operation Supervisor security post order number 3
 - a. Operation supervisor post order review log
10. Dorm Officer security post order
 - a. Dorm Officer post order review log
11. Dorm Officer/Dorm Control security post order
 - a. Dorm Officer/Dorm Control Post Officer review log
12. Director Memorandum (6/18/20)

13. Director Memorandum (7/10/20)
14. Operating Procedure 135.1
15. Incident video

Grievant mailed to the Hearing Officer two paperclipped packets which were otherwise unidentified. The Agency Advocate indicated to the Hearing Officer that the Grievant did not provide the Agency Advocate with copies of the documents mailed to the Hearing Officer. Over the objection of the Agency, the Hearing Officer admitted the first packet which the Hearing Officer designated as Grievant Exhibit A (which appears to be Grievant's Form A with attachments) and the second packet, designated by the Hearing Officer as Grievant Exhibit B (which appears to be Operating Procedure 135.1). The Grievant did not provide the Hearing Officer with a list of witnesses to be called.

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 Agency employed Grievant as a Corrections Officer. At the time of the offenses, August 2, 2020 and August 3, 2020, the Grievant held the title of Lieutenant. As such, the Grievant was obligated to obey Watch Commander Security Post Order No. 2 (Agency Exhibit 8), Operation Supervisor Security Post Order No. 3 (Agency Exhibit 9), Dorm Officer Security Post Order No. 5 (Agency Exhibit 10) and Dorm Officer/Dorm Control Security Post Order No. 6 (Agency Exhibit 11). The Grievant signed a Post Order Review Log for each Post Order stating "I understand that it is my responsibility to read and understand the post order indicated above prior to assuming the duties of this post."

During the two consecutive nights involved, the Grievant is shown in still photos and video in the control room playing cards with staff members under the Grievant's supervision and not wearing a face covering. (as required by Director Memorandum dated June 18, 2020, Agency Exhibit 12).

Director Memorandum dated June 18, 2020 regarding COVID-19 requirements clearly states "Employees are required to have the face covering any time they are inside a Facility with some exceptions which do not apply to the facts of this case. The Memorandum also states, "not wearing your mask as instructed, could result in disciplinary action up to and including termination or a safety violation."

The Agency's first witness, the Grievant's immediate supervisor, testified that the "rapid eye" video footage showed the Grievant with the entire dorm security shift in the control room playing cards on two consecutive nights for a period of hours. The witness testified that the Grievant admitted that the staff was playing cards and that the Grievant allowed the staff to play

“to build morale.”

The witness emphasized the safety and security of the Facility were compromised because inmates could see that the entire staff was in the control room playing cards, allowing inmates to move about unescorted.

The Agency’s second witness has been the Superintendent of the Facility for two years. The witness testified that on the dates of the offenses, the Grievant was the lead officer at the Facility. The witness testified that the concern was not just that the Grievant played cards and did not wear a mask while on duty. The witness testified that of great concern was the fact that at the time of the offenses, the Grievant was in charge of new staff who were not only allowed to breach security by their conduct, but were joined by their own supervisor.

Operating Procedure 135.1 (Agency Exhibit 14) provides at V.E. Third Group Offenses (Group III) No. 1. These offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant termination. No. 2. Group III Offense include, but are not limited to: ...o. gross negligence on the job that results (or could have resulted) on the escape, death, or serious injury of a ward of the state or the death or serious injury of a State employee. The Grievant’s behavior, both with respect to the failure to wear a face covering and allowing staff and joining staff in playing cards while on duty, are Group III offenses.

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency’s evidence, even when considering Grievant’s assertions contained in

Grievant's Form A, establishes by a preponderance of the evidence that the Grievant was guilty of Group III offense.

Virginia Code Section 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 Resources Management ...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Superintendent testified that after consulting with the Superintendent Supervisor and considering the Grievant's work record in way of mitigation, the defendant was suspended and demoted rather than terminated. In light of the standards set forth in Rules, the Hearing Officer finds no additional mitigating circumstances which exist or further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice, the five day suspension and the demotion are upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 12/21/2020
Date



John R. Hooe, III
Hearing Officer

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