



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11622**

Hearing Date: March 12, 2021

Decision Issued: April 21, 2021

### **PROCEDURAL HISTORY**

On August 6, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On September 2, 2020, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 7, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 12, 2021, a hearing was held by remote conference.

### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Counsel  
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 employs Grievant as a Major at one of its facilities. She has been employed by the Agency for approximately 16 years. She was promoted to the position of Major on January 10, 2020. No evidence of prior active disciplinary action was presented during the hearing.

The Agency was conducting a point-prevalence survey (PPS) at the Facility. These surveys are used in facilities to identify the number of people with a disease or condition at a specific point in time. A PPS is a snapshot that identifies who might have been exposed to a specific infectious disease, regardless of who is exhibiting symptoms at that time. The Agency had tested its inmates for COVID19 on April 17, 2020 and was in the process of conducting another test on April 22, 2020.

On April 22, 2020 at approximately 12:53 p.m., Ms. M told Grievant that the Inmate refused to take the mandatory COVID19 test as part of a PPS. Grievant believed that the Inmate posed a threat to staff and inmates at the Facility by not taking the Point Prevalence Survey. At approximately 1:05 p.m., Grievant went to see the Inmate. Grievant told the Inmate of the importance of being tested because all inmates needed to be tested. Grievant told the Inmate that the Inmate needed to go with Grievant to the

Medical Department to be tested. The Inmate shook her head to say “no” and remained on her bed. Grievant told the Inmate to put her shoes on because she had to go to take the test. The Inmate said, “no.”

The Warden called Grievant. Grievant told the Warden she was dealing with the Inmate who refused to be tested for COVID19. The Warden told Grievant to bring the Inmate to the Gate where the Warden planned to meet the Inmate.

Grievant called the Corrections Officer to come to her location. Grievant asked the Inmate to go to the Medical unit and the Inmate refused again. Grievant told the Corrections Officer to get a pair of handcuffs from Master Control and the Corrections Officer did so. At approximately 1:18 p.m., Grievant and the Corrections Officer approached the Inmate. Grievant asked the Inmate to put on her shoes so they could go to the Medical unit. The Inmate refused to do so. The Corrections Officer told the Inmate to present herself to be handcuffed. The Inmate refused and remained in her bed. The Corrections Officer placed a handcuff on the Inmate’s left wrist but the Inmate was resisting by pulling her right arm away. Grievant told the Inmate to stop resisting. The Corrections Officer placed his knee on the Inmate’s back as Grievant tried to roll the Inmate over onto her stomach so that the Corrections Officer could access the Inmate’s right wrist. Once the handcuffs were applied, the Inmate was escorted to the Medical Unit and the handcuffs were removed. The Inmate took the COVID19 test. At approximately 2:14 p.m., the Inmate was assessed by a nurse and doctor who concluded she suffered no injuries. None of the staff were injured.

Earlier in the day, the Lieutenant told the Inmate she could “wait until later” to take the test. Neither the Lieutenant nor the Inmate told Grievant about this conversation.

The Warden learned of the incident four hours later.

## **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.”<sup>1</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>2</sup> Operating Procedure 420.1 governs Use of Force. Section I(B) provides:

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, and then only as a last resort and in accordance with appropriate statutory authority.

On April 22, 2020, Grievant directed the Corrections Officer to use force on the Inmate by placing the Inmate in handcuffs and removing the Inmate from her bed against her will. This force was not used for self-defense, protection of others, protection of property, prevention of an escape or to maintain and regain control. It was not used as a last resort. For example, Grievant could have charged the Inmate under Operating Procedure 861.1 for Offender Discipline, Institutions. "Refusal to participate in testing" is an inmate offense. The Agency has established that Grievant acted contrary to its use of force policy thereby justifying the issuance of a Group II Written Notice for failure to follow policy.

### 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 ...."<sup>3</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.

Mitigating circumstances exist to reduce the disciplinary level from a Group II to a Group I Written Notice for several reasons. First, the context of this case is that it occurred at the beginning of a pandemic. The occurrence of a pandemic by itself is unusual and abnormal. The Facility was not operating under normal circumstances where Grievant's training and work experience should have been enough to enable her to make rational decisions under known policy. Second, in April 2020, COVID19 was not widely understood except that it created a material threat to the safety and welfare of anyone exposed to the virus. It posed significant danger to staff and employees working in a correctional facility because maintaining safe distance from others was not always possible. Third, the Inmate was the only inmate who had not been tested as part of that series of tests. The Inmate was being tested as part of a PPS. A purpose of the PPS was

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<sup>3</sup> Va. Code § 2.2-3005.

to test everyone at one time in order to determine the risk to staff and inmates at the Facility. Allowing the Inmate to avoid being tested would undermine the purpose of the PPS thereby increasing the risk to the Facility of passing COVID19. Fourth, individuals with COVID19 could be asymptomatic. Grievant could not look at the Inmate and determine whether the Inmate had COVID19. Only a test could reveal the Inmate's health status. Fifth, Grievant knew of 57 positive COVID19 results at the Facility. She knew COVID19 was a serious risk to the health and safety of inmates and employees at the Facility. Grievant's objective was to protect the health and safety of staff and inmates by ensuring compliance with the testing protocol. Sixth, in April 2020, the Agency had not provided guidance as to whether inmates could refuse to be tested.<sup>4</sup> As far as Grievant knew, the Inmate did not have a choice in whether to be tested. Seventh, the Warden instructed Grievant to bring the Inmate to the Gate. The only way for Grievant to accomplish that instruction was to place the Inmate in handcuffs and escort her to the Gate. Grievant did not know that the Warden would have walked to the Inmate's location had the Warden realized the Inmate was refusing to be handcuffed. Eighth, the use of handcuffs in a correctional facility is a normal practice at correctional facilities. For example, inmates being transported must remain in handcuffs at all times. Inmates do not give consent to be handcuffed, they merely cooperate with being handcuffed. What may seem as a severe action to a layperson would not seem as significant to a reasonable correctional officer.

When the factors are considered, it is appropriate to mitigate the disciplinary action under the Rules for Conducting Grievance hearing.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

## 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

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<sup>4</sup> On June 24, 2020, the Agency informed Grievant that inmates could refuse to be tested for COVID19.

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*

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.