



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11644

Hearing Date: April 8, 2021
Decision Issued: April 28, 2021

PROCEDURAL HISTORY

On December 2, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy or instructions, safety rule violation, disruptive behavior, and insubordination.

On December 17, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 19, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 8, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
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:

George Mason University employed Grievant as a Police Officer. He had been employed by the University for approximately two and a half years. Except for the facts giving rise to this grievance, Grievant's work performance was satisfactory to the University. He was considered a "hard worker." Grievant's typical shift began at 6 p.m. and ended at 6 a.m. on the following day. No evidence of prior active disciplinary action was introduced during the hearing.

On June 23, 2020, University administrators sent employees including Grievant an email about "Safe Return to Campus Plan Website." The site included the University's COVID19 health and safety protocols and other information designed to support the health, safety, and well-being of University employees. Employees were required to complete Safe Return to Campus Training.

On July 24, 2020, the Assistant Vice President sent employees including Grievant an email about COVID testing and Safe Return to Campus. Grievant was informed:

Complete your daily Mason COVID Health Check. ***
Stay home if you feel symptoms consistent with COVID.

If you display symptoms consistent with COVID

[U]ninsured Mason employees ... will be tested at the Mason On-campus Testing site. ***

All other employees should be tested through their insured health providers. ***

[F]aculty and staff must stay away from campus until they are cleared by a medical professional to return.¹

On August 10, 2020, the University President sent employees including Grievant an email:

All students, faculty, and staff who come to campus must complete an online health survey every day before arriving on campus. This tool – the Mason COVID Health Check, an online health screening protocol developed by the College of Health and Human Services – will serve as a quick and effective way to track the health conditions of students, faculty, staff and contractors who will work, study, or live on campus.²

On August 13, 2020, the Assistant Vice President sent employees including Grievant an email:

So, everyone who plans to come to campus must fill out the Mason COVID Health Check on a daily basis. This is required seven days a week, whether you plan to come just once or every day. It is simple and takes just two minutes each day to fill out, so let's please all do our part to keep our campus healthy and safe. ***

[E]veryone in our community *** will receive a daily reminder email in the morning with a link to the Mason COVID Health Check website.

Based on your responses to the Mason COVID Health Check you will receive one of three automated messages.

Green –

You have no symptoms, testing, or contacts that indicate exposure or illness and therefore you are free to come to campus or participate in face-to-face classes, events, and activities. You must bring a copy of your Green result with you when you come to campus.

Yellow –

¹ University Exhibit 3.

² University Exhibit 3.

You have indicated that you may have one or more COVID-19 symptoms, have been tested and are awaiting results or received a positive test, or you were in contact with someone with COVID or who tested positive for COVID. If you receive a Yellow message:

Remain in your residence hall room, if you live on campus.
You will receive specific instructions on what you should do.
Additional information and resources will be emailed to you immediately after completing Mason COVID Health Check.

Red –

Based on your responses, you may be experiencing a medical emergency and should immediately contact your health care provider or emergency services.

Everyone who comes to campus must have a GREEN result and be prepared to show their green status email to supervisors or course instructors who may request to verify that you are cleared to be on campus. Requesting to verify your Mason COVID Health Check™ status is optional for supervisors and instructors.³

On August 16, 2020, the Deputy Chief sent an email to Police Department employees including Grievant stating, “an ongoing ‘daily health check’ online journal (Mason COVID Healthcheck) is now required for employees and students to complete seven days a week indefinitely.”⁴

On September 8, 2020, the Deputy Chief sent an email to Police Department employees including Grievant:

If you take the daily Mason COVID HealthCheck Survey and get a “yellow” result – it clearly states you cannot come to campus.⁵

Grievant reported to work on Saturday October 3, 2020 at 6 p.m. He noticed a change in his health during his shift. He left work and went home before midnight.

Grievant completed the daily online health check. On Sunday October 4, 2020 at 4:13 p.m., Grievant received an email regarding “Daily Screening Received” and instructing him:

Your Daily Screening questionnaire is received on October 04, 2020.

³ University Exhibit 3.

⁴ University Exhibit 3.

⁵ University Exhibit 3.

DO NOT visit campus or participate in group/social activities. Based on your responses to Mason COVID Health Check, you reported that you have one or more symptoms NOT explained by allergies or another health condition, or have been in close contact (within 6 feet for 15 minutes or more) with someone who has/had COVID-19. [The background of this message is yellow]. Please take the following actions:

Take Care of Yourself: Get rest, stay hydrated, take over the counter medications if necessary, and discuss your circumstances with your health care provider. Residential students must contact Student Health Services (703) 993-2831 for additional guidance.

Get Tested: If you have not been tested for COVID-19, discuss testing with a health care provider. Students contact Student Health Services for health information and resources.

Self-Isolate/Quarantine: Remain in your residence and do not visit public places until you are able to return to campus. Residential students, please contact housing@gmu.edu for additional instructions.

Avoid Public Locations: If you must go out for essential items or to receive healthcare, wear a mask, do not use public transportation, and maintain physical distancing.

Notify Your Close/Intimate Contacts: Notify those that you are in close contact with (i.e., within 6 feet for more than 15 minutes, household members, roommates, intimate contacts and close friends) that they may be a risk, should take appropriate precautions, and to consult with a health care provider.

Notify Your Faculty or Supervisor: Notify your faculty or supervisor that you will not be able visit campus. They do not need to take any additional action unless directed to do so by the university or local health department.

Return to Campus: Return to campus only after:

a. If you were in contact with a positive or symptomatic case, 14 days after contact or 10 days after a positive or negative test. A negative test does not allow you to return to campus. If you develop symptoms please see c. below.

b. If you tested positive, 10 days from the test date if you have no symptoms. If you develop symptoms please see c. below.

c. If you have/had symptoms: you may return under the guidance of your healthcare provider, and at least 10 days after the onset of symptoms, AND symptoms have improved AND at least 24 hours after with no fever (without the use of medications).

Please follow these guidelines as they are a critical part of slowing the spread of COVID-19.

Additional information about returning to campus is available at healthcheck.gmu.edu. If you have specific questions about this guidance or need assistance while you are in isolation/quarantine please contact the appropriate resources below.

Students: For questions regarding your medical condition, please contact Student Health Services. To speak with a staff member about navigating your academics and other University resources, please complete this form.

Employees: Contact benefits@gmu.edu for information about leave, work schedules, accommodations, and compensation during isolation/quarantine.⁶

Grievant was scheduled to work on Sunday October 4, 2020 for a 12 hour shift. On Sunday October 4, 2020 at 4:15 p.m., Grievant sent the Sergeant a text message saying he woke up and was “super congested.” Grievant wrote, “I think it is seasonal allergy but the Covid test gave me a yellow. I’m gonna sign up for Covid test tomorrow just to be on the safe side.”⁷

On Monday October 5, 2020, Grievant reported to work for an elective overtime shift. He worked from 12:30 p.m. until 4:47 p.m. at the University’s COVID-19 testing site located at the Mason Global Center. This site was intended to test randomly chosen students, faculty, and staff to identify asymptomatic cases of COVID-19 on-campus. Sergeant B heard Grievant make radio transmissions and believed Grievant sounded sick. The Deputy Chief later listened to those transmissions and found Grievant’s voice “audibly abnormal.”⁸

On Monday, October 5, 2020 at 2:06 p.m., Grievant received an email regarding daily screening received:

Your Daily Screening questionnaire is received October 05, 2020.

Based on your responses to Mason COVID Health Check you are approved to participate in on campus classes, events, and activities. Thank you for your continued assistance in helping Mason slow the spread of COVID-19. *** [The background of this message is green.]⁹

⁶ University Exhibits 3.

⁷ University Exhibit 3.

⁸ University Exhibit 3.

⁹ University Exhibit 18.

On Monday October 5, 2020 at 8:05 p.m., the Sergeant sent Grievant a text, “Did you get tested today? Also did you do check list today?” Grievant replied:

I did the Covid screening which was negative for symptoms but have not been able to get lab tested. My personal doctor and appointments across are filled most of the week. The GMU testing is filled too. That was 100% my bad on a bad relay. I also *** did show up to OT today. I woke up 100% today and completely forgot about not showing up/cancelling it. I came into contact with no one today but I know I messed that up.¹⁰

On Monday October 5, 2020 at 8:16 p.m., the Deputy Chief sent Grievant an email:

If you are in fact awaiting test results, you may not be at work. If you are symptomatic with or without a test, you may not be at work. Until you are cleared with a negative test or by your physician under the circumstances, you need to remain out of work. I have no communication from you or your supervisor indicating you are currently clear to be at work since your sick call-outs occurred and pending test matter was reported. I was advised you reported to work today to work your elective overtime assignment at the test site. Is this true?¹¹

On Monday October 5, 2020 at 9:33 p.m., Grievant sent the Deputy Chief an email stating, “I was able to find an open COVID testing slot at the Globe for 1530 on 10/6. I was not able to find any open spaces until then. *** I attached my COVID screening test from 10/1 – today. I could not find my Friday Screening so I will say that I most likely forgot to do my screening of that day but remember feeling healthy and strong the entire day. I did not start experiencing a change in my health until 10/3/2020 while on shift.”

On Monday October 5, 2020 at 11:33 p.m., the Deputy Chief sent Grievant an email, “you may not return to work until you have a negative test and physician’s OK, or absent a test, *** 10 days. One thing we have learned about COVID is that it affects everyone differently. Many are asymptomatic or only experience mild symptoms. This very well could be you but we don’t know that right now. *** If you need assistance securing a test, please advise, as we do have additional resources to consult with.

On Tuesday October 6, 2020 at 3:31 p.m., the Deputy Chief sent Grievant an email:

I was told today that you have household members who are employees that include [name] and [name]. They too have to remain out of work in

¹⁰ University Exhibit 3.

¹¹ University Exhibit 3.

quarantine until you have received your test results. Please advise when and where you have scheduled your test and the expected turnaround time.

On Tuesday October 6, 2020 at approximately 6:20 p.m., Grievant called the Deputy Chief and told her that he was tested at the campus Global Center that afternoon but expected the results would take several days. The Deputy Chief offered Grievant the opportunity to take a rapid test through the local Fair Department but Grievant declined saying he was in quarantine in another Virginia City.

On October 7, 2020, Grievant sent the Deputy Chief an email indicating he would be out of work until October 15, 2020 with pre-planned leave.

On October 8, 2020, Grievant travelled to another state without knowing the results of his COVID-19 test. While in the other state that day, he learned he was positive for COVID-19. Grievant was surprised by the results because he felt fine. At 2:32 p.m., Grievant sent the Deputy Chief an email:

I got my results back and I did test positive. I am still in good health and am waiting for a call from the [county] Health Dept. If there is anything else you need, please let me know.¹²

Grievant took a second COVID-19 test while in the other state. He again tested positive for COVID-19.

On October 15, 2020 at 3:30 p.m., Grievant sent the Deputy Chief an email indicating that the local health department told him he could leave isolation. He said he had a doctor's appointment scheduled for the following day.

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."¹³ 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."

The University established a safety rule governing how its employees should respond to possible COVID-19 infections. If an employee received a Yellow email the employee was supposed to avoid reporting to work

¹² University Exhibit 16.

¹³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Group III offenses include, “violating safety rules (where threat of bodily harm exists).”¹⁴ On October 4, 2020, Grievant received a yellow email informing him:

DO NOT visit campus or participate in group/social activities.

Return to Campus: Return to campus only after: ***

c. If you have/had symptoms: you may return under the guidance of your healthcare provider, and at least 10 days after the onset of symptoms, AND symptoms have improved AND at least 24 hours after with no fever (without the use of medications).

Grievant did not wait ten days before returning to campus. On Monday October 5, 2020, Grievant reported to work for an elective overtime shift. He worked from 12:30 p.m. until 4:47 p.m. at the University’s COVID-19 testing site located at the Mason Global Center. Grievant violated the University’s Safety Rule. He created a risk of bodily harm by possibly exposing others to COVID-19. The University has presented sufficient evidence to justify the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the University’s decision to remove Grievant must be upheld.

Grievant argued he was authorized to return to work on Monday October 5, 2020 because he completed the online health check and received a green email. This argument is not persuasive. Grievant received a yellow email warning him not to return to campus for ten days and informing him he could seek additional information if needed. He began his voluntary shift on October 5, 2020 at 12:30 p.m. He received the green email notification at 2:06 p.m. after he had already begun his shift. Grievant should have complied with the instructions contained in the yellow email. If he had any questions about those instructions, he should have sought additional information.

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”¹⁵ 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

¹⁴ See, Attachment A, DHRM Policy 1.60. The University alleged three other reasons for disciplinary action but none of those are Group III offenses.

¹⁵ Va. Code § 2.2-3005.

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.

Grievant argued the University inconsistently disciplined its employees. To establish the allegation, Grievant was obligated to present evidence showing similarly situated employees were treated differently from Grievant by the University. Grievant did not present persuasive evidence to show that other employees violated the University’s COVID-19 safety policy and were not disciplined with removal. The Hearing Officer does not believe the University singled-out Grievant for disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

Grievant argued the University issued disciplinary action to him in retaliation for his objection to illegal activities by the University Police. For the most part, University Police did not have jurisdiction to investigate possible crimes outside of the University’s campus. Grievant presented evidence that the University Police intended to conduct police surveillance on private property located away from the University’s campus. The evidence showed the University received a tip that some students intended to have a party with many guests on a property located off-campus. Such a party would violate the University’s instructions to students limiting the size of gatherings. The evidence showed that the Chief of Police visited an off-campus house where University students were having a party. The Deputy Chief also went to the location. The Chief of Police was doing a “knock and talk” with the assistance of the local police department. Prior to conducting the knock and talk, Grievant and several other employees were informed of the plan by the Sergeant and Lieutenant. Grievant objected to the plan because he believed it was illegal.

The Deputy Chief issued the Written Notice. Although she spoke with other managers, she was the primary decision-maker regarding Grievant’s removal. The Deputy Chief was not aware of Grievant’s concerns about the “knock and talk” off-campus. She did not take disciplinary action against Grievant because he complained about any improper activity by University Police leaders. The Hearing Officer believes the University took disciplinary action against Grievant because of his behavior and not because he objected to off-campus actions of University Police employees.

DECISION

For the reasons stated herein, the University’s issuance to the Grievant of a Group III 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
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.