



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11531**

Hearing Date: July 17, 2020

Decision Issued: July 20, 2020

#### **PROCEDURAL HISTORY**

On April 15, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for failing to wear a Sneeze Guard. On April 15, 2020, Grievant was issued a Group I Written Notice of disciplinary action for using obscene language.

On April 16, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 4, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2020, a hearing was held by audio 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. She began working for the Agency in February 2019. No evidence of prior active disciplinary action was introduced during the hearing.

Some inmates at the Facility had contracted the COVID-19 virus and had to be hospitalized. Some of those inmates died due to the virus. The Agency sought to reduce the risk of spreading the virus within its facilities.

On April 1, 2020, the Agency Head sent employees a memorandum regarding COVID-19:

Virginia Department of Corrections continues to be proactive in providing resources for our staff and offender population. While the Sneeze Guard will not avoid exposure to all hazards, it will provide an added level of protection and should provide an additional level of comfort.

Two Sneeze Guards will be or have been provided to each staff member. **Staff members are now required to wear their Sneeze Guards unless wearing another form of Personal Protective Equipment (PPE) mask.** Employees will be responsible for maintaining and laundering their provided Sneeze Guards. In the event the Sneeze Guards become

unserviceable, staff may request a replacement mask from their immediate supervisor. (Emphasis original.)<sup>1</sup>

The Warden sent a memorandum dated April 3, 2020 to staff reiterating the Agency Head's instruction. These memoranda were discussed with staff during daily briefings. They were posted at the Facility for staff and inmates to read. Grievant was provided with two Sneeze Guards.

Grievant worked at a Facility with barrack-styled housing for inmates. Approximately 68 inmates lived in one large room. Grievant was responsible for conducting rounds by walking up and down rows of beds assigned to inmates.

On April 6, 2020, Grievant conducted approximately four rounds over the course of 30 to 45 minutes during which she did not wear her required Sneeze Guard. She removed the Sneeze Guard because she felt it was uncomfortable to wear. She encountered numerous inmates during her rounds.

Several inmates observed Grievant not wearing her Sneeze Guard. One of the inmates told Grievant to, "Put your f—king mask on!" She told the inmate to, "Shut the f—k up!" Numerous inmates heard Grievant's response.

On April 8, 2020, an inmate's family member sent an email to the Governor, Secretary of Public Safety, Agency Head, and Warden, reporting that Grievant was not wearing her Sneeze Guard on April 6, 2020.

The Major later asked Grievant why she did not put on her Sneeze Guard when confronted by the inmate. Grievant replied, "I just looked at him and kept going."

## **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."<sup>2</sup> 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."<sup>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

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<sup>1</sup> Agency Exhibit p. 40.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

### Group III Written Notice

“Violating safety rules where there is a threat of physical harm” is a Group III offense.<sup>5</sup> The Agency established a safety rule requiring employees to wear Sneeze Guards at all times. Grievant did not wear a Sneeze Guard for more than 30 minutes as she conducted rounds with the Facility. The safety rule was intended to reduce the risk of contracting a virus which could cause physical harm. The Agency has presented sufficient evidence to support 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 Agency’s decision to remove Grievant must be upheld.

Grievant argued the Agency did not provide her with a warning before disciplining her. Although the Agency could have issued a lesser level of disciplinary action as a warning, the Agency was not obligated to do so. The level of discipline issued by the Agency is authorized by its Standards of Conduct.

### Group I Written Notice

“Use of obscene or abusive language” is a Group I Offense.<sup>6</sup> On April 6, 2020, Grievant told an inmate to “Shut the f—k up!” Grievant used obscene language and directed it at another person thereby justifying the issuance of a Group I Written Notice.

### 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>7</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.

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<sup>5</sup> DOC Operating Procedure 135.1(V)(E)(2)(g).

<sup>6</sup> DOC Operating Procedure 135.1(V)(C)(2)(d).

<sup>7</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice 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 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].

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer