



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11708

Hearing Date: October 8, 2021
Decision Issued: October 27, 2021

PROCEDURAL HISTORY

On December 21, 2020, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On January 20, 2021, 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 he requested a hearing. On June 21, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 8, 2021, a hearing was held by remote conference. Grievant was notified of the hearing date and time but did not participate in the hearing.

APPEARANCES

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 employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Employees at the Facility were required to wear personal protective equipment in response to the COVID19 pandemic. Wearing properly fitting masks was a safety rule at the Facility where Grievant worked. Part of Grievant's job duties included transporting inmates to the Hospital. The Hospital also required people entering the Hospital to wear masks.

On August 24, 2020, the Chief of Corrections Operations sent all unit heads a memorandum regarding Fit Testing and Respiratory Protection. The Chief wrote, "[e]mployees arriving with facial hair will not be fit tested until they return clean-shaven." The Chief added:

Compliance with this directive is mandatory and considered a condition of employment. Failure to observe the requirements of the Respiratory

Protection Standard may result in disciplinary action in accordance with Operating Procedure 135.1, Standards of Conduct.¹

On November 9, 2020, Lieutenant M instructed Grievant to shave his beard by November 10, 2020. Lieutenant M's instruction was based on the Warden's directive that employees should be clean-shaven in order to ensure protective masks would have a good seal. Grievant reported to work on November 10, 2020. He was not clean-shaven.

On November 10, 2020, Grievant received a Notice of Improvement Needed/Substandard Performance. Grievant was reminded of a policy change on May 1, 2020 suspending the authorization to have facial hair. He was reminded of the policy change on November 1, 2020 reiterating the facial hair standard to achieve a good face mask seal. Grievant's Improvement Plan was:

Follow up with [Grievant] to make sure he is in compliance with Policy 105.1 amendments.²

Captain S instructed Grievant to report to work clean-shaven. Captain S discussed the Agency's policy with Grievant and made sure Grievant knew of the Warden's directive that staff report to work clean-shaven.

On November 13, 2020, Grievant reported to work but was not clean-shaven. The Agency initiated disciplinary proceedings.

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."³

Directive 105 governs Employee Uniforms and Identification Cards. Section IV provides:

During a declared State or National emergency or other unusual events, the Director or designee may modify this operating procedure to include additional restrictions or requirements in the interest of public health and

¹ Agency Exhibit p. 19.

² Agency Exhibit p. 5.

³ See, Virginia Department of Corrections Operating Procedure 135.1.

safety, including but not limited to, requiring face covering or other personal protective equipment be worn in the workplace and facial hair to be trimmed or shaved to achieve a good facial mask seal.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ On November 9, 2020, Lieutenant M instructed Grievant to report clean-shaven. Grievant did not comply with that instruction. On November 10, 2020, Grievant received a Notice of Improvement Needed/Substandard Performance for failing to report to work clean-shaven. Captain S instructed Grievant to report to work clean-shaven. Grievant did not comply with that instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant asserted that the Agency’s policy did not require him to be clean-shaven. Grievant did not present any evidence to support this assertion.

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”⁵ 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 is **upheld**.

APPEAL RIGHTS

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

⁵ *Va. Code § 2.2-3005*.

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.