



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11714**

Hearing Date: February 16, 2022  
Decision Issued: March 8, 2022

**PROCEDURAL HISTORY**

On March 19, 2021, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction.

On March 23, 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 she requested a hearing. On June 28, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for October 13, 2021 but continued several times at Grievant's request. On February 16, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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. She has been employed by the Agency since August 10, 2006. No evidence of prior active disciplinary action was introduced during the hearing.

On May 20, 2020, Grievant completed a Respirator Medical Evaluation Questionnaire as part of the Agency's process to identify employees who could wear respirators. A medical professional concluded that Grievant's use of a respirator was not approved due to "medical ailments." Sergeant S did not know that Grievant could not wear an N95 mask.

In February 2021, employees at the Facility were wearing cloth masks because of the COVID-19 pandemic. They were not required to wear N95 masks.

The Agency's COVID-19 Transportation Plan required the use of N95 masks to transport an inmate but only if the inmate tested positive for COVID-19 or was "pending positive COVID-19." None of the inmates at the Facility where Grievant worked had COVID-19 or were "pending positive" for COVID-19.

On February 24, 2021, an Inmate cut his finger and needed to be transported from the Facility to a Hospital Emergency Room. Sergeant S talked to Grievant and told Grievant that she needed to assist with transporting the Inmate to the Hospital. He told Grievant it was a “medical run.” Grievant said, “You have other officers that can go on the medical run, why [did] you pick me?” Sergeant S said he was her supervisor and he decided to send her and Officer A to escort the Inmate. Grievant told Sergeant S, “I am not going.” When Grievant attempted to explain she was not fitted for an N95 mask, Sergeant S was combative and did not want to listen to her explanation.<sup>1</sup> Grievant feared she might contract COVID-19 if she was not wearing an N95 mask. She was concerned she might contract COVID-19 when she interacted with staff in the main facility or at the Hospital.

Because Grievant refused to go on the medical run, Sergeant S instructed Officer W to go with Officer A. Officer A and Officer W took the Inmate to the Hospital.

### **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>2</sup>

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure” is a Group II offense.<sup>3</sup> On February 24, 2021, Sergeant S instructed Grievant to escort the Inmate to the Hospital. Grievant refused to comply with the instruction.

*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>4</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

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<sup>1</sup> Sergeant S’s demeanor during the hearing was sometimes consistent with Grievant’s description of his demeanor.

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

<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>4</sup> *Va. Code § 2.2-3005.*

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.

Failure to follow a supervisor's instructions may result in the issuance of a Group II Written Notice. Mitigating circumstances exist in this case to justify reduction of the disciplinary action to a Group I Written Notice for two reasons. First, in February 2021, COVID-19 was rampant throughout the United States. COVID-19 caused a significant number of people to face sickness, hospitalization, and/or death. It also caused people to become fearful and act in a manner they might not otherwise act.<sup>5</sup> Grievant was fearful that she would contract COVID-19 because she could not wear an N95 respirator. Grievant's refusal to go on the transportation run was not because it would create an inconvenience for her but rather because she feared doing so might cause her sickness. Second, Grievant attempted to explain to Sergeant S the nature of her concerns. Sergeant S "was not hearing what I was truly saying"<sup>6</sup> but rather insisted she comply with his instruction regardless of the merits of her reasons to resist. Sergeant S essentially "shut down" Grievant and she did not seek additional guidance from the Assistant Warden or human resource staff as encouraged by DHRM policy.<sup>7</sup> If the Agency supervisors at the Facility had fully considered Grievant's concerns, it is possible their decision-making may have been different or they may have been able to allay Grievant's fears to the extent that she would have acted differently.

## 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:

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<sup>5</sup> DHRM described this as "[u]nfamiliar circumstances that make us feel vulnerable can impact how we behave." See, Grievant's Exhibit p. 29.

<sup>6</sup> Grievant Exhibit p. 10.

<sup>7</sup> See, Grievant Exhibit p. 29.

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].

*/s/ Carl Wilson Schmidt*

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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.