



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11595**

Hearing Date: January 11, 2021  
Decision Issued: February 1, 2021

**PROCEDURAL HISTORY**

On July 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for “assaulting offender [Inmate] by pushing him with enough force to make him stumble backwards.” On July 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action for “not wearing proper PPE (face covering).”

Grievant filed a grievance to challenge the Agency’s actions. The matter advanced to hearing. On September 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?

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. Grievant had prior active disciplinary action. On May 20, 2020, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions to wear a sneeze guard while performing work duties.

On April 1, 2020, the Agency Head issued a memorandum regarding COVID-19 Sneeze Guards. The Agency Head instructed, "Staff members are now required to wear their Sneeze Guards unless wearing another form of Personal Protective Equipment (PPE) mask."<sup>1</sup> Grievant was advised of the Agency Head's instruction.

On June 18, Grievant was working at the Facility. He was outside on the basketball court with several inmates. Some of the inmates were bringing chairs from the outside into the building. Grievant was speaking to several inmates. Grievant was standing with his back one or two feet from the outside wall. To his right was the door to enter the building. Several of the inmates entered the building.

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<sup>1</sup> Agency Exhibit p. 35.

The Inmate was holding a chair that he moved from his right hand to his left hand as he walked towards the door. He was speaking to Grievant and raised his right arm as if to touch Grievant on Grievant's right side and as if to push Grievant slightly. Grievant observed the Inmate raising his arm. Grievant raised his right arm, touched the Inmate on the Inmate's right shoulder, and slightly pushed the Inmate as the Inmate passed through the doorway. A video of the incident does not show the Inmate falling down, falling backwards, or otherwise retaliating against Grievant.

While Grievant was outside, he had his mask (sneeze guard) below his chin. Grievant did not pull up his mask as he stepped into the building and closed the door behind him.

Grievant resigned from his position effective August 9, 2020.

## **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>

### Group III Written Notice for Assaulting an Inmate

The Agency alleged Grievant assaulted the Inmate by pushing him with enough force to make him stumble backwards.<sup>3</sup> Touching someone with the intent to harm is assault. Horseplay does not involve the intent to harm and is materially different from an assault. The Agency conceded that Grievant engaged in horseplay and did not assault the Inmate. Grievant's slight push of the Inmate was in response to the Inmate acting as if (and possibly actually) pushing Grievant.<sup>4</sup> Grievant's response was consistent with stopping the Inmate from touching him. Whether or not Grievant engaged in horseplay (fraternization) is unclear. What is clear is that Agency alleged Grievant assaulted the Inmate, but Grievant did not assault the Inmate. The Group III Written Notice for assaulting the Inmate must be reversed.

### Group III Written Notice for Failing to Wear a Mask

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

<sup>3</sup> The Inmate did not stumble backwards.

<sup>4</sup> Grievant's body blocks a full view of the Inmate's action.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup> The Agency Head instructed employees to wear sneeze guards. Grievant was aware of the instruction and had a sneeze guard on June 18, 2020. He failed to wear the sneeze guard to over his mouth and nose thereby violating the Agency Head’s expectation. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two active Group II Written Notice and, thus, the Agency’s decision to remove him must be upheld.

The Agency argued that Grievant should receive a Group III Written Notice. The Agency’s allegation was that Grievant failed to follow instructions. The Agency did not present evidence explaining why Grievant should receive a Group III Written Notice instead of a Group II Written Notice. Grievant had a prior Group II Written Notice for the same offense. DHRM Policy authorizes elevation of a Group I to a Group II for a repeated Group I offense. It does not authorize elevation of a Group II to a Group III for a repeated Group II offense. DOC’s Standards of Conduct must comply with DHRM Policy and its policy governing repeated offenses cannot be interpreted to authorize elevation of a Group II to a Group III offense based on repeating an offense.<sup>6</sup> The Agency did not present evidence showing Grievant’s behavior created a unique impact on the Agency justifying the issuance of a Group III Written Notice. The Agency disciplined Grievant for “[f]ailure to follow instructions and/or policy” which is a Group II offense.

Grievant argued he had been told he could lower his mask when he was outside. The evidence showed Grievant was told he could lower his mask only if no one else was around him. Grievant had several inmates near him when his mask was lowered. He should have been wearing his sneeze guard properly.

### 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

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<sup>5</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>6</sup> See, Agency Exhibit 17. DOC’s section numbering is inconsistent.

<sup>7</sup> Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action for assaulting an inmate is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for failing to follow an instruction is **reduced** to a Group II Written Notice. Grievant's 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 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>

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

[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