



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11606

Hearing Date: January 20, 2021

Decision Issued: January 25, 2021

PROCEDURAL HISTORY

On June 17, 2020, Grievant was issued a Group III Written Notice of disciplinary action with a one day suspension for gross negligence.

On July 31, 2020, Grievant 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 November 2, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 20, 2021, 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 for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Inmate was transported to the Hospital from the Facility. Prior to being transported, the Inmate was tested for COVID19 and the result was negative. The Inmate's room was on the fourth floor of the Hospital in a room similar to one held by private citizens. The Inmate was not held on a secured wing because the Hospital did not have one.

On June 2, 2020, approximately two days after being transported to the Hospital, Grievant and Officer W went to the Hospital to supervise the Inmate. They arrived at approximately 8 a.m. They relieved the two officers who were sitting with the Inmate inside his room. Officer W checked the Inmate's restraints to make sure the Inmate was properly restrained. Grievant learned from the two departing officers that the Inmate had tested positive for COVID19.

Grievant called the Warden at the Facility. The Warden authorized Grievant and Officer W to sit outside of the room instead of being inside the room as was usually

required. The Warden learned for the first time on June 2, 2020 that the Inmate was positive for COVID19.

Shortly thereafter, Officer W left to use the restroom. He was gone for at least ten minutes. A Nurse approached Grievant and “pressured” Grievant to be fitted for an N95 mask. The Nurse told Grievant that the person involved in fitting the mask came from another hospital and would only be at the Nurse’s Hospital for a limited period of time. The Nurse told Grievant she could not go into the Inmate’s room without properly fitted personal protective equipment (PPE).

Grievant left her post outside the Inmate’s room and walked down to the first floor to be fitted with an N95 mask. When Officer W returned from the restroom, he noticed that Grievant was not in front of the Inmate’s room. A Nurse approached Officer W and said Grievant was downstairs being fitted for PPE and that Officer W should also be fitted. Officer W went to the first floor to find Grievant and be fitted with an N95 mask. Grievant and Officer W left the Inmate unsupervised for approximately twenty minutes.

Grievant and Officer W received disciplinary action for leaving the Inmate unsupervised.

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.”¹

Group III offenses include “[l]eaving a security post without permission during work hours” and “[g]ross negligence on the job that results (or could have resulted) in the escape ... of a ward of the State ...”² On June 2, 2020, Grievant’s post was the Inmate’s room. Operating Procedure 411.1(IX)(A)(7) requires, “[a]n offender must not be left unattended and must be escorted everywhere while in the hospital.” While Officer W was in the restroom, Grievant left her post to go to the first floor to be fitted for PPE. No one was supervising the Inmate at the moment Grievant left her post. Grievant did not have permission to leave her post. Her actions could have resulted in the Inmate escaping. 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

¹ See, Virginia Department of Corrections Operating Procedure 135.1.

² See, Virginia Department of Corrections Operating Procedure 135.1.

may suspend an employee for up to 30 workdays in lieu of removal. Accordingly, the Agency's one day suspension of Grievant must be upheld.

Grievant argued that the level of discipline was too harsh. She asserted that when she learned that the Inmate had COVID19, she reacted to protect her health as someone with a prior medical condition that could amplify the consequences of contracting the virus. Although Grievant's concern is understandable, she could have contacted her supervision for guidance or asked someone to notify Officer W and have him remain with the Inmate until she returned. Grievant created a significant risk of harm to the public by leaving the Inmate unsupervised which justified the Agency's decision to issue a Group III Written Notice with a one day suspension.

Grievant argued that the Agency failed to take proper action to provide her with adequate PPE before she arrived at the Hospital. If the Agency had done so, Grievant would not have faced a situation where she had to protect her health and would not have been forced to leave her post. The evidence showed that the Agency did not learn the Inmate was positive for COVID19 until June 2, 2020. The Agency did not send Grievant on a transportation assignment knowing it was putting Grievant at risk of contracting COVID19.

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"³ 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 III Written Notice of disciplinary action with a one day suspension is **upheld**.

APPEAL RIGHTS

³ 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.