Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 08/30/18; Decision Issued: 09/19/18; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 11232; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of
Case Number: 11232
Hearing Date: August 30, 2018
Decision Issued: September 19, 2018

SUMMARY OF DECISION

The Agency had found that Grievant failed to follow instructions or policy. The Agency then issued Grievant a Group II Written Notice. The Hearing Officer has determined that Grievant engaged in the misconduct. In addition, the Agency's discipline is consistent with policy/law and reasonable. Thus, the Hearing Officer has upheld the discipline.

HISTORY

On January 30, 2018, the Agency issued Grievant a Group II Written Notice for failure to follow policy. On or about February 14, 2018, Grievant timely filed his grievance to challenge the Agency's action. The matter advanced through the first and second steps of the grievance process. Then on June 7, 2018, the Agency Head qualified the grievance for a hearing. Thereafter, the Office of Equal Employment Dispute Resolution ("EEDR") assigned the undersigned as the hearing officer to this appeal, effective July 9, 2018. On July 24, 2018, the Hearing Officer held a prehearing conference ("PHC") to discuss matters of concerns regarding the case. A scheduling order addressing, among other matters, topics discussed during that PHC was issued on the same date. As scheduled during the PHC, the Hearing Officer held the grievance hearing on August 30, 2018.[1]

Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. First, the Agency's Advocate moved for the admission of a document identified as Agency Exhibit 6. The Agency represented that it had received the document on the day of the hearing. Grievant stated that he had an opportunity to review the document and did not object to its admission. The parties also presented one stipulation of fact which is set forth in the "Statement of Facts" section of this decision.

The Hearing Officer admitted the Agency's binder consisting of Agency Exhibits 1 through 6.[2] The Hearing Officer also admitted, without objection, Grievant's Exhibits 1 and 2.[3]

During the hearing, both parties were given the opportunity to make opening statements and call witnesses. Also, each party was provided the opportunity to cross examine any witnesses presented by the opposing party. Although each party had the opportunity to present rebuttal evidence, they declined to do so. Moreover, both parties were given an opportunity to make closing statements.

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[1] This was the first date available for the parties.
[2] These exhibits included, among the others, the previously referenced Exhibit 6 that the Agency initially disclosed on the day of the hearing.
[3] Grievant's Exhibit 1 consists of 65 pages; and Exhibit 2 is the Department's Operating Procedure 145.4.

During the hearing, the Agency was represented by its advocate. Grievant represented himself.

APPEARANCES

Advocate for Agency
Agency's Representative
Witnesses for the Agency and Grievant (2 witnesses)
Grievant
Witness for Grievant (1, Grievant)

ISSUE

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact[4]:

1. The Agency is a prison within the Department. Grievant is employed by the Agency as a Correction Sergeant. In this position, Grievant supervises other employees. (Testimony of Major/Investigator; A Exh. 2).

2. On January 9, 2018, the following social media posting appeared.

"Who calls ppl to work at 2 am to be at work at 3"

(A Exh. 5, p. 65).

3. The individual placing this message on the internet worked at the Agency as a correctional officer at the time of the posting. (Testimony of Grievant).

4. The subsequent messages resulting from the post appear below:

[Respondent 1's Comment]
The DOC ..lol
3d Like Reply

[4] By agreement of the parties, one witness – Assistant Warden – testified by telephone.

[Respondent 2's Comment]
Get all dat money cuz

3d Like Reply

[Respondent 3's Comment]
That Crap Happens Brigade.

3d Like Reply

[Respondent 4's Comment]
Evidently….yo boss…lol

3d Like Reply

[Respondent 5's Comment]
The Supervisor, After the Manager called them!!!!

3d Like Reply

[Respondent 6's Comment]
I'm guessing SBCC

2d Like Reply

[Grievant's First Comment]
I wouldn't have answered the phone

2d Like Reply

[Respondent 7's Comment]
You are supposed to set the example sgt.

2d Like Reply

[Grievant's second comment]
When im at work….fuck that place when im not

2d Like Reply

Write a reply…

[Respondent 8's comment]
There's a do not disturb button on your phone
2d Like Reply

[Respondent 9's comment]
A nights

2d Like Reply

[Respondent 10's comment]
Doc……

2d Like Reply

(A Exh. 5, pp. 65-68).

5. Grievant admits he made the statements attributed to him in the above social media thread. (Stipulation of Parties; A Exh. 5, pp. 67-68).

6. On the date of the referenced responses, Grievant, Respondent 5, Respondent 6, and Respondent 8 were employees of the Agency. (Testimonies of Major/Investigator and Assistant Warden). Respondent 7 was known to Grievant as a former employee of the Agency. He had been employed as a correctional officer. (Testimony of Grievant).

7. Grievant worked a second job at the time he commented on the initial posting. His second job involved answering calls to schedule individuals traveling to Disney Resorts. He was not referred to as Sergeant on the second job. (Testimony of Grievant).

8. At the time Grievant posted the comments to the initial question, the device he used to make the comments had a small viewing screen. Even so, Grievant was aware that other comments had been made. Moreover, he was not proscribed from viewing them. Grievant was also aware that the individual posting the initial question was, at that time, employed as a correctional officer with the Agency. (Testimony of Grievant).

9. As showed in "Findings of Fact" # 4, Respondents 1 and 6 posted comments before Grievant posted his. Respondent 1's comment uses the acronym that represents the Department; Respondent 6's comment includes the Agency's acronym. Both acronyms were commonly known as representing the Department and Agency. (A Exh. 5; Testimony of Major/Investigator).

10. The evidence is sufficient to show the posted messages concerned the Department and Agency. Further, the evidence is sufficient to show Grievant was aware that the messages were about the Department or Agency or reasonably should have been aware of such. (A Exh. 5; Testimonies of Assistant Warden, Major/Investigator, and Grievant).

11. The posting came to the attention of the Agency when an employee of the Agency became aware of it and provided Investigator/Major with a screen shot of the messages. (Testimony of Major/Investigator).

12. It is obligatory that an employee of the Department inform his immediate superior, of any social media posting by another employee that is believed to violate Department policy. (Policy 310.2 IV(B)10f; A exh. 4, p. 50).

13. A disciplinary investigation ensued. The purpose of it was to determine the facts surrounding the social media posting. (Testimony of Major/Investigator).

14. On January 15, 2018, Grievant received a memorandum dated January 14, 2018, from the Major/Investigator notifying Grievant that a fact finding hearing had been scheduled for January 17, 2018, regarding the posting. The meeting was held on January 17, 2018. Those present included Major, Lieutenant, and Grievant. (G Exh. 1, at 58).

15. During the investigation Grievant admitted to publishing the statements attributed to Grievant in the message thread. (Stipulation by the Parties).

The Agency provided Grievant with a copy of the posting set forth above in "Findings of Facts" numbered 2 and 4 above, also located in Agency Exhibit 5. (A Exh. 5; G Exh. 1 at 4).

16. Thereafter, by memorandum Grievant was served with notice that a due process hearing had been scheduled with the assistant warden regarding the posting. The memo notified Grievant that the meeting was set for January 22, 2018, and that Grievant had violated the Department's Operating Procedures 310.2 and 135.1. (G exh. 1, at 57).

17. Next, on January 29, 2018, at 8:30 a.m. Grievant was notified that a meeting was scheduled for him to meet with Assistant Warden at 1:30 p.m. on January 30, 2018.

18. The parties concur that two due process meetings occurred. Accordingly, the Hearing Officer finds those meetings happened on January 22 and 30, 2018. (Testimonies of Grievant and Assistant Warden).

19. During the January 30, 2018 meeting, Assistant Warden issued Grievant a Group II Written Notice. Specifically, the notice described the offense as follows:

> Group II, Failure to follow instructions and/or policy. Correction Sergeant [Grievant] posted comments on Facebook stating "I wouldn't have answered the phone" referring to if [the prison] called him when he is not scheduled to work. [Grievant] also posted "fuck that place when I'm not" referring to when he is not at work at prison. This constitutes a violation of DOC Information and Technology Security policy #310.2 and Standards of Conduct policy #135.1.

(A Exh. 1).

20. In determining Grievant's discipline for the January 9, 2018 violation, the Assistant Warden considered Grievant's vulgar comment on the post. He also noted that Grievant made more than one comment while the other employees commented one time. A snow storm had just occurred and several correctional officers had not reported to work. As such, Assistant Warden

considered the impact Grievant's comments may have had on other correctional officers who may have been telephoned to report to work. Pursuant to their Employee Work Profiles they were expected to report for duty even under the conditions presented by the inclement weather. (Testimony of Assistant Warden).

The Major/Investigator found Grievant's media comments aggravating. He had previously disciplined Grievant for making an inappropriate social media posting in 2016. The Major/Investigator did not have the authority to issue the group notice. (Testimony of Major/Investigator).

21. The Agency disciplined the other employees who commented to the post less severely than Grievant. As a basis for this difference in discipline, the Agency considered the number of comments each employee made to the post, the language used by each employee, Grievant's supervisory position, and the inclement weather and resulting staffing shortage at the time of the postings. (Testimony of Assistant Warden).

OPERATING PROCEDURES 310.2 and 135.1

22. Among other things, the Agency's Operating Procedure 310.2 (Policy 310.2) establishes the Department's standards regarding the acceptable use of social media. (A Exh. 4; Policy 310.2).

23. Policy 310.2 provides in pertinent part the following:

> When using electronic communication tools and social media, users should follow all applicable Commonwealth policies and be responsible and professional in their activities. Employees should conduct themselves in a manner that supports the Department's mission and performance of their duties.

(Policy 310.2 IV(B)(9)(b); A Exh. 4, p. 49).

24. Further, Policy 310.2 mandates that when an employee is "posting entries on the internet, employees should ensure that they do not undermine the public safety mission of the Department, impair working relationships of the Department, impede the performance of their duties, undermine the authority of supervisors, diminish harmony among coworkers, or negatively affect the public perception of the Department."

(Policy 310.2 IV(B)10(a); A Exh. 4, p. 50).

25. Moreover, this policy goes on to state in pertinent part that [e]mployees' speech on or off-duty, made pursuant to their official duties, that owes its existence to employees' professional duties and responsibilities, is not protected speech under the Frist Amendment and may form the basis for discipline if deemed detrimental to the [Department]. [Department] employees should assume that their speech and related activity will reflect upon their office and [the Department].

(Policy 310.2 IV(B)10(b); A Exh. 4, p. 50).

26. Additional Germane provisions of Policy 310.2 provide the following:

d. For Safety and security reasons, [Department] employees' are cautioned not to disclose their employment with the [Department] or post information pertaining to any other employee of the [Department] without his or her permission.

i. [Department] employees should not post personal photographs or provide similar means of personal recognition that may cause them to be identified as a sworn employee of [the Department].

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e. Engaging in prohibited speech noted herein will be considered a violation of Operating Procedure 135.1, *Employee Standards of Conduct*, and may be subject to disciplinary action up to and including termination.

(Policy 310.2 IV(B)10(d) and (e); A Exh. 4, p. 50).

27. Operating Procedure 135.1 (Policy 135.1) identifies failure to follow policy as a Group II Offense. (Operating Procedure 135.1(V)(C); A Exh. 3, p. 31).

PRIOR DISCIPLINE

28. When the Agency issued Grievant the group notice on January 30, 2018, Grievant's disciplinary history contained no active prior written group notices. However, Grievant had previously been issued a Group I Written Notice on December 5, 2015, for making an inappropriate posting on face book concerning information about the Agency's operation. The Agency had issued this prior group notice on December 7, 2015. On February 4, 2016, the Agency reduced the group notice to "Notice of Improvement Needed/Substandard Performance. (A Exh. 2 at 19-20; G Exh. 1 at 39-40).

29. Under applicable policy, a Group I Written Notice remains active for only two years from its issuance date. (Operating Procedure 135.1(V)(B)(3)(d); A Exh. 3, p. 31). Accordingly, Grievant's Group I Written Notice became inactive on December 7, 2017.

DUE PROCESS

30. Grievant did not request a copy of all related documents associated with the investigation prior to being issued the Group II Written Notice. (G Exh. 1).

On February 14, 2018, Grievant timely appealed the Group II Written Notice. The Agency upheld the discipline at the first step of the grievance on March 18, 2018.
(G Exh. 1, at 23).

Grievant advanced the Grievance to the second step on March 22, 2018. The Agency upheld the discipline at the grievance's second step on April 20, 2018. Grievant received notice of the second step decision on April 30, 2018. On May 7, 2018, he advanced the matter to the third step. (G Exh. 1, at 23-24 and 37-38).

Grievant received the third step reply to his grievance on or about May 24, 2018. (G Exh. 1, at 16-17).

31. Neither party has requested a compliance ruling from EEDR.

32. The Agency had scheduled Grievant to work the evening of January 30, 2018, from 7:50 p.m. to 6:15 a.m. on January 31, 2018. (G Exh. 1, at 50).

RETIALIATION

33. Grievant filed a Grievance against the Agency on or about July 20, 2016 (2016 Grievance). In this grievance, Grievant contended that the Agency had used an improper interview panel when it interviewed candidates for a sergeant position. Grievant had applied for the position. He asserts that the improper panel was bias against him and therefore he was denied a promotion. The improper panel consisted of Grievant's immediate supervisors at the time, one of which Lieutenant. The lieutenant was involved in the fact finding meeting for the current Group II Written Notice before this Hearing Officer.

At the second step of the 2016 Grievance, Grievant avers that he was awarded the promotion he sought and therefore the 2016 Grievance was concluded.

34. Grievant contends that thereafter that the Agency has retaliated against him for pursuing the 2016 Grievance. (G Exh. 1, at 59 – 64).

OTHER FACT(S)

35. The Agency periodically telephones employees to determine if the Agency has a working number for each employee. Employees are expected to answer their telephones when called or to telephone back to inform the Agency that the number the Agency has on file is a working number. (Testimony of Major/Investigator).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code* §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes,* 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints… To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[5]

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.[6]

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.[7] When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.[8]

As stated previously, Agency management issued Grievant a Group II Written Notice. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Was the discipline warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group II Written

The pertinent provisions of Policy 310.2 are set forth in "Findings of Fact" numbered 22 through 26.

The parties stipulated that Grievant posted certain comments on Social Media on January 9, 2018, in response to the question "Who calls ppl to work at 2 am to be at work at 3?" The Hearing Officer now examines whether those comments constitute misconduct.

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[5] Grievance Procedural Manual §5.8

[6] Virginia Department of Corrections Operating Procedure 135.1

[7] Virginia Department of Corrections Operating Procedure 135.1(V).

[8] *Id.*

The evidence shows that Grievant, as a sergeant, works in a supervisory position. He, among others, responded to the question. Grievant wrote, after several before him commented, "I wouldn't have answered the phone." Later in the series of remarks, he writes, "when im at work…fuck that place when im not. In addition, a review of the thread of comments shows that several respondents used the commonly known acronyms that represent the Department and the Agency. What is more, the evidence shows that at least five of the eleven individual commenting to the post were employees of the Department or Agency. Accordingly, clearly the comments concerned the Department and Agency.

The Hearing Officer is cognizant of Grievant's claim that he was unaware of the other posted comments due to his small viewing screen. And further, that the comments could have been about another job. Considering the evidence, the Hearing Officer is not persuaded and finds Grievant knew that the comments referred to the Department or reasonably should have known such.

Furthermore, a review of the evidence illustrates that Grievant's comments failed to support the Agency's mission for public safety. In particular, when Grievant's social media posting occurred, the Agency had just experienced a snow storm. This resulted in some workers not reporting to work. Particularly correctional officers were not reporting for duty. Consequently, the Agency needed to call in workers who had not previously been scheduled to work to assure adequate staffing at the prison. Grievant's social media comments, in effect, encouraged workers not to answer their phones such that they could avoid having to come in to work. This had the potential of exasperating the staffing issue at an Agency that houses prisoners. Moreover, the thread of comments displayed employees' disdain for being called in to work on short notice and the means employed by Grievant and others to avoid reporting to work during a possible staffing shortage. Clearly, the comments, including Grievant's, compromised Agency safety and security as well as public safety.

What is more, it was discernable from a review of the comments that Grievant held the supervisory position of sergeant. To this point, after Grievant's initial response stating "I wouldn't have answered the phone," – Respondent 7 commented "You are supposed to set the example sgt." Grievant goes on to say "When im at work…fuck that place when im not." Plainly, Grievant's comments failed to foster working relations at the Agency.

Moreover, Grievant's responses weakened his effectiveness as a supervisor. The evidence shows that the Agency requires employees to answer their telephones when called or promptly return the Agency's call. This is a means for the Agency to confirm employees' telephone numbers in the event the Agency has a need to call a worker in early. Distinctly, Grievant's comments damaged his ability to hold his subordinates accountable if they evaded their responsibility to be accessible by telephone when off duty in the event their employer had a legitimate need to contact them?

In sum, Grievant's social media comments on January 9, 2018, undermined the safety and security of the Agency and public. His use of the language, "fuck that place…," cast a negative light on the Agency. Grievant also failed to foster good working relationships at the Agency and harmed his authority as a supervisor.

In addition, utilizing the balancing test employed in *Grutzmacher v. Howard Co.,,* 4 Cir. No 15-2066 (March 20, 2017), the Hearing Officer finds the Grievant's right to free speech is outweighed by the Agency's interest in managing its internal affairs. Further, as noted above, Grievant's social media activity conflicted with his responsibility as a supervisor and frustrated the Agency's public safety mission. Accordingly, The Hearing Officer finds his social media responses were prohibited speech, not protected as free speech under the United States Constitution.[9]

Under Agency policy 135.1, engaging in prohibited speech on social media is a violation of the Employee Standards of Conduct. Hence, the Hearing Officer finds Grievant engaged in misconduct when made the comments on January 9, 2018.

II. Consistent with Law or Policy

The Hearing Officer now examines whether the discipline was consistent with law and policy.

Disparate Treatment

Grievant claims the Agency treated him differently and punished him too harshly. Regarding this accusation, the evidence demonstrates that Grievant held a supervisory position. No evidence was presented to show other employees of the Agency who responded to the post were more than rank and file employees. Also, the evidence illustrates that Grievant commented more than once, while the other employees responded a single time to the post. Further, the Agency contends Grievant used vulgar language. The Agency's assertion is substantiated by a review of Grievant's comments where in referring to the Agency, Grievant writes "fuck that place…." The other posters refrained from such unrefined diction Hence, considering these facts, the Hearing Officer finds the evidence abundantly shows that Grievant's situation was not similarly situated to the other employees who received less severe discipline.

Due Process

Grievant also appears to claim that the discipline is flawed because the Agency failed to afford him due process. Particularly, he contends that before being disciplined, he only received the social media posting thread, rather than all the documents compiled during the disciplinary investigation. The evidence does not demonstrate that Grievant requested other documents. Further, even if such a request had been made, the *Grievance Procedural Manual* only provides for production of such documents (i) once a grievance has been initialed and (ii) the grievant has made a request.[10] At the point Grievant contends the Agency failed to furnish documentation, no disciplined had been rendered. Accordingly, no grievance existed to allow for a document request.

[9] *See Grutzmacher v. Howard Co.,,* 4 Cir. No 15-2066 (March 20, 2017).

[10] *See* GPM §§2.4 and 8.2

Moreover, under the Standards of Conduct, due process requires only that prior to disciplinary action, the employee be given oral or written notice of the offense, an explanation of the Agency's evidence in support of the charge and a reasonable opportunity to respond. Normally, a 24 hour period is considered a reasonable amount of time to respond. However, that time may be less or more depending on the nature of the charge and the time needed to refute the charge or provide mitigating factors.[11] A review of the evidence demonstrates the Agency afforded Grievant not one, but two due process hearings over an eight day period. Further, prior to the issuance of the Group Notice, the Agency provided Grievant with the social media posting thread and notified him of polices the Agency contended he violated.

Moreover, assuming for the sake of argument, that the Agency denied Grievant pre-disciplinary due process, the Hearing Officer finds that any defect in due process has been cured by the hearing process.[12] Through this process, Grievant had the opportunity to know the allegations against him and present any defenses during the hearing.[13]

Accordingly, the Hearing Officer finds no denial of due process.

Retaliation

Grievant also avers retaliation**.** Particularly, he contends that the Group II Written Notice constitutes reprisal by the Agency for his prior successful use of the grievance procedure against the Agency in 2016.

In order to support a retaliation claim, Grievant must show (1) that he engaged in a protected activity; (2) that the Agency took adverse employment action against him; and (3) that there was a causal link between the two events. *See E.E.O.C. v. Navy Federal Credit Union*, 424 F3d 397, 406 (4th Cir. 2005). A review of the evidence shows that Grievant filed a grievance against the Agency in 2016 and was promoted as a result of that filing. His filing the 2016 grievance was a protected activity. *Id.* The evidence also shows that since that time, the Agency has taken adverse action against Grievant. Namely, Grievant received a Group II Written Notice on January 30, 2018. However, Grievant has not shown a causal link between his engaging in the protected action and receiving the group notice. Rather, the evidence demonstrates that Grievant discipline was based on legitimate reasons, a violation of Agency policy. As previously discussed, that violation entailed the posting of prohibited speech on social media. The posting, among other effects, impacted the Agency's mission for public safety; undermined Grievant's ability to supervise his subordinates; and reflected poorly on the Department and Agency.

Hence, the Hearing Officer finds Grievant has failed to substantiate Agency retaliation.

[11] *See* Agency Operating Procedure 135.1(IV)(K)(2).
[12] *See* EDR Ruling No. 2013-3572; *Va. Dep't of Alcohol Bev. Control v. Tyson*, 63 Va. App. 417, 423-28, 758 S.E. 2nd 89, 91-94 (2014).
[13] Also, if Grievant contends that once the grievance commenced the Agency failed to comply with the grievance procedure, he could have requested a compliance ruling which would have stopped the grievance timeline temporarily until EEDR issued its ruling. GPM §6.1. Grievant requested no compliance ruling from EEDR, but proceeded with the grievance. Hence, any claim of non-compliance has been waived. GPM §6.3.

Prior Discipline

In addition, Grievant argues that the Agency erred in considering his prior group notice because it was inactive.

Grievant correctly asserts that Agency Policy 135.1(V)(G)(6) provides that inactive written notices "shall not be taken into consideration in the accumulation of *Notices* or the degree of discipline for a new offense." That said, this same policy identifies failure to follow policy as a Group II offense. As previously discussed, Grievant clearly did not follow the social media policy. Accordingly, the Agency's discipline is consistent with policy and law. This is so regardless of whether the prior group notice (which the evidence shows had become inactive at the time of the current offense) was considered.

Moreover, although Major/Investigator noted that Grievant's prior discipline for a prohibited post on social media was an aggravating factor, Major had no authority to issue the current group notice before the Hearing Officer. In fact, the evidence demonstrates that the Assistant Warden issued Grievant the Group II Written Notice. The warden testified credibly that this level of notice was issued for reasons other than the prior group notice which had become inactive. Assistant Warden referenced Grievant's vulgar comment. He also noted that Grievant made more than one comment while the other employees commented one time. A snow storm had just occurred and several correctional officers had not reported to work. The warden considered the impact Grievant's comments may have had on other correctional officers who may have been telephoned to report to work.

Employee's Free Speech

For reasons already stated, the Hearing Officer finds Grievant was not denied his constitutional right to free speech.

II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."[14] EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[15] More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

(i) the employee engaged in the behavior described in the Written Notice.
(ii) the behavior constituted misconduct, and
(iii) the agency's discipline was consistent with law and policy,

[14] Va. Code § 2.2-3005 and (C)(6)
[15] *Rules for Conducting Grievance Hearings* VI(A)

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[16]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.[17]

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated.

The Hearing Officer has considered Grievant's arguments. They include, among others, that he was disciplined more harshly than others, he was denied due process, the Agency wrongly considered his prior inactive group notice, he did not read the other comments posted, and one could not ascertain that the comments were about the Agency. She has also noted aggravating factors at the time Grievant posted his comments. They include Grievant was a supervisor and as such held to a higher standard than his subordinates. Inclement weather had occurred, correctional officers had not reported to work, the prison was dealing with staffing shortages, the Agency's and community's safety were at risk, and Grievant's comments had the potential of exasperating the staffing issue at the prison.

Thus, having carefully considered all evidence of record, whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline is reasonable.

DECISION

Accordingly, for the reasons provided here, the Hearing Officer upholds the Agency's Group II Written Notice.

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[16] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[17] *E.g., id.*

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

Entered this 19th day of September, 2018.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
EEDR's Director of Hearings

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.