

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 09/13/17; Decision Issued: 09/14/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11059; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 09/28/17; EEDR Ruling No. 2018-4622 issued 11/07/17; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11059

Hearing Date: September 13, 2017
Decision Issued: September 14, 2017

PROCEDURAL HISTORY

On June 2, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for gang affiliation.

On June 21, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 18, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 13, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency since 2006. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received annual training regarding identifying offenders who were members of gangs. The online training module did not provide information discussing and showing gang hand signs.

Some inmates are members of gangs. They pose a security risk within the Department's institutions. The Agency identifies gang members and monitors their activities. One of those gangs is the bloods. Blood gang members can be identified by the red color of their clothing and hand signs.

Mr. T posted pictures on a social media website. He included pictures showing his affiliation with the bloods gang. He posted pictures of himself wearing red shirts and red hats. He posted a picture with a gray background and the word "blood" written in red. He posted a picture with a red background and showing the word "blood." It also contained an image of two hands placed together with fingers positioned to spell out "blood." One picture showed Mr. T with two other men. Mr. T was holding his hand with the tip of his index finger touching the tip of his thumb and his remaining three fingers extended. Mr. T's hand sign meant he was "throwing" a "b" for bloods.

Grievant met Mr. T in 2010. They did not marry but had a son. Grievant named her son Kar—r with a name typically spelled Car—r. They did not live together but Mr. T visited his son daily.

Grievant and Mr. T were “friends” on their social media websites. This meant that they could see each other’s posts and view their pictures.

Grievant posted on her social media webpage two pictures of her with Mr. T. In one of the pictures, Mr. T had his body behind Grievant’s body with his chin on Grievant’s left shoulder. His left arm is extended and wrapped around Grievant. He is showing a hand sign which consists of the tip of his index finger touching the tip of his thumb and his three remaining fingers extended. He is “throwing” a “b” for bloods.

Once the Agency learned of the pictures on Grievant’s social media website, the Agency began an investigation. The Agency concluded it could not continue to employ Grievant because of the heightened risk she posed by associating with someone who may be a gang member.

Grievant is not a member of a gang. She did not “throw” any gang hand signs.

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.”¹ 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.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Virginia Department of Corrections Operating Procedure 135.2 governs Standards of Ethics and Conflict of Interest. Section M provides:

1. Gang involvement by staff undermines the safety and security of our facilities, supervision of offenders in the community, and the operations of the DOC.

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

2. Gang membership or association with a gang is prohibited for employees of the Department of Corrections. It is considered a Group III Offense under the Standards of Conduct and requires termination.
3. We must be vigilant (1) in identifying any staff or vendors who are gang members or have gang affiliations and (2) in our recruitment and selection of future employees and vendors to ensure that we do not employ people who are gang members or have gang affiliation.
4. Gang membership or association with a gang is prohibited for employees of other agencies, volunteers, interns, or vendors who work within the confines of a facility or who work with offenders under DOC supervision.
5. Applicants who are gang members or associated with a gang will not be employed by the Department of Corrections.

The Department has presented sufficient evidence to show that Mr. T is a member of the bloods or identifies with the bloods gang. Grievant is associated with Mr. T because they have a child together, Mr. T visits Grievant frequently, and they remain friends. Association with a gang member is an association with a gang. The Agency has presented sufficient evidence to support its conclusion that Grievant associated with a gang thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant asserted that Mr. T was not a gang member. The evidence showed that Grievant does not believe Mr. T to be a gang member and that if she knew he was a gang member she would not have associated with him. Grievant is not a gang member. Mr. T's pictures, however, contain the word "blood" and show hand signs associated with the bloods gangs. There is sufficient evidence to show that Mr. T is a member of or closely identifies with the bloods.

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"⁴ 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-

⁴ Va. Code § 2.2-3005.

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.

The outcome of this case is unfortunate. Grievant is not a gang member and has faithfully served the Department of Corrections and the Commonwealth of Virginia since 2006. Grievant complained that she was unable to obtain a job at another State agency because DOC has listed her as ineligible to be rehired. The Hearing Officer recommends that the Agency, at its discretion, amend its database to ensure that Grievant has the opportunity to be hired by another State agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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