Issue: Group III Written Notice with Termination (conduct that undermines the Agency's mission); Hearing Date: 09/27/12; Decision Issued: 11/13/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9890; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 11/27/12; DHRM Ruling issued 12/11/12; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Wise County Circuit Court (01/08/13); Outcome: AHO's decision affirmed (05/28/13) [CL13-007].**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9890

Hearing Date: September 27, 2012
Decision Issued: November 13, 2012

PROCEDURAL HISTORY

On May 3, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for undermining the Agency's ability to provide a safe and secure living/working environment and undermining his ability to work effectively with offenders.

On May 29, 2012, 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 he requested a hearing. On October 10, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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. 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. He had been employed by the Agency for approximately ten years prior to his removal effective May 3, 2012. Grievant had no prior active disciplinary action.

On May 19, 2011, Grievant signed a certificate of receipt indicating he had been given a copy of DHRM Policy 1.75 and DOC HR Memorandum 2010-02 governing "Internet Postings." The certificate stated, "I understand that it is my responsibility to read and abide by these policies, even if I do not agree with them."

Grievant joined a social media internet website and created a web page containing his picture, name, and information about him and his interests. Grievant could share his thoughts and provide links to web pages he wished to discuss. Grievant's web page was private except that he could invite individuals to view the contents of his web page. Grievant could also view the contents of people who had given him authorization to view their web pages on the social media site. Once Grievant had invited an individual to have access to his web page, that individual could write comments and post links to other websites on Grievant's web page.

Grievant did not identify himself as an employee of the Agency. He wrote where he went to high school, where he lived, and his birth date. In Grievant's "newsfeed" he

wrote that he was going to "White Pride Day – Wednesday, March 21 at 12:00 a.m." On the page created by someone other than Grievant for White Pride Day, it shows Grievant's picture and that he is one of 110 people who are "Going" to the event. The location listed for White Pride Day was "Everywhere".[1] White Pride Day was described as:

> White pride day is just that. A day in which we take pride in our people. If you can do something like pass out flyers, Great!.

At least three people whom Grievant may or may not have known wrote "14/88" as part of their comments about White Pride Day.

Grievant linked a picture of a boot from Dr. M's web page onto Grievant's web page. On February 29, 2012 at 10: 27 a.m., Grievant commented "14/88 from USA!" At 2:04 p.m., Grievant wrote "ROAR!!! ox blood docs, strait White Laces is how I 'roll'".

Grievant sent invitations to three other employees at the Facility to access his social media webpage. Those employees did not express any objection to the content of Grievant's webpage. In March 2012, Grievant sent an invitation to the Institutional Investigator to have access to his social media webpage. The Institutional Investigator accepted the invitation and viewed the contents of Grievant's webpage. The Institutional Investigator became concerned that Grievant was associated with racist groups and reported his concerns to the Agency which began an investigation.

The Agency Investigator and the Institutional Investigator interviewed Grievant and obtained a statement from Grievant about his comments on his social media webpage. Grievant wrote, "When I typed 14/88 I was referring to the 88 precepts of National Socialism."

"14" refers to the Fourteen Words and is used predominately by white nationalists. The words are, "We must secure the existence of our people and a future for White Children?" The words were coined by Mr. L, a member of a white separatist organization.

"88 Precepts" refers to an essay or manifesto written by Mr. L. It is a guide for securing, protecting, preserving, and establishing a white society and is an expansion upon Mr. L's Fourteen Words. The 88 Precepts states, in part:

> These few pages are not intended to provide a detailed system of government, but as PRECEPTS which, when understood, will benefit and preserve a People as individuals and as a Nation.
>
> 21. People who allow others not of their race to live among them will perish, because the inevitable result of a racial integration is racial inter-

[1] Grievant asserted that he was at work on March 21, 2012.

breeding which destroys the characteristics and existence of a race. Forced integration is deliberate and malicious genocide, particularly for a People like the White race, who are now a small minority in the world.

28. The concept of a multi-racial society violates every Natural Law for specie preservation.

32. Miscegenation, that is race-mixing, is and has been, the greatest threat to the survival of the Aryan race.

37. That race whose males will not fight to death to keep and mate with their females will perish. Any White male with health instincts feels disgust and revulsion when he sees a woman of his race with a man of another race. Those, who today control the media and affairs of the Western World, teach that this is wrong and shameful. They label it "racism." As any "ism", for instance the word "nationalism," means to promote one's own nation; "racism" merely means to promote and protect the life of one's own race. It is, perhaps, the proudest word in existence. Any man who disobeys these instincts is anti-Nature.

The Gang Unit Manager testified that he has interviewed hundreds of white supremacists. He had received training from the Agency regarding identifying white supremacy. He said that white supremacy is a hate ideology. He testified that the boots Grievant displayed on his webpage were part of the uniform for members of white supremacy groups. The boots were expected to be worn when attending rallies and committing crimes. He testified that "14/88" was a code identified with white supremacy and that "14" refers to the Fourteen Words and "88" refers to the 88 Precepts. The Gang Unit Manager testified that he believed Grievant was a member of a white supremacy group although he could not identify which specific group within that ideology of which Grievant was a member. The Gang Unit Manager's testimony was credible.

Seventy-eight percent of the offenders at the Facility are non-white.

The Agency referred to videos posted by Grievant on his webpage, but did not provide the videos. The Hearing Officer will disregard the Agency's allegations against Grievant with respect to the videos on his webpage.[2]

[2] Grievant also used a word considered by homosexuals as an insult. The 88 Precepts mention Mr. L's belief that homosexuality is a crime against nature. Grievant's comments could be perceived as contrary to Executive Directive 1 which states, "Discrimination based on factors such as one's sexual orientation or parental status violates the Equal Protection Clause of the United States Constitution." Since the Agency did not take action against Grievant for this behavior, the Hearing Officer will not address it.

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."[3] 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."[4] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[5]

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct,* states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

DOC Memorandum Hr-2010-02 states, in part:

> When posting entries on the internet, employees should ensure that they are representing themselves as individuals. They should not imply or state that they represent the Department of Corrections.
>
> When posting entries on the internet, employees should ensure that they do not undermine the public safety mission of the Department. They should not post information, images or pictures which will adversely affect their capacity to effectively perform their job responsibilities or which will undermine the public's confidence in the Department's capacity to perform its mission.
>
> Additionally, since other people tagging (or posting) items to a social media page is possible, it is recommended that employees review their site regularly and remove any information that they believe is inappropriate.
>
> Below are some examples of what should not be posted: this list is not all inclusive:

[3] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[4] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[5] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

> Pictures, images or information suggesting identification with Security Threat Groups (gangs)[6] or which portray security threat groups in a positive manner.
>
> Information, images, or pictures of other conduct which would interfere with an employee's ability or effectiveness to perform assigned job responsibilities.[7]

The Agency has presented sufficient evidence to show that Grievant is either a white supremacist or closely identifies with the ideology of white supremacy. Grievant wrote "14/88" several times to show his allegiance to the words of Mr. L. Several of the precepts written by Mr. L show disdain for individuals who are not white simply because of their race. For example, Mr. L described race-mixing as a threat to the survival of the Aryan race. Grievant's expression of allegiance with white supremacists was hateful, repugnant, and inflammatory but it was clearly speech under the First Amendment. Whether the Agency can regulate Grievant's speech depends on the degree to which it is protected speech. Even hate speech can be protected speech under the First Amendment.

Grievant argued that his conduct fell within the protected category of citizen commentary on matters of public concern. In *San Diego v. Roe* 543 U.S. 77, the Supreme Court held:

> A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, *e. g., Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U. S. 589, 605-606 (1967). On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick, supra; Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States* v. *Treasury Employees,* 513 U. S. 454, 465, 475 (1995) (*NTEU*).
>
> ***

[6] The Agency did not discipline Grievant for being a member of a Security Threat Group.

[7] Agency Exhibit 2.

> This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public [543 U.S. 83] concern." 461 U. S., at 143 (internal quotation marks omitted).
>
> *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U. S., at 147.

Issues of race relations are "inherently of public concern." *Connick v. Myers,* 461 U.S. 138, 148 (1983). By expressing his alignment with the views of white supremacists, Grievant was expressing his opinions regarding the relationship of races and his expressions were matters of public concern requiring a balancing under *Pickering*.

In *Pickering v. Board of Education*, the Supreme Court held:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The interests of Grievant and the interests of the Agency must be weighed.

Grievant's views were important to him and to those who agreed with him or wished to debate his views with him. His views were not in the form of an artistic expression[8] or academic research. His views were a minority view that could be painful or uncomfortable for the majority to hear. Grievant made some effort to keep his views within the context of people he knew and believed he could trust. There is no reason to believe that Grievant implemented his views in his workplace.

The Agency has a vested interest in not only treating offenders without regard to their race but also being perceived by the public as treating offenders and Agency employees without regard to their race. The effectiveness of the Agency depends in part on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. Grievant was responsible for supervising inmates at the Facility. He had the authority to use physical force including lethal force against them when appropriate under the Agency's policies. If the Agency were perceived by employees, offenders, and/or the public as permitting employees sympathetic to white supremacy to be supervising non-white offenders, it could destroy the Agency's reputation as an unbiased organization. The Warden testified that non-white offenders could be vulnerable to working with an employee with a white supremacy ideology. He testified that Agency employees worked as a team and

[8] Compare, *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985).

having an employee with a white supremacy ideology may undermine the ability of Agency employees to work as a team.

As long as Grievant had other people viewing his web page, he could not ensure that his views would not become widely known in the community. The capacity of Grievant's statements to damage the effectiveness of the Agency in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Agency by promoting resentment, distrust and racial strife between fellow officers.

Under these circumstances, an individual correction's officer's right to express his personal opinions must yield to the public good. The Agency may take disciplinary action against Grievant for expressing on a social media webpage his views supporting white supremacy.

Grievant argued that the Agency had no evidence that he had treated any employees or offenders differently based on their race. He pointed out that his work record was exemplary and that he was well respected at the Facility because of his work performance. Grievant argued that his actions on his social media page were unrelated and separate to his work duties.

The Agency's right to discharge an employee by reason of his or her speech in matters of public importance does not depend on the Agency having suffered actual harm resulting from the speech. The employee's speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission. *See Waters v. Churchill,* 511 U.S. 661, 673-74, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (the government need only "make a substantial showing that the speech is ... likely to be disruptive"); *Connick,* 461 U.S. at 152, 103 S.Ct. 1684 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); *Heil,* 147 F.3d at 109 ("the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities"); *Jeffries v. Harleston,* 52 F.3d 9, 12-13 (2d Cir.1995) (rejecting any actual harm requirement, and stating that the proper inquiry is into "potential disruptiveness"). The Agency's interest in discharging Grievant is demonstrated if Gievant's statements create a significant risk of harm, regardless whether that harm actually materializes. Once Grievant elected to give authorization to coworkers to view and comment in his web page, his private thoughts were no longer private and could begin to affect his relationships with other Agency employees and, thus, with the Agency.

Grievant argued that there is nothing wrong with showing pride in one's race. He argued that non-white races have events showing pride in their races. Grievant's argument assumes that a display of racial pride does not also include denigration of other races. In this case, Grievant's display of white pride included the implication that non-whites were inferior or of a lesser race. His expression of white pride was also a

condemnation of other races. His comments reflected more than merely showing pride in one's race.

Grievant argued that he did not agree with all of the 88 Precepts especially those that were racially offensive. He cited several Precepts that he agreed with and argued those would reflect his personal political or social philosophy and could not be racially inappropriate. The problem with this argument is that Grievant did not make such a distinction on his social media webpage. He wrote "14/88" which suggested he supported all 88 Precepts rather than just a few of them. People viewing his webpage would not be able to discern that he objected to any racially offensive precepts.

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 Employment Dispute Resolution…."[9] 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 removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

[9] Va. Code § 2.2-3005.

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.[10]

[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].

_____
Carl Wilson Schmidt, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Sara Redding Wilson
Director

Department of Human Resource Management

101 N. 14th Street
James Monroe Building, 12th floor
Richmond, Virginia 23219
(804) 225-2131
(TTY) 711

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

December 11, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9890. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

As presented by the hearing officer, the relevant facts of this case are as follows:

> On May 3, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for undermining the Agency's ability to provide a safe and secure living/working environment and undermining his ability to work effectively with offenders.

****

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. He had been employed by the Agency for approximately ten years prior to his removal effective May 3, 2012. Grievant had no prior active disciplinary action.

On May 19, 2011, Grievant signed a certificate of receipt indicating he had been given a copy of DHRM Policy 1.75 and DOC HR Memorandum 2010-02 governing "Internet Postings." The certificate stated, "I understand that it is my responsibility to read and abide by these policies, even if I do not agree with them."

> Grievant joined a social media internet website and created a web page containing his picture, name, and information about him and his interests. Grievant could share his thoughts and provide links to web pages he wished to discuss.

Grievant's web page was private except that he could invite individuals to view the contents of his web page. Grievant could also view the contents of people who had given him authorization to view their web pages on the social media site. Once Grievant had invited an individual to have access to his web page, that individual could write comments and post links to other websites on Grievant's web page.

Grievant did not identify himself as an employee of the Agency. He wrote where he went to high school, where he lived, and his birth date. In Grievant's "newsfeed" he wrote that he was going to "White Pride Day - Wednesday, March 21 at 12:00 a.m." On the page created by someone other than Grievant for White Pride Day, it shows Grievant's picture and that he is one of 110 people who are "Going" to the event. The location listed for White Pride Day was "Everywhere." White Pride Day was described as:

> White pride day is just that. A day in which we take pride in our people. If you can do something like pass out flyers, Great!.

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The Agency Investigator and the Institutional Investigator interviewed Grievant and obtained a statement from Grievant about his comments on his social media webpage. Grievant wrote, "When I typed 14/88 I was referring to the 88 precepts of National Socialism."

"14" refers to the Fourteen Words and is used predominately by white nationalists. The words are, "We must secure the existence of our people and a future for White Children?" The words were coined by Mr. L, a member of a white separatist organization.

"88 Precepts" refers to an essay or manifesto written by Mr. L. It is a guide for securing, protecting, preserving, and establishing a white society and is an expansion upon Mr. L's Fourteen Words. The 88 Precepts states, in part:

> These few pages are not intended to provide a detailed system of government, but as PRECEPTS which, when understood, will benefit and preserve a People as

individuals and as a Nation.

21. People who allow others not of their race to live among them will perish, because the inevitable result of a racial integration is racial inter- breeding which destroys the characteristics and existence of a race. Forced integration is deliberate and malicious genocide, particularly for a People like the White race, who are now a small minority in the world.

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Seventy-eight percent of the offenders at the Facility are non-white.

The Agency referred to videos posted by Grievant on his webpage, but did not provide the videos. The Hearing Officer will disregard the Agency's allegations against Grievant with respect to the videos on his webpage.

In the Conclusions of Policy, the hearing officer stated:

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."

Virginia Department of Corrections Operating Procedure 135.1 (IV)(C), *Standards* of *Conduct,* states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards* of *Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

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Additionally, since other people tagging (or posting) items to a social media page is possible, it is recommended that employees review their site regularly and remove any information that they believe is inappropriate.

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The Agency has presented sufficient evidence to show that Grievant is either a white supremacist or closely identifies with the ideology of white supremacy. Grievant wrote "14/88" several times to show his allegiance to the words of Mr. L. Several of the precepts written by Mr. L show disdain for individuals who are not white simply because of their race. For example, Mr. L described race-mixing as a threat to the survival of the Aryan race. Grievant's expression of allegiance with white supremacists was hateful, repugnant, and inflammatory but it was clearly speech under the First Amendment. Whether the Agency can regulate Grievant's speech depends on the degree to which it is protected speech. Even hate speech can be protected speech under the First Amendment.

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A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, e. *g.*, *Keyishian* v. *Board* of *Regents* of *Univ.* of *State* of *N. Y.*, 385 U. S. 589, 605-606 (1967). On the

other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick, supra; Pickering* v. *Board* of *Ed.* of *Township High School Dist. 205, Will Cty.,* 391 u. S. 563 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States* v. *Treasury Employees,* 513 U. S. 454, 465, 475 (1995) *(NTEU).*

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This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public [543 U.S. 83] concern." 461 U. S., at 143 (internal quotation marks omitted).

Connick held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U. S., at 147.

Issues of race relations are "inherently of public concern." *Connick v. Myers, 461* U.S. 138, 148 (1983). By expressing his alignment with the views of white supremacists, Grievant was expressing his opinions regarding the relationship of races and his expressions were matters of public concern requiring a balancing under *Pickering.*

In *Pickering v. Board* of *Education,* the Supreme Court held:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The interests of Grievant and the interests of the Agency must be weighed.

Grievant's views were important to him and to those who agreed with him or wished to debate his views with him. His views were not in the form of an artistic expression or academic research. His views were a minority view that could be painful or uncomfortable for the majority to hear. Grievant made some effort to keep his views within the context of people he knew and believed he could trust. There is no reason to believe that Grievant implemented his views in his workplace.

The Agency has a vested interest in not only treating offenders without regard to their race but also being perceived by the public as treating offenders and Agency employees without regard to their race. The effectiveness of the Agency depends in part on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. Grievant

was responsible for supervising inmates at the Facility. He had the authority to use physical force including lethal force against them when appropriate under the Agency's policies. If the Agency were perceived by employees, offenders, and/or the public as permitting employees sympathetic to white supremacy to be supervising non-white offenders, it could destroy the Agency's reputation as an unbiased organization. The Warden testified that non-white offenders could be vulnerable to working with an employee with a white supremacy ideology. He testified that Agency employees worked as a team and having an employee with a white supremacy ideology may undermine the ability of Agency employees to work as a team.

As long as Grievant had other people viewing his web page, he could not ensure that his views would not become widely known in the community. The capacity of Grievant's statements to damage the effectiveness of the Agency in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Agency by promoting resentment, distrust and racial strife between fellow officers.

Under these circumstances, an individual corrections officer's right to express his personal opinions must yield to the public good. The Agency may take disciplinary action against Grievant for expressing on a social media webpage his views supporting white supremacy.

Grievant argued that the Agency had no evidence that he had treated any employees or offenders differently based on their race. He pointed out that his work record was exemplary and that he was well respected at the Facility because of his work performance. Grievant argued that his actions on his social media page were unrelated and separate to his work duties.

The Agency's right to discharge an employee by reason of his or her speech in matters of public importance does not depend on the Agency having suffered actual harm resulting from the speech. The employee's speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission. *See Waters* v. *Churchill, 511* U.S. 661, 673-74,114 S. Ct. 1878, 128 L.Ed.2d 686 (1994) (the government need only "make a substantial showing that the speech is ... likely to be disruptive"); *Connick, 461* U.S. at 152, 103 S. Ct. 1684 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); *He ii,* 147 F.3d at 109 ("the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities"); *Jeffries* v. *Harleston, 52* F.3d 9, 12-13 (2d Cir.1995) (rejecting any actual harm requirement, and stating that the proper inquiry is into "potential disruptiveness"). The Agency's interest in discharging Grievant is demonstrated if Grievant's statements create a significant risk of harm, regardless whether that harm actually materializes. Once Grievant elected to give authorization to coworkers to view and comment in his web page, his private thoughts were no longer private and could begin to affect his relationships with other Agency employees and, thus, with the Agency.

Grievant argued that there is nothing wrong with showing pride in one's race.

He argued that non-white races have events showing pride in their races. Grievant's argument assumes that a display of racial pride does not also include denigration of other races. In this case, Grievant's display of white pride included the implication that non-whites were inferior or of a lesser race. His expression of white pride was also a condemnation of other races. His comments reflected more than merely showing pride in one's race.

Grievant argued that he did not agree with all of the 88 Precepts especially those that were racially offensive. He cited several Precepts that he agreed with and argued those would reflect his personal political or social philosophy and could not be racially inappropriate. The problem with this argument is that Grievant did not make such a distinction on his social media webpage. He wrote "14/88" which suggested he supported all 88 Precepts rather than just a few of them. People viewing his webpage would not be able to discern that he objected to any racially offensive precepts.

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 Employment Dispute Resolution .... 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 nonexclusive 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 hearing officer made the following 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.**

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In his request to this Department for an administrative review, the grievant raised the following questions:

1. Whether the evidence as presented in this hearing shows that Mr. M. (grievant) in fact violated DOC Memorandum HR – 2010-12?

2. Whether the Hearing Officer's decision is consistent with the First Amendment of the United States Constitution and with Art 1 & 12 of the Constitution of the Commonwealth of Virginia and thus consistent with the public policy of the Commonwealth of Virginia?

Concerning item number one, the hearing officer determined that the agency's evidence was credible and sufficient to support that the grievant was affiliated with and/or a member of a white supremacist group. He further concluded that that affiliation and/or membership could be potentially detrimental to the image of the agency and may have a negative impact on the concept of correction officers working as a team as well as affect the care and custody of the inmates. Based on his assessment, the hearing officer upheld the disciplinary action. In his appeal to this Department, it appears that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision.

Regarding item number two, the issues the grievant raised are a matter of law. It is beyond the purview of this Agency to rule on these matters.

Based on the foregoing reasons, we will not interfere with the application of this decision.

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Office of Equal Employment Services

Thirtieth Judicial Circuit of Virginia

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May 28, 2013

Jeremy O'Quinn, Esquire
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In re: v. Virginia Department of Corrections
CL13-007

Dear Counsel:

As you know, a hearing was held on March 13, 2013, on Appellant's Petition for Appeal in the above-referenced matter. The Court has considered the arguments made at the hearing, the transcript of the November 27, 2012 hearing at the DOC grievance record, and the memoranda submitted by both parties. After a careful consideration of all issues, the Court makes the following conclusions of law.

As you know, the Court has a limited role in reviewing the State Grievance procedure. Virginia Code §2.2-3006(B) restricts the Court's review to an adjudication of whether the decision by the agency is "contradictory to law," given that determination of matters of policy is not within the authority of the courts. There is a detailed grievance system available for most state employees to challenge certain management actions.

Virginia Code §2.2-3005.1(C) states that the decision of a hearing officer within the grievance system is "final and binding if consistent with law and policy." Thus, this Court does not have authority to review the findings of fact made by the hearing officer or the Department of Human Resource Management's rulings on personnel policy.

We can dispense quickly with the first question presented by the appellant. It is clear that the hearing officer's findings of fact did identify their basis, and were supported by the evidence contained in the record.

Therefore, we move to the Constitutional question of whether the decision by the hearing officer is consistent with the First Amendment to the United States Constitution and/or Article 1, Section 12 of the Constitution of the Commonwealth of Virginia, i.e., whether the right to free speech has been implicated and violated by the decision of the hearing officer.

When a public employee asserts a First Amendment/Free Speech claim in challenging disciplinary action, a two-part test is implicated. First, we must determine whether the speech is related to a matter of public concern warranting constitutional protection. Then, if the speech does warrant such protection, the Court must determine whether the government's interests outweigh the employee's right to free speech. That balancing test, as noted by Pickering v. Board of Education, 391 US 563 (1968), requires the Court to weigh the right of the individual employee as a citizen in commenting upon matters of public concern against that of the public employer in performing its mission efficiently.

Here, it is clear that the speech in question is protected speech under the First Amendment. It is equally clear that this speech threatened the efficient and safe operations of the Department of Corrections facility in question, and the hearings officer was correct in reaching that conclusion.

Appellant posted racist and hateful language, subscribing to a views regarding white supremacy, on a public site, and invited others to participate. Whether appellant is actually a white supremacist, or whether he genuinely subscribes to these views is not relevant. Appellant was a correctional officer whose personal safety requires that he receive the support of his fellow officers. Further, and perhaps most importantly, the Department of Corrections has a legitimate interest in ensuring that the DOC be perceived as treating inmates under its care fairly and humanely, without racial or ethnic bias. (The Court must note, however, that an argument that appellant does not actually subscribe to these views seems ludicrous, in light of the substance of the online postings, which include racist code language and indications of his alignment with white supremacist ideologies.)

It is uncontested, as well, that the DOC has a written social media guideline – Memorandum HR-2010-02 – which cautions employees about improper postings online. The specific purposes of that guideline are to protect the public perception of the Department, public safety, and the ability of employees to carry out the responsibilities of employment. The language used by appellant clearly fits within the examples provided to employees in this guideline, and appellant had fair warning through the written policy that such language was in violation of DOC policy.

The DOC has legitimate concerns in not allowing such public postings, especially when the employee invites co-workers into the "discussion," as it were. As such, this Court finds that the Department of Corrections has a compelling interest in providing a safe and humane environment for its staff and inmates, as well as an interest in presenting itself to the public as a responsible custodian of a public trust. Those compelling interests outweigh appellant's right to free speech in this instance.

Therefore, the Court sustains the hearing officer's decision approving the termination. Counsel for appellee is directed to prepare an order consistent with the Court's ruling today.

Sincerely,

Chadwick S. Dotson
Judge