

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 02/18/16; Decision Issued: 03/04/16; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10742; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10742
HEARING DATE: February 18, 2016
DECISION ISSUED: March 4, 2016

PROCEDURAL HISTORY

Grievant received a Written Notice on November 3, 2015¹ for actions which occurred on October 12, 2015. Grievant was charged with violating Operating Procedure Policy § 310.2. There were two meetings prior to the Written Notice. A Hearing Officer was assigned to this matter on December 15, 2015. Due to change in the Agency Advocate, a Pre-Hearing Conference was delayed to January 7, 2016. The hearing was finally scheduled (rescheduled several times) on February 18, 2016.

APPEARANCES

Agency Advocate
Agency representative as witness
Agency additional 3 witnesses
Grievant as witness

ISSUES

- 1) Did Grievant violate Operating Procedure 310.2 regarding his use of information technology, specifically communication made on his family personal Facebook page?
- 2) Was Agency's discipline consist with law and policy?
- 3) Are mitigating circumstances present that would impact the discipline?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

¹ Agency exhibit 7

APPLICABLE LAW and POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Virginia Department of Corrections Operating Procedure 135.1 (IV) (C), *Standards of Conduct*, states, "[t]he list of offenses in the 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."²

The Agency relies on Operating Procedure 310.2 VI B (10) a,b; Operating Procedure 310.2 VI B (10) d; Operating Procedure 310.2 VI B (10) e; Operating Procedure 310.2 VI B (10) h4; Operating Procedure 135.1 "Standard of Conduct" V,D³

Operating Procedure 310.2 VI B (10) a "When posting entries on the internet, employees should ensure that they do not undermine the public safety mission of the DOC, impair working relationships of the DOC, impede the performance of their duties, undermine the authority of supervisors, diminish harmony amount coworkers, or negatively affect the public perception of the DOC. 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 DOC's capacity to perform its mission."

Operating Procedure 310.2 VI B (10) b "Employees' 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 First Amendment and may form the basis for discipline if deemed detrimental to the DOC. DOC employees should assume that their speech and related activity will reflect upon their office and the DOC."

Operating Procedure VI B (10) d "For safety and security reasons, DOC employees' are cautioned not to disclose their employment with the DOC or post information pertaining to any other employee of the DOC without his or her permission "

Operating Procedure VI B (10) e "Engaging in prohibited speech noted herein will be considered a violation of Operation Procedure 135.1, Employee Stands of Conduct, and may be subject to disciplinary action up to and including termination."

² Agency exhibit 4

³ Agency exhibit 3

Operating Procedure VI B (10) h4 “References to any employment with the DOC that are likely to undermine or impair an employee’s ability to function as a DOC employee or interfere with the DOC’s mission reputation, or the effectiveness or efficiency of the DOC’s activities”

Operating Procedure 135.1 “Standard of Conduct” V D.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

On the afternoon of October 12, 2015 Grievant posted language on his personal Facebook page that contained words regarding different ethnic groups and used the word “niggers” to refer to one of the groups of people.⁴ Grievant did not deny that he wrote the comments. A Facebook “friend of a friend” saw the comments and sent an email to the Richmond VADOC office, registering her complaint.⁵ Grievant had, in the past, identified himself on his Facebook as an employee of the Department of Corrections, which affiliation was noticeable on his Facebook page.⁶

Grievant admitted it was his duty to be aware of DOC policies. He did admit to not always reading policy updates. The policies that are pertinent to this case were updated on August 25, 2015.⁷ This date was prior to Grievant’s actions in October of 2015. Grievant has been an employee as a Correctional Officer for the Department of Corrections for approximately 3 years and he had no previous disciplinary actions.

Grievant feels his discipline is too harsh.⁸ He believes consideration should be given since his comments were (loosely quoted), “between two friends” “Not intended for the public” and spoken about groups of people and not a specific person.⁹

OPINION

Using derogatory words or references to describe an ethnic or social group is not acceptable behavior. It is a further concern when the narrator holds the position of authority over others. In this case, being a Correctional Officer is having a degree of control over a diverse

⁴ Agency exhibit 2

⁵ Agency exhibit 1

⁶ Agency exhibit 9

⁷ Agency exhibit 3

⁸ Agency exhibit 6

⁹ Testimony of Grievant

group of people. Comments that may show preference of one group over another is not in keeping with the performance expected of a Correctional Officer.

Restrictions in a Correctional Officer's behavior are codified by Operational Procedures. By taking a position at the Department of Corrections a Correctional Officer agrees to the terms of employment. Grievant should have known that he was breaching the rules and should have expected to be reprimanded.

The standards for mitigating a discipline are as follows:

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 Resources Management..." 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 where (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 reviewing the Operational Procedure rules of Operational Procedure 310.2 as listed supra in this decision. I find the Grievant did violate Operating Procedure 310.2. I do find that the Agency's was consistent with policy and I do not find any mitigating circumstance that would reduce the Agency's discipline.

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:

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

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

Sondra K. Alan, Hearing Officer

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.