

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 01/23/18; Decision Issued: 03/16/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11125; Outcome: No Relief – Agency Upheld; **Administrative Review**: Ruling request received 03/30/18; EEDR Ruling No. 2018-4700 issued on 05/18/18; Outcome: AHO's decision affirmed; **Judicial Review**: Appealed to Augusta County Circuit Court 06/14/18; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11125

Hearing Date: January 23, 2018
Decision Issued: March 16, 2018

PROCEDURAL HISTORY

On October 10, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On October 6, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 20, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. Grievant had been employed by the Agency for approximately 20 years. She received an Exceeds Contributor rating on a recent performance evaluation. Grievant was a loyal employee who worked well for the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Approximately 95% of the offenders leaving the Facility immediately entered probationary status.

The Probationer was incarcerated at the Facility where Grievant worked. Grievant knew the Probationer. He was released from the Facility, but remains on active probation until May 2, 2019. The Probationer lived within a 45 minute drive of Grievant's location. The Probationer had a Facebook account.

Grievant had a Facebook account. Grievant's 18 year old Daughter set up the Facebook account for Grievant. Grievant's Facebook account was "public" meaning that people who were not Grievant's "friends" could see the contents of Grievant's Facebook account.

Grievant had approximately 599 "Friends" through her Facebook account. Grievant and her family own and operate a farm. They bought, sold, and traded items

for their business as well as livestock using Grievant's Facebook account. Approximately 75 percent of those friends related to Grievant's business and were not close personal friends.

Grievant had internet access at her home. She had a computer in her home and could access Facebook from her computer. Grievant usually accessed her Facebook account using her cell phone rather than her computer.

Grievant gave her Daughter permission to access Grievant's Facebook account. The Daughter sometimes used Grievant's cell phone to access Grievant's Facebook account. She has accepted friend requests made to Grievant's account. Grievant's husband and adult son also were able to access Grievant's Facebook account.

Grievant's Daughter had her own Facebook account. She had approximately two thousand Facebook friends. She sometimes received friend requests as a group. She sometimes accepted them all at once or accepted them after reviewing each one. She accepted friend requests even if she did not know the person making the request. The Daughter had a personal relationship with only a small portion of her Facebook friends.

During the course of an investigation into another matter, the Agency learned on September 11, 2017 that Grievant had a Facebook account and was "friends" with the Probationer.

On August 9, 2017, the Probationer wrote on his Facebook account:

Passed my urine screen this morning so getting back to work Monday with [Company], a place I can honestly grow and probably work there for the next 20 years.

Approximately 42 people including Grievant responded to the Probationer's post by indicating that they "liked" his post. Three people responded by indicating that they "loved" his post.

During the Agency's investigation, Grievant admitted that she knew the Probationer had been an offender at the Facility but she was not aware that he was still on probation.

Rather than interfering with the Agency's investigation, Grievant continued to show the Probationer as a Facebook friend until she obtained permission from the Agency to remove him.

There is no reason to believe Grievant had any additional contact with the Probationer other than through her Facebook account.

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

Except for preexisting relationships ..., fraternization or non-professional relationships between employees and offenders are prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last.⁴

Group III offenses include, “[f]raternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from DOC custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis.”⁵

Fraternization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁶

Black’s Law Dictionary (6th edition) defines “associate”, in part, “Signifies confederacy or union for a particular purpose, good or ill.” Webster’s New Universal Unabridged Dictionary defines “associate”, in part:

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).

⁴ DOC Operating Procedure 135.2 IV(C)(1).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D)(2)(ee).

⁶ Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees’ Relationships with Offenders.

2. to join as a companion, partner, or ally: *to associate oneself with a clause.* *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. To join together as partners or colleagues. *** 8. A companion or comrade: *my most intimate associates.* 9. A confederate; an accomplice or ally: criminal associates.

Grievant had a Facebook account that she accessed to connect with people she knew well and people she did not know well. By linking her Facebook account with the Probationer's Facebook account and by liking one of his posts, Grievant associated with the Probationer. Her communication was not related to the Agency's business or her duties at the Facility. It was a non-professional communication. The Agency has established that Grievant fraternized with the Probationer 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 has the burden of proof to show her defenses. Grievant argued that her Daughter may have accepted the Probationer's friend request and may have liked the Probationer's post. Asserting that her Daughter may have connected with the Probationer is not the same as proving her Daughter was the one who connected with the Probationer. While it may have been the case that the Daughter connected with the Probationer, it may also have been the case that Grievant did so, which is consistent with the Agency's assertion.

Grievant argued she did not know the Probationer remained under the Department's supervision. Grievant remembered the Probationer and had access to VACORIS. She could have obtained information about the Probationer's status. Given that 95 percent of offenders leaving the Facility remained under Agency supervision, Grievant should have recognized the risk that the Probationer may have been in probation.

The Agency could have adequately addressed Grievant's behavior with a level of discipline that did not include removal. Whether it is wise to remove a 20 year employee with favorable evaluations in this case is open to question. Once the Agency's meets its burden of proof, however, the Hearing Officer is required to defer to the Agency's judgment as to the level of disciplinary action even if the Agency's decision is unwise.

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"⁷ 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

⁷ Va. Code § 2.2-3005.

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 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]

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

[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