Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 01/28/19; Decision Issued: 01/30/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11300; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11300

Hearing Date: January 28, 2019
Decision Issued: January 30, 2019

PROCEDURAL HISTORY

On October 29, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy.

On November 28, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 10, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2019, 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. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had an intensive treatment program for inmates at the Facility. The Agency took several inmates from the segregation unit and placed them in general population. The inmates began receiving treatment to assist with their mental health and other treatments needs in what the Agency considered as a "healing environment."

Four inmates graduated from the program. The Agency wanted to acknowledge their success by placing a picture of the inmates on the Agency's Facebook page. The Agency took a picture of the four inmates standing side by side holding their graduation certificates as they smiled for the picture. The Agency used its public Facebook page as a means to communicate with the public including inmates' families. All of the inmates had mental health concerns including one who would sometimes cut himself.

Grievant received training regarding the Agency's social media policy. He was told by the Assistant Warden during staff meetings to be careful regarding what he posted on Facebook.

Grievant had a personal Facebook page. On his Facebook page he described himself as "Correctional officer at [Facility]."

Grievant used his Facebook account to post a comment on the Agency's Facebook page under the picture of the four inmates. On or about October 9, 2018, Grievant wrote:

> Ain't that some s—t. [First word of Facility's name] finest. Twettle dee, twettle dum, cutty mccutterson, and [First name of Inmate D] f—king doughnuts. What a f—king sorry crew. Oh I shouldn't think that or say it it defeats the purpose of this lovely dove of a program we wasted money on.
>
> F—k these sorry f—king inmates. Anybody has a problem with that can kiss my hard working ass.[1]

Agency staff viewed Grievant's post and considered it inappropriate. A "concerned citizen" called the Facility to complain about the post. The Agency understood this person to be a member of the public who had read the Agency's Facebook page and read Grievant's comment about the four inmates.

When the Agency questioned Grievant about his post comment, Grievant admitted making the post. He explained his comments reflected poor judgment arising from his frustration with the Facility and stress he had been experiencing.

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."[2] 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."[3] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[4]

Agency Operating Procedure 310.2 governs Information Technology Security. Section VI(B)(10) provides:

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[1] Agency Exhibit 7.

[2] Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

[3] Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

[4] Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

10. When using electronic communications 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 DOC mission and performance of their duties.

> When utilizing social media for posting and communicating information for business purposes, users should be respectful of the DOC, other employees, customers, vendors, and others. Be aware of any associated potential liabilities and obtain consent prior to communicating or posting information about the workplace.

11. When posting personal entries on the Internet, employee shall ensure that they are representing themselves as individuals. They shall not imply or state 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 DOC, impair working relationships with the DOC, impede the performance of their duties, undermine the authority of supervisors, diminish harmony among coworkers, or negatively affect the public perception of the DOC. They should not post information, images, or pictures that 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.
>
> DOC employees should assume their speech and related activity will reflect upon their office and the DOC. ***
>
> The following are some examples of what should not be published, posted, or displayed, this list is not all inclusive:
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> > Comments or information regarding a specific offender or information which would reasonably identify a specific offender.
> > Confidential information about offenders, DOC programs, facilities or offices. ***
> > Derogatory or offensive information or commentary about offenders in general.[5]

Grievant's post on the Agency's Facebook page was contrary to the Agency's policy. Grievant's post undermined the Agency's business purpose of treating inmates in a healing environment. His post was disrespectful to the Inmates and the Agency. Grievant's post undermined the public's confidence in the Agency's capacity to perform

[5] Agency Exhibit 6.

its mission as evidenced by the complaint from a concerned citizen. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. The DOC may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

In this case, the Agency has presented sufficient evidence to elevate the disciplinary action from a Group II Written Notice to a Group III Written Notice because of Grievant's public undermining of the Agency's mission and image. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant acknowledged that his behavior was a mistake of judgment but contends it arose from his frustration with the Agency and the stress related to working in a difficult job. Although these factors may have explained Grievant's behavior, they do not serve to excuse his actions.

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 …."[6] 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.

Grievant contends the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. Grievant presented evidence relating to Corrections Officer T who is charged with possession of marijuana and received Community Service. Corrections Officer T was also charged with driving with a revoked or suspended license. Corrections Officer T was convicted of driving under the influence of drugs. Grievant argued that the Agency allowed Corrections Officer T to remain an employee even though she had violated criminal law, yet the Agency chose to remove him even though he violated no laws. In order to establish the inconsistent application of disciplinary action, an employee must show that the Agency treated him or her differently from a similarly situated employee. An employee who has violated

[6] Va. Code § 2.2-3005.

drug and driving laws is not similarly situated employee to an employee who has posted inappropriate messages on Facebook. Although it may have appeared unreasonable for the Agency to have retained Corrections Officer T, she was not similarly situated with Grievant. In light of the standard set forth in the Rules, 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

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Carl Wilson Schmidt, Esq.
Hearing Officer