

Issue: Group III Written Notice with Termination (gang membership or association);
Hearing Date: 04/16/13; Decision Issued: 04/22/13; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10049; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10049

Hearing Date: April 16, 2013

Decision Issued: April 22, 2013

PROCEDURAL HISTORY

On February 8, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for gang membership or association.

On March 1, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 19, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 16, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 prior active disciplinary action. On February 25, 2011, Grievant received a Group I Written Notice for not wearing his hat or headgear when outside. On August 8, 2011, Grievant received a Group I Written Notice for failure to report to work or call in for duty.¹

On January 6, 2013, Grievant was arrested by the Deputy Sheriff regarding his participation in an alleged crime. The Deputy Sheriff asked Grievant to prepare a written statement. He signed the statement and wrote "All rights reserved." She took his fingerprints and on the document containing his fingerprints he wrote, "All rights reserved." The Deputy Sheriff recognized use of the phrase "All rights reserved" as a phrase used by the sovereign citizens. She asked Grievant if he was a sovereign citizen. Grievant responded in the affirmative. She then notified the State Police that Grievant said he was a sovereign citizen. Grievant's name was placed in the State Police's database as a sovereign citizen.

The Agency presented testimony from the DOC Manager of the Gang Unit. He testified that the sovereign citizens are a domestic terrorist group or gang. Members of the organization behave in a militant manner towards judicial and law enforcement officers. Since 1990, sovereign citizens have killed 42 law enforcement officers. The Agency has inmates who are sovereign citizens.

¹ Agency Exhibit 5.

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

The Department has a zero tolerance for gang activity by offenders, volunteers, visitors, vendors, contractors, and employees. DOC Policy 427.1 states, “Any ex-offender, employee, intern, volunteer, vendor, visitor or other person determined to be actively affiliated with a gang is prohibited from employment or entrance into a DOC facility.”

The Agency has presented sufficient evidence to support its allegation that Grievant is affiliated with the sovereign citizens. He used a phrase associated with the sovereign citizens and he admitted to the Deputy Sheriff that he was a sovereign citizen. The Agency established that the sovereign citizen organization is more than an organization with political views that would otherwise be protected by State policy and that it is an organization with a history of its members engaging in criminal violence. The Agency has presented sufficient evidence to support the issuance of a Group III offense. Upon the issuance of a Group III offense, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he was not a sovereign citizen. He stated he wrote “All rights reserved” because he wished to reserve to right to amend his statement in the future if he felt doing so was necessary. He also claimed he was being sarcastic when he wrote the phrase. He said that he was being sarcastic when he told the Deputy Sheriff that he was a sovereign citizen. Grievant’s argument fails. The Deputy Sheriff did not believe Grievant was being sarcastic when he admitted he was a sovereign citizen. Providing fingerprints on a form is not a form that would likely need to be amended. Writing “All rights reserved” on a document with fingerprints does not likely convey a message of sarcasm.

Grievant argued that he suffered from post traumatic stress disorder and that the Agency failed to provide accommodation. The evidence showed that Grievant did not disclose his mental health concern to the Agency. To the extent Grievant suffers from a mental health illness, the Americans with Disabilities Act would not require an

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

accommodation that results in the reversal of disciplinary action. Grievant did not establish that his post traumatic stress disorder caused him to state incorrectly that he was a member of the sovereign citizens.

Grievant argued that the Agency failed to provide him with the opportunity to confront his accuser and various other procedural due process rights. Grievant had the opportunity to learn all of the Agency's evidence against him and to challenge that evidence as part of the hearing process. To the extent the Agency failed to provide him with procedural due process, that defect was cured by the hearing process.

Grievant argued that he should have been permitted to transfer to another position within the Agency at another facility. The Agency may chose to do so but is not obligated to transfer an employee in lieu of removal. Given the Agency's zero tolerance for gang affiliation, it chose to remove Grievant.

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"⁵ 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

⁵ Va. Code § 2.2-3005.

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.⁶

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.