

Issue: Group III Written Notice with Termination (conduct that undermines the Agency's reputation); Hearing Date: 02/13/15; Decision Issued: 03/03/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10535; 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: 10535

Hearing Date: February 13, 2015
Decision Issued: March 3, 2015

PROCEDURAL HISTORY

On December 8, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for making a racial slur in a public manner.

On December 20, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 13, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 13, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Time Computation Specialist at one of its offices. One of Grievant's duties included interpreting court orders to determine end dates of inmate sentences. She had been employed by the Agency for approximately 29 years. No evidence of prior active disciplinary action was introduced during the hearing.

African Americans make up a majority of the Agency's inmates. Almost half of the Agency's employees are racial minorities.

Grievant set up a web page within a social media website. The information she wrote on her web page was accessible to the public. Although she was currently employed by the Agency, she wrote on her web page that she "Worked at Virginia Department of Corrections.

A woman wrote an article criticizing the two daughters of an African American politician. Below the article was a section for readers to post comments about the article. Grievant posted a comment using her social media web page. Her post revealed her picture and her first, middle, and last names. Grievant wrote:

She spoke the truth and I'm proud of her. The ni--lets either need to be taught better or not appear in public.

Anyone clicking on Grievant's name could access her web page and determine her affiliation with the Department of Corrections.

A person read Grievant's comment about the article and was offended. On December 1, 2014, the person sent an email to the Agency Head and two Virginia news organizations. The email said:

I have to say I am truly disgusted by a Dept of Corrections employee, [Grievant's name] comments calling the [politician's] daughters "ni—lets."

Is this how government employees are expected to behave? Maybe, just maybe you should investigate how she treated the black inmates when she worked there ...¹

The Agency Head was offended by Grievant's email and became concerned about how Grievant's action might affect the public's perception of the Agency. The Agency began an investigation. Several Agency employees were given responsibility to contact the two news organizations to comment about to the person's email and Grievant's comments.

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

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."

¹ Agency Exhibit 3.

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).

DHRM Policy 1.75 governs Use of Electronic Communications and Social Media. Section C(3) requires employees to “[b]e clear that their communication or posting is personal and is not a communication of the agency or the Commonwealth when using electronic communications or social media for personal use, including personal use of social media outside of the work environment.”

DOC Operating Procedure 310.2 governs Information Technology Security. Section VI(B) provides, in part:

9. When using electronic communication 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.

10. 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.

a. 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.

In the Agency’s judgment, Grievant’s behavior rises to the level of a Group III offense. The Agency has presented sufficient evidence to support its conclusion. The word “ni--lets” refers to the children of African Americans and incorporates the word “ni—er”. “Ni—er” is a racial slur used to describe and demean African Americans. Grievant associated her racially offensive comment with the Department of Corrections by listing her background as someone who worked for the Agency. A significant portion of the Agency’s inmates and employees are African American. Grievant’s public comment undermined the Agency’s mission to treat employees and inmates appropriately and without regard to race.

Grievant argued that the discipline should be reduced because she had not engaged in racially objectionable behavior during the performance of her job duties and with respect to her interactions with co-workers. No evidence was presented to refute this assertion and Grievant presented witnesses whose testimony was consistent with her assertion. Grievant’s argument fails because 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. The fact that Grievant held a position in which she could discriminate against inmates based on their race or disrupt the workplace by treating African Americans employees inappropriately because of their race is a sufficient basis to support the Agency's decision to take disciplinary action.

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.

Grievant argued that some punishment was appropriate but removal was too harsh for someone who never intended to bring shame to the Agency. The Hearing Officer's authority to mitigate begins only with a finding that the disciplinary action exceeds the limits of reasonableness. In this case the Agency has presented sufficient evidence to support its decision to remove Grievant. This decision does not exceed the limits of reasonableness. 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 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:

⁵ *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.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.