

Issue: Group II Written Notice (conduct unbecoming an officer); Hearing Date: 04/30/15; Decision Issued: 05/29/15; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10577; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10577  
HEARING DATE: April 30, 2015  
DECISION ISSUED: May 29, 2015

PROCEDURAL HISTORY

Grievant received a Written Notice<sup>1</sup> on October 23, 2014 for an action which occurred on August 8, 2014. Grievant was charged with violating Operating Procedure Policy § 101.3.<sup>2</sup> There were five meetings prior to the Written Notice. Grievant went through a first step review on December 4, 2014 a second step review on December 22, 2014 and a third step review on January 30, 2015. A Hearing Office was assigned to this matter on March 30, 2015. A phone conference was held on April 9, 2015. The hearing commenced on April 30, 2015.

APPEARANCES

Agency Attorney  
Agency representative as witness  
Agency additional 2 witnesses  
Grievant's Advocate  
Grievant  
One sworn statement of behalf of Grievant

ISSUES

- 1) Did Grievant violate Policy 101.3 Standards of Ethics and Conflict of Interest? Specifically 101.3 IV B.1<sup>3</sup> "Employee of the Department of Corrections shall conduct themselves by the highest standards of ethics so that their actions will not be constructed as a conflict of interest or conduct unbecoming to an employee of the Commonwealth" and 101.3 IV A.2<sup>4</sup> "Respect: I will respect the rights of all people. All individuals will be valued for their own uniqueness and treated with dignity" and 101.3 IV A2<sup>5</sup> "Professionalism: I will carry out my duties in an objective and competent manner with respect for humanity."
- 2) Whether mitigating circumstances were applied to discipline?
- 3) Whether Grievant's conduct was protected by Freedom of Speech as provided by the Constitution of the United States?

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<sup>1</sup> Agency Exhibit 3

<sup>2</sup> Agency Exhibit 4 Standards of Ethics and Conflict of Interest

<sup>3</sup> Agency Exhibit 4 page 2 and 3

<sup>4</sup> Agency Exhibit 2 page 2

<sup>5</sup> Agency Exhibit 2 page 2

## 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.

## APPLICABLE LAW and POLICY

The Agency relies on Operating Procedure 101.3 “Standards of Ethics and Conflict of Interest”.<sup>6</sup> and Operating Procedure 135.1 “Standard of Conduct”<sup>7</sup>

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.”

## FINDING OF FACTS

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

On August 8, 2014 Grievant was on vacation. He was approved for vacation time by his Agency. On that day he was called on his cell phone “at 6:00 am” from an Agency employee questioning why he was not at work. Agency admits an error was made by Agency in not properly recording the leave time. This prompted the call to Grievant. Grievant was upset to be called at 6:00 am on his vacation day and later made comments

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<sup>6</sup> Agency Exhibit 4

<sup>7</sup> Agency Exhibit 10. The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

regarding the call on his Facebook. The comments received responses and at least one responder was a co-worker at the Agency.

Grievant's comments were very derogatory towards his Superiors and foul language was used. Grievant did not identify anyone by name and did not identify his employer. Grievant's posts were in part,

“...when some stupid ass didn't do their paperwork”... “when someone from the damn place calls me at 6:00 am when I am scheduled off they won't like me ha” “...but the stupid fucks must not have put it in the books”<sup>8</sup>

Grievant admitted he posted these comments.

### OPINION

Much evidence was given at hearing as to Social Media policies. However, Grievant was not charged in his written notice with violation of any Social Media policies so this issue will not be addressed. Grievant was charged with unethical and unbecoming behavior. Surely Grievant would have expected to be terminated had he, in the presence of other officers, confronted his Superior face to face and made the comments that he did. The fact that the comments were made in a less direct manner does not lessen the lack of respect for authority at the Facility. Any number of people could have seen the posts and in fact at least one other employee of the Agency did see the comments. Grievant was aware of Operating Procedure 101.3 and did clearly show a lack of respect in his comments.

Agency considered a Group II action<sup>9</sup> coupled with a Group I action.<sup>10</sup> Agency considered Grievant's good previous record and the fact that Grievant admitted to the error of his behavior. As such, the Group II, which could include up to 80 hours of suspension, was issued without any suspended time.

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 Employment Dispute Resolution...” Under the Rules for Conducting Grievance Hearings, “[a] hearing office must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. In light of this, the Hearing Officer finds the Agency had properly considered mitigating the disciplinary action.

Grievant contended that his First Amendment rights protected his speech (posting) as it was personal and did not mention any person's name, or the name of his employer. However, Grievant was aware of Operating Procedure 101.3 and in order to be an employee of the Agency Grievant was expected to follow the policy. The Agency

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<sup>8</sup> Agency Exhibit 1

<sup>9</sup> Agency Exhibit 10 Page 8, VC2A “...comply with applicable established written policy”.

<sup>10</sup> Agency Exhibit 10 page 7, VB2C

had a compelling reason to expect its employees to respect their superiors. The facility requires a military like atmosphere to keep order and protect the public. Grievant's posts showed a significant lack of respect.

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, e.g., *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-606 (1967). On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the rights of employees to speak on matter of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick, supra*; *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968). Outside of this category, the Court had held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States v. Treasury Employees*, 513 U.S. 454, 465, 475 (1995) (NTEU).

The Agency was justified in limiting such actions and speech and Grievant was on notice his disrespectful behavior would not be accepted.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>11</sup>

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

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Sondra K. Alan, Hearing Officer

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<sup>11</sup> 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.