Issues: Two Group II Written Notices with Termination (misrepresentation of Agency); Hearing Date: 06/17/19; Decision Issued: 07/08/19; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11347; 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: 11347

Hearing Date: June 17, 2019
Decision Issued: July 8, 2019

PROCEDURAL HISTORY

On March 4, 2019, Grievant was issued a Group II Written Notice of disciplinary action with removal for misrepresentation of Agency. On March 4, 2019, Grievant was issued a second Group II Written Notice for misrepresentation of the Agency.[1] Grievant was removed from employment based on the accumulation of disciplinary action.

On April 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 22, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

[1] Grievant elected to contest only these two Group II Written Notices.

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 Virginia Department of Social Services employed Grievant as a Program Administrative Specialist I at one of its facilities.

Grievant had prior active disciplinary action. She received a Group II Written Notice on March 4, 2019 casting the Agency in a negative light. On March 4, 2019, Grievant received a Group I Written Notice for casting the Agency in a negative light.

The Agency's clients include custodial and non-custodial parents.

Grievant had a Facebook account. Her privacy settings allowed the account to be viewed by anyone with access to Facebook.

On September 10, 2018, Grievant made an entry on her Facebook page stating:

> Fyi: y'all still gotta pay child support even though it's a hurricane coming. Don't spend all your money on weed, snacks, and liquor. And wear condoms. Geesh
> Mychildsupport.dss.virginia.gov[2]

[2] Agency Exhibit 1.

On January 29, 2019, Grievant made an entry on her Facebook page stating:

> THESE ARE MY PERSONAL COMMON SENSE TIPS FOR MEN IN REGARDS TO DCSE, AND/OR LIFE IN GENERAL. APPLY AS NEEDED: 1: Never trust a big butt and a smile. 2. My military dudes, women in this area have been groomed on how to get a military man. Be ever vigilant about who you lay with. 3. Your caseworker knows that not all men are deadbeats. 4. We have a job to do, don't take it personal. 5. Stop laying with everything moving and creating kids and them complain about all your child support orders. Blame yourself. 6. We take the same enforcement actions against women when they are ordered to pay. Women are just smarter at hiding than y'all. 7. We cannot make her be a better mother. 8. Watch out for the red flags. Y'all see em, y'all just ignore them cuz the coochie good. 9. GET A DNA TEST BEFORE SIGNING THE BIRTH CERTIFICATE AND/OR ACKNOWLEDGMENT OF PATERNITY. 10. If y'all are separated and she has a baby by another dude, guess what, you're still there legal father. You will need to file paperwork to disestablish paternity. Just get a divorce already. 10. Don't do your homegirl a favor and say ur the dad so she can get benefits. It will bite you in the ass. 11. If you have a bitter bm, just get an atty to navigate the process of dcse and custody. 12. Your homeboys $65 order has nothing to do with you. 13. All ya orders charge 6% interest on unpaid support. YOUR CW DOES NOT GET PAID THAT MONEY. IT GOES TO THE CUSTODIAL PARENT OR BACK TO THE STATE FROM WHEN THEY GOT TANF.

An individual commented on Grievant's post and discussed his experience with DCSE. Grievant replied:

> Oh I remember. The system is f—ked.[3]

On February 9, 2019, several Agency employees who knew Grievant reported the matter to the Agency's managers. One employee told the Supervisor that Grievant's posts were "wrong" and that "everyone knows" about them.

CONCLUSIONS OF POLICY

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."[4] Group II offenses "include acts of misconduct of a more serious

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[3] Agency Exhibit 2.

[4] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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."

Under the Standards of Conduct, employees:

> are employed to fulfill certain duties and expectations that support the mission and values of their agencies and are expected to conduct themselves in a manner deserving of public trust. ***
>
> Employees who contribute to the success of an agency's mission:
>
> - Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers. ***
>
> - Make work-related decisions and/or take actions that are in the best interest of the agency. ***
>
> - Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Group II Written Notice – September 10, 2018 Offense

Grievant's September 10, 2018 post served to demean non-custodial parents by suggesting they (1) might believe a hurricane would excuse their obligation to pay child support, (2) would engage in criminal behavior by purchasing marijuana, (3) wasted money on snacks and liquor and (4) engaged in unprotected sexual activity.

Grievant established a connection between her behavior and the Agency by referring to an Agency child support website.

Grievant's behavior was not consistent with her obligation to respect customers, act in the Agency's best interest, and support the Agency's mission. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for misrepresentation of the Agency.

Group II Written Notice – January 29, 2019 Offense

Grievant's January 29, 2019 post served to demean custodial and non-custodial parents by suggesting some (1) custodial parents trust a big butt and a smile, (2) custodial parents groom military men (3) non-custodial parents were "laying with everything moving", and (4) non-custodial parents ignore the red flags because the "coochie good". Grievant also suggested the Agency's child support enforcement system "was f—ked".

Grievant established a connection between her behavior and the Agency by referring to Agency policies and caseworkers.

Grievant's behavior was not consistent with her obligation to respect customers, act in the Agency's best interest, and support the Agency's mission. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for misrepresentation of the Agency.

Accumulation of Disciplinary Action

Upon the accumulation of two or more Group II Written Notices, an agency may remove an employee. Grievant has now accumulated more than two Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Defenses

Grievant argued that her posts reflected her personal opinions and did not affect the Agency. Grievant's posts were her personal opinions but those opinions were made by someone employed by the Agency. Her actions risked damaging the Agency's reputation.

Grievant claimed her posts were protected as "free speech." In *San Diego v. Roe,* 543 U.S. 77 (2004), the Supreme Court held:

> 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 right of employees to speak on matters 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 has 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*).
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> This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of "public [543 U.S. 83] concern." 461 U. S., at 143 (internal quotation marks omitted).
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> *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U. S., at 147.

The threshold question in this case is whether Grievant's postings were a matter of public concern rather than on matters of personal interest. The majority of Grievant's comments were directed at providing advice to custodial and non-custodial parents who were clients of the Agency. Grievant's comments were not a matter of public concern but rather her opinions reflecting her personal interest in the Agency's clients.

Grievant presented evidence that she had suffered from acute stress and panic disorder, post-traumatic stress disorder, and severe depression. Grievant did not establish that her mental health concerns caused her to make the September 10, 2018 and January 29, 2019 Facebook posts.

Grievant asserted that her September 10, 2019 post was "in regard to my own child support enforcement case that was directed toward the absent parent on my case." Grievant's argument is not persuasive. Nothing in her post shows it is directed to her own child support enforcement case. She refers to a group of people by referring to "y'all".

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

[5] Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency disciplined her too harshly when compared to the level of discipline given to other employees. In order to show the inconsistent application of disciplinary action, an employee must show that the Agency took different disciplinary action without reason against a similarly situated employee. Grievant did not present evidence of another Agency employee who made public Facebook posts similar to Grievant's posts and received a lesser level of disciplinary action. 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 the first Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of the second Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 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]

[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

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