

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 07/25/19; Decision Issued: 08/14/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11379; 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: 11379**

Hearing Date: July 25, 2019  
Decision Issued: August 14, 2019

#### **PROCEDURAL HISTORY**

On April 25, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating Operating Procedure 145.3 and Operating Procedure 310.2.

On May 10, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 4, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 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. She began working for the Agency in February 2016. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a Facebook account showing her picture. She did not identify herself as an employee of the Department of Corrections. She did not wear her uniform in any pictures appearing in her Facebook account. Her account privacy settings allowed any member of the public to view her postings.

Grievant did not have a problem working with African American employees prior to November 19, 2018. Grievant's work performance was satisfactory to the Agency.

Grievant knew Mr. Ha. Mr. Ha did not work at the Facility. Grievant and Mr. Ha were Facebook friends. Mr. Ha shared a post created by Mr. C. Grievant did not know Mr. C. The post was a picture of a Politician with an anus in place of his mouth with excrement coming from the anus. Mr. C wrote, "Didn't nothing but pure s—t come out of his mouth."

On November 19, 2018, Grievant looked at her Facebook account and noticed the picture posted by Mr. C and shared by Mr. Ha. Grievant viewed the Politician favorably and was offended by the picture and Mr. C's comment. Grievant replied to the

post, “All y’all ni—ers are just jealous because [Politician] won the election and he’s the only man that has done anything to help the country.”<sup>1</sup>

Mr. Ho read Grievant’s post and recognized her picture. He called Grievant and said he had seen Grievant’s comment on Facebook and could not believe what Grievant did for the whole world to see.

Mr. Ha also viewed Grievant’s comment. He and Grievant spoke by telephone and sent text messages about Grievant’s post. Mr. Ha said he would kill Grievant and that Grievant better watch where she went because people knew Grievant was driving (Grievant’s outside employment) and would give her the worst ass beating she had ever had. Mr. Ha had a nephew who was incarcerated at the Facility where Grievant worked. Mr. Ha told Grievant that when he came to visit his nephew, he would tell his nephew that Grievant was a racist. Mr. Ha began notifying Grievant’s co-workers and all the African Americans he could to tell them about Grievant’s post.

On November 19, 2018 at approximately 4:00 p.m., Sergeant C received a call from an anonymous caller stating that Grievant making racial posts on Facebook.

Officer H received a Facebook message from a member of her church asking if Officer H knew Grievant. Officer H was tagged and allowed to read certain Facebook comments. Officer H read Grievant’s comments which Officer H thought were racial slurs and derogatory comments about African Americans. Officer H was offended by Grievant’s comments. Officer H made screen shots of some of Grievant’s comments and informed the Watch Commander of the incident on the November 20, 2019.

## **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.”<sup>2</sup> 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.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

Operating Procedure 310.2 governs Information Technology Security. Section (VI)(B)(11) provides:

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<sup>1</sup> Agency Exhibit 2. This comment is from Grievant’s written statement of the incident.

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

a. When posting entries on the Internet, employees should ensure that they do not undermine the public safety mission of the DOC, impair working relationships of 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 which 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. \*\*\*

e. Engaging in prohibited speech noted herein will be considered a violation of Operating Procedure 135.1 Standards of Conduct and may be subject to disciplinary action up to and including termination.

The Department of Corrections employs African Americans at the Facility where Grievant worked. African American inmates were incarcerated at the Facility. On November 19, 2018, Grievant used a racial slur highly offensive to African Americans. Her use of the racial slur was communicated by people not affiliated with the Agency to several Agency employees and possibly to an inmate. Grievant's use of the racial slur affected her working relationship with Officer H and undermined the public's perception of the Agency. The Agency has presented sufficient evidence to show that Grievant violated Operating Procedure 310.2 and that Grievant's behavior justified the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she did not identify herself as an Agency employee, did not wear her uniform in any pictures appearing on her Facebook page, and wrote her comments away from the Facility during her personal time. The Agency established a connection between Grievant's post and the Agency's operations. Members of the public recognized Grievant and reported her comments to Facility employees. Grievant's otherwise private behavior affected her work performance for the Agency thereby justifying the Agency's decision to take disciplinary action against Grievant.

Grievant argued that she was ill on November 19, 2018. She had been treated for cough, acute upper respiratory infection, and bronchitis on November 18, 2018 and sought treatment from a medical provider on November 20, 2018. Although Grievant's illness may have made her feel poorly, Grievant had not established that her illness caused her to use a racial slur.

Grievant asserted that Lieutenant M and Mr. Ha should have been called as witnesses. Grievant had the opportunity to call any witnesses she wanted. Grievant could have called Lieutenant M. Grievant attempted to reach Mr. Ha but he was unavailable during the hearing. The Agency is not obligated to produce a witness who is

not an employee. The Hearing Officer does not believe Lieutenant M or Mr. Ha would have provided any testimony affecting the outcome of this case.

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 ....”<sup>5</sup> 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 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 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 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.

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<sup>5</sup> Va. Code § 2.2-3005.

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.<sup>[1]</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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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