



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11378a, b, c, d, e, f, g, i, j, k, l

Hearing Date: September 23, 2019

Decision Issued: November 8, 2019

PROCEDURAL HISTORY

On April 17, 2019, Grievant was issued a total of twelve Written Notices. He was removed from employment.

Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On June 10, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 2019, a hearing was held at the Agency's office.

Due to the number of disciplinary actions at issue, the Hearing Officer will issue a decision for this case in two parts. As noted above, this decision addresses eleven of the Written Notices. The twelfth Written Notice (Case Number 11378h) will be addressed in a forthcoming decision.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the 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 Division of Capitol Police employed Grievant as a Sergeant. He had been employed by the Agency for approximately five years. He was promoted to Sergeant in July 2018. No evidence of prior active disciplinary action was introduced during the hearing.

On February 8, 2019, the Agency began an investigation. The Agency used two Investigators who reviewed the electronic records on Grievant's Agency-issued computer, cell phone, and office telephone. The Agency also reviewed Grievant's public social media postings.

On February 14, 2019, a third Investigator met with Grievant and presented him with a Letter of Allegations describing the Agency's allegations against him. The Investigator interviewed Grievant.

On February 2, 2015, Grievant was charged with violation of PHOTOSAFETY ENFORCEMENT PROGRAM. The case was filed in a local General District Court on March 12, 2015. Grievant's hearing date was April 16, 2015. Grievant pleaded "not guilty." The Final Disposition was "Not Guilty." Grievant did not report to the Agency that he had received the charge.

On January 16, 2018, a Company filed a Warrant in Debt with Grievant as the defendant in a civil action in a local General District Court. The case was dismissed. Grievant did not notify any Agency manager that he had become a defendant in a civil law suit.

Grievant used his Agency-issued cell phone to send text messages to and receive text messages from his Wife's personal cell phone. For example, on August 17, 2018 between the hours of 9:24 a.m. and 4:12 p.m., Grievant was on duty and used his Agency-issued cell phone to exchange 171 text messages with his Wife. Grievant's Wife was not an Agency employee. The messages were not business-related.

Grievant's work shift usually began at 8 a.m. and ended at 4 p.m. On December 2, 2018 between 8:42 a.m. and 12:50 p.m., Grievant spent approximately one hour and 46 minutes conducting personal Internet searches on his Agency-issued computer instead of performing work-related duties. On December 3, 2018 between 8:08 a.m. and 2:03 p.m., Grievant spent approximately 2 hours and three minutes conducting personal Internet searches on his Agency-issued computer instead of performing work-related duties. These internet searches included visiting websites for shopping, cruises, vacations, medical procedures, finances, and religious interests.

On December 3, 2018, Grievant completed an Employee Time Sheet showing his Day Shift from 8 a.m. to 4:12 p.m. with Extra Hours Worked of .2 hours and Total Hours Worked of 8.2. He wrote "at central late."

Grievant used the Agency-issued computer to conduct internet searches relating to a medical matter. Grievant identified a local medical provider. The medical provider had a website showing "Before & After Photos" and information regarding appointment scheduling. Some of the photos were of genitals. The images were clinical in nature and consistent with images one might expect to see in a medical text book. The pictures were not pornographic or sexually explicit as defined by Va. Code § 2.2-2827.

Grievant had a Facebook account. His privacy settings were set so that his Facebook profile and postings were visible to the public.

On October 2, 2018, Grievant posted a picture of himself on his Facebook page. The picture showed him sitting in a patrol vehicle wearing his uniform. The top of his uniform shirt and the top of his badge were showing. His left hand was facing towards the camera as if his hand were a gun pointed at the camera. His thumb was up, index finger extended and his remaining fingers curled. A person wrote on his page, "Looking

good Sarg.” Grievant responded, “That’s me telling my squad to do their reports in a timely fashion. Lol.”

Grievant’s family member sent Grievant a text message to his Agency-issued cell phone, “Im mad I need weed. So [far] im ok” Grievant replied, “Have her come to u ...” Grievant’s family member replied, “I hope shed do that”. Grievant wrote, “Since she ripped u off before it’s the least she can do.”

Grievant sent his Wife a text message from his Agency-issued cell phone, “I have to do an IA investigation on someone ...” Grievant’s Wife replied, “Who who who”. Grievant replied, “[first and last name of employee].” Grievant’s Wife wrote, “Why Inquiring minds Take 5 pills today Youre gonna need em.” Grievant replied, “Lol ok. She didn’t complete required [training] by deadline after being told to do it multiple times”

Grievant contacted the Local Police Department to ask for assistance. Grievant had participated in the arrest of members of a Group. When the Police Officer arrived at his house, Grievant discussed the reason for his request with the Police Officer. Grievant discussed having a weapon.

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.”¹ 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.”

11378a Group II Written Notice

General Order 104 governs Employee Code of Conduct. Section B(2) provides:

Any employee who is the plaintiff in any civil action, is charged with a traffic infraction, learns that he or she may be the defendant in any civil or criminal action, or who is subject to protective/restraining order, shall report such action in writing to the Chief, through channels, without delay.

Failure to follow policy is a Group II offense.² In January 2018, Grievant became a defendant in a civil action in a local General District Court. Grievant was obligated by General Order 104 to “report such action in writing to the chief,” but Grievant failed to do

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

so. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

11378b Group II Written Notice

The Agency alleged Grievant made a false statement to a Police Officer when Grievant said that he had arrested a few members of a Group and that they were now lashing back trying to get him fired. Grievant denied making the statements as expressed by the Police Officer and asserted the Police Officer misinterpreted his comments. Grievant claimed that he was one of a group of law enforcement officers who arrested several members of the Group and that he placed handcuffs on at least one of them.

The Agency did not present the Police Officer as a witness. It is difficult for the Hearing Officer to determine if the Police Officer accurately understood Grievant's comments. The Hearing Officer is unable to determine the reliability of the Police Officer's statement without knowing the precise statement made, the context of the statement, and the tone and demeanor of Grievant as he expressed whatever words he said. The Agency has not met its burden of proof. The Group II Written Notice must be reversed.

11378c Group II Written Notice

The Agency alleged Grievant made a false statement to a Police Officer when Grievant said he had no firearms in his house to defend himself. Grievant denied the allegation. Grievant alleged one of the officers was biased against him. There were two police officers involved in the interaction with Grievant and Grievant may have confused the two officers. The Police Officer reported Grievant as saying he did not have any weapons to defend himself. Grievant asserted that he said he did not have any weapons on him when he spoke with the Police Officers as an obvious safety precaution.

The Agency did not call the Police Officer as a witness. The precise words used by Grievant, the context of those words, the tone Grievant used are all factors the Police Officer could have established by his testimony. For example, in an email, the Police Officer wrote, [Grievant] made it seem like he did not have any other firearms inside the residence."³ (Emphasis added). What Grievant actually said may be different from what he made it seem like he was saying. The Police Officer wrote in an email that Grievant "made statements to the effect". (Emphasis added). The Police Officer expressed an opinion when he concluded Grievant "made statements to the effect". The Police Officer's opinion may or may not have been accurate. Without the Police Officer's testimony it is difficult for the Hearing Officer to determine whose account of the interaction was more accurate. The Agency has not met its burden of proof. The Group II Written Notice must be reversed.

³ Agency Exhibit 5, p. 436.

11378d Group III Written Notice

General Order 126 governs Telephone Use. Section IV(B)(6) requires:

All texting and push to talk, if equipped, will be business related.

Section IV(C) provides:

Personal phone calls and texting while on-duty shall be limited so as to not adversely affect work performance and/or compromise the mission of the Division.

Failure to follow policy is a Group II offense.⁴ On August 17, 2018, Grievant and his Wife were involved in a conversation by text message that included 171 text messages. Grievant's text messages on his Agency-issued cell phone were not business related as required by policy. Given the number of text messages, it is likely that Grievant's texting adversely affected his employment by distracting him from his work duties. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

The Agency asserted but did not establish that Grievant's behavior rose to a Group III offense. Abuse of State time is a Group I Offense. Unauthorized use or misuse of State property is a Group II offense. The Agency did not establish that Grievant's excessive personal text messages undermined the Agency's overall effectiveness. The Group III Written Notice must be reduced to a Group II Written Notice.

Grievant argued that he confused his personal cell phone with the Agency's cell phone because the two phones were of similar appearance. Although this may explain why Grievant sent text messages using his Agency-issued cell phone, it does not excuse his behavior. Even if Grievant had used his personal cell phone to send the text messages, it is likely that his texting would have adversely affected his work performance by distracting him from his work duties.

Grievant asserted he was able to "multi-task" and, thus, could perform his work duties while sending numerous text messages. Sending text messages requires focus when reading text messages, thinking about how to respond, and then typing a response to send. The number of text messages between Grievant and his Wife showed he was unable to adequately devote his time and attention to his work duties. Grievant's argument is not persuasive.

11378e Group II Written Notice

General Order 112 governs Computer Usage. Section D(2) provides:

⁴ See, Attachment A, DHRM Policy 1.60.

Using the Internet or email for occasional, limited, appropriate personal use is acceptable when:

- a. The use does not interfere with the employee's productivity or work performance, or with any other employee's work performance.

Failure to follow policy is a Group II offense.⁵ On December 3, 2018 between 8:08 a.m. and 2:03 p.m., Grievant spent approximately 2 hours and three minutes conducting personal Internet searches on his Agency-issued computer instead of performing work-related duties. Grievant's personal Internet use was not acceptable because the amount of time he devoted to Internet searches interfered with his work performance. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

11378f Group II Written Notice

General Order 112 governs Computer Usage. Section D(2) provides:

Using the Internet or email for occasional, limited, appropriate personal use is acceptable when:

- a. The use does not interfere with the employee's productivity or work performance, or with any other employee's work performance.

Grievant used the Agency-issued computer to search for information relating to a medical condition. As part of his research, he viewed a website created by a medical provider displaying before and after pictures of genitals.

Grievant's personal Internet use was supposed to be "appropriate." Viewing pictures of genitals using an Agency-issued computer and the Agency's Internet access is not an appropriate use even if associated with an employee's search relating to a medical condition. The images could have been viewed by other employees who approached Grievant during the workday. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

11378g Group III Written Notice

Grievant completed a timesheet showing he worked overtime on December 3, 2018. The Agency argued that he falsified records because he spent over two hours that day conducting Internet searches for personal information. The Agency asserted that Grievant knew he had not performed work duties for over two hours yet he claimed overtime pay by submitting a falsified timesheet. The Agency's disciplinary action is not supported by the evidence.

⁵ See, Attachment A, DHRM Policy 1.60.

The Agency's timesheet was intended to record the amount of time Grievant spent at work. The Agency was obligated to account for Grievant's additional time at work by giving him compensatory leave or overtime pay. The timesheet was not intended to record the quality of work performed. It was a tool to record an employee's hours at work. It appears that Grievant worked .2 hours beyond the end of his shift on December 3, 2018. Grievant intended to record the amount of time he worked beyond his normal shift end. Since it appears he was at work beyond his work shift, he did not falsify his timesheet. The Group III Written Notice for falsifying records must be reversed.

11378i Group I Written Notice

General Order 127 governs Use of Social Media. Section (C)(3)(f) provides:

Members are prohibited from posting photographs or other depictions of themselves in uniform, or displaying any clothing, equipment, logos, etc. issued by the Division.

"[U]nsatisfactory work performance" is a Group I offense.⁶ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant posted on his public Facebook account a picture of himself wearing his Division uniform with his hand simulating a cocked handgun. The top of his shirt, a portion of his radio, and a portion of his Division badge are visible in the picture. Grievant's behavior was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant denied wearing his uniform in the picture. Although the picture only shows a portion of Grievant's body, the picture reveals Grievant is wearing his uniform with his badge and radio.

11378j Group III Written Notice

General Order 108 governs Administrative Investigations. This policy sets forth the Division's policy "to conduct timely, thorough, and impartial administrative investigations in order to uphold the integrity and reputation of the Division and to ensure that the public trust is maintained." This policy establishes numerous procedures governing the collection of information and determination of disciplinary action. Section III(C)(7) requires:

All administrative investigations are confidential. Working files will be maintained in a secure location when not being actively worked on.

⁶ See Attachment A, DHRM Policy 1.60.

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.”

Grievant failed to keep confidential an administrative investigation assigned to him. He disclosed to his Wife that he had been assigned an investigation, the person being investigated, and the nature of the allegations to be investigated. Grievant's disclosure undermined the Agency's objective of upholding its reputation and integrity. If the employee being investigated had learned of Grievant's disclosure, it could have undermined the employee's perception of the Agency and the employee's trust of Agency managers. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

11378k Group II Written Notice

General Order 126 requires text messages to be “business related.” General Order 104 requires that “[o]fficers shall display a high degree of integrity” and “[e]mployees shall conduct their private and official lives in a way that will reflect favorably upon themselves and the Division of Capitol Police.”

Failure to follow policy is a Group II offense.⁷ Grievant used the Agency-issued cell phone to engage in a discussion with a family member regarding “weed”. “Weed” is another name for marijuana. The possession of marijuana is illegal in Virginia.⁸ Grievant had the authority to arrest people using or selling marijuana. Grievant's discussion about having someone come to his family member with “weed” is contrary to the Agency's expectation that Grievant conduct his life in a way that will reflect favorably upon Grievant and the Division of Capitol Police. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that his use of the word “weed” actually referred to CBD oil which is legal to possess in Virginia. Grievant's argument is not persuasive. Even if Grievant's assertion is true, Grievant knew that “weed” typically referred to marijuana and that getting “ripped off” is language typically associated with illegal drug transactions. Grievant should have known that it would be inappropriate for a law enforcement officer to discuss obtaining “weed.”

⁷ See, Attachment A, DHRM Policy 1.60.

⁸ See, Va. Code § 18.2-250.1.

11378I Group II Written Notice

General Order 104 governs Employee Code of Conduct. Section B(2) provides:

Any employee who is the plaintiff in any civil action, is charged with a traffic infraction, learns that he or she may be the defendant in any civil or criminal action, or who is subject to protective/restraining order, shall report such action in writing to the Chief, through channels, without delay.

Failure to follow policy is a Group II offense.⁹ On February 2, 2015, Grievant was charged with violation of PHOTOSAFETY ENFORCEMENT PROGRAM. The case was filed in a local General District Court on March 12, 2015. Grievant's hearing date was April 16, 2015. Grievant pled "not guilty." The Final Disposition was "Not Guilty." Grievant did not report to the Agency that he had received the charge. His actions were contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Upon the issuance of one Group III Written Notice, an agency may remove an employee. The Agency has presented sufficient evidence to support the issuance of at least two Group II Written Notices and at least one Group III Written Notice. Accordingly, the Agency's decision to remove Grievant must be upheld.

Additional Argument

Grievant argued that the Agency began investigating him regarding several images on his Facebook account and in a few days knew that the allegations against him were untrue. He argued the Agency continued to investigate him without reason. Even if the Hearing Office assumes that Grievant's assertion is true, the Agency did not violate any policy by continuing its investigation. The Agency reviewed Grievant's usage of Agency equipment which is something the Agency could review at any time and for any reason.

Mitigation

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"¹⁰ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

⁹ See, Attachment A, DHRM Policy 1.60.

¹⁰ *Va. Code § 2.2-3005.*

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 further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the following Written Notices is **upheld**:

- 11378a Group II Written Notice
- 11378e Group II Written Notice
- 11378f Group II Written Notice
- 11378i Group I Written Notice
- 11378j Group III Written Notice
- 11378k Group II Written Notice
- 11378l Group II Written Notice

The agency's issuance to the Grievant of the following Written Notices is **rescinded**:

- 11378b Group II Written Notice
- 11378c Group II Written Notice
- 11378g Group III Written Notice

The agency's issuance to the Grievant of a 11378d Group III Written Notice must be **reduced** to a Group II Written Notice.

As stated at the beginning of this decision, a second decision addressing the twelfth and final Written Notice issued to the Grievant will be forthcoming. Based on the Grievant's accumulation of disciplinary action as found by the Hearing Officer in this decision, however, Grievant's 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. As this decision is being issued in two parts, the 15 calendar day period for requesting administrative review **will not begin** until the second part of the decision is issued. You may request

administrative review of **either or both parts** of the decision within 15 calendar days from the date the second part of the decision is 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.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11378h-S

Hearing Date: September 23, 2019
Substituted Decision Issued: March 5, 2020¹

PROCEDURAL HISTORY

On April 17, 2019, Grievant was issued a Group III Written Notice with removal for impairing the Agency's reputation.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 10, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 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?

¹ This Substitute Decision replaces the prior Original Decision.

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 Division of Capitol Police employed Grievant as a Sergeant. He had been employed by the Agency for approximately five years. He was promoted to Sergeant in July 2018. Grievant received an overall rating of Contributor on his 2018 annual evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is a member of a non-profit Religious Organization.² Grievant practiced his belief by attending meetings with other members of his religious organization and wearing tattoos of religious symbols. He posted pictures of himself displaying his tattoos on his public Facebook page.

On February 5, 2019, a Group³ posted a document on a blog alleging Grievant "Shows Affinity with White Nationalist Groups." The document alleged Grievant, "has explicit, overt ties to a white nationalist pagan organization." The document identified

² Grievant told Investigator R, "I am Asatru which is Germanic paganism. I believe in my ancestor's religion that was around thousands of years before Christianity." See, Agency Exhibit 7.

³ Grievant described the Group as a, "domestic terrorist group that advocates the violent overthrow of the government" See, Agency Exhibit 7.

Grievant as a police officer with the Agency and showed pictures of him wearing the Agency's uniform. The document included images of Grievant taken from Grievant's public Facebook page. The document showed a picture of Grievant with a "Wolfsangel" tattoo and an "Anchor" tattoo. The document claimed Grievant had a tattoo of the "Helm of Terror/Helm of Awe" rune. The document included a picture of Grievant lifting a barbell with weights while wearing pants, a shirt, and hat with the American flag stars and colors. The document asserted that a flag hanging in the picture background was a "German nationalist flag – Josef Wirmer's 'Resistance' Flag" which was a combination of the Weimar republic and Reich flags and its design referenced the Iron Cross. The document showed a picture of Grievant lifting weights and referred to the appearance of a "Thin Blue Line 'Punisher' flag" and asserted it was carried by white supremacists in a rally. The document showed a picture of Grievant lifting weights and asserted a "Raven banner" was visible. The document stated it was known as the flag of a Viking king and recently adopted by white supremacists. The document showed a picture of Grievant with the logo of the Asatru Folk Assembly (AFA) overlaid. The document alleged the AFA was a hate group.

On February 8, 2019, the Agency began an investigation and assigned three fact investigators. The Investigators reviewed all of the electronic records on Grievant's Agency-issued computer, cell phone, and office telephone. This information included Internet searches, file transfers and downloads, text messages, emails, phone calls, and contact information. The Agency also reviewed Grievant's public social media postings and public records relating to Grievant.

Lieutenant M reviewed Grievant's cell phone calls, text messages, and desk phone log. Sergeant G reviewed Grievant's Internet search history and email communications using Agency-issued equipment. Sergeant G also reviewed Grievant's public Facebook page and postings. Sergeant G concluded Grievant was not a member of a white supremacy group. Sergeant G testified he did not believe Grievant had "any ties to a white supremacy group."

On February 14, 2019, Investigator R met with Grievant and presented him with a Letter of Allegations describing the Agency's allegations against him. The Investigator interviewed Grievant. During the interview, Investigator R asked Grievant about one of his images. Investigator R said, "And that is not connected to any white supremacist groups?" Grievant replied, "They may have appropriated it as they appropriated many ancient symbols. Of course, they were obsessed with Nordic people." Investigator R asked, "But it could be considered" Grievant replied, "Absolutely. And that is one reason that I got it⁴ covered up [A]fter some friends of mine had advised me, hey, there's a double meaning there, you might want to get that covered up so no one thinks you're one way. That's when I got it covered up."⁵

⁴ Grievant was referring to one of his tattoos.

⁵ Agency Exhibit 7.

Investigator R concluded Grievant displayed a “vast knowledge” of the meaning of each of his tattoos.

CONCLUSIONS OF POLICY

Va. Code § 2.2-1202.1 provides that the DHRM Director shall “establish a comprehensive program of employee relations management” and “establish the grievance procedure ...” Va. Code § 30-34.2:1 makes all members of the Capitol Police “subject to the provisions of § 2.2-1202.1.”

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts less severe in nature but require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior of a more severe and/or repetitive nature ...” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”⁶

The Agency did not discipline Grievant for being a member of a white supremacy organization. Indeed, Sergeant G concluded that Grievant was not a member of a white supremacy organization. Grievant testified that he was “one quarter Filipino” and as such could not be a white supremacist.⁷ Grievant denied being a white supremacist and his denial was credible.

The Agency took action against Grievant based on two allegations:

- 1) Grievant “posted images on social media (Facebook) that are associated with white supremacy.”
- 2) Grievant “admitted that he posted photos that he knew could be associated with white supremacy.”⁸

Images Posted by Grievant

The Agency established that Grievant posted some images on Facebook that were associated with white supremacy.

Grievant was photographed having a Wolfsangel tattoo on his neck.⁹ The image was posted on his Wife’s social media page, according to Grievant. At the time Grievant

⁶ See, General Order 118.

⁷ Grievant told Investigator R he had “extensive Filipino tribal tattooing” on his body. See, Agency Exhibit 7.

⁸ Agency Exhibit 1.

⁹ Grievant told Investigator R, “It is a magical rune that is supposed to represent independence and strength. It was also used in the 15th Century by the peasant’s revolt against the nobles for unfairness. As

was hired by the Agency, his tattoo had been covered by another tattoo – an anchor. The Wolfsangel is an ancient runic symbol that was believed to be able to ward off wolves. It appeared in Germany in many places including the side of roads and heraldic use in the coats of arms of various towns. The symbol predates the rise of Nazi Germany. Nazi Germany appropriated the Wolfsangel. It was used as part of the emblem for several Waffen SS divisions. Several European and American neo-Nazi groups adopted the symbol. For example, the neo-Nazi group Aryan Nations incorporated the Wolfsangel into their logo.

Grievant displayed a tattoo with the design of a “Helm of Terror/Helm of Awe”¹⁰ also known as a Viking Compass. The meaning of this rune involved protection and prevailing over one’s enemies. The Helm of Awe is the subject of Icelandic folktales. This Nordic symbol is one of guidance and protection. Members of Grievant’s Religious Organization sometimes use the Viking Compass to identify themselves and as a symbol of spiritual guidance. These symbols predate Nazism and do not necessarily suggest Nazism or white supremacy.

Grievant displayed Josef Wirmer’s Resistance Flag. The flag contains red, black, and gold which are traditional colors associated with Germany and a cross resembling that of the flag of Norway. It was created as a proposed national flag in the event that a plot to overthrow Hitler was successful. The flag was used as a political party banner in the 1950s by the Christian Democratic Union and the Free Democratic Party.¹¹ The flag is not connected with white supremacy.

Grievant displayed an “Iron Cross” tattoo.¹² The Iron Cross is common among motorcycle groups. It is used in designs with no connection to Nazism but has been used by some white identity groups. Grievant’s tattoo of the Iron Cross should not be considered related to white supremacy because of the wide-spread use of the Iron Cross.

to this very day, it is the municipal coat of arms for many cities in Germany, including the City of Nordrhein, Westfalen, which is where the [last name] are from.” See, Agency Exhibit 7.

¹⁰ Grievant told Investigator R, “That is the helm of awe. It is a rune stave. It has magical properties. It is for bravery. In our profession, bravery is something you want to cultivate.” See, Agency Exhibit 7.

¹¹ Grievant told Investigator R he displayed the flag because, “I support the July plotters against Hitler.” See, Agency Exhibit 7.

¹² Grievant told Investigator R that the, “iron cross – it is a German military decoration from, I believe, they started issuing it in 1871 (I love history, so you’re going to get a lesson today), by the first emperor of the German Empire until right after World War II. *** It is actually a symbol that is on the current modern Bundeswehr tank and airplane. It hails from a long history of the Teutonic knights, carried it into battle in Jerusalem and, in northern Europe during the crusades. It is a symbol of Germany. It is to this day in their parliament.” See, Agency Exhibit 7.

Grievant displayed a “Punisher” flag on a wall in his gym. The flag depicts a “Punisher” skull logo overlaid with a “thin blue line.” The flag related to a motion picture and comic books.¹³ The flag is not inherently racist.

Grievant displayed a “Raven Banner” which is the banner of Viking King Ragnar Lothbrok. It has been popularized by the History Channel television show “Vikings.” The banner is not inherently racist. It is not widely known to have been adopted by white supremacists.

Grievant displayed the logo of the Asatru Folk Assembly overlaid on a picture of Grievant.¹⁴ Grievant “liked” the Facebook page of the Asatru Folk Assembly.¹⁵ He was a “Facebook friend” with Mr. F, a leader of the Asatru Folk Assembly.

Asatru is not inherently a racist belief.¹⁶ The Asatru Folk Assembly, however, links religion to ethnicity and genetics. It was founded by Mr. M. Mr. M was present at the Unite the Right Rally in August 2017. Mr. F was Mr. M’s successor. Mr. F changed the AFA’s declaration of purpose from “Northern European Folk” to “Ethnic European Folk.” Grievant chose to display the symbols of the Asatru Folk Assembly, an organization easily associated with or sympathetic to white supremacy.

Knowledge of Association

The Agency has established that Grievant knew or should have known that the images he displayed could be associated with white supremacy. The Agency has asserted and established that Grievant had a “vast knowledge” of the meaning of his tattoos. With such knowledge, Grievant should have recognized that his tattoos could be interpreted as racially offensive. Grievant admitted to covering one of his tattoos because of its “double meaning” that included association with white supremacy.

Obligation to Protect the Agency’s Reputation

The Agency has numerous policies informing its employees that it values its reputation and expects employees to act always in a manner to protect the public’s trust in the Agency. For example, General Order 104 governs Employee Code of Conduct. Section III(C)(1) provides:

¹³ Grievant told Investigator R he read “The Punisher” comic book as a child and that he enjoyed the TV show today. See, Agency Exhibit 7.

¹⁴ Grievant told Investigator R that the symbol came from “an 8th Century rune stone found in Sweden. *** It’s supposed to represent the heart of Oden.” See, Agency Exhibit 7.

¹⁵ At some point, a prior Facebook page of the organization had been deleted by Facebook.

¹⁶ Modern Asatru was recognized by the Icelandic government in 1973. It is the sixth largest religion in Iceland and Iceland’s fastest growing religion.

Employees shall conduct their private official lives in a way that will reflect favorably upon themselves and the Division of Capitol Police.

Section III(C)(6) provides:

[A]ny action that discredits, unfavorably reflects upon or discredits members of ... the Division in an unbecoming manner, impinges the reputation of any individual or that of the Division ... is prohibited.

The Agency's Law Enforcement Code of Ethics provides, in part:

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property, to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice. I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or my agency. *** I recognize that the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service.

The Agency's Law Enforcement Oath of Honor provides, in part:

Oh my honor, I will never betray my badge, my integrity, my character, or the public trust.

General Order 127 governs Use of Social Media. Section IV(C)(1) provides:

When employees create their own blogs, comment on a blog, contribute to a discussion forum or website, create a Facebook page or LinkedIn profile (or similar site), or otherwise contribute to online discussions, they are impacting their personal image and potentially affecting the Division. This is particularly so if the member identifies himself as employed by the Division.

Section IV(C)(2) provides:

If a personal social media posting by a member of the Division is contrary to the Division's interest in maintaining the efficiency and effectiveness of the workplace, the public reputation of agency or members, and/or the public perception of the Commonwealth, a supervisor may require the member to remove content that violates this general order, and may recommend appropriate disciplinary action if the member refuses. The supervisor may also recommend disciplinary action when the content is removed, depending upon the nature of the offending content.

An employee whose behavior might impair the Agency's reputation is subject to disciplinary action. General Order 118 governs Disciplinary Procedures & Separation from Service. Group III offenses include:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Division's activities. This includes actions which might impair the Division's reputation as well as the reputation or performance of its employees.¹⁷

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Grievant's posting of images associated with white supremacy reasonably may have lead others (such as the Group) to believe he was affiliated with white supremacy groups. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Religious Discrimination

General Order 118 provides "[d]iscipline under the Standards of Conduct and Performance will not be based on any employee's ... religion"

42 USC 2000a-2 provides:

It shall be an unlawful employment practice ... to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion

Grievant had symbols of his religion tattooed on his body. He took pictures of those tattoos and displayed them on his Facebook page in order to express his religious beliefs. Upon viewing symbols displayed by Grievant, the Agency took disciplinary action against him. Grievant argued that the Agency discriminated against him based on his religion. The Agency argued it took disciplinary action against Grievant because he knowingly displayed symbols associated with white supremacy and not based on his religious beliefs.

Even if the Hearing Officer assumes for the sake of argument that there is a causal connection between Grievant's religion and the Agency's disciplinary action as claimed by Grievant, the outcome of this decision does not change. When Grievant's interest in practicing his religion freely is weighed against the Agency's interest in being perceived as employing racially unbiased police officers, the Agency's interest is superior. In this case, the Agency is a law-enforcement organization whose public service mission includes having police officers who enforce criminal laws without regard to race. If Agency law-enforcement officers enforced criminal laws differently based on race, the Agency would be engaging in unlawful racial discrimination. If the Agency

¹⁷ See, General Order 118(IV)(K)(3)(b)(20).

were perceived as employing officers who may discriminate based on race, the Agency's reputation and public service mission could be undermined. The Agency may protect its reputation by removing from employment an employee who could be reasonably perceived as likely to treat citizens differently based on race even if the employee has not actually discriminated against anyone based on race.¹⁸

Mitigation

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"¹⁹ 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 further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a 11378h Group III Written Notice with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR of this and other decisions in this series within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR by **February 20, 2020**.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor

¹⁸ There is no evidence or reason to believe that Grievant treated individuals differently based on their race. The Agency's discipline is based on the possible public perception created by Grievant's associations.

¹⁹ *Va. Code § 2.2-3005*.

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.