



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11406

Hearing Date: November 1, 2019
Decision Issued: November 21, 2019

PROCEDURAL HISTORY

On July 9, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for using social media to post defamatory and discriminatory information.

On July 10, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 12, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 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. Grievant had prior active disciplinary action. He received a Group II Written Notice on July 27, 2018 for failure to follow policy.

Grievant and Mr. M had Facebook pages. Their privacy settings were set to public so that anyone with access to Facebook could read their Facebook information. Grievant and Mr. M were not Facebook "friends."

Mr. M wrote on a Facebook page relating to law enforcement:

F—k these [pig emoji].

Grievant followed the law enforcement Facebook page and read Mr. M's comment. Grievant was offended by Mr. M's comment about law enforcement officers. While off-duty, Grievant replied to Mr. M's post:

[Mr. M's name] and f—k you too ma'am.

Mr. M replied to Grievant:

Aww ... a snowflake wants to give me special attention .. and look Marge, he's got a fan. Go play in traffic and stop breeding.

Grievant believed Mr. M's reference to "snowflake" was a reference to Grievant's race. Grievant replied to Mr. M:

[Mr. M's name] snowflake? Lol, sounds like you want me to melt in your mouth f-g, go back to where you beaner sp-k sub-humans come from.

Mr. M was offended by Grievant's post. He posted Grievant's comment on Twitter. Mr. M also posted Grievant's comment and a link to Grievant's Facebook account on Mr. M's Facebook page and invited his friends to "SHARE SHARE SHARE SHARE SHARE SHARE SHARE."¹

Grievant did not identify himself as an employee of DOC. However, Mr. M viewed Grievant's Facebook account and the accounts of "friends" of Grievant. One of Grievant's Facebook friends had taken a photograph of Grievant wearing his DOC uniform. Mr. M was able to determine that Grievant was an employee of the Virginia Department of Corrections. Mr. M sent the Agency an email stating:

I'm wondering if the State of Virginia knows it employs racist bigots to watch over their incarcerated ... Currently looking for other emails to send this too. There is no place for this in any form of government position.²

The Agency began an investigation.

Grievant testified credibly that he did not have bias against anyone based on ethnicity. His comment was intended to upset Mr. M as Mr. M had upset Grievant.

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."³ 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

¹ Grievant Exhibit 1.

² Agency Exhibit 11.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Operating Procedure 310.2(VI)(B)(11) provides:

- 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 has employees of various ethnicities responsible for supervising inmates of various ethnicities. The Department of Corrections has employees whose sexual orientation may differ from the sexual orientation of inmates under supervision. It is essential for the Agency to treat its employees and for employees to treat inmates without regard to their ethnicity and sexual orientation and that the public perceive the Agency as non-discriminatory.

Grievant attempted to insult Mr. M by referring to him as a “f-g” and “beaner sp--k”. As used by Grievant, “F-g” was a derogatory insult referring to male sexual orientation. As used by Grievant, “beaner sp--k” was a derogatory insult referring to ethnicity. Grievant’s comments negatively affected the public’s perception of the Agency. Mr. M considered Grievant to be a racist bigot and asked the Agency why it would employ someone like Grievant to supervise inmates. Mr. M used Grievant’s comments and identity to inform other members of the public that the Agency was employing a racist bigot and asked them to share Grievant’s posts with others. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he acted in his capacity as a private citizen without identifying himself as an Agency employee. Although Grievant’s assertion is true, it does not excuse his behavior. He was obligated to refrain from posting information that might impair public confidence in the Agency even if no one knew he was an Agency employee.

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

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”⁶ 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 Ms. G was employed by the Agency and engaged in a similar offense yet she was not removed from employment. Insufficient evidence was presented for the Hearing Officer to determine whether Grievant and Ms. G engaged in similar behavior and were treated differently without reason. 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 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.

⁶ Va. Code § 2.2-3005.

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.