Issue: Group III Written Notice with Termination (identifying with Security Threat Group); Hearing Date: 06/20/16; Decision Issued: 07/22/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10804; 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: 10804

Hearing Date: June 20, 2016
Decision Issued: July 22, 2016

PROCEDURAL HISTORY

On March 11, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for identifying with a security threat group.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 26, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 20, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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. 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 Probation and Parole Officer at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is a fan of the music of the Insane Clown Posse. Insane Clown Posse is an American hip hop duo whose members have stage names of Violent J and Shaggy 2 Dope. Enthusiasts of the band's music are called Juggalos.[1] Members of the band wear makeup showing clown faces when performing. Juggalos wear clown makeup to show fellowship with fans of the Insane Clown Posse. Some Juggalos, however, engage in crime and display the characteristics of a criminal gang.

Grievant enjoys music of the Insane Clown Posse[2] because of the "shock and awe of it." She appreciates the philosophy of the band that if someone is an outcast in society, he or she can be a member of the Juggalos. In other words, if someone does not "fit in" elsewhere, he or she "can fit in with us." She appreciates the "mass accepting" philosophy of the band and "representing the underdog." She has appreciated the band's music since 1997. Grievant is not a member of a gang and

[1] Juggalos are also fans of bands with the Psychopathic Records label. Female fans are sometimes referred to as Juggalettes. For simplicity, the Hearing Officer will use only the word Juggalos to refer to followers of the Insane Clown Posse.

[2] The Agency's gang expert testified that the Insane Clown Posse does not approve or condone acts of violence.

does not engage in any gang related criminal behavior. She does not condone gang or criminal behavior. Grievant does not wear clown makeup at work. She does not discuss at work her interest in the Insane Clown Posse.

On June 4, 2015, Grievant took Basic Gang & Security Threat Group Awareness Training. Grievant was taught that Juggalos were among the "Major Gangs within the Virginia Department of Corrections." She was advised that "Juggalo Identifiers" included:

> Use of clown faces
> Hatchet man tattoos
> Members are referred to as a Juggalo or Juggalette
> Are followers of the music group Insane Clown Posse[3]

Grievant was taught, "If you have questions and you are not sure if the activity that you observed is considered gang related please contact your gang specialist or the Gang Unit."

Grievant created a user profile on a popular a social media website. Her profile was personal and she did not use it as part of her work duties. She did not use her full name on her profile but rather used a pseudonym containing part of her first name. She entered information onto her profile outside of her normal work hours. She posted her picture on the site. She posted or "liked" numerous pictures of Juggalos, Hatchet Man, and the Insane Clown Posse. One of the pictures showed a person wearing clown makeup and displaying the "W" and "C" hand sign for Wicked Clown. Grievant posted a picture of herself riding a motorcycle that was similar to the black and red motorcycle ridden by Shaggy 2 Dope. She wrote "Red & black … down with the clown till I'm dead in the ground."[4] Grievant posted a picture of herself in a Jester Halloween costume standing next to her male friend who was wearing clown makeup.

A Juggalo enthusiast created a profile with the initials of D.C. on the social media website and published pictures and sayings related to Juggalos and the Insane Clown Posse. Grievant "liked" pictures on the D.C. profile. Grievant's "friends" could see which pictures Grievant "liked."

Grievant "friended" other employees who recognized that Grievant's postings regarding Juggalos might be inappropriate. On March 4, 2016, an employee notified an Agency Manager that she noticed Grievant was using a handbag with "Insane Clown Posse" on it and that she discovered that Grievant "likes" and shares posts and pictures related to the Insane Clown Posse. The Agency began an investigation.

---

[3] Agency Exhibit 9.

[4] Grievant testified these words are lyrics from an Insane Clown Posse song. Grievant meant to convey she would be a fan of the Insane Clown Posse's music forever.

Grievant had ink pens in her desk with the name and symbols of the Insane Clown Posse.

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."[5] 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."[6] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[7]

DOC Operating Procedure 427.1 governs Offender Gang Identification and Tracking. A Gang is defined as:

> A group of individuals who: (a) possess common characteristics that distinguish them from other offenders or groups of offenders and who, as an entity, pose a threat to the safety and security of staff, the facility, other offenders or the community; (b) have a common distinctive goal, symbolism or philosophy; (c) possess identifiable skills or resources, or engage in unauthorized/illegal activities. Criminal street gangs, neighborhood cliques, hate groups, cults, and domestic terrorist that meet these conditions are considered gangs. For the purpose of this operating procedure, any reference to a gang or gang member will be synonymous with a STG or STG member.
>
> Gang Behavior is defined as:
>
> Any documented behavior that promotes, furthers, or assists a gang; this includes, but is not limited to, conduct of any person that leads to and includes the commission of an unlawful act or violation of a regulation or lawful supervision requirement that demonstrates a nexus to a gang.
>
> A Security Threat Group (STG) is defined as:
>
> A group of individuals who: (a) possess common characteristics that distinguish them from other offenders or groups of offenders and who, as an entity, pose a threat to the safety and security of staff, other offenders, the correctional facility, the probation & parole district or the community at

[5] Virginia Department of Corrections Operating Procedure 135.1(V)(B).

[6] Virginia Department of Corrections Operating Procedure 135.1(V)(C).

[7] Virginia Department of Corrections Operating Procedure 135.1(V)(D).

> large; (b) have a common distinctive goal, symbolism or philosophy; (c) possess identifiable skills or resources, or engage in unauthorized/illegal activities. Criminal street gangs, terrorists (domestic & international), radical extremists, hate groups, cults, and neighborhood cliques are examples of STGs. For the purpose of this operating procedure, any reference to a gang or gang member will be synonymous with STG or STG members.

DOC Operating Procedure 135.3 governs Standards of Ethics and Conflict of Interest. Section IV(N)(2) provides:

> Gang membership or association with a gang is prohibited for employees of the Department of Corrections. It is considered a Group III Offense under the Standards of Conduct and requires termination.

DOC Operating Procedure 310.2 governs Information Technology Security. This policy governs how employees should share information on social media sites. Section VI(B)(10)(h)(vii) provides that employees posting personal entries on the internet should not post:

> Pictures, images, or information suggesting identification with Security Threat Groups (gang) or which portray security threat groups in a positive or appealing manner.

Section VI(B)(10(e) provides:

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

One can make a simple and convincing argument that Juggalos are <u>not</u> a gang/security threat group. Nearly all gangs have criminal activity as one of their primary activities. The primary activity of Juggalos is to demonstrate their appreciation of the music of the Insane Clown Posse. All Juggalos are fans of the music of the Insane Clown Posse. Some Juggalos are fans of the music of the Insane Clown Posse <u>and</u> commit crimes. Simply because a small portion of Juggalos commit crimes, it does not follow that the remaining members are gang members or sympathetic to gang behavior. Indeed, having a few criminal Juggalos does not and should not undermine the right of the remaining Juggalos to express their enjoyment for their preferred source of music without the stigma of being associated with a gang. Although the Hearing Officer is persuaded by this argument, it does not control the outcome of this case.

The Department of Corrections believes that Juggalos are a security threat group. The Agency incarcerates inmates making up numerous different gangs. The Agency employs staff whose primary function is to identify, separate, and control gang members who are in Virginia prisons. The Agency presented testimony from a gang

expert who stated the Department has 169 Juggalos as inmates and identified one Juggalo who committed murder in the name of the Juggalos. The Agency considers it to be a dangerous conflict for an employee to be a gang member or sympathetic to a gang and also supervise members of that gang.

The Agency's position regarding Juggalos is consistent with the National Gang Information Center's conclusion. In Parsons v. United States Department of Justice, 801 F3d 701, 706 (2015), the United State Court of Appeals, Sixth Circuit, discussed the 2011 National Gang Intelligence Center's report as follows:

> In the 2011 NGIC Report, Juggalos are classified as a "loosely-organized hybrid gang." The Report defines hybrid-gangs as "non-traditional gangs with multiple affiliations" that "are adopting national symbols and gang members often crossover from gang to gang." The Report further states the following:
> - "Many Juggalo subsets exhibit gang-like behavior and engage in criminal activity and violence."
> - "Most crimes committed by Juggalos are sporadic, disorganized, individualistic, and often involve simple assault, personal drug use and possession, petty theft and vandalism."
> - "A small number of Juggalos are forming more organized subsets and engaging in more gang-like criminal activity, such as felony assaults, thefts, robberies, and drug sales."
> - "Juggalos' disorganization and lack of structure within their groups, coupled with their transient nature, makes it difficult to classify them and identify their members and migration patterns."
>
> The Report also notes that Arizona, California, Pennsylvania and Utah are the only states officially recognizing Juggalos as a gang, but that Juggalo gang-related criminal activity is reported in other states. (Citations omitted).

Although it may be debatable whether Juggalos are a gang, it is not debatable that the Agency placed Grievant on notice of its criteria and conclusion that Juggalos are a security threat group. The fact that the Agency notified Grievant of its position that Juggalos are among the "Major Gangs within the Virginia Department of Corrections" controls the outcome of this case.

Grievant posted pictures on her profile suggesting identification with a Security Threat Group identified by the Agency. She wrote that she was **"**down with the clown till I'm dead in the ground." Grievant "liked" pictures of Juggalos from the D.C. profile. Grievant acted contrary to DOC Operating Procedure 310.2 thereby justifying 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 DOC Operating Procedure 310.2 did not apply to Agency employees using their own computers outside of work hours. Grievant cites Case No. 10660 in which the hearing officer concluded the policy "is inapplicable in dealing with a personal computer at the Grievant's home and on the Grievant's time." The hearing officer reasoned, "I can find no language in OP 310.2 that governs an individual's computer used while not at work and while not connected in any way to the Agency's system."

Hearing decisions are not precedent. DOC Policy 310.2 is applicable to Agency employees including Grievant when they are using their own computers to access social media sites outside of their work time, location, and duties. This conclusion is based on several factors. First, it is not necessary for a policy to state specifically that it applies to employees. If an employee's behavior establishes a connection to the Agency's operations, the employee is subject to relevant agency policies. In this case, Grievant was in a position to encounter gang members and supervise them. She "friended" other employees thereby notifying the Agency of her behavior. A sufficient connection exists between Grievant's behavior and the Agency's operations to apply the provisions of DOC Operating Procedure 310.2. Second, DOC Operating Procedure 310.2 is authorized by DHRM Policy 1.75. DHRM Policy 1.75 addresses, "social media for personal use, including personal use of social media outside of the work environment." (Emphasis added). Third, few State employees are responsible for submitting information to social media sites on behalf of their agencies. Most state agencies have software "firewalls" prohibiting employees from visiting inappropriate websites. The social media website on which Grievant created a user profile is among those websites rarely accessible by State employees as part of their work duties. It would be unnecessary for the Agency to create a detailed policy governing employee access of social media websites during work hours given that few employees can access social media websites during work using their agency's computer systems. Fourth, many provisions of DOC Operating Procedure 310.2 are intended to ensure that employees posting information in their individual capacity do not undermine the Agency's mission or reputation. The opportunity for an employee to undermine the Agency's mission or reputation using social media sites arises when the employee is at home using his or her own computer to access the internet.

Grievant argued that her dismissal was without due process and in violation of the Virginia Personnel Act. The evidence showed that Grievant was notified of the allegations against her and given an opportunity to meet with the Chief Probation Officer to present her response. The Agency complied with the Virginia Personnel Act.

Grievant argued that the Agency violated her right to engage in free speech. The First Amendment to the Constitution of the United States provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble[.]" The First Amendment embodies fundamental restraints on the power of government. Under the Fourteenth Amendment, these restraints apply not

only to the laws of Congress, but also to the policies, practices and decisions of State government.

Section 12 of Article I of the Constitution of Virginia provides:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

Grievant's postings on her social media page expressing her enthusiasm for and enjoyment of the music of the Insane Clown Posse are clearly speech. The question then become whether that speech is protected from interference by the Department of Corrections.

In *San Diego v. Roe* 543 U.S. 77, 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*).
>
> ***
>
> 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).
>
> *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 facts presented to the Hearing Officer are not sufficient for the Hearing Officer to conclude that Grievant's speech was regarding a matter of public concern. The evidence presented showed that Grievant's postings on a social media site reflected her personal preference regarding a type of music and enjoyment of identifying with others fans of the Insane Clown Posse. Because the Hearing Officer cannot conclude that Grievant was addressing a matter of public concern, it is not appropriate to apply the Pickering balancing test. The Agency did not violate Grievant's freedom of speech when it took disciplinary action against her for her postings regarding Juggalos and the Insane Clown Posse.

Grievant argued that her dismissal was arbitrary or capricious. The Agency presented sufficient facts and policy to show its removal of Grievant was not in disregard of any material facts or without a reasoned basis.

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 …."[8] 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.

The Hearing Officer believes that the Agency is removing an otherwise valuable employee. The Hearing Officer, however, is not a "super personnel officer" who can substitute his human resource decision onto an agency who has met its burden of proof supporting 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

[8] Va. Code § 2.2-3005.

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 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 14th St., 12th 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 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 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.[9]

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

[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