

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (computer/internet misuse), and Termination; Hearing Date: 01/17/17; Decision Issued: 05/01/17; Agency: VDOT: AHO: Carl Wilson Schmidt, Esq.; Case No. 10915; 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: 10915**

Hearing Date: January 17, 2017  
Decision Issued: May 1, 2017

### **PROCEDURAL HISTORY**

On October 14, 2016, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instructions and/or policy, abuse of state time, and computer/Internet misuse. On October 14, 2016, Grievant received a second Group II Written Notice of disciplinary action for attendance/excessive tardiness, leaving work without permission, failure to follow instructions and/or policy, and abuse of state time. Grievant was removed from employment based on the accumulation of disciplinary action.

On November 11, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 28, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 17, 2017, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
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. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employed Grievant as a Program Administrative Specialist II. She began working as a contractor for the Agency in 2008. Approximately 85 percent of her time involved working on her computer. No evidence of prior active disciplinary action was introduced during the hearing.

On April 21, 2016, Grievant received a Counseling Memorandum to address concerns about her unsatisfactory job performance as it relates to hours of work and use of leave. Grievant was informed:

Personal time off to include extended lunch periods, vacation, or personal leave must be pre-approved in advance. If not approved, the time will be charged as leave without pay. Communication must be verbally discussed with supervisor or manager and should be followed up by an email. An email may not be accepted without verbal communication.

The work schedule you have provided to me is Monday through Friday 8:30 a.m. to 5 p.m. with a 30-minute lunch break. In the last few months, you have consistently reported to work late, outside of your agreed and approved work schedule. To compensate for your late arrivals, you have

not been notifying me of late departures via email or after your arrival in an effort to adjust your work schedule. This is no longer acceptable.

In accordance with the Hours of Work Policy 1.25, scheduling adjustment is at the discretion of management based on business needs. The business needs of our work unit is for everyone to report to work at the regularly scheduled time and take the appropriate lunch break. Therefore, moving forward, you must notify me when you are going to be late to the office, prior to your arrival, or if you have been leaving early, prior to your departure. If your lunch break will be longer than your regularly scheduled time, you must notify me in advance. If approved, then you will be required to use your available accrued leave balances for that time. If not approved, you will be placed on leave without pay for those hours.

Also note that it is not acceptable to report to work briefly, then leave to park your car, and returned to the office in an attempt to appear to be on time. Nor is it acceptable to follow another employee into the building without swiping your badge for access.

Action Plan:

- Effective immediately, you will need to email me from your VDOT email account when you report to work and before you leave. If you need to make an adjustment to your weekly work schedule, we can discuss making this adjustment.
- Effective immediately, you must swipe your badge each time you enter the building.
- Effective immediately, you must log into Microsoft Lync while you are at work.
- You may consider working with Human Resources to put in place an Intermittent Family Medical Leave Act Plan<sup>1</sup> to ensure you are able to use your sick leave for your medical appointments.<sup>2</sup>

Grievant later sought and received approval to change her regular work schedule to 8:45 a.m. to 5:15 p.m. with a 30 minute lunch break. Grievant had discretion as to when to take her lunch break in the middle of the day.

Grievant began having panic attacks in early 2016. She did not tell anyone; she kept it to herself. She experienced these attacks for 15 to 45 minutes depending on the attack. Sometimes Grievant would go to a stairway or to her car when she was having

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<sup>1</sup> Grievant received allergy shots two times per week. Grievant informed the Agency of her need to attend medical appointments to receive allergy shots. She stopped receiving the shots in August 2016.

<sup>2</sup> Agency Exhibit 3.

a panic attack at work. She was prescribed depression medication and began taking it. She stopped taking the medication because it made her sick.

On July 6, 2016, Grievant met with a Mental Health Professional who diagnosed Grievant with Adjustment Disorder with Mixed Anxiety and Depressed Mood. Grievant told the Mental Health Professional she was having panic attacks at work.

In July 2016, the Agency received an anonymous complaint regarding Grievant. On August 15, 2016, the Agency received an anonymous complaint stating that Grievant was abusing leave. The agency began monitoring Grievant's computer usage using software it installed on Grievant's State-owned computer. The software recorded "screen shots" of Grievant's computer every 30 seconds.

The Agency ignored gaps in time of fewer than 20 minutes to account for Grievant taking restroom breaks and 15 minute breaks permitted by policy.

The Agency considered Grievant's leave usage, and building and parking access "swipes" and video images of Grievant entering and leaving the building.

On August 19, 2016, Grievant logged in to her computer at 8:24 a.m. Grievant left the building from 9:19 a.m. until 9:49 a.m. (approximately 30 minutes). Grievant took a break from 10:28 a.m. until 10:53 a.m. (approximately 25 minutes). Grievant took a break from 10:53 a.m. until 11:45 a.m. (approximately 51 minutes). Grievant took a break at 1:27 p.m. She drove her vehicle out of the parking garage at 1:34 p.m. She resumed working at 2:31 p.m. (approximately 63 minutes). Grievant took a break from 3:01 p.m. until 4:16 p.m. (approximately 75 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately 3 hours and 34 minutes.

On August 22, 2016, Grievant logged into her computer at 8:37 a.m. She took a break at 9:34 a.m. and left the building. She entered the parking deck at 9:54 a.m. She resumed working at 10:16 a.m. (approximately 42 minutes). Grievant took a break from 12:16 p.m. to 12:42 p.m. (approximately 26 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately 38 minutes.

On August 23, 2016, Grievant logged into her computer at 8:29 a.m. Grievant took a break from 9:17 a.m. to 10:12 a.m. (approximately 55 minutes). Grievant took a break at 1:35 p.m. until 2:47 p.m. (approximately 72 minutes). Grievant "swiped" the parking garage exit gate at 2:30 p.m. After accounting for a 30 minute lunch break, Grievant was inactive for approximately one hour and 37 minutes.

On August 24, 2016, Grievant logged into her computer at 8:38 a.m. Grievant took a break from 9:30 a.m. until 10:06 a.m. (approximately 36 minutes). Grievant took a break from 11:27 a.m. until 1:23 p.m. (approximately 115 minutes). Grievant "swiped" into the entrance gate at 1:19 p.m. After accounting for a 30 minute lunch break, Grievant was inactive for approximately one hour and 21 minutes.

On August 25, 2016, Grievant logged into her computer at 8:43 a.m. Grievant took a break from 10:19 a.m. until 10:41 a.m. (approximately 21 minutes). Grievant took a break at 10:44 a.m. until 11:09 a.m. (approximately 24 minutes). Grievant took a break from 11:20 a.m. until 11:34 a.m. (approximately 23 minutes). Grievant took a break from 12:38 p.m. to 2:06 p.m. (approximately 88 minutes). At 12:44 p.m., she “swiped at the exit gate. Grievant took a break from 4:29 p.m. until 4:51 p.m. (approximately 22 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately two hours and 27 minutes.

On August 26, 2016, Grievant logged into her computer at 8:43 a.m. Grievant took a break from 9:35 a.m. until 10:08 a.m. (approximately 32 minutes). Grievant “swiped” at the entrance at 9:50 a.m. She “swiped” door access for the basement door at 10:16 a.m. Grievant took a break from 3:02 p.m. until 4:01 p.m. (approximately 58 minutes). She “swiped” the access door at 3:51 p.m. After accounting for a 30 minute lunch break, Grievant was inactive for approximately 1 hour.

On August 31, 2016, Grievant logged into her computer at 8:59 a.m. Grievant took a break at 9:59 a.m. until 10:25 a.m. (approximately 25 minutes). Grievant took a break from 10:31 a.m. until 10:53 a.m. (approximately 21 minutes). Grievant took a break from 1:08 p.m. until 1:36 p.m. (approximately 28 minutes). Grievant took a break from 1:41 p.m. until 2:04 (approximately 23 minutes). Grievant took a break from 4:46 p.m. until 5:16 p.m. (approximately 30 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately one hour and 37 minutes.

On September 2, 2016, Grievant took a break from 2:45 p.m. until 3:42 p.m. (approximately 57 minutes). She took a break from 3:56 p.m. until 5:03 p.m. (approximately 67 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately one hour and 34 hours.

On September 6, 2016, Grievant took a break from 9:03 a.m. until 9:23 a.m. (approximately 20 minutes). Grievant took a break from 9:24 a.m. until 9:55 a.m. (approximately 30 minutes). Grievant took a break from 10:06 a.m. until 10:32 a.m. (approximately 25 minutes). Grievant took a break from 2:56 p.m. until 3:23 p.m. (approximately 27 minutes). Grievant took a break from 4:08 p.m. until 4:33 p.m. (approximately 24 minutes). After accounting for a 30 minute lunch break, Grievant was inactive for approximately one hour and 36 minutes.

Grievant did not obtain prior approval before taking extended lunch breaks.

Grievant accessed approximately 2,500 web pages of non-work related internet activity. This resulted in approximately 21 hours and 18 minutes of non-work related internet activity:

August 19, 2016 – approximately 1 hour and 14 minutes  
August 22, 2016 – approximately 5 hours and 23 minutes  
August 23, 2016 – approximately 1 hour and 57 minutes

August 24, 2016 – approximately 1 hour and 28 minutes  
August 25, 2016 – approximately 1 hour and 34 minutes  
August 26, 2016 – approximately 1 hour and 37 minutes  
August 31, 2016 – approximately 45 minutes  
September 2, 2016 – approximately 4 hours and 30 minutes  
September 6, 2016 – approximately 3 hours and 40 minutes

## **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.”<sup>3</sup> 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.”

### **Group II Written Notice – Failure to Follow Instructions**

On April 21, 2016, Grievant was instructed to obtain approval in advance of taking lunch breaks exceeding 30 minutes. Grievant took an extended lunch break of 63 minutes on August 19, 2016 including driving her vehicle out of the parking garage at 1:34 p.m. Grievant took an extended lunch break of 72 minutes on August 23, 2016 including swiping the garage gate at 2:30 p.m. Grievant took an extended lunch break of 115 minutes on August 24, 2016 including swiping a gate at 1:19 p.m. On August 25, 2016, Grievant took an extended lunch break of 88 minutes including swiping a gate at 12:44 p.m. On August 26, 2016, Grievant took an extended lunch break of 58 minutes including swiping an access door at 3:51 p.m. Grievant did not obtain prior approval from the Supervisor prior to taking these extended lunch breaks. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

Grievant argued that the Agency discriminated against her based on her disability and failed to accommodate her disability. Grievant asserted that she went to her vehicle when she was having panic attacks and, thus, her absences from work were not subject to disciplinary action. The Agency presented testimony from a co-worker who indicated Grievant would leave to run errands including getting her nails polished. It is not clear why Grievant left her desk on the specific days monitored by the Agency. Even if Grievant left her desk on those days due to disability related to panic attacks, the Americans with Disabilities Act does not prohibit employers from taking disciplinary action when an employee violates the employer rules.

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant testified she told a human resource employee, Ms. W, about her panic attacks in May 2016 and that the Agency did nothing in response. Ms. W testified she referred Grievant to the Employee Assistance Program in response to the conflict Grievant expressed with her supervisor and the stress it was causing Grievant. It is not clear that Ms. W learned in May 2016 of Grievant's panic attacks. In any event, the Agency informed Grievant of the availability of the FMLA policy in response to Grievant's need to obtain allergy shots. It was a reasonable expectation that Grievant would request protection under FMLA for other illnesses such as having panic attacks. The Hearing Officer cannot conclude that the Agency was aware of Grievant's panic attacks and failed to provide her with notification of her rights under the Family Medical Leave Act.

### Group II Written Notice – Computer/Internet Misuse

DHRM Policy 1.75 governs Electronic Use of Communications and Social Media. This policy requires users to:

Be responsible and professional in their activities. Employees should conduct themselves in a manner that supports the mission of their agency and the performance of their duties. \*\*\*

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's electronic communications tools including the Internet is permitted as long as the personal use does not interfere with the user's productivity or work performance, does not interfere with any other employee's productivity or work performance, and does not adversely affect the efficient operation of the Commonwealth's systems and networks.

The amount of time Grievant spent from August 19, 2016 through September 6, 2016 looking at non-work related web pages during work hours was excessive. Her internet usage was much more than incidental or occasional. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that her computer usage was not excessive. She testified she did not have a vehicle to drive to work and was relying on family members to take her to work. She was using her work computer to search for a new vehicle. These excuses explain but do not excuse Grievant's excessive computer use.

### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.



Grievant questioned the appropriateness of issuing two written notices on the same day. Nothing in policy prohibits an agency from issuing multiple written notices at one time when there is sufficient evidence to support the issuance of those policies.

### 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 ....”<sup>4</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.

Grievant asserted that others were not disciplined for excessive computer use. The evidence showed that other employees received disciplinary action for excessive computer use. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Other Assertions

Grievant asserted it was improper for the Agency to receive anonymous complaints regarding behavior that had already occurred and then investigate Grievant’s behavior after the date of the complaint. Grievant argued it would be more appropriate for the Agency to investigate behavior prior to a complaint since that is the behavior giving rise to the complaint. Nothing in State policy prohibited the Agency from monitoring Grievant’s behavior following its receipt of anonymous complaints.

Grievant argued that the Agency took disciplinary action against her because she complained about her supervisors to the Agency’s human resource department staff. The evidence, however, showed that the Agency’s investigation arose from anonymous complaints and that the discipline was consistent with the behavior identified during the Agency’s investigations.

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<sup>4</sup> Va. Code § 2.2-3005.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for computer/internet misuse is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.