

Issue: Group III Written Notice with Termination (computer/internet misuse and fraternization); Hearing Date: 05/08/18; Decision Issued: 05/18/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11192; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 05/31/18; EEDR Ruling No. 2018-4738 issued 06/28/18; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11192

Hearing Date: May 8, 2018
Decision Issued: May 18, 2018

PROCEDURAL HISTORY

On March 13, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for computer/internet misuse and fraternization.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 2, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 8, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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. 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 Re-Entry Counselor at one of its facilities. No evidence of prior active disciplinary action.

The Agency uses VACORIS as its database to record information regarding inmates including their locations and status. Grievant had a unique login and identification enabling her to access VACORIS. She was only authorized to access VACORIS to accomplish work-related tasks.

Grievant worked at Facility 1. Ms. D worked as a Counselor at Facility 2. The Inmate was held at Facility 2. He was never an inmate at Facility 1. Ms. D fraternized with the Inmate and was removed from employment. The Inmate was transferred from Facility 2 to Facility 3.

Grievant and Ms. D were friends.

On October 15, 2017 at 9:16 p.m., Counselor D sent Grievant a text message:

[Inmate’s number] take this with u [this] morning and tell me if he is still in [general population] at [Facility 3].

Grievant replied:
Got it

On October 16, 2017 at 7:08 a.m., Ms. D sent Grievant a text:

Good morning don’t forget

On October 16, 2017 at 5:18 p.m., Grievant logged into the VACORIS to accessed information relating to the Inmate. She reviewed an electronic page in VACORIS entitled "Housing Assignment" for the Inmate. Grievant was able to determine the Inmate's location and status at Facility 3.

Grievant spoke with Ms. D by telephone. During that telephone conversation, it is likely that Grievant informed Ms. D of the information she learned about the Inmate by accessing VACORIS.¹

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Operating Procedure 310.2, Information Technology Security, prohibits employees from unauthorized access of DOC data or information. On October 16, 2017, Grievant determined the location and status of the Inmate by accessing the Agency's data in VACORIS. She was not authorized to obtain this information because the Inmate was not located at Facility 1 and Grievant did not provide treatment or services to the Inmate. Grievant accessed the information at the request of a former employee who fraternized with the Inmate. Grievant's actions were contrary to policy

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency has presented sufficient evidence to elevate the disciplinary action to a Group III Written Notice. Grievant's actions served as a breach of security by providing information that would otherwise be confidential to a former employee who was acting in furtherance of her improper relationship with an offender. Upon the

¹ Grievant argued that the Agency did not establish the contents of her conversation with Ms. D and, thus, could not conclude that Grievant and Ms. D discussed the Inmate. Grievant did not testify during the hearing and did not present any evidence to show that the Agency's conclusion was in error. It is reasonable to conclude that Grievant informed Ms. D of Grievant's findings about the Inmate.

² Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant asserted that she did not act with malicious intent or the intent to deter the Agency from its mission. It is not necessary for the Agency to show that Grievant's actions were based on malicious intent or to undermine the Agency's mission. The Agency showed that Grievant accessed information in VACORIS without authorization at the request of a former employee seeking to further her relationship with an Inmate.

Grievant argued that she did not provide information about the Inmate to Ms. D and did not know that Ms. D and the Inmate were in an improper relationship. Grievant did not testify and did not provide evidence to support her defenses. Based on the evidence presented it is certain that Grievant acted contrary to policy by accessing the Inmate's information. Even if the Hearing Officer assumes for the sake of argument that Grievant did not know Ms. D had fraternized with the Inmate and did not answer Ms. D's question about the Inmate, it would not affect the outcome of this grievance.

Grievant argued the Agency retaliated against her because she previously filed a grievance. No credible evidence was presented to support this assertion.

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"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

⁵ *Va. Code § 2.2-3005.*

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.