

Issues: Group II Written Notice (failure to follow policy and falsifying records), Group II Written Notice (failure to follow policy); Hearing Date: 10/11/18; Decision Issued: 10/31/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11256; Outcome: Partial Relief; **Administrative Ruling Requests Received from Grievant on 11/13/18 and from the Agency on 11/15/18; EDR Ruling Nos. 2019-4809 and 2019-4811 issued on 12/21/18; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Goochland County Circuit Court on 01/18/19.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11256

Hearing Date: October 11, 2018

Decision Issued: October 31, 2018

PROCEDURAL HISTORY

On February 9, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and falsifying records. On February 9, 2018, Grievant was issued another Group II Written Notice of disciplinary action for failure to follow policy. She received a disciplinary pay reduction, demotion, and transfer based on the accumulation of disciplinary action.

On March 6, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 14, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 11, 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 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?
5. Whether the Agency retaliated against Grievant?

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 Sergeant at one of its facilities. Grievant was demoted to a Corrections Officer and transferred to another facility as part of this disciplinary action. She received an 8% disciplinary pay reduction to a lower pay band. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked at the Front Gate post. Her shift began at 5:45 p.m. and ended at 6:15 a.m. She worked "five days on" with "five days off." She frequently worked overtime. Grievant was allowed two 30 minute breaks during her shift.

On October 16, 2017, Grievant received a Virginia Uniform Summons charging her with reckless driving as prohibited by Va. Code 46.2-852. She was summoned to appear at the Local General District Court on November 20, 2017.

On November 29, 2017, Grievant submitted to the Agency a completed “Criminal Offense/Moving Traffic Violation Notifications” form. The Agency created this pre-printed form with blanks to be completed by employees. Part of the pre-printed language was:

Pursuant to Department of Corrections Operating Procedure 040.1, Litigation, I am notifying my Organizational Unit Head that I have been charged with the following criminal offense, moving traffic violation, or civil or disciplinary proceeding for engaging or attempting to engage in sexual activity by force in the community:

Grievant wrote on the form:

Case to be heard on 3/14/18
Reckless Driving

Above the pre-printed words “Date of Event”, Grievant wrote, “11/25/17.”

Another pre-printed part of the form stated:

I understand I am responsible for notifying my Organizational Unit Head of the disposition (outcome) of the criminal charge, moving traffic violation, or civil or disciplinary proceeding for engaging or attempting to engage in sexual activity by force in the community. Failure to notify my Organizational Unit Head of the disposition may result in disciplinary action.

Grievant signed her name below the above statement and wrote the date “11/28/17.”

Although the case was originally scheduled to be heard on November 20, 2017, it was continued to March 12, 2018.

Grievant hired an attorney to handle the reckless driving charge. Her attorney appeared in court on her behalf.

Grievant had a unique log in identification and password. She was authorized to access the Agency’s computers which would provide her with access to the internet. Each time Grievant logged into her computer account, she received a notice that her computer usage was monitored and she was obligated to comply with the Agency’s computer usage policy.

There were often periods of limited activity at the Front Gate. Grievant had access to a computer in the Front Gate post. When Grievant took breaks, she sometimes accessed the internet using the Agency’s computers located in other sections of the Facility.

The Agency had internet firewall software to record every employee's internet activity. Each time Grievant accessed a website, the Agency's firewall software would record her activity. The software recorded the webpages visited. Each time Grievant accessed a webpage, that webpage would automatically activate and load numerous objects contained on the webpage. The firewall software would record each time Grievant accessed a webpage but also each of the software objects contained on the webpage. This resulted in a lengthy report.

Grievant sometimes watched YouTube videos that were work-related.

Grievant was involved in preparing for some social events at the Facility. She sometimes searched for recipes for food for the events. She sometimes considered purchasing items such as jugs of juice for a Facility event.

On December 15, 2017, the Warden asked the Information Technology Officer to "run a report" on Grievant's internet usage for the prior 60 days.

The Agency's Information Technology Officer testified that in her opinion Grievant had excessive personal internet use. However, she could not recall how much time per day Grievant's spent engaging in personal use of the internet.

Grievant did not seek reinstatement to her prior position at her former facility. She indicated she preferred to remain at the facility where she was transferred.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁴

Group II Written Notice – Failure to Follow Litigation Policy

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

DOC Operating Procedure 040.1 governs Litigation. Under this policy a “Moving Traffic Violation is:

Citations received for any reason while operating a motor vehicle.

Section IV(A)(2) provides:

Employees charged with ... a moving traffic violation that occurs on or off the job ... shall inform the organizational unit head immediately if received during normal working hours, or the next day if received during non-working hours.⁵

Grievant received a moving traffic violation as defined by the policy because she received a Virginia Uniform Summons for reckless driving. She received the moving traffic violation on October 16, 2017 and reported this to the Agency on November 29, 2017. Grievant did not report the moving traffic violation immediately or the next day as required by Agency policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.⁶

Grievant argued that she failed to report receiving the reckless driving charge because she forgot and had other important personal and family matters preoccupying her thoughts. This is not a sufficient basis to excuse her failure to timely report receiving the summons.

Group II Written Notice – Internet Usage

The Agency took disciplinary action against Grievant because she allegedly “failed to follow written policy and spending excessive non-work related time on the internet during work hours.”

DOC Operating Procedure 310.2 governs Information Technology Security. This policy provides:

Personal use means use that is not job-related. Internet use during work hours should be incidental and limited to not interfere with the performance of the employee’s duties or the accomplishment of the unit’s responsibilities. Personal use is prohibited if it:

Adversely affects the efficient operation of the computer system; or
Violates any provision of this operating procedure, any supplemental procedure adopted by the agency supplying the internet or electronic

⁵ Agency Exhibit 10.

⁶ It is not necessary to address whether Grievant falsified records given that the Agency has presented sufficient evidence to support the issuance of the Group II Written Notice.

communication system, or any other policy, regulation, law, or guideline as set forth by Federal, State or Local law.

The Agency has not presented sufficient evidence to show that Grievant's personal internet use was more than incidental. The Agency's policy does not define what exceeds incidental use. The Agency did not present evidence showing how much time in a given day Grievant spent on the internet. The Agency did not present evidence showing that it reviewed Grievant's internet usage to distinguish between personal and business related usage. Grievant sometimes searched for items for Facility events that would otherwise appear as personal usage. She reviewed business related YouTube videos that might otherwise appear as personal use. The Agency did not present evidence showing that it excluded time Grievant spent on the internet during her work lunches and breaks. The opinion of the Information Technology Officer, standing alone, is not sufficient for the Agency to meet its burden of proof.

The Group II Written Notice relating to internet usage must be reversed.

Retaliation

Grievant alleged the Agency's disciplinary action resulted from retaliation. Grievant had complained about her post assignments and objected to the Facility's limitations where she parked her vehicle.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁷ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"⁸ cause of the alleged adverse action by the employer.⁹

⁷ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁸ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

⁹ See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

Grievant engaged in protected activity because she complained about how the Agency treated her. She suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection between her protected activity and the adverse action. The evidence showed that the Agency took disciplinary action against Grievant because of her behavior and without regard to her protected activity. The Agency did not take action against Grievant as a pretext for retaliation.¹⁰

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”¹¹ 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 action.

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 the Agency’s Litigation policy is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for her internet use is **rescinded**.

The Agency is ordered to **reinstate** Grievant to the rank of Sergeant. The Agency is ordered to **reverse** the disciplinary pay reduction and restore Grievant to her prior compensation as a Sergeant. The Agency is directed to provide the Grievant with **back pay (and any benefits)** resulting from the reduction in rank.

¹⁰ Grievant also alleged she was subject to workplace harassment. Grievant did not present sufficient evidence to show that the Agency took disciplinary action against her as a form of workplace harassment. The Agency removed Grievant from her Facility and placed her at another Facility. Grievant does not seek reinstatement to that former facility where she claimed the Agency created a hostile work environment for her.

¹¹ 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.