

Issue: Group III Written Notice with termination (accessing confidential files without authorization); Hearing Date: 03/05/04; Decision Issued: 03/05/04; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 585



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 585

Hearing Date: March 5, 2004
Decision Issued: March 5, 2004

PROCEDURAL HISTORY

On October 27, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

During the week of October 7-10, 2003, [Grievant] without my permission, approval or authorization, accessed my office computer, searched for and reviewed confidential documents, personnel folders and supervisory notes contained therein, and made a printed copy of personal confidential supervisory notes and information regarding his employment. He subsequently provided me with a memo dated October 10, 2003 which included a copy of my confidential notes regarding his employment that I had placed on my office computer. On October 13, when I asked why he had used my office computer he was unapologetic and replied that he needed to find out what I was saying about him.

On November 17, 2003, Grievant filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 11, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 5, 2004, a hearing was held at the University's regional office. Although Grievant participated in a

prehearing conference with the Hearing Officer to schedule the hearing date and was sent a letter confirming that date, Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Advocate
One witness

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for accessing confidential files of Grievant's supervisor.

BURDEN OF PROOF

The burden of proof is on the University 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:

Virginia Commonwealth University employed Grievant until his removal on October 27, 2003. No evidence of prior disciplinary action against Grievant was introduced.

During the week of October 7 -10, 2003, the Supervisor was away from work. Without obtaining the Supervisor's permission and without notifying the Supervisor, Grievant turned on his Supervisor's computer and searched¹ the Supervisor's files. Grievant located several electronic documents the Supervisor had written about Grievant's work performance. These notes provided dates and descriptions of Grievant's behavior. After reviewing the notes, Grievant drafted a memorandum, stamped "Confidential", to the Supervisor as an attempt to challenge and rebut the Supervisor's conclusions about Grievant. Grievant placed it on the Supervisor's desk.

¹ The Supervisor kept notes on his computer regarding many of his employees. Grievant could have easily viewed these documents.

When the Supervisor returned to his office, he read Grievant's memorandum and immediately concluded that Grievant must have accessed the Supervisor's personnel notes. The Supervisor confronted Grievant and Grievant responded that he had accessed the Supervisor's computer because he needed to find out what the Supervisor was saying about him.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).² Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

It is the University's judgment that when Grievant accessed his supervisor's computer personnel files without permission, Grievant committed a Group III offense. The University has presented sufficient evidence to support its judgment. Being able to trust an employee to work on behalf of his employer without undermining the confidence of his supervisor is an essential part of employment. The University can no longer trust Grievant.

DECISION

For the reasons stated herein, the University'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 **10 calendar** days from the date the decision was issued, if any of the following apply:

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.³

[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].

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer