

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 03/28/05; Decision Issued: 03/29/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8012



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8012

Hearing Date: March 28, 2005
Decision Issued: March 29, 2005

PROCEDURAL HISTORY

On October 19, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

[Grievant] received an E-mail. The E-mail was not job related. DOC prohibits personal use of the computer if it violates any provision of procedure 310.2. DOC authorizes only legal and ethical use of Internet Services. The E-mail was unethical and unacceptable. [Grievant] forwarded the E-mail to other Employees. The policy prohibits the creation, transmission, retrieval or storage of material or messages of a libelous, defamatory, derogatory, inflammatory, discriminating, or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender and age of physical, mental and emotional disability. [Grievant] violated the policy once she transmitted it to others.

On November 18, 2004, 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 February 24, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow established written policy.

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 employs Grievant as a Counselor at one of its Facilities. She has been employed by the Agency for approximately six years. No evidence of prior disciplinary action against Grievant was presented during the hearing.

On August 25, 2004 at 9:31 a.m., Grievant received an email from another Agency employee. The subject line of the email stated, "When Not To Have Your Photo Taken!". Attached to the email were photos of people in various states of nudity. One photo shows a young female gymnast with a portion of her genitals exposed. The second photo shows a female swimmer with her breasts protruding from her bathing suit. The third photo shows a nude man urinating in the street near a police vehicle. The fourth photo shows two men wearing kilts sitting on stairs. A portion of one man's genitals are shown. A fifth photo shows a man rollerblading without wearing pants. A portion of his genitals are shown.

At 9:39 a.m., Grievant sent the email to three people including at least one State employee. One of those recipients sent the email to another person who sent the email to seven people. One of those individuals complained to Agency managers and the Agency began investigating the origin of the email.

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.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. 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.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

Department of Corrections Procedures Manual 11-1 governs Agency employee use of the computer system and internet. This policy sets forth unacceptable uses of DOC personal computers, networks, etc. to include:

Placing obscene material on DOC computer network, or use for access and/or distribution of sexually explicit, indecent or obscene material.

Obscene material is defined as:

any material that “considered as a whole, has an its dominate theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.”

Va. Code § 18.2-390(2) defines nudity as:

a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Four of the pictures contain nudity. The third picture does not show nudity because the otherwise pant-less and shirt-less man has his hand covering his genitals as he urinates on the street.

The theme of four of the pictures is a prurient interest in sex. Unless the nudity is included, the pictures are of no significance or interest. The pictures represent a shameful interest in nudity. The picture of the man urinating shows a shameful interest in excretory functions. All of the pictures exceed customary limits of candor. None of

the pictures have serious literary, artistic, political or scientific value. Thus, the pictures are obscene material.¹

“Failure to ... otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant knowingly distributed obscene material over the DOC computer network. Her actions were contrary to DOCPM § 11-1.15(D) thereby justifying the Agency’s issuance of a Group II Written Notice.

Grievant contends the disciplinary action should be mitigated because the Agency has taken inconsistent disciplinary action. Grievant argues she should not receive a Written Notice because the Agency did not issue a disciplinary notice to a “P-14” employee. This argument fails because part-time “P-14” employees are not subject to the Standards of Conduct. Written Notices may be issued only as permitted by the Standards of Conduct. The Agency lacks the authority to issue a part-time employee a Group II Written Notice. The Agency’s witness testified that disciplinary action was taken against other classified employees sending the email. Although no evidence was presented regarding the details of disciplinary action taken against other classified employees, the Agency’s witness testified, without rebuttal, that Grievant’s discipline was consistent with the disciplinary action taken against the other classified employees sending the email.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action 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 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

¹ Grievant contends the pictures are not obscene. The Agency has presented sufficient evidence to support its conclusion that the pictures are obscene with the policy definition.

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 15 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 15-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.²

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.