

Issue: Group II Written Notice with suspension (failure to comply with applicable written policy); Hearing Date: 05/08/06; Decision Issued: 05/09/06; Agency: DCE; AHO: David J. Latham, Esq.; Case No. 8314; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8314

Hearing Date: May 8, 2006
Decision Issued: May 9, 2006

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Employee Benefits Manager
Attorney for Agency
One witness for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the principal retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice issued for failure to comply with established written policy.¹ As part of the disciplinary action, grievant was suspended without pay for two days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Virginia Department of Correctional Education (Hereinafter referred to as “agency”) has employed grievant as an academic teacher³ for 20 years.

In 1990, agency policy specified that computers were not to be used by inmates in classrooms unless the teacher was physically present at the time of use.⁴ Another agency policy specifically addresses computer security.⁵ In 1996 the superintendent notified all principals that printers are off limits to all inmates except when being personally observed by teachers or administrators.⁶ Grievant’s principal discussed this instruction with grievant. In September 2000, grievant signed an acknowledgement memorandum stressing the importance of restricting inmate use of computer equipment and data. Agency policy provides that unauthorized individuals (inmates, students and aides) are not to have access to personal information of other inmates under any circumstances.⁷ A DCE teacher shall be present at all times during a student’s use of the computer.⁸ In December 2000, grievant was disciplined about the importance of computer security following an incident in which an inmate discovered where grievant hid her key to the computer cabinet and then used the computer without authorization.⁹ In 2003, an inmate used grievant’s staff computer and printer to produce a Mother’s Day card.¹⁰ The principal verbally counseled grievant on this occasion that inmates were not to use her printer at all. In 2004, grievant was advised in writing that, “At no time may the students have access to the printer.”¹¹

Grievant teaches a small number of inmate students. Usually an inmate is designated as an aide to the teacher. The classroom has six standalone computers for student use and one standalone computer with printer to be used only by the teacher. The staff computer for teacher use includes information about all student inmates.

¹ Agency Exhibit 1. Group II Written Notice, issued January 18, 2006.

² Agency Exhibit 10. Grievance Form A, filed February 3, 2006.

³ Grievant Exhibit 8. Grievant’s Employee Work Profile Work Description, September 17, 2003.

⁴ Agency Exhibit 5. Department of Correctional Education (DCE) Policy 6-1.12, Student Use of Computers, January 1, 1990. [NOTE: This policy was rescinded and replaced by Policy 4-1 on December 15, 2000.]

⁵ Agency Exhibit 6. DCE Policy 4-2, *Security of Computers*, issued January 1, 1990.

⁶ Agency Exhibit 4. Memorandum from superintendent to regional principals, April 16, 1996.

⁷ Agency Exhibit 1. Sections IV, VI.D & VI.G.1, DCE Policy 4-1, *Information Technology Systems Usage*, December 15, 2000.

⁸ Agency Exhibit 1. Section VI.G.2, *Ibid*.

⁹ Agency Exhibit 2. Group I Written Notice, issued December 5, 2000.

¹⁰ Agency Exhibit 3. Mother’s Day card and principal’s counseling note.

¹¹ Agency Exhibit 9. Memorandum from assistant principal to grievant, October 7, 2004.

On December 14, 2005, grievant was teaching a class of eight inmate students. She was being assisted by an inmate who was neither a student nor an aide but whom grievant was interviewing and evaluating to determine whether she would recommend him to be an aide. She permitted this inmate to use her staff computer and printer without direct supervision. Grievant was teaching the class from the front of the room while the inmate used her computer and printer at the rear of the room. She had first directed the inmate to use one of the student computers to write a poem he had composed, and to compose a job application letter¹² for evaluation purposes. The inmate wrote both documents on a student computer and copied them to a disc. Grievant directed the inmate to use her computer and printer to print the poem for use in class. She did not know that he intended to also print out the job application letter. After the inmate printed out both the poem and the letter, he took the letter with him at the end of class, without authorization, and sent it to an instructor at another correctional institution. Grievant never asked the inmate to produce the job application letter she had requested him to compose.

The receiving instructor questioned why an inmate from another facility was contacting her and how he had managed to produce a professionally typed job application letter. When she reported the matter, an investigation ensued during which the grievant stated that she had printed out the letter on her computer. The inmate was questioned and admitted that he had used the teacher's computer to print out the letter. When confronted with this inconsistency, grievant said that the inmate could have printed the letter. Grievant also admitted that she allowed inmates to use her computer.¹³ Grievant admitted allowing students to print out stories and personal letters which they purportedly mailed to family members.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

¹² Agency Exhibit 1, p.2. Letter from inmate to outside instructor, December 14, 2005.

¹³ Agency Exhibit 8. Timeline of events prepared by regional principal, January 6, 2006.

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁴

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Policy No. 1.60 provides that 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.¹⁵ Failure to comply with established written policy is a Group II offense.

The agency has demonstrated, by a preponderance of evidence, that it restricts inmate usage of computers to strictly controlled situations. Inmates may not use networked computers in order to prevent them using the Internet or e-mail. Inmates are prohibited from using printers in order to prevent them from printing out unauthorized documents or other items. While inmates may use standalone computers to produce electronic documents, only the teacher is permitted to print documents to assure that whatever is printed is used only for authorized or instructional purposes. Grievant has received ample notice of the restrictions through agency policies and as a result of both counseling and a prior disciplinary action. During the two most recent counseling sessions, the principal told the grievant that *inmates were not to use the printer at all* (2003), and the assistant principal told grievant that *students may not have access to the printer at any time* (2004). These two instructions are unambiguous and leave no room for interpretation or exceptions.

¹⁴ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

¹⁵ Agency Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Notwithstanding these clear instructions, grievant allowed inmates to use her printer. In the incident that precipitated this disciplinary action, grievant not only allowed the inmate to use her computer and printer but failed to be physically present and supervise him during the process. This allowed the inmate to print out an unauthorized document which he removed from the classroom and mailed out of the facility. This is the type of activity that the policy attempts to prevent. Grievant may feel that, with so many years of experience, she is able to trust an inmate. Inmates are incarcerated because they have demonstrated that they cannot be trusted to do the right thing. Hence, there are extensive rules and restrictions placed on inmates to assure that they do not have the opportunity to violate agency policies.

Grievant argues that the policies are unclear because some sentences refer only to *students* but not *aides*. However, the sum total of all the policies – as well as the counseling and previous discipline – makes clear that the restrictions apply to ***all inmates*** whether they are students, aides or just non-student inmates. In this case, the inmate was neither a student nor an aide.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁶ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Based on grievant's testimony and evidence, her only basis to claim participation in a protected activity was her alleged complaint about the principal in August 2005.¹⁷ The principal denies any knowledge of such a complaint and grievant failed to produce any documentation to prove that such a complaint was filed. However, assuming, arguendo, that grievant did complain and that such a complaint would constitute a protected activity, grievant must show a nexus between her complaint and the adverse employment action (the Written Notice at issue herein). Grievant has not established any such connection between the two events. Moreover, even if such a nexus could be found, the agency has established a nonretaliatory reason for disciplining grievant. For the reasons stated previously, grievant has not shown that the agency's reason for discipline was pretextual in nature.

Mitigation

The normal disciplinary action for a Group II offense is a Written Notice or a Written Notice and up to ten days suspension. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances

¹⁶ EDR *Grievance Procedure Manual*, p.24

¹⁷ Grievant avers that the principal came into her classroom and, in front of students and another teacher, spoke to grievant in a harsh manner that embarrassed grievant.

such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. Grievant has long service with the agency and an otherwise good work record; the agency considered these factors to be mitigating when it decided to suspend grievant for only two days rather than ten days. However, the agency also considered as aggravating circumstances the fact that for many years, multiple policies have stressed computer security vis-à-vis inmates, and that grievant had previously been counseled and disciplined for multiple incidents involving inmate access to computers. Given the totality of the evidence, it is concluded that the agency's discipline was measured and appropriate considering the circumstances of this case.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and two-day suspension for failure to comply with established written policy is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.¹⁸ 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.¹⁹ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹⁸ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.