

Issues: Group III Written Notice (unauthorized/misuse of State property to access obscene material) and Termination; Hearing Date: 05/09/07; Decision Issued: 05/21/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8598; Outcome: Written Notice – Partial Relief (reduced to Group II); Termination – No Relief: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8598

Hearing Date: May 9, 2007
Decision Issued: May 21, 2007

PROCEDURAL HISTORY

On November 14, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for unauthorized use or misuse of State property by accessing obscene material using a State computer.

On December 1, 2006, 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 he requested a hearing. On April 11, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency party designee
Agency advocate
Witnesses

ISSUE

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. 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 Correctional Lieutenant at one of its facilities. One of his responsibilities included training other employees regarding Agency policies and procedures.

On November 14, 2006, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.¹ In 2005, Grievant was instructed by the warden not to bring pornographic movies to the office. On October 18, 2006, the Agency discovered in Grievant's office two floppy disks and a DVD containing sexually explicit content.²

¹ Grievant did not file a grievance challenging the Group II Written Notice.

² As part of the evidence for this group III written notice, the Agency submitted two floppy disks and one DVD containing sexually explicit pictures and video. These items were used by the Agency to show that Grievant failed to follow a supervisor's instruction and should be given a group II written notice. Because the floppy disks and DVD are evidence to support the issuance of the Group II written notice, they cannot be included as part of the evidence to support the group III written notice also issued on November 14, 2006. Accordingly, the hearing officer will exclude from consideration as evidence in this grievance the two floppy disks and the DVD. Agency Exhibit 3 is rejected.

In April 2006, the Secretary approached Grievant while he was working in front of his computer. She looked at his screen and observed a picture of a woman wearing a negligee. She was offended by Grievant's behavior.

Grievant has a unique log on identification necessary to enable him to access the Internet. Every time he logged onto his computer he would receive a message informing him that his computer usage could be monitored by the Agency.

Grievant used the Agency's Computer Network to visit an Internet web site entitled hotornot.com. On this web site appeared pictures of women. Grievant would then rate the women's physical appearance on a scale of 1 to 10 in order to advance to the next picture. Grievant also visited a website entitled onlinebootycall.com. This is a dating web site for "singles who enjoy being singles." This site has a menu option to "rate booty." Pictures of women appear with an opportunity to rate the women on a scale of 1 to 10 in order to advance to the next picture. The site has a menu option to reach a page showing items that may be purchased through the website. Several women appear modeling short shorts exposing a portion of their rear ends. Grievant visited websites entitled married secrets.com and AshleyMadison.com, sites dedicated to married people searching for a "romantic rendezvous". Grievant viewed a website entitled "iwantu.com", a website for "swingers and singles personals."

Grievant admitted to the Agency's investigator that he rated women's pictures on the web sites.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

The Agency contends Grievant should receive a Group III Written Notice for accessing obscene material on this computer. The evidence is insufficient to support this conclusion. When the Agency examined Grievant's computer it was unable to find

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

any images containing sexually explicit content.⁶ Grievant visited certain websites of a romantic or sexual nature, but the exact images he viewed are not known. The question is whether Grievant engaged in inappropriate behavior by visiting those websites.

Virginia Department of Corrections Operating Procedure 310.2 governs information Technology Security. An employee's "failure to follow this procedure is a violation of the Employee Standards of Conduct (Directive 135 and related procedures), and may result in disciplinary action."

Section 310.2(VI)(C) of this policy addresses the personal use of the computer and Internet:

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

1. Adversely affects the efficient operation of the computer system;
or
2. Violates any provision of this procedure ... or any other policy, regulation, law or guideline as set forth by local, State or Federal law.

Section 310.2(X)(D)(1) provides:

DOC has no tolerance for employees, contractors and volunteers who use the DOC Internet Services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate, and unauthorized purposes.

Section 310.2(X)(D)(3) provides:

Specific unacceptable, inappropriate and unauthorized usages of Internet Services include, **but are not limited** to:

- a. Violations of Federal or state laws or violations of state and departmental policies or procedures.
- b. For profit activities, excluding those directly related to the DOC's charter, mission, goals and purposes, or employees' job responsibilities of activities.
- c. Private business, including commercial advertising.

⁶ The Agency found sexually explicit content in Grievant's office, but that content is not part of this grievance.

- d. Personal or other non-DOC related fund raising or public relations activities, excluding those approved by the director or the director's designee.
- e. Intentional modification of passwords, files or other data belonging to another employee without that employee's approval or a request from the employee's supervisor.
- f. Creation, transmission, retrieval or storage of material or messages of the libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender, and age, or physical, mental and emotional disability. (Emphasis added).

The Agency contends Grievant's use of the computer was inappropriate for the workplace because of the possibility that his behavior would be offensive to other employees. Grievant argues he was merely visiting websites devoted to dating or romantic interests. The Agency's contention, however, is supported by the evidence presented. When the evidence is viewed as a whole, it is clear that Grievant's visited sites not merely devoted to dating but those reflecting a prurient interest. For example, the iwautu.com site encourages viewers to join an Adult Club with:

Adult Dating Personals, live out your sexual fantasies and discover a new playmate online or adult swinger whether you are looking for a one night stand or casual sexual encounters, the Adult Club is where the game is played.

In addition, rating the physical appearance of woman is to some extent an objectification of women. If the type of sites visited by Grievant were viewed by other employees, especially female employees, those employees may reasonably view Grievant's behavior as demeaning to women. This conclusion is confirmed by the fact that the Secretary glanced at Grievant's computer screen and observed him viewing a woman wearing a negligee. She felt offended by Grievant's actions. Grievant's usage of the computer was not appropriate for the workplace.⁷

"[F]ailure to ... comply with applicable established written policy" is a Group II offense.⁸ Grievant failed to comply with Virginia Department of Corrections Operating Procedure 310.2 thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a second Group II Written Notice, an employee may be removed from employment. The Agency's decision to remove Grievant from employment must be upheld based on the accumulation of disciplinary action.

⁷ Viewing inappropriate websites in the workplace would otherwise be a Group I offense. Because the Agency has adopted a specific policy to address such inappropriate behavior, Grievant's failure to comply with that policy supports the issuance of a Group II Written Notice.

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Grievant contends he was denied procedural due process because when he met with the Warden on November 1, 2006 he was denied the opportunity to meet with the investigator and obtain the information the Agency relied upon to take disciplinary action against him. To the extent Grievant's procedural due process rights were violated prior to the qualification of this grievance for hearing, Grievant could have sought a ruling from the EDR director. Because Grievant failed to do so his claim that the Agency violated his procedural due process rights is moot. Grievant received copies of the Agency's evidence against him prior to the grievance hearing and was informed of the Agency's witnesses against him prior to the grievance hearing. Accordingly, Grievant was not denied procedural due process at the hearing.

Grievant contends that he was the victim of a coordinated effort by certain members of the security staff at his facility to remove him from his position. He also alleges the Agency inconsistently applied policy. No evidence was presented to support these contentions.

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 Employment Dispute Resolution..."⁹ 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 is **reduced** to a Group II Written Notice. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

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:

⁹ *Va. Code § 2.2-3005.*

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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. 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.¹⁰

[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/Carl Wilson Schmidt

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer