

Issues: Group III Written Notice (failure to follow policy, abuse of State time, unauthorized use of State property, internet abuse), and Termination; Hearing Date: 01/12/09; Decision Issued: 01/30/09; Agency: DOC; AHO: John R. Hooe, Esq.; Case No. 8990, 8991; Outcome: Partial Relief; **Judicial Review: Appeal to Clarke County Circuit Court on 03/09/09; Outcome pending.**

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case Nos. 8990 and 8991

Hearing Date: January 12, 2009
Decision Issued: January 30, 2009

PRELIMINARY MATTERS

During the telephone pre-hearing conference conducted on December 9, 2008 it was agreed by the parties' representatives that the hearing in this matter would be conducted on Monday, January 12, 2009 commencing at 10:30 a.m. The Grievant requested that the hearing be held at his work location and objected to the hearing being held at the location suggested by the Agency. The Hearing Officer overruled the objection, finding that the location suggested by the Agency qualifies as an appropriate place for the hearing.

It was further agreed during the pre-hearing conference that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and to the other party no later than January 5, 2009 at 5:00 p.m.

APPEARANCES

Grievant
Representative for Agency
Agency Advocate
Six Witnesses (in addition to Grievant)

ISSUES

1. Did the Grievant commit the offenses set out in the written notice, namely: failure to follow instruction and/or policy (DHRM 1.75 Use of Internet and Electronic Communications); abuse of state time (Length of time on internet and insufficient time on assigned job); unauthorized use of state property (use of state computer for excessive personal use); and computer/internet misuse (excessive computer abuse). If so, what was the appropriate level of disciplinary action for the conduct at issue?

2. Should mitigating factors result in less severe discipline?
3. Did the Agency retaliate against the Grievant by terminating the Grievant's employment?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

- Tab 1 - The Written Notice ("Corrected Copy") and letter of termination dated August 11, 2008
- Tab 2 - Employee Grievance Form A filed August 19, 2008 and the related statement prepared by the Grievant
- Tab 3 - Employee Grievance Form A filed August 26, 2008, a related statement prepared by the Grievant and a memorandum addressed to the Grievant dated September 22, 2008
- Tab 4 - DVD containing computer used data
- Tab 5 - Employee work profile for Grievant
- Tab 6 - Policy No.: 1.75-Use of the Internet
- Tab 7 - Agency Operating Procedure 310.2
- Tab 8 - Agency Logon banner and to Grievant certificates of completion of security awareness training
- Tab 9 - Conditions of employment
- Tab 10 - Agency's Standards of Conduct, Operating Procedure 135.1
- Tab 11 - Orientation checklist
- Exhibit 12 - Application for employment
- Exhibit 13 - Amazon.com printout regarding Grievant DVD
- Exhibit 14 - Memos dated January 9, 2009 and January 8, 2009
- Exhibit 15 - Internet logs for January 8, 2008, March 12, 2008, March 18, 2008 and March 20, 2008
- Exhibit 16 - Agency Operating Procedure 427.1
- Exhibit 17 - Official transcript of course completion dated January 5, 2009

The Grievant's Exhibits entered into evidence were as follows:

- Exhibit 1 - Memos dated July 24, 2008 and December 15, 2008
- Exhibit 2 - Undated memo and memo dated December 15, 2008
- Exhibit 3 - Written Notice issued August 8, 2008 indicating disciplinary action of suspension pending termination

FINDINGS OF FACT

The Grievant filed timely appeals: first, from the Written Notice for the four listed offenses, written as a Group III Notice and resulting in suspension pending termination; and second, from the subsequent notice of termination. The two grievances, not having been resolved, were consolidated and qualified for a hearing.

The Agency's first witness was the acting superintendent of the facility where the Grievant was employed and was the person who gave the Grievant his termination notice dated August 11, 2008. According to the witness, the basis for the written notice (which first resulted in suspension and ultimately in termination) was the Grievant's conduct surrounding his use of the computer provided to him by the Agency. Although the Written Notice listed the offense date as "January - March, 2008", the witness testified that no evidence of computer use in February, 2008 had been reviewed at the time the written notice was given. Upon cross-examination, the witness confirmed that the Grievant did not have use of the computer from January 22, 2008 to March 6, 2008 because the Grievant had not completed a required security course.

The primary evidence presented by the Agency was the contents of the CD at Tab 4 (internet logon records) and Agency Exhibit 15.

Agency Exhibit 15 consisted of the printouts of the internet use logs for the Grievant's work computer for the dates January 8, 2008, March 12, 2008, March 18, 2008 and March 20, 2008. The "Summary" cover sheet for Exhibit 15 indicated that on January 8, 2008 the Grievant "accessed the internet 329 times, on March 12, 2008 accessed the internet 871 times, on March 18, 2008 accessed the internet 240 times and on March 20, 2008 accessed the internet 276 times".

Regarding the summary of computer activity on January 8, 2008, one full page (page 20) represented elapsed time of three minutes. The Agency did not provide a witness who could adequately testify as to conclusions which can be drawn from review of the computer logs. For instance, on the March 12, 2008 log, pages 9 through 18 represent elapsed time of six minutes. However, the Hearing Officer does not know whether the Grievant was actually viewing the computer during the entire six minutes. On the January 8, 2008 printout, the log indicates twenty-four hits at 13:40 and fourteen at 13:44. Between the time of 13:36 and 13:44 (eight minutes) the log indicates a total of fifty-one hits.

No evidence was submitted by the Agency indicating that any of the hits involved pornographic or other objectionable sites. However, the Agency's witness did point out that the March 20, 2008 log showed that the Grievant "googled" two co-workers, one co-worker between the time of 15:15 and 15:17 and the other worker between 15:20 and 15:23.

The Grievant's employee work profile (Agency Tab 5) sets out the duties of Probation Officer 1, the position held by the Grievant. The same exhibit indicates that on September 27, 2007 his performance evaluation indicated that he met performance standards and was "an asset to this facility."

Policy No.: 1.75-Use of the Internet and Electronic Communications Systems (Agency Tab 6) states as follows:

In general, incidental and occasional personal use of the Commonwealth's Internet access...is permitted; however, personal use is prohibited if it interferes with the users productivity or work performance...; adversely affects the efficient operation of the computer systems; or violates any provision of this policy...

No evidence was presented by the Agency that the Grievant's use of the computer did in fact interfere with work performance or affect the efficient operation of the computer systems.

Policy No.: 1.75 provides that violations must be addressed under Policy 1.60, Standards of Conduct Policy. It goes on to state that the appropriate level of disciplinary action will be determined "on a case-by-case basis...with sanctions up to or including termination depending on the severity of the offense, consistent with Policy No.: 1.60."

The Agency's position is that the "seriousness" of the Grievant's violation warrants termination. However, the four violations cited in the written notice do not include any violation which alone would be considered a Group III Offense. "Abuse of state time" is a Group I Offense. "Failure to follow instruction and/or policy" is Group II Offense. "Unauthorized use of state property" is a Group II Offense. "Computer/internet misuse" could be categorized as a Group II Offense. However, all of the offenses charged arise out of the Grievant's alleged excessive personal use of the internet.

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 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, 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 to provide appropriate corrective action.

Standards Of Conduct (135.1) are designed in part to assure efficient government operations. The Standards exist to establish a fair and objective process for correcting or treating unacceptable conduct or work performance (Standards, Page 2, IV.B.1.) The Standards provide that corrective action may range from an informal action such as counseling to formal disciplinary action. The Standards further provide that counseling typically consists of an informal discussion between an employee and his or her supervisor regarding problems with the employee's work performance (Standards, Page 1, III).

The evidence indicated that the Agency investigated the Grievant's use of the computer without the Grievant's knowledge of the investigation. The investigation covered the months of January, February and March, 2008 and was completed in April, 2008. The Grievant was not confronted regarding his use of the computer until August 8, 2008 when he received a Group III Written Notice with a thirty day suspension. Subsequently, on August 25, 2008, the Grievant received a second Written Notice with termination, for the same conduct set out in the August 8, 2008 written notice.

Although the Agency presented evidence of the Grievant's excessive personal use of the internet, the Agency did not present evidence indicating that the use affected the Grievant's job performance. Neither did the Agency present any evidence that the Grievant's excessive use of the internet involved pornographic sites or other prohibited material.

The Virginia Department of Corrections Operating Procedure No. 135.1 sets out its Standards of Conduct under the authority of the Code of Virginia § 2.2-1201. Operating Procedure 135.1 sets out at XII. Third Group Offenses (Group III), A.: "These Offenses include acts and behavior of such a serious nature that a first occurrence normally should

warrant removal.” § XII.B. States that “Group III Offenses include, but are not limited to:” and proceeds to list twenty-six offenses. None of the Grievant’s alleged offenses are included in the twenty-six listed and are not comparable to the twenty-six serious offenses listed.

The Agency has not demonstrated, by a preponderance of the evidence, that the Grievant’s misconduct was of such a serious nature that it should be considered a Group III violation.

It is the opinion of the Hearing Officer that the conduct of the Grievant is first, a Group II Offense of “failure to comply with applicable established written policy”. The alleged offense of “abuse of state time” and “computer/internet misuse-excessive computer abuse” is a single Group I Offense of “abuse of state time.” The alleged offense of “unauthorized use of state property” is not supported by the evidence as being a separate and distinct offense from the other offenses.

The Hearing Officer does not find evidence to support Grievant’s claim of retaliation. In that regard, the Grievant’s witnesses testified as to rumors that the acting superintendent had a “hit list” including the Grievant, an allegation not supported by the remainder of the evidence.

DECISION

The disciplinary action of the Agency is rescinded. The Written Notice shall be for a Group I Offense “abuse of state time” and a Group II Offense “failure to follow instruction and/or policy”. The written notice shall impose a suspension of ten work days without pay with all other back pay and benefits, if any, awarded to the Grievant.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency

policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

John R. Hooe, III
Hearing Officer