Issues: Group II Written Notice (internet abuse) and Retaliation (other protected right); Hearing Date: 10/27/10; Decision Issued: 10/29/10; Agency: DJJ; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9418; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9418

Hearing Date: October 27, 2010
Decision Issued: October 29, 2010

PROCEDURAL HISTORY

The Department of Juvenile Justice ("Agency"), on February 26, 2010, issued to the Grievant a Group II Written Notice for excessive internet usage during January 2010. The Written Notice was ultimately amended on August 13, 2010, to reflect the applicable policy, DHRM Policy 1.75. Agency Exh. D.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On September 29, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on October 12, 2010. The hearing was scheduled for October 27, 2010, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were, with limited objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant's exhibits were received into the grievance record without objection, and they will be referred to as the Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

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?

The Grievant asserts that the discipline was excessive, disparate treatment, retaliation, and he requests rescission or reduction of the Group II Written Notice.

BURDEN OF PROOF

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 claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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:

> 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.

The Agency's Standards of Conduct, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. M.

DHRM Policy 1.75, Use of the Internet and Electronic Communications Systems, provides as follows:

> Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:
>
> - interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
> - adversely affects the efficient operation of the computer system;
> - violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

Prohibited activies described in Policy 1.75 are stated as follows:

> Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:
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> - accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
> - downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images;
> - installing or downloading computer software, programs, or executable files contrary to policy;
> - uploading or downloading copyrighted materials or proprietary agency information contrary to policy;
> - uploading or downloading access-restricted agency information contrary to policy or in violation of agency policy;
> - sending e-mail using another's identity, an assumed name, or anonymously;
> - permitting a non-user to use for purposes of communicating the message of some third party individual or organization;
> - any other activities designated as prohibited by the agency.

Agency Exh. H.

The Agency included among its exhibits its Administrative Directive No. 02-002.2, Internet Access and Computer Utilization. This directive provides:

> As with telephones, which also are provided primarily for business purposes, limited personal use of computing resources is permitted, provided that any

> personal use is of an incidental nature, of reasonable duration and frequency. Such incidental use must not interfere with agency activities, must not involve solicitation, must not be associated with any for-profit outside activity, and must not potentially embarrass the Commonwealth, its residents, its taxpayers, or its employees.

Agency Exh. K.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a corrections sergeant, and the Agency became aware of the Grievant's internet usage on the job. The Grievant did not need to access the internet for his job duties. The Agency's information technology witness presented a report that showed the Grievant's internet access during work shifts of social networking, video, and other various sites. The Agency showed no malevolence or internet activity specifically prohibited by the applicable policies. The extent of the usage was the offending aspect to the Agency.

The Agency highlighted evidence at the hearing of the Grievant's internet transactions for January 2, 2010, and January 16, 2010. On January 2, 2010, there was a total of 414 minutes; on January 16, 2010, there was a total of 439 minutes. Other dates within January also showed varying and apparently extensive internet usage. Agency Exh. C and Agency Exhibit Disc A. The Grievant did not testify at the grievance hearing, but he voiced no challenge to the usage detailed in the Agency's reports. The Grievant asserted in his remarks that the internet was left active even when he left his computer station to perform his tour of duties.

Despite the extensive record of internet usage, the Agency witnesses did not indicate any discernable adverse affect on the Agency operations. The Agency also did not establish any communication or notice of its interpretation of the limits of incidental and occasional personal use of the internet compared to what constitutes excessive use. The Grievant's witnesses established that another corrections sergeant was disciplined with a Notice of Improvement Needed in February 2010 for excessive internet usage. The Agency's cross-examination showed that the other sergeant's internet usage was not as extensive as the Grievant's.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Although the policy does not specify a threshold to determine the amount of personal use that exceeds what is reasonable, Grievant's use on January 2 and 16, 2010, is clearly excessive in light of the Agency's expressed desire for employees to minimize personal use of the internet. Grievant acted contrary to DHRM Policy 1.75 because his personal use of the internet exceeded the incidental and occasional standard set by policy. It is reasonable for the Agency to discipline an employee who abuses the access to the internet excessively. I find that the Agency has met its burden of proving the Grievant's excessive use of the internet violates the Standards of Conduct. The remaining issue is whether the conduct is properly considered a Group II offense. Given the written policy on internet usage, a Group II Written Notice is within the Agency's discretion, subject to mitigation and other factors.

Mitigation

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of a Group II Written Notice. The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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.

Grievant contends the disciplinary action should be mitigated. Grievant contends his otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group II. However, length of service, alone, is insufficient for a

hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." None of the Agency's witnesses testified that any mitigation was specifically considered. In a case where there is no evidence that the agency considered any mitigating circumstances, a hearing officer can still fulfill the requirement to determine if mitigation is appropriate. While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. If the agency presents no evidence of its consideration of

mitigatingcircumstances, then the simple result is there is no agency position on mitigation to which the hearing officer must give deference. The hearing officer should then proceed to assess whether the disciplinary action exceeds the limits of reasonableness to determine if mitigation is appropriate. EDR Ruling #2008-1749, 2008-1759 (September 5, 2007).

The Grievant's position is that the Agency's interpretation of the policy, *i.e.*, what is considered incidental versus excessive, was not communicated to the Grievant. The Agency's witnesses and evidence did not show any notice to the Grievant of what the Agency considered permitted incidental personal use of the internet.

In order to determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors. The *Rules* provide a non-exclusive list of factors for consideration by the hearing officer, notably:

> • Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable

If, after weighing all relevant factors, the hearing officer determines that the agency's action exceeded the bounds of reasonableness, the hearing officer may mitigate the disciplinary action. I find that the Grievant did not have sufficient notice of the Agency's interpretation of what level of internet usage would be deemed excessive. Because of this mitigating factor, I conclude that the Group II Written Notice is excessive and should be reduced to a Group I Written Notice.

Disparate Treatment

The Grievant also argues disparate treatment, based on the other sergeant who was given a Notice of Improvement Needed in response to a finding of excessive internet usage. While the Grievant asserts that the other sergeant was not formally disciplined with a Group Notice, the evidence revealed that the other sergeant did not have nearly the extent of internet usage as the Grievant. The Grievant has not borne his burden of showing disparate treatment, but, as noted above, the Group II Written Notice will be reduced to a Group I.

Retaliation

The Grievant asserts that his discipline was retaliatory for his implication in an incident that occurred in January 2010 involving printed internet pages and pictures placed in an assistant superintendent's mailbox. No wrongdoing was found against the Grievant from such incident. To establish a *prima facie* case of retaliation, the grievant must show that: (1) he engaged in

protected activity; (2) he suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the materially adverse employment action. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Only certain activities are protected under the state grievance procedure. They include "use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See* Va. Code § 2.2-3004(A). The grievance statute also provides that it is "the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000. I find that the Grievant has not shown a protected activity.

However, if the Grievant is found to have engaged in protected activity, *i.e.*, his involvement in or exoneration in the mailbox incident, or if the grievant makes a *prima facie* case of retaliation, the agency merely has to proffer a legitimate, non-discriminatory reason for the discipline, which it did in this case. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the trier of fact remains at all times with the plaintiff).

As stated above, for the Grievant to show retaliation, he must show that (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the employee must then present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual. On this issue, I find the Grievant has not borne his burden of proving the Agency's issuance of the Group II Written Notice was merely pretextual.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice of disciplinary action is reduced to a Group I Written Notice.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)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 of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer