

Issue: Group III Written Notice with Termination (Computer/Internet Misuse); Hearing Date: 06/22/11; Decision Issued: 06/23/11; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9605; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9605

Hearing Date: June 22, 2011

Decision Issued: June 23, 2011

PROCEDURAL HISTORY

On February 7, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for computer and Internet misuse.

On March 1, 2011, 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 May 16, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuance a decision in this case due to the unavailability of a party. On June 22, 2011, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Counsel
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?

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:

Norfolk State University employed Grievant as a Housekeeping and Apparel Manager I. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant had access to the Agency's computer system. He was assigned a unique login identification and password.

Grievant viewed a Website with individuals soliciting sexual relations. Grievant used the Agency's computer and sent emails using his Agency email account to respond to the individuals soliciting sexual relations through the Website. Grievant typically instructed the recipients not to respond to his Agency email address but to respond to his personal email address which he listed. From March 2009 through May 2010, Grievant sent a minimum of 40 sexually oriented emails using his Agency email address.

There are several examples of Grievant's inappropriate emails. On April 3, 2009, Grievant responded to an individual using the Website to offer to perform sex acts. Grievant responded using his Agency email address and wrote:

Hey what hotel are u in I am very much interested. PLEASE DO NOT REPLY TO THIS EMAIL. I WILL NOT RECEIVE IT MY EMAIL ADDRESS

IS [Grievant's personal email address]. I AM IN THE ... AREA LOOKING TO HAVE FUNN. SHOOT ME AN MESSAGE. THANKS.

On April 30, 2009, Grievant sent an email using his Agency email address to the Website inviting people to his home for a party. People responding were asked to describe how they "get down" and to send pictures and describe their sexual preferences.

On April 30, 2009, the Website sent Grievant an emailing stating:

We've received too many mails from [Grievant's Agency email address] in a short time span. Sorry, but no messages from [Grievant's Agency email address] will be relayed for 24 hours.¹

On May 1, 2009, the Website sent Grievant another message indicating it had received too many emails from Grievant's Agency email address.

The Agency investigator confirmed that Grievant was at work on the dates he sent emails to people on the Website. Grievant admitted that his Agency emails referred to his personal email account and his personal telephone number.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The Agency has a policy entitled Acceptable Use of Technological Resources Policy to "familiarize users with the purposes for which technological resources are provided and the type of activities that are prohibited." Section I provides:

Users are responsible for maintaining the privacy and security of their computer network account user IDs and passwords and for the computer information systems accessed through the network. Users are also responsible for the activities carried out under their user accounts.

Section IV sets forth prohibited activities such as:

¹ Agency Exhibit G.

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Intentionally downloading and/or transmitting ... obscene ...or inappropriate messages or images.

Section VIII states:

Violations of this policy will be addressed in accordance with the Commonwealth of Virginia Policy Number 1.75 which is relevant to this policy. The appropriate level of disciplinary action will be determined on a case-by-case basis by the appropriate Vice President or designee, with sanctions up to and including termination or expulsion from the university depending on the severity of the offense.

In this case, Agency has presented sufficient evidence to support its decision to issue Grievant a Group III Written Notice and to remove Grievant from employment. Grievant used the Agency's email to respond to requests for sexual activity. He did so during work hours. He responded using sexually explicit language. Grievant sent inappropriate emails using the Agency's computer system. The number of times Grievant sent inappropriate messages is significant. Grievant sent so many emails from the Agency's email address that the Website limited his access to the Website. Recipients of Grievant's emails and administrators with the Website would know that Grievant worked for the Agency. This diminished the Agency's reputation.

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...."³ 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 with removal is **upheld**.

³ *Va. Code § 2.2-3005.*

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
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
600 East Main St. STE 301
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.⁴

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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

Carl Wilson Schmidt, Esq.
Hearing Officer