

Issues: Group I Written Notice (unsatisfactory performance) and Group II Written Notice (failure to follow policy); Hearing Date: 06/09/16; Decision Issued: 06/14/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10800, 10801; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 06/18/16; EDR Ruling No. 2016-4378, 2017-4388 issued 07/12/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/18/16; DHRM Ruling issued 07/26/16; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10800 / 10801**

Hearing Date: June 9, 2016  
Decision Issued: June 14, 2016

### **PROCEDURAL HISTORY**

On January 5, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. On January 5, 2016, Grievant was issued a Group II Written Notice for failure to follow instructions or policy.

On January 29, 2016, Grievant timely filed grievances to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 19, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 9, 2016, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 employs Grievant as a Casework Counselor at one of its Facilities. She has been employed by the Agency for approximately 29 years. Grievant received the Agency's annual Security Awareness Training. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received assistance from Inmate S. He had better computer skills than many other inmates at the Facility. He tutored other inmates at the Facility. Inmate S resided in a dorm with other inmates. Other inmates could see items in Inmate S's possession.

Several laptops were located in the computer lab at the Facility. Inmates would go to the lab and use the computers as part of their studies. Laptops were supposed to remain in the lab when not used for activities in that room.

Grievant learned of construction that would take place in the area of the computer lab and she knew that Inmate S would not be able to go to the computer lab, obtain a laptop, and assist Grievant. Grievant could have taken a laptop from the computer lab and kept it in her office with a locked door and then allowed Inmate S to use the computer. Instead, Grievant authorized Inmate S to take a laptop from the lab and keep it with him in the dorm. Grievant did not have the authority to permit Inmate S to keep the laptop in the dorm. On the following day, Inmate S brought the laptop to

Grievant's office. Grievant and Inmate S downloaded information about a project into a portable hard drive. Grievant connected the portable hard drive to her computer and printed information contained on the portable hard drive.

Two inmates used laptops to create a database to help Grievant perform her work duties. The database information included offenders' names, offender discharge dates, offenders needing birth certificates, offenders needing social security numbers. It is unclear who "populated" the database. Grievant claimed that the inmates created a template and but were not involved in updating the information in that database. Without additional evidence, the Hearing Officer cannot substantiate the Agency's allegation that Grievant permitted the inmates to access personal information about inmates and then enter that information into the database.

On September 29, 2015, the Agency received an Offender Request Form submitted by an anonymous inmate. The inmate claimed that Grievant had violated security policies including allowing Offender S take a laptop into the dorms. The inmate also claimed Grievant was permitting inmates to use the internet from her office.

As a result of the Offender Request Form, the Agency began an investigation. On September 29, 2015, the Major spoke with Grievant regarding the Offender Request Form. On the interview, major wrote:

I spoke with [Grievant] in my office and she did confirm that [Inmate F] and [Inmate S] did create a database for her. The database consists of offender discharge dates, offenders who still need a birth certificate, offenders who still need Social Security cards, offenders who were born outside of the United States, and offenders who have no case plan. She also confirmed that [Inmate S] did take the laptop to his bed area at night to work on projects for her. [Grievant] denied ever allowing the offenders to use the Internet in her office.<sup>1</sup>

As part of the Agency's investigation, it examined Grievant's internet use. Grievant used her DOC email address to send emails to her husband and son. She also received emails from them. She received emails from private organizations and public utilities. For example, she received bill payment reminders from a retail business. Grievant received an email about biometric screening for DOC employees. Grievant forwarded the email to her personal email address from her DOC email address. Grievant received an email from a DOC employee at another facility regarding whether Grievant wanted to purchase Girl Scout candy and nuts from that employee's daughter. Grievant deleted the email without replying. Grievant did not report to the Agency that she had received the email.

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<sup>1</sup> Agency Exhibit 9.

## 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.”<sup>2</sup> 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.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

### Group I Written Notice

DOC Operating Procedure 310.2 governs Information Technology Security. Section VI(B)(3) addresses Personal Use of the Computer and the Internet:

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

- a. Adversely affects the efficient operation of the computer system;
- b. Violates any provision of this operating procedure, any supplemental procedure adopted by the Agency supplying the Internet or electronic communication systems, or any other policy, regulation, law, or guidance as set forth by local, State, or Federal law.

Grievant had personal use of her computer and the Internet because she sent emails not relating to Agency operations using her computer to access the Internet. Grievant’s personal use was incidental and not contrary to policy. Over a six-month period, Grievant sent between 40 and 50 emails using the Agency’s computer and Internet access. On those days that she sent emails, Grievant typically averaged one email per day. Grievant’s behavior did not interfere with the performance of her duties or affect the Agency’s responsibilities. The Agency has not presented evidence showing Grievant’s Internet use was contrary to policy.

The Agency argued that Grievant violated DOC Operating Procedure 310.2 by using her DOC email address to send emails to her husband, son, and receive emails from private organizations and public utilities. The Agency relied on section VI(B)(11) which provides:

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

Certain activities are prohibited when using the Internet, electronic communications, and information technology systems. These include, but are not limited to:

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q. Utilizing a DOC issued laptop device and/or DOC issued mobile phone as one's own personally owned device for personal business

Grievant did not use her DOC email address as "one's own personally owned device for personal business." Grievant's usage of her DOC email address for personal use was limited. If Grievant had treated the DOC email address as if she owned the email address herself, she would have demonstrated frequent and extensive usage of that DOC email address. Sending and receiving a few emails using the DOC email address is not sufficient to show that the email address was used as if "personally owned."

The Agency argued that Grievant violated DOC Operating Procedure 310.2 by forwarding an email she received with her DOC email address to a non-DOC email address. Section VI(F)(8) provides

DOC email must not be auto-forwarded to an external email address unless there is a documented business case provided to CTSU Security by the Organizational Unit Head.

Page 120 of the Agency's exhibits shows Grievant received an email on May 1, 2015 from a DOC Personnel Analyst regarding Biometric Screenings. Grievant sent that email to a personal email address. The email did not contain any DOC sensitive information but rather reflected questions and answers about biometric screening sent to all Facility staff. Page 121 shows that on April 9, 2015 Grievant sent a DOC employee a question about bonding letters and who should complete the task. The recipient indicated it "would be great if [another employee] would do them for the current class." It is unclear what significance, if any, bonding letters have to the Agency's operations. The email did not have any attachments. The correspondence suggests that Grievant wanted to send herself a reminder about the discussion rather than remove or affect sensitive information from the Agency.

At the time Grievant forwarded these emails to her personal account, the Agency's policy read "auto-forwarded". The policy shows that on August 25, 2015, the word "auto" was stricken from the policy. As the policy was written in April and May 2015, Grievant did not violate the policy by forwarding email she received with her DOC email address to her personal email address.

The Agency argued that Grievant used her DOC email address to solicit business. The email presented at page 116 of the Agency's exhibits shows Grievant's husband sent her a copy of an email he received from an employee at his workplace seeking to purchase pastries and cakes from Grievant and her husband. Grievant's

husband told Grievant, “[t]hey really liked the coconut cake.” Nothing about this email shows Grievant used her DOC email account to solicit business from anyone.

The Agency argued that Grievant violated DOC Operating Procedure 310.2 by failing to report her receipt of an email from another employee soliciting Girl Scout candy and nuts. Section VI(F)(4)(c) provides:

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

(iv) Personal or other non-DOC related fundraising ....

Section VI(F)(6) provides:

Any user of a DOC network who receives an email message violating the Internet Service Usage requirements should report the incident to their immediate supervisor. The supervisor should then contact CTSU Security.

Grievant did not violate the Agency’s policy for two reasons. First, she would have had to have immediate recollection of a 23 page densely worded policy immersed in computer jargon. Second, soliciting Girl Scout candy and nuts is not a material violation of the policy that would justify reporting the violation. Indeed, the author of the email did not receive disciplinary action for sending it but rather was simply told not to send similar emails again.

### Group II Written Notice

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.<sup>5</sup>

DOC Operating Procedure 310.2(VI)(B)(5) provides:

The Organizational Unit Head will ensure employees ... shall NOT allow offenders to have access (supervised or unsupervised) to any DOC Information Technology ... resource that can access the Internet. The exception must be unequivocally approved by the CIO and Deputy Director.

DOC Operating Procedure 310.3 governs Offender Access to Information Technology. The goal of the policy is “to prevent the unacceptable, inappropriate, or unauthorized access, use, ... misuse of DOC technology by offenders.”<sup>6</sup> Section IV(A)(4) provides:

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<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

<sup>6</sup> Agency Exhibit 6.

Offenders shall only be permitted to use IT resources to perform approved job assignments, education, instruction, research, and specific career and technical education duties as defined in this operating procedure.

Section IV(A)(6) provides:

DOC employees are responsible for the appropriate use of technology by offenders and may be held accountable for the misuse of technology, which may result in disciplinary action in accordance with Operating Procedure 135.1, Standards of Conduct.

Grievant permitted Inmate S to take a laptop into his dorm in order to be able to access the laptop on the following day and avoid construction around the computer lab. Inmate S was not performing an approved job assignment or other permitted duties while he kept the laptop in the dorm. Although Inmate S may have been supervised by a Corrections Officer while Inmate S was in the dorm, Inmate S's use of the laptop was not supervised and not authorized. It was unnecessary for Grievant to permit Inmate S to take the laptop to his dorm. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violating DOC Operating Procedure 310.3.

*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 Human Resource Management ...."<sup>7</sup> 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 Group II Written Notice.

## DECISION

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

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<sup>7</sup> 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.<sup>8</sup>

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<sup>8</sup> Agencies must request and receive prior approval from 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer