

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 02/06/18;  
Decision Issued: 02/26/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11120; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11120**

Hearing Date: February 6, 2018  
Decision Issued: February 26, 2018

**PROCEDURAL HISTORY**

On July 28, 2017, Grievant was issued a Group II Written Notice of disciplinary action for violating policy.

On August 24, 2017, 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 she requested a hearing. On December 5, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 6, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Vocational Teacher at one of its Facilities. The purpose of Grievant's position included teaching offenders how to install and uninstall software, identify and explain basic computer components of PC systems, identify and explain the function of peripherals, and describe how to install and configure an operating system such as Windows. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. M held a position similar to Grievant's position. His classroom was near Grievant's classroom in the Facility.

When Grievant was hired, the Regional Office Manager forwarded to Grievant an email sent by the former teacher containing the passwords for the systems in the computer lab. The Regional Office Manager said the information was necessary so that Grievant could access computer accounts. Grievant had full administrative rights to the equipment in her classroom. It was common practice at the Facility for a classroom teacher to have administrative rights.

When Grievant began working at the Facility she found a computer with a clear case in her classroom closet. This computer was listed on the inventory sheet left by the former teacher. Grievant installed Windows on the computer and attached a

scanner. This computer had a keyboard, mouse and monitor attached. Grievant had administrator rights to the computer. The computer's operating system was Windows XP. Since the Agency no longer used Windows XP, Grievant installed Windows 7 on the computer. Grievant changed the account name of the computer to her name. She did not secure the computer with a password.

Grievant used the clear computer as a teaching tool in her classroom. The clear case gave her the opportunity to show offenders what each part of the computer looked like. When Grievant first removed the computer from the closet, the power supply was not working. One of Grievant's aides worked with Mr. M's class to get the power supply working so that she could use the computer as a simulated employment kiosk. A scanner was connected to the computer. Grievant worked on the computer to prepare a job application form attached to a database. She wanted offenders to go to the kiosk and fill out a job application. Doing this would prepare an offender to complete job applications once he left the Facility and returned to the community.

Grievant had an interactive whiteboard installed in her Classroom in May 2017. The installation technicians needed a computer to connect to the interactive whiteboard so they could finish calibrating it during the installation. Grievant had not yet received the laptop that was designated to use with the whiteboard. Grievant had an older laptop in her inventory so she brought it out and set it up so the technicians could finish the installation. Grievant decided to use the older laptop until the new laptop arrived. This computer "booted" directly to the operating system and did not require a customary DOC log-in. Grievant had not received the new laptop when she took leave on June 16, 2017. No offenders used the older laptop.

Mr. M asked Grievant if he could use an old server that was in Grievant's classroom. Mr. M had a desktop computer that he was using as a server. He and his clerk already had administrator rights to use that desktop computer. Grievant saw nothing wrong with letting Mr. M use the server because it would make his job easier and not give him any more rights than what he currently had. Grievant did not know that her actions might be contrary to policy. Grievant set up the server so that Mr. M would have administrative right on that server. Mr. M and his aide moved the server to his classroom. Mr. M connected the server to 12 out-of-warranty computers in his classroom. An offender clerk had administrator rights to the server. Mr. M did not receive disciplinary action.

No one told Grievant she could not use the equipment in her classroom closet. These computers were on the classroom inventory that was left by the teacher before Grievant began working in the classroom.

Officer L had a laptop in need of repair. She approached Grievant and asked how to repair the laptop. Grievant asked Officer L who handled her unit's information technology work. Officer L said she did not know. Officer L said the last time she sent the laptop to be repaired it took four months to get the laptop back. Grievant researched several websites and discovered how to fix the problem. Grievant printed

out instructions on repairing the problem. Included in those instructions was a discussion of how to reset an administrator password for the operating system used by the Agency. Grievant was able to repair Officer L's laptop. Grievant had to leave her classroom early and left the instructions on a desk in her classroom instead of securing them in her private office. She knew she would return the classroom the next morning before students arrived and could secure the instructions then. On June 2, 2017, Mr. S entered Grievant's classroom when no one else was there. He observed the instructions. He became concerned because he feared the consequences if an inmate learned how to reset an administrator password.

None of the computers in Grievant's classroom were connected to the internet. Only a computer in Grievant's office was connected to the internet and offenders were not allowed access to that computer. None of the offenders had access to the Agency's computer systems or the internet. Grievant did not bypass any account login requirements to access the computers.

### **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>1</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>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>4</sup>

The Agency's Written Notice alleges that Grievant violated DOC Operating Procedure 310.2, Information Technology Security, because she "installed, moved and repaired computer equipment in your classroom without authorization." The Written Notice does not identify the specific section of the policy that Grievant allegedly violated. During the hearing, Agency employees identified several sections of the policy they believe that Grievant violated.

The Agency alleged Grievant acted contrary to Operating Procedure 310.2(VI)(C)(4) which provides:

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

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

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

All accounts will have a password.

Grievant changed the name on the clear computer account to her name but did not add a password. Grievant acted contrary to policy.

The Agency alleged Grievant acted contrary to Operating Procedure 310.2(VI)(H)(5) which provides:

The following are examples of IT security incidents:

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h. Circumvention of IT security controls, safeguards, or procedures.

Grievant did not violate this policy provision. Neither Grievant nor any inmate circumvented an IT security, control, safeguard, or procedure. When Mr. S found the document describing how to reset administrator password for Windows, no one else was in Grievant's classroom. Grievant testified that no inmate had access to the document and that she kept it locked in her office. There is no evidence showing an inmate had access to the document and could circumvent any security controls, safeguards, or procedures.

The Agency alleged Grievant acted contrary to Operating Procedure 310.2(VII)(B)(1) which provides:

No Information Technology hardware shall be installed, used or, or connected to DOC IT Systems by no-CTSUS staff without prior knowledge or approval from VITA/NG and CTSU Security. Examples including but are not limited to routers, switches, hubs, servers, workstations, wireless IT equipment, PDAs, removal drives and storage, printers, or any other Information Technology device or peripheral.

Operating Procedure 310.2 defines "Information Technology" as:

Equipment or interconnected system or subsystem used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information; this term includes computers, peripherals, software, firmware, and similar procedures, services, and related resources.

DOC IT system is not defined by policy. Information Technology includes an interconnected system or subsystem used in storage and manipulation of data. The Hearing Officer interprets the phrase DOC IT system to include a server connected to several computers even though those computers are not connected to the Agency's intranet or the Internet. Based on this interpretation, Grievant acted contrary to policy because she assisted with the installation of a server at Mr. M's request.

The Agency has a policy governing Administrator access but did not cite it in the Written Notice and did not provide a copy as part of its hearing exhibits. Thus, Grievant's actions with respect to acting as an Administrator do not form a basis for disciplinary action in this case.

The Agency failed to provide Grievant with updated computer equipment to perform her job duties. The Agency failed to notify Grievant she could not use computer equipment in the closet in her classroom.

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>5</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.

Mitigating circumstances exist to reverse the disciplinary action in this case. First, the Agency created some of the circumstances giving rise to the disciplinary action. The Agency failed to provide Grievant with adequate resources to perform her job duties. The Agency failed to remove the computer equipment from the classroom. If the Agency has removed the equipment from the classroom, Grievant would not have been in a position to act contrary to any of the Agency's policies governing that equipment. The Agency failed to inform Grievant that she was not supposed to use the equipment in the classroom closet. The Agency failed to remove the items in the closet from Grievant's inventory list. Grievant assumed reasonably that items on her inventory were available for her use. Second, Grievant's actions were based on her desire to teacher her students. She did not intend to circumvent the Agency's computer usage policies. Third, there was little or no impact on the Agency from Grievant's action. The purpose of Operating Procedure 310.2 was to establish "security controls." None of the computers Grievant accessed were connected to the Agency's intranet or the internet. An inmate accessing the clear computer, laptop, or server could not jeopardize the Agency's VACORIS or other Agency wide computer systems. Fourth, Mr. M and his aide, not Grievant, moved the server from Grievant's classroom to Mr. M's classroom. He requested Grievant's help in obtaining the server. In other words, it was not just Grievant who was responsible for the server being attached to the computers in Mr. M's classroom. Even though Mr. M acted contrary to Operating Procedure 310.2, he did not receive disciplinary action. The Agency inconsistently applied disciplinary action. For

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<sup>5</sup> Va. Code § 2.2-3005.

these reasons, the disciplinary action exceeds the limits of reasonableness and must be reversed.

## DECISION

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

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer