

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 03/19/13; Decision Issued: 04/05/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 2013-10020; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/19/14; EDR Ruling No. 2013-3592 issued 04/30/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/19/14; DHRM Ruling issued 05/06/13; 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: 10020

Hearing Date: March 19, 2013
Decision Issued: April 5, 2013

PROCEDURAL HISTORY

On August 13, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for unauthorized use of State property or records.

On September 10, 2012, 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 February 11, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this appeal due to the unavailability of a party. On March 19, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. 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 Virginia Department of Transportation employs Grievant as an Engineering Tech III at one of its Facilities. The purpose of his position is:

To assist the District Locally Administered Projects Coordinator in the review and approval of Enhancement SAFETEA-LU and Locally Administered projects in an accurate and precise manner.

To maintain high skills in new design technology and construction methodology and provide extraordinary customer service.¹

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding the Agency's Information Technology Security Awareness and the Agency's Security Agreement. For example, on September 15, 2011, Grievant received a Certificate of Compliance for completing

¹ Agency Exhibit 4.

Security Awareness Training. Grievant acknowledged under the Agency's ITD 33A Security Agreement:

Although I have access to VDOT and COV information and data, I shall not read or access information and data that is not needed to perform my job.²

The Agency's policies governing use of its information technology systems were located on the Agency's intranet and provided as part of employee training. Grievant had access to these policies.

Each time Grievant logged into the Agency's computer system he was required to acknowledge:

This system is for the use of authorized users only. Authorized users are permitted access to the Internet and VDOT's electronic communication system to assist in the performance of their duties.³

Many of the Agency's photocopiers were also document scanners. When documents were photocopied by an employee or on behalf of an employee, a copy of the scanned document would appear in an electronic folder under the employee's name. For example, if Ms. F made a copy of a document or scanned a document under her name, an electronic copy of the document would appear in her electronic folder and remain there until she removed it. Anyone with access to the Agency's computer system could access Ms. F's electronic folder and read the document she scanned.

On July 11, 2012, the Engineering Manager received a telephone call from someone claiming that Grievant was accessing the electronic files of other employees. The Agency initiated an investigation. The Agency created a mirror image of Grievant's computer hard drive and also viewed his "My Recent Documents" folder. Grievant's recent documents folder showed that he frequently accessed the electronic folders for other employees without any business need or specific authorization to do so. For example, Grievant accessed the electronic file folder of Ms. F on July 23, 2012. On May 1, 2012 and June 20, 2012, he accessed the electronic file folder of Ms. H who was the Human Resource Manager. Ms. H's folder contained electronic copies of grievances filed by Agency employees and other private human resource matters. On February 3, 2011, Grievant accessed the folder of the Engineering Manager. On November 3, 2011 and April 24, 2012, Grievant opened and read .pdf documents showing grievances filed by another employee. On March 22, 2012, Grievant opened the electronic folder of the District Administrator. Grievant had a copy of an Acknowledgement of Extraordinary Contribution earned by an employee in May 2004.

² Agency Exhibit 6.

³ Agency Exhibit 6.

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.”⁴ 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.”

Under the Agency’s Acceptable Use – Personnel Security policy, employees have User Requirements including:

Users shall be granted access to VDOT IT assets in order to accomplish the Agency’s mission. Data created by use of VDOT’s information resources remain the property of VDOT. Individuals will access only those components of VDOT IT assets for which they have a specific authorization.⁵

The Agency’s Information Technology Security Manual prohibits employees from engaging in certain activities when using the “VDOT Computing Environment”:

Effecting security breaches or disruption of network communication. Security breaches include, but are not limited to, accessing data for which the employee is not an intended recipient (e.g. accessing another’s file folder) or logging into a server or a count that the employee is not expressly authorized to access, unless these duties are within the scope of regular duties. For purposes of this section, “disruption” includes, but is not limited to, network sniffing, pinged floods, packet spoofing, denial of service, and forged routing information for malicious purposes.⁶

Failure to follow policy is a Group II offense.⁷ Grievant accessed the electronic folders designated for other employees and did so without permission to do so and without any business need. He accessed data for which he was not the intended recipient. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s ten workday suspension must be upheld.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ Agency Exhibit 6.

⁶ Agency Exhibit 6.

⁷ See, Attachment A, DHRM 1.60.

Grievant argued that the Agency failed to properly secure its computer system and, thus, there was no breach of security. The Agency's policy anticipated circumstances where employees can access files of other employees and established a policy to prevent security breaches. Grievant disregarded the Agency's policy.

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"⁸ 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 argued that at least three other employees engaged in similar behavior but were not disciplined. The evidence showed that after Grievant provided Agency managers with the names of the three employees, the Agency investigated the allegations and spoke with each employee. Agency managers conclude that they could not prove the employees violated policy or that the employees were not similarly situated with Grievant in terms of the number and degree of policy violations. There is no basis for the Hearing Officer to disbelieve the Agency's conclusion. Grievant was not singled out for disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant alleged that the Agency discriminated against him. He presented no evidence to support this allegation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a ten workday suspension is **upheld**.

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:

⁸ Va. Code § 2.2-3005.

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 14th St., 12th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.⁹

[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].

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer