

Issues: Group III Written Notice (theft and failure to follow policy) and Group III Written Notice with Termination (making false statements to Warden); Hearing Date: 03/20/13; Decision Issued: 04/02/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10043; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 04/11/13; EDR Ruling No. 2013-3584 issued 04/22/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/11/13; DHRM Ruling issued 05/02/13; 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: 10043

Hearing Date: March 20, 2013

Decision Issued: April 2, 2013

PROCEDURAL HISTORY

On February 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for theft and for violating written policy. On February 7, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for making false statements to the Warden and Special Investigator.

On February 13, 2013, 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 March 6, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Department of Corrections employed Grievant as a Senior Lab Tech at one of its Facilities. She began working for the Agency in 2008. Grievant had prior active disciplinary action. On July 11, 2012, Grievant received a Group I Written Notice for excessive personal use of the Internet and abuse of State time.

Grievant worked in the same office with Ms. S, an LPN. Ms. S was on short-term disability from August 7, 2012 to September 23, 2012 and did not work at the Facility. Ms. S had a unique identification and password to log into the Agency's computer system. Once she entered the computer system, she was able to access the Internet. Ms. S wrote her password on a piece of paper and placed that paper in the drawer of her desk. She did not lock her desk. Ms. S did not tell anyone where she kept her password. She did not authorize anyone else to log into the Agency's computer system under her name. She did not access her account from a remote location.

Grievant often sat Ms. S's desk. Grievant opened Ms. S's desk drawer while Ms. S was on short-term disability and without Ms. S's permission to do so. Grievant noticed the paper containing Ms. S's password. Grievant used the computer on Ms. S's desk and entered Ms. S's unique identification and the password she read from the piece of paper in Ms. S's desk. Once Grievant was inside the Agency's computer system, she accessed a link to the Internet. She accessed a link to a school in which

she was a student. She viewed information on the school's website. She visited the same websites for which she was disciplined for accessing in July 2012.

Grievant had been disciplined for excessive personal use of the Internet. She used Ms. S's log in information in order to prevent the Agency from identifying her as an employee who frequently accessed the Internet.

The Agency identified excessive use of the Internet by someone at Ms. S's computer. Agency managers questioned Ms. S and she explained that she was not working at the Facility on the day of her account was used because she was on short-term disability. She identified several employees including Grievant as people who might have accessed her computer account.

On January 25, 2013, Grievant met with the Warden and the Special Investigator. The Warden told Grievant several times that it was important that she be honest when answering his questions. The Warden and Special Investigator asked Grievant whether she accessed Ms. S's computer account and the circumstances surrounding that access. Grievant wrote a statement:

Sometime during my employment possibly last summer while [Ms. S] contacted me and requested me to look something up on her account for her. I don't specifically recall what it was that [Ms. S] requested me to check. [Ms. S] conveyed to me her login information and password information for me to gain access to her account. I don't remember if I talked to [Ms. S] while I checked what she wanted. I gained access to her account and checked the information she requested. I got what she needed and later provided the information to her. I don't remember ever using [Ms. S] computer account for any purpose other than to provide her with the information she requested.

While I was researching the information that [Ms. S] requested, [Nurse M] came and asked what I was doing. I told [Nurse M] that I was getting some information for [Ms. S].

On January 25, 2013, the Investigator met with Nurse M who provided a statement:

During the course of period that [Ms. S] was on medical disability, I did see [Grievant] at Ms. S's computer station. I never inquired why she was on [Ms. S's] computer. I assumed that [Grievant] was using her own account. [Grievant] never stated to me that she was requested by [Ms. S] to access something for her on [Ms. S's] account. I never gave [Grievant] permission to use [Ms. S's] account.

On January 30, 2013, and Grievant approached the Investigator and indicated that she wished to amend her previous statement. Grievant provided a statement:

When I stated that [Ms. S.] had requested me to do something on her computer account and had provided me her log on information and password information to gain access to her account that statement was false. [Ms. S] never provided me her computer account information and security password information. [Ms. S] never requested me to gain access to the computer. I gained access to [Ms. S.'s] computer by gaining her logon information and security password from a book that she keeps in her desk. Because we work so closely together, I knew that she kept the information written in the book. The purpose of maintaining access to her account was I was trying to keep her account active to keep it [from] becoming deactivated. [Nurse M] specifically knew of what I was doing. I specifically told [Nurse M] what I was doing and the purpose for doing so.

I provided you a false statement because I was scared and never spoken to someone from the Inspector General's Office before. I also was scared because I had recently received disciplinary action and I didn't know what the purpose of the meeting was. I apologize for making the false statement and I have been trying to meet with you to rectify my earlier statement [when] we met last Friday.

In regards to whether or not I accessed my account at [school] with [Ms. S.'s] account, there is a possibility that I may have. I am not completely sure because at the time I dropped the Anatomy class I was enrolled in during the summer months and had a lot of things going on in my personal life regarding some health issues I was having.

[Ms. S] and I have been close friends for a period of the last six years. We work together previously at a doctor's office before becoming employed at [the Facility]. We regularly talk to each other via telephone. I believe that [Nurse M] may have conveyed information to [Ms. S] regarding statements I made to the Special Investigations Unit because [Ms. S] is presently not accepting my phone calls.

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."¹ 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

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

Group III for Theft

DOC Operating Procedure 310.2(VI)(B)(10), Information Technology Security, provides, “[c]ertain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to ... [u]sing another employee’s DOC network account for any purpose.”

“[F]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant acted contrary to DOC Operating Procedure 310.2 because she accessed the Internet using Ms. S’s account network. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with established written policy. The Group III Written Notice must be reduced.

The Agency argued that Grievant engaged in theft. Group III offenses include:

Theft or unauthorized removal of state records, state property, or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors, volunteers, contractors, and students.

The DOC Standards of Conduct policy does not define the term “property”. The Agency has not established that a password, in itself, is property under the Standards of Conduct. Ms. S’s password was a series of letters and numbers created by Ms. S. Grievant read the password and used that information to access the Agency’s computer system under Ms. S’s name. Grievant did not take the paper containing the password. She did not take an electronic file containing Ms. S’s password. Grievant did not take Ms. S’s password in the sense that Ms. S no longer had or could use her password. Ms. S retained access to her computer system using her password. Grievant did not photocopy Ms. S’s password and transfer the copy to someone else. Grievant did not engage in identity theft under Va. Code § 18.2 – 186.3 because she did not have the intent to defraud, sell, or distribute. Grievant did not engage in computer fraud under Va. Code § 18.2 – 152.3 because she did not obtain property or services by false pretenses, embezzle, commit larceny, or convert the property of another. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.

Group III Written Notice for Making False Statements

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Group III offenses include:

Falsifying any records, including but not limited to all work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.⁵

On January 25, 2013, Grievant submitted a statement to the Warden and the Special Investigator in which she stated that Ms. S had contacted Grievant and asked Grievant to access Ms. S's computer account to obtain information for Ms. S. The document signed by Grievant was an Agency record generated in the regular and ordinary course of the Agency's business. Grievant's statements were untrue.⁶ She knew that her statements were false at the time she made them. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of a record. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Mitigation

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"⁷ 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 further 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 or theft is **reduced** to a Group II Written Notice

⁵ DOC Operating Procedure 135.1(V)(D)(2)(b).

⁶ The Warden knew Grievant's statements were untrue when she made them on January 25, 2013.

⁷ Va. Code § 2.2-3005.

for failure to follow policy. The Group III Written Notice of disciplinary action with removal for making false statements to the Warden and Special Investigator 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:

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.⁸

⁸ 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

Carl Wilson Schmidt, Esq.
Hearing Officer