

Issues: Group II Written Notice (internet abuse) and Termination (due to accumulation);
Hearing Date: 05/31/13; Decision Issued: 06/04/13; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10081; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10081

Hearing Date: May 31, 2013

Decision Issued: June 4, 2013

PROCEDURAL HISTORY

On March 7, 2013, Grievant was issued a Group II Written Notice of disciplinary action for excessive use of the internet. She was removed from employment based on the accumulation of disciplinary action.

On March 9, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 31, 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 Program Support Tech. The purpose of her position was to "provide support for comprehensive recruitment and selection services, for compensation services, receptionist services, and to the Department's HR function."¹ Grievant had prior active disciplinary action. She received a Group III Written Notice with a two work day suspension on September 15, 2009.

The Employee Relations Manager received complaints from Grievant's co-workers that Grievant was using the internet for personal business an excessive amount of time. Grievant and other employees had received training about the importance of not using the Agency's internet access to conduct personal business for an excessive amount of time. Grievant was aware of the Agency's policy governing internet use. Each time she logged onto her computer she received notice that she should not have any expectation of privacy and that her usage could be monitored.

The Information Security Officer reviewed Grievant's internet usage from December 3, 2012 through January 25, 2013. The Agency's computer software allows it to categorize the websites visited by an employee into Department of Corrections related sites, shopping sites, news sites, etc. She presented to the Employee Relations Manager a detailed spreadsheet showing the websites visited by Grievant. Following the Employee Relations Manager's review, the Agency determined that:

- During 17 of the 27 days reviewed, Grievant spent time on numerous shopping and restaurant sites.

¹ Agency Exhibit 4.

- Grievant established a pattern of checking news, weather, and personal email sites upon arrival at work and during the last hour before she left for the day.
- Grievant's personal internet usage exceeded 30 minutes or more on six days. The total time in those days was 563 minutes (9 hours and 23 minutes)
- Of the 563 minutes, only approximately 15 minutes occurred while Grievant was taking lunch or a work break.

Grievant had a backlog of work that she did not complete, in part, because she was distracted from her duties by personal internet use.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Operating Procedure 310.2 governs Information Technology Security. Section VI B(3) provides:

Personal use means use that is not-job related. Internet use during work hour 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:

Adversely affects the efficient operation of the computer system; or
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 guideline as set forth by local, State or Federal law.

Grievant used the Agency's internet on average 1.5 hours per day for six of the 27 days reviewed. Grievant worked eight hour per day and 1.5 hours would amount to approximately 18 percent of her time devoted to personal internet usage rather than performing her duties. She had a backlog of work that she could better have addressed had she devoted her time to her work duties. Grievant's usage exceeded what would be described as incidental and occasional. This conclusion is confirmed by the Agency's receipt of complaints from co-workers who recognized that Grievant's personal internet use was excessive. The Agency has presented sufficient evidence to

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

support the issuance of a Group II Written Notice. Grievant had prior active disciplinary action consisting of a Group III Written Notice. Once an employee has an active Group III Written Notice, any additional disciplinary action could result in removal. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Grievant argued that she used the internet during her work breaks and that her usage was not contrary to policy. The evidence showed that Grievant used the internet for personal business during her normal work hours and not while she was on breaks with the exception of approximately 15 minutes. Her usage exceeded incidental and occasional use.

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"⁵ 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 II Written Notice of disciplinary action is **upheld**. Grievant's removal from employment is **upheld** due to the accumulation of disciplinary action.

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

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.