Issues: Group I (abusive language), Group II (unsatisfactory job performance), Group II (misuse of Sate property), Group III (excessive internet use), and Termination; Hearing Date: 12/02/13; Decision Issued: 01/08/14; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10151; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 01/23/14; EDR Ruling No. 2014-3797 issued 02/24/14; Outcome: Remanded to AHO; Remand Decision issued 05/08/14; Outcome: Group III dropped to Group II but termination upheld; Administrative Review: EDR Ruling Request on Remand Decision received 05/29/14; EDR Ruling No. 2014-3898 issued 07/16/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request on Remand Decision received 05/29/14; DHRM Ruling issued 07/30/14; Outcome: AHO's decision affirmed.**

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10151
HEARING DATE: DECEMBER 2, 2013
DECISION ISSUED: JANUARY 8, 2014

PROCEDURAL HISTORY

The Grievant was issued four (4) Written Notices on June 20, 2013. The first was a Group I Written Notice for, "On May 18, 2013 Grievant sent an offensive e-mail to ***, RN. The e-mail featured bold, oversized letters and condescending rhetoric that gave the appearance of strong anger".[1] The second was a Group II Written Notice for, "Grievant treated fewer patients per day because he did not take adequate action to resolve the problem of not having enough security officers available to escort patients to the dental clinic".[2] The third was a Group II Written Notice for, "On September 26, 2012, Grievant sent an e-mail from his work computer to his dental assistant in which he used multiple obscene words to describe his dental hygienist's cat".[3] The fourth was a Group III Written Notice for, "From 4/1/13-5/16/13, Grievant spent five hours plus per day on the internet. Many of the sites visited were non-work related and were in violation of DVOC Operating Policy 310.2, Information Technology Security".[4]

Pursuant to the Written Notices issued on June 20, 2013, the Grievant was terminated. [5] On July 8, 2013, Grievant timely filed a grievance to challenge the Agency's actions. On August 7, 2013, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer.

A pre-hearing telephone conference was held on August 21, 2013. A second pre-hearing telephone conference was held on August 28, 2013 regarding Grievant's Motion for Discovery. On September 9, 2013, Grievant filed a request for compliance ruling with EDR and a Compliance Ruling was issued September 13, 2013. A third pre-hearing conference was scheduled for September 24, 2013 but was rescheduled and held on September 26, 2013. A fourth pre-hearing conference was held on October 31, 2013. A hearing was scheduled for September 18, 2013 but was rescheduled and held at the Agency's location on December 2, 2013.

APPEARANCES

Advocate for Agency
6 witnesses for Agency
Attorney for Grievant
Grievant

[1] Agency Ex. 6 (Offense 36) and Agency Exhibit 7 Operating Procedure 135.1 B2(c) page 7
[2] Agency Ex. 10 and Agency Exhibit 7 Operating Procedure 135.1 B2 (d) page 7
[3] Agency Ex. 8 (Offense 52) and Agency Exhibit 9 Operating Procedure 310.2 B10 (j) page 10
[4] Agency Ex. 11 and Agency Exhibit 7 Operating Procedure 135.1 C2 (e)
[5] Agency Ex. 6, 8, 10, 11

6 witnesses for Grievant

ISSUES

1. Did Grievant violate Section 36 of the Department of Correction Offense Codes with use of obscene or abusive language when responding to a letter from the Head Nurse?

2. Did Grievant have a duty to take adequate actions to resolve the problem of not having enough Correctional Officers to escort Grievant's patient's to his clinic?

3. Did Grievant violate Section 52 of Department of Corrections Offense Codes by misuse of a State computer by sending an email with multiple obscene words to describe his co-workers cat?

4. Was Grievant in violation of Department of Corrections Operating Policy 310.2, Information Technology Security by spending excessive personal time on a State computer?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

APPLICABLE LAW and POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2012.

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." 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 certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the Agency and the fact that the potential consequences of the performance or misconduct substantially exceeded Agency norms.[6]

[6] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Other procedures or offense codes pertinent to this case are:

Department of Corrections Offense Codes 36 and 52, Operational Procedure 135.1 B2 (c) page 7, Operational Procedure 135.1 B2 (d) page 7, Operating Procedure 310.2 B10 (j) page 10, Operational Procedure 135.1 C2 (e) page 8, Standards of Conduct 1.60

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was a dentist hired by the Agency for full time employment. The Agency also had a medical department with physicians hired to work part time on specific days. A Head Nurse was in charge of the medical department and responsible for scheduling patients in both the dental and medical department. Correction Officers were required for the task of bringing offenders from their cells to the medical or dental department for treatment. Grievant was often idled as Officers would be taking patients to the medical department rather than the dental department. Therefore, Grievant often had no patients to treat. Testimony would indicate Grievant and Head Nurse had a long standing dislike and disrespect for each other.

As a policy, the Agency initiated "learning teams" in July of 2012 to promote a good working environment within the facility. All department personnel were expected to attend learning teams meetings. Grievant had not been attending meetings. The Head Nurse was asked to convey to Grievant that he would need to start attending meetings. The Head Nurse acknowledged in her testimony that her being responsible for delivering the request would not be well taken by Grievant. Nonetheless, a short email was sent by Head Nurse to Grievant.[7] Grievant responded with an email which not only discussed his need to be at meetings but also addressed his disdain for Head Nurse telling his department what to do.[8] Head Nurse found the email "hostile" and since it was in a large font found it "as if he was yelling at me". The administration agreed with Head Nurse that the letter was aggressive and initiated an investigation of Grievant. This investigation also included going through Grievant email history on the department computer. From the investigation other emails were found that were deemed to be offensive particularly one with offensive language describing his feelings about his co-worker's cat.[9] It was also discovered that Grievant has considerable idle time while on the payroll since an insufficient number of patients to fill Grievant's schedule were brought to Grievant's clinic during his five (5) day work week.[10] Further, it appeared Grievant often used the State computer for personal use.

[7] Agency Ex. 1A
[8] Agency Ex. 1B
[9] Agency Ex. 4
[10] Agency Ex. 3

DISCUSSION

As evidence of the misuse of State computers is an intrigal part of this discipline, I will first expound on the evidence presented. Grievant's counsel contended all employees at one time or another use State computer for personal use. Grievant's counsel did not have any other person from Agency's facility that had any form of discipline from misuse of State computers. However, counsel contended he had the right to see logs of other employee's computers. Under the Freedom of Information Act, a compliance ruling was issued that Grievant's counsel did have the right to obtain computer records of other employee's to support his disparate treatment claim. Much of the hearing was devoted to review of printout logs from various computers.[11] However, even if the printouts were able to prove that others besides Grievant had apparently misused State computers, none of the others besides Grievant had the benefit of a due process proceeding to determine if their use was justified and there was no other discipline of any employee for comparison. In other words, no one else stood in the same position as Grievant thus making disparate treatment a moot point.

Further, and more importantly, the printout logs are incompetent evidence. While color coded as they were and many opinions given, when it came to the expert's testimony there was not much solid evidence that could be gleamed from the printouts. The expert witness testified she could determine when a computer was on and the sites it visited. However, she could not testify as to who was viewing or manipulating the computer at the time. Even further, she could not verify if the viewer was the one requesting the site. She explained that every time "pop ups" (apparently unrequested by the viewer) came up, it would show the computer acknowledged the pop up site. The printout log, for instance, showed that the Warden had been on the computer during a long period that he, the Warden, wasn't even at the facility. It also showed the impossibility that Grievant was actively on the computer while he was engaged in treating patients.

The only competent value the printout logs could have would be to identify a site and have the party admit they had been on that site, or to have a witness stating they had seen an accused using the specific site at a specific time consistent with the information shown on a log printout.

Returning to the specific Written Disciplines:

1. I find Grievant's email to the Head Nurse enough of a concern to the Agency to initiate further investigation but not an abusive writing intended to harass or put fear in the recipient. The Head Nurse acknowledged she expected a negative response to her initial email. The response, although not intended to be cordial, did no more than state Grievant's position in strong terms. No vulgar words were used and no threat made.

[11] Agency Exhibit 2 on flash drive and Grievant Exhibit 9 on flash drive

2. No Operational Procedure or policy code was provided that specifically stated it was Grievant's duty to provide himself with sufficient patients to keep the dental department busy 5 days a week. There was considerable testimony that Grievant did treat all patients that were brought to him and that he had never refused to treat a patient.[12] The quality of his treatment of patients and the outcome of his treatment was reported to have never been challenged. While it could have behooved Grievant to campaign for more work rather than sit idle, it was not his defined duty to do so.

3. In investigating Grievant's previous emails one particularly egregious email was found. Grievant had two staff members, a Dental Hygienist and a Dental Assistant. Apparently the Dental Hygienist spoke often of her pet cat. Grievant and the Dental Assistant made light of this. At one point, Grievant sent the Dental Assistant an email about the Dental Hygienist's cat in an extraordinary large font and red in color that described his feelings about the Dental Hygienist "F…ing cat". The email contained offensive language, showed extraordinary disrespect for a co-worker, was completely unprofessional and clearly an abuse of State time and State equipment.[13] Grievant's counsel contended the email was not "obscene" as described by the State Supreme Court. However, Grievant was not charged with saying the cat was having a sexual event (Policy 34). Grievant was charged with using offensive language on a State computer (Policy 52). F…. may be described as an obscene word used to describe a sexual act which word is often considered offensive whether it is intended in use as a verb or an adjective. Further, when using something belonging to another it is not constitutionally protected language when the owner places limits on the use of his private property, particularly when there is a compelling reason (workplace tranquility, for instance) to limit the use. Agency found the email correspondence to be so potentially disruptive and out of character with accepted use of a computer as to warrant a Group II offense.

4. Grievant excessive use of the State computer was neither proven nor disproven by the printout logs presented. His use was proven by Grievant's own admission. While the Warden accused Grievant of being on the internet 6 hours a day, Grievant stated he told the Warden he spent a lot of time on the computer because he often had no patients. Grievant further described in his testimony a math game he played on the computer. There is no doubt that Grievant had considerable time available to engage in computer use which would not be consistent with "incidental and limited use".[14] Agency found the volume of the computer misuse to warrant a Group III action.

MITIGATING FACTORS

A Hearing Officer is authorized to consider mitigating factors if pled by the Grievant.[15] Grievant did contend he was treated unfairly for his misuse of the State computer. However, as stated earlier, there was no other employee which Grievant could

[12] Agency Ex 5, Grievant Ex 2,3,4,5,6
[13] Agency Ex. 10 and Agency Exhibit 7 Operating Procedure 135.1 B2 (d) page 7
[14] Agency Ex 9 Operating Procedure 310.2 pg. 8, B3
[15] GPM § 5.8 (2)

say stood in his position and had been treated in a different matter. To say a person who had never been given the benefit of due process was engaged in the same behavior as Grievant is not a competent comparison but rather conjecture. Grievant's previous evaluations were good.[16] This fact was considered when concluding Grievant did not have a duty to self-improve his employment situation.

DECISION

For the reason stated above I find the Group I discipline for sending an offensive email to the Head Nurse and the Group II discipline for failure to improve his patient load to be unfounded. I find the Group II discipline for offensive use of the computer and a Group III discipline for excessive of a State computer for personal use to be warranted. This matter is **dismissed** in part and **upheld** in part. Termination from employment is **upheld**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.[17] Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

   Director, Department of Human Resources Management
   101 N. 14th Street, 12th Floor
   Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing

[16] Grievant Ex 7, 10, 11, 12

[17] 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 and EDR Consultant.

officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision,** with no further possibility of administrative review when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance arose.[18] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____
Sondra K. Alan, Hearing Officer

[18] An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10151-R
RECONSIDERATION DECISION ISSUED: May 8, 2014

RECONSIDERATION DECISION

The Grievant Procedure Manual revised July 1, 2012 provides for Administrative Review of decisions made by Hearing Officers § 7.2 provides "A hearing officer's decision is subject to administrative review by both EDR and DHRM Director based on the request of a party"; § 7.2(a) provides " A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director" and "A challenge that the hearing decision is not in compliance with the grievance procedure (including this Manual and the Rules for Conducting Grievance Hearings), as well as a request to present newly discovered evidence, is made to EDR", § 7.2 (c) If the DHRM Director or EDR order the hearing officer to reconsider the hearing decision, the hearing officer must do so".

The Grievant was issued four Written Notices on June 20, 2013. Of the four Written Notices only two were upheld by the hearing officer which are now the subject of review, namely: A Group II Written Notice for, "On September 26, 2012, Grievant sent an email from his work computer to his dental assistant which he used multiple obscene words to describe his dental hygienist's cat"; and a Group III Written Notice for, "From 4/1/13-5/16/13, Grievant spent five hours plus per day on the internet. Many of the sites visited were non-work related and were in violation of DVOC Operating Policy 310.2, Information Technology Security".[19]

[19] See Decision of Hearing Officer Case No. 10151, 1-8-14 Agency Exhibits 8 and 11

The initial decision in this case was issued January 8, 2014. A timely appeal to the Office of Employment Dispute Resolution was made based on:

1) a due process issue alleging the Written Notices failed to give Grievant adequate notice of the conduct he was required to defend at hearing.

The Administrative Review ruling found adequate notice had been given in both Written Notices.

2) an allegation the Hearing Officer failed to find a sufficient factual basis to support the Group II and Group III disciplines.

The Administrative Review ruling found no reason to reconsider the Group II discipline but requested the Hearing Officer's reconsideration of the Group III action.

3) an allegation the Hearing Officer failed to consider mitigating circumstances.

The Administrative Review ruling requested the Hearing Officer to reconsider mitigating factors.

DISCUSSION

The language of DOC Operational Procedure 310.2, Information Technology Security is:

"*Personal use of the Computer and the Internet* – Personal use means use that is not job-related. Internet use 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".[20]

The policy statement is interpreted to be time sensitive, that is, only short periods of personal time use will be tolerated and further even short time usage must not interfere

[20] DOC Operational Procedure 310.2 pg. B(3)

with work duties. This policy says nothing about long term use as it is implied by the policy that long term use is prohibited. Since long term use is simply not tolerated the factor of interfering with work duties is irrelevant.

While Grievant denied he was on his office computer 6 hours a day for personal use he did admit he was on the computer "a lot" and did admit to use which was not work related. It is true that whatever employment related work that Grievant did do he was considered to have done competently. There was no evidence to show the personal computer use inhibited or degraded his work duties. However, once it was established his personal use of the computer was more than "incidental" the competency of his work was irrelevant. The online Merriam-Webster's Dictionary defines:

incidental - "1. a - being likely to ensue as a chance or minor consequence[21]; and

a lot - "to a considerable degree or extent "[22].

It is factual evidence that Grievant admitted to "a lot" of usage and therefore he did violate the policy.

Whether this infraction should have been elevated to a Group III does require review. As a Group II, violating policy 310.2 fits with Operational Procedure 135.1 c(2)e for unauthorized use or misuse of State property.

The Dental Director for the Commonwealth Department of Corrections took responsibility for issuance for the various disciplinary actions. When questioned why he elevated the violation of policy related to the internet use to a Group III he responded it was because of the accumulation of so many disciplinary actions. While it is within the

[21] http://www.merriam-webster.com/dictionary/incidental
[22] http://www.merriam-webster.com/dictionary/a+lot?show=0&t=1399572287

Agency's ability to reduce or expand a Group discipline, the reason must be sound.[23] Half of the four Written Notices were not even upheld by the Hearing Officer. Further, enhancing a punishment because there are other unrelated punishments offers no unique impact on Department of Corrections or other sound reason to increase a punishment level.

In considering mitigation, this Hearing Officer finds no circumstances to mitigate the discipline for the "F…ing cat" message. The Hearing Officer was not convinced the message was "a joke" as characterized by the Grievant. Nor was there any other comparable evidence of other employees sending such unprofessional, insensitive messages.

In considering mitigation for the Group III discipline for excessive use of the internet this Hearing Officer also finds no comparable evidence to warrant mitigation. While Grievant did produce internet logs of others than himself, this Hearing Officer has previously held internet logs alone are not competent evidence. To further explain, while logs may show the computer is online and may show sites not relevant to the employee's duty, it alone cannot prove who was on the computer or, for that matter, if anyone was at the computer at the time. While the logs would be excellent supporting evidence when it is established a party was observed actively on the computer at a time contiguous to the log report, it is not good "stand alone" evidence. Grievant was not found to be in violation of State computer use by the internet log evidence produced but rather by his own admission of excessive use. Grievant produced no other person who admitted to more than incidental use of the computer. If the logs alone were not considered to find Grievant at fault, it also could not be used as a mitigating factor to find others at fault.

[23] DOC Operational Procedure 135.1 pg. 6, 7 V

All considered, the Group III discipline should be reduced to a Group II discipline. Mitigation, having been considered does not further reduce or dismiss the Group II disciplines. Grievant remains terminated for two active Group II disciplines.

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.[24]

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

_____

Sondra K. Alan, Hearing Officer

[24] 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.