

Issue: Group II Written Notice with Suspension (failure to follow instructions, abuse of State time, computer/internet misuse, insubordination); Hearing Date: 01/03/14; Decision Issued: 01/06/14; Agency: VCCS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10229; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10229

Hearing Date: January 3, 2014
Decision Issued: January 6, 2014

PROCEDURAL HISTORY

Grievant is a housekeeper for the Virginia Community College System (“the Agency”). On September 10, 2013, the Grievant was charged with a Group II Written Notice, with ten days suspension, for what was considered by the Agency as a) failure to follow instructions and/or policy; b) abuse of state time; c) computer/internet misuse; and d) insubordination.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the outcome of the resolution steps was not satisfactory to the Grievant and the grievance qualified for a hearing. On November 26, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for January 3, 2014, on which date the grievance hearing was held, at the Agency’s location.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s Exhibits. The Grievant also submitted documents for the grievance record. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Representative for Agency
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?

Through her grievance filings, the Grievant requested rescission of the Group II Written Notice and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of

duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 2.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Written Notice described the nature of the offense as follows:

On September 10, 2013 @ 7:36 a.m., [the Grievant] was found in Room 849 with the lights out, the door locked and using the classroom computer. This action is in direct violation of written and verbal directives issued by the Facilities Manager (see attached).

Agency Exh 1, p. 11. As for circumstances considered, the Written Notice, in Section IV, stated: "[The Grievant's] past service to [the Agency] was taken into consideration." The Grievant has 14 years of service with the Agency.

The Agency's witness, the facilities manager, testified consistently with the charge in the Written Notice. The facilities manager issued a memorandum directive on computer usage to the staff on August 9, 2013, which was signed for by the Grievant, and it directed:

Effective immediately all Buildings and Grounds classified staff shall only use facility department computers assigned to the B&G Department located in the B&G Shop area, rooms 101 and 102. Any exemptions to this directive must be approved by me. Failure to comply with this policy shall result in disciplinary action.

Agency Exh. 1, p. 13.

The Grievant admits the basal facts of the offense, but she offers mitigating circumstances of a family emergency involving the health of her immediate family members. She was attempting to send an email communication on the computer when the facilities manager interrupted her. This is documented in her grievance submissions included among the Agency's exhibits. Agency Exh. 1, pp. 4-7. The Grievant testified that the classroom door locked automatically and that there was natural light in the room from the windows.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Based on the evidence presented, the Agency has met its burden of proving that the Grievant committed the offense of unauthorized use of the classroom computer. The Written Notice characterized the offense in multiple ways: a) failure to follow instructions and/or policy; b) abuse of state time; c) computer/internet misuse; and d) insubordination. Because the specific controls over the general, the offense is properly characterized as computer/internet misuse. The conduct falls under the more general characterizations as an abuse of state time and failure to follow instructions and/or policy, but not insubordination. The question then becomes whether the offense is characterized properly as Group II. Group II offenses are generally distinguished from Group I offenses by the significance of the offense—whether the offense in question presents a significant impact on business operations.

The Agency relies on a prior counseling issued to the Grievant, documented in an August 9, 2013, memorandum addressing an instance in which the Grievant, to treat a migraine headache, retreated to a locked, dark room without notice to her supervisors. Agency Exh. 1, p. 14. The memorandum ended with the conclusion that “in the future if she was feeling bad that [the Grievant] should notify her supervisor, [] or she could come to the HR Department.” The similarity of the two incidents is that she withdrew to a room for non-work-related purposes. The first instance was to treat a medical condition; the present instance was to communicate in an unauthorized manner, against policy, with family members via email. I do not find this to be a repeat of the misconduct counseled on August 9, 2013.

The Agency has not shown that the present offense created any significant impact on the Agency's business operations. Because I do not find the current offense to be repeat conduct, I find that the lack of significant impact on the Agency's business operations renders the offense properly a Group I offense. Accordingly, I find the Agency has met the burden of showing a Group I Written Notice—not Group II.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution.” 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.

The Grievant offers mitigating circumstances, being the need to communicate with family members regarding an emergent situation. However, the Grievant has not shown why the mitigating circumstances led her to use the unauthorized classroom computer rather than the computer available for authorized use. As discussed above, the offense is being reduced from a Group II to a Group I Written Notice, but I find no other circumstances exist to mitigate the discipline further.

DECISION

For the reasons stated herein, the Agency’s Group II discipline with suspension for ten days is reduced to a Group I Written Notice. The Group I Written Notice does not support suspension, so the suspension is reversed and the Grievant is awarded applicable back pay.

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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.