

Group III Written Notice with Termination (internet abuse); Hearing Date: 06/03/14; Decision Issued: 06/26/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No.10366; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10366

Hearing Officer Appointment: May 13, 2014
Hearing Date: June 3, 2014
Decision Issued: June 26, 2014

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the termination of his employment pursuant to a Group III Written Notice issued April 14, 2014 by the Department of Corrections (the "Department" or the "Agency"), as described in the Grievance Form A dated April 18, 2014.

The Grievant, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on May 21, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on May 21, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not submit any exhibits.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. On April 14, 2014, the Agency terminated the employment of the Grievant pursuant to a Group III Written Notice. "[Grievant] spent an extensive number of hours on numerous dates while on duty visiting websites looking at photos and videos that would be described as inappropriate (both sexually provocative and graphic violence). This violates Oper. Procedure 310-2- Information Technology Security and DHRM Policy 1.75 - Use of Electronic Communications and Social Media. The countless hours spent on the computer were hours he was not alert in the housing units which jeopardized the safety and security of the facility." AE 1.
2. The Grievant was formerly employed as a Correctional Officer ("C/O") at a correctional facility (the "Facility") of the Agency. AE 2. The Grievant at the time of the termination of his employment had been so employed for approximately 2 years.
3. In March 2014, the Assistant Warden received an anonymous letter from an inmate alleging that the Grievant was viewing "hardcore porn" on the computer, giving specific dates and times. AE 5, at 1-2.
4. In early March, the Facility Investigator had also received an anonymous letter concerning the Grievant's inappropriate viewing of "videos of half naked girls" on the computer in the control booth of the Facility. AE 5, at 3-4.
5. The Assistant Warden asked the Agency's Information Security Officer in the Agency Headquarters to investigate the matter.
6. The Information Security Officer began February 1, 2014, and examined the first 25,000 lines produced from her search concerning the Grievant's individualized assigned alias account name.
7. The query showed, amongst other things, that the Grievant searched for 54 YouTube videos in 2 days. AE 6.
8. The Grievant spent numerous hours on YouTube watching videos and visited several websites looking at photos and videos with pornography and graphic violence. AE 6 and 7.

9. On April 14, 2014, when the Grievant met with the Warden, Assistant Warden and Facility Human Resources Officer, the Grievant admitted in writing that through the State computer, he accessed and looked at the pornography at AE 7 and the voluminous materials represented by AE 9 (a stack of paper itemizing computer activity by the Grievant about 7 inches high).
10. The Grievant received significant training concerning the Agency IT Security policies. *See, e.g.,* AE 3.
11. The Grievant's viewing of the voluminous materials discovered by the search could potentially cause the Grievant to be distracted from his main functions of watching out for the safety and security of fellow officers and the inmates.
12. Security at the Facility is paramount and the consequences of security lapses can be serious.
13. The presence and alertness of security officers on their posts at all times is important to fulfill their dual role of both supervising and protecting offenders.
14. The testimony of the Agency's witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance*

Procedure Manual, § 5.8. To make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or Group III offense.)"

In this proceeding, the Agency has shown upon a preponderance of the evidence that the Grievant engaged in a violation of the Agency's policy regarding IT Security. The Grievant's argument that all inappropriate websites are blocked (AE 2) was clearly disproven by the Information Security Officer, who explained at the hearing that while the Agency does use a web filter to block inappropriate websites, because of the ever-changing nature of the worldwide web, things can slip through the cracks and it is not possible to come up with a foolproof filtering system.

This is precisely why the IT Security policy requires any Agency employee to notify his supervisor and CTSU Security if he gains access to a pornographic or other web site designated by the Agency as inappropriate and unauthorized, "whether intentional or not." AE 4. The Grievant did not report as clearly required by policy under any circumstances. AE 4.

Personal use of the computer and internet by policy must be incidental and limited to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. AE 4. The Grievant's use of the computer and internet was pervasive and sustained and by no means incidental and limited. AE 9.

Personal use and certain activities are strictly prohibited if they involve, for example, accessing or downloading: sexually explicit content; obscene images; the use of language, words or pictures that could be considered offensive to others; streaming audio or video; and any other activities designed as prohibited by the Agency. AE 4. The Grievant clearly violated this policy on numerous occasions and in numerous ways.

The policy provides that "[t]he use of DOC Internet services or any DOC Information Technology System for visiting pornographic web sites, or for accessing, storing, or distributing pornographic material, is prohibited." AE 4. Clearly the Grievant visited pornographic web sites in violation of this strict policy.

The Grievant specifically raised mitigation as an issue arguing that the Group III Written Notice should be reduced to a lesser offense and that management's decision is arbitrary and capricious. AE 2.

EDR's Rules for Conducting Grievance Hearings provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an

employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant. AE 1.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A, the Written Notice and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 2 years;
2. the fact that the Grievant's had no prior discipline; and
3. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The Agency has met its burden of proving upon a preponderance of the evidence that concerning the Grievant's violation of the IT Security policy, the Grievant engaged in the behavior contrary to policy, such behavior constitutes serious misconduct and is properly characterized as a Group III offense warranting termination.

DECISION

For the reasons stated herein, the discipline is upheld. The hearing officer hereby upholds the Agency's Group III Written Notice and termination of employment as warranted and appropriate under the circumstances.

APPEAL RIGHTS

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

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

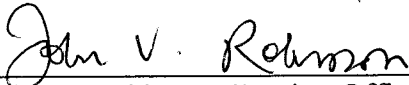
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **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; the day following the issuance of the decision is the first of the 15 days.) 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 an 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 the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 6 / 26 / 14



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

**Distribution List
for
Due Process Hearing
regarding
Edward C. Brown (Case No. 10366)**

Grievant

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OEDR Representative

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