

Issues: Group II Written Notice with suspension (unauthorized use of State property), and Group III Written Notice with termination (disseminating confidential information); Hearing Date: 02/09/14; Decision Issued: 04/13/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10515, 10516; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 04/23/15; EDR Ruling No. 2015-4142 issued 05/18/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/23/15; DHRM Ruling issued 05/26/15; 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: 10515 10516

Hearing Date: February 9, 2015
Decision Issued: April 13, 2015

PROCEDURAL HISTORY

On October 21, 2014, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for unauthorized use of State property or records.¹ On October 21, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for improperly disseminating confidential information about an offender.

Grievant timely filed grievances to challenge the Agency's actions. On December 2, 2014, the Office of Employment Dispute Resolution issued Ruling 2015-4053, 2015-4054 consolidating the grievances for hearing. On December 9, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 9, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Representative
Witnesses

¹ Grievant's behavior is better described as a failure to follow policy because DOC policy specified the type of use that was not permitted. In other words, although some of Grievant's use of her computer was unauthorized, other DOC policy explains why that use was unauthorized.

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Probation and Parole Officer II at one of its facilities. She began working for the Agency on June 25, 2004. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for writing pre-sentence investigation reports (PSI) regarding defendants convicted of felonies. As part of her training, Grievant was told that pre-sentence investigation reports were confidential documents.

Grievant often worked from her home. She signed a teleworking agreement in June 2011 providing the Agency with certain assurances including:

Employee will apply approved safeguards to protect agency or state records from unauthorized disclosure or damage, and will comply with the privacy requirements set forth in the state law and the Department² of Personnel and Training's Policies and Procedures Manual.³

² This agency is now known as the Department of Human Resource Management.

Grievant signed a Windows/VMS User Information Security Agreement on March 14, 2009. In this agreement, Grievant acknowledged that that she was granted access to automated systems including licensed software, hardware, and date of DOC. She also acknowledged:

That data contained in and accessed using the information systems and network of DOC, and their information systems at the Virginia Information Technologies Agencies (VITA) are the property of the Commonwealth of Virginia. This includes all systems and data used to conduct the business of the DOC, regardless of where the system or data resides. I shall not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of the DOC to whom such disclose is authorized. Such disclosure shall be in confidence for purposes specifically related to the business of the DOC and the Commonwealth. ***

I understand and agree that all computer resources and equipment are the property of DOC and shall be used for official business only. I understand that DOC reserves the right to monitor, access, and disclose any communications using its system and, there, I have no expectation of privacy. I understand that it is my responsibility to protect the data and systems from damage or destruction. I agree to comply with DHRM Policy 1.75 – Use of the Internet and Electronic Communications Systems. ***

I acknowledge that I have read and will comply with DOC Information Technology Security Operating Procedure 310.2. Use of the computer resources and equipment with knowledge of this procedure will be deemed consent to this procedure. This agreement shall be interpreted in accordance with the laws of the Commonwealth of Virginia.⁴

Grievant was scheduled to begin medical leave for an injury to her hand. Grievant was an especially hard working employee and the Chief believed that Grievant might work from home while she was supposed to be recovering. The Agency's practice was to disable DOC email accounts when an employee was on short term disability and not supposed to work. The Chief decided that Grievant's DOC account should be disabled while she was on leave.

On September 30, 2014, the Deputy Chief sent Grievant an email stating:

³ Agency Exhibit 3.

⁴ Agency Exhibit 3A.

I found out since you are going on medical leave your computer will be disabled starting tomorrow until your return on 10/16. If your return to work is extended then it will be turned back on once [you] return to work.

Grievant replied:

What do you mean by “disabled”? I understand that I will not do any work while out, especially since I can only “peck” at the keys. However, I need my computer for e-mail communications with [the Third Party Administrator], my daughter, the college, etc. I do not have another computer at my house since my son moved out and took the one in the house. Accessing my e-mail via my cell phone is very difficult. I can use the computer without exceeding the network, which is no problem.

The Chief became concerned about Grievant’s use of her computer upon learning of Grievant’s concern about access to her DOC issued computer. She asked the Information Security Officer to examine the computer issued to Grievant. The Information Security Officer reviewed the documents contained on the hard drive of the computer assigned to Grievant. The hard drive held shopping receipts and correspondence with merchants regarding personal shopping. The hard drive also contained emails between Grievant and an attorney regarding a divorce property settlement agreement and pleadings for a “pro se” plaintiff. Grievant wrote the attorney with questions “regarding the divorce I am handling for [pro se client’s name].”⁵ Grievant used the Agency’s email to send pictures of her family and friends. Grievant used the Agency’s email to send personal emails to her family.

On September 18, 2014, Grievant sent an email to an acquaintance, Mr. P regarding a pre-sentence investigation report she was drafting regarding Mr. C. She began the email, “I wrote this in the PSI for [Mr. C]. Of course, [another employee] instructed me to take out what I said. I knew he would make me. What an ass.” She then inserted into the email the text she had written for the presentence investigation report for Mr. C. The information included the number of Mr. C’s prior convictions, current sentence. The information included a discussion about Mr. C submitting a letter to a Deputy in a local jail after the Deputy made a derogatory comment about Mr. C’s sentence. Grievant stated, “His ‘justification’ for the offense is compelling and perhaps sheds some light on what sometimes occurs behind the scenes in a correctional setting. Whether it be the truth or fabrication on the subject’s part, the inhuman treatment of inmates has unfortunately been a concern in the correctional setting for as long as the criminal justice system has existed. In this case, subject chose to address his issue in writing as opposed to using verbal or physical means. This in itself is perhaps a good thing.” Grievant explained the applicable sentencing guidelines for Mr. C.

In the final pre-sentence investigation report for Mr. C, Grievant removed several of her comments about Mr. C’s justification.

⁵ Agency Exhibit 5H.

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.”⁶ 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.”⁷ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁸

Group II Written Notice

DOC Operating Procedure 310.2(VI)(B)(11) sets forth certain prohibited activities when using the Internet, electronic communications, and information technology systems:

Utilizing a DOC issued laptop device and/or DOC issued mobile phone as one’s own personally owned device for personal business.

Section (VI)(F)(1) governs email usage:

The DOC email system and all email accounts and their associated messages and attached files, are the property of the Commonwealth of Virginia and should be used for appropriate business purposes.

- a. Appropriate use refers to job functions, job communications, information exchange and collaborative work directly related to the mission, goals, and business of the DOC.
- b. Personal, non-work related or inappropriate comments, graphics, quotes, links, or other non-business related items are not permitted in official communications using email or other media.

Grievant did not have a personal computer at her home. She used the DOC computer as her as a personally owned device for personal business by sending personal emails using her DOC issued email account. She sent emails to her friends and family with pictures. She sent emails to an attorney regarding divorce papers for another person. The Agency has presented sufficient evidence to support the issuance

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁷ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁸ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Grievant's five work day suspension must be upheld.

Group III Written Notice

DOC Operating Procedure 050.1 governs Offender Records Management. This policy defines a pre-sentence investigation as a "special individual background investigation and report prepared by P&P Officers for the Court and Parole Board." Section IV addresses privacy and confidentiality of offender record information:

A. Information pertaining to the records, offenses, personal history, and private affairs of offenders is for official use only.

1. Employees will seek to obtain such information only as needed for the performance of their official duties and will not discuss such information except as required in the performance of official duties.

Section XII(L)(2) states:

Presentence investigations (PSI) and Post Sentence Reports (PSR) cannot be disseminated except:

- a. In accordance with COV §19.2-299.
- b. To any criminal justice agency as described in COV § 9.1-101.
- c. To any agency where the offender is referred for treatment.
- d. To counsel for any person who has been indicated jointly for the same felony as the subject of the report.
- e. If the subject is later charged with a new felony, the report may be released to his attorney.

"Failure to ... otherwise comply with applicable established written policy" is a Group II offense.⁹

Grievant drafted text that she intended to comprise a pre-sentence investigation report. The words she used to describe the subject and the information contained in the draft report about the subject were confidential information that could not be disseminated to an unauthorized third party. Mr. P had no right to see the information about the subject and there was no need to send it to him. The Agency has established that Grievant engaged in behavior giving rise to a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the information about Mr. C contained in her draft PSI was not confidential information. Grievant's argument is unpersuasive. The Agency has

⁹ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

deemed the information Grievant wrote as confidential. Whether someone else could search public records and find the same information has no bearing on whether the information once contained in the Agency's records remains confidential. In addition, if Mr. P had searched every public record regarding the subject, Mr. P would not have known that there existed as pre-sentence report drafted by Grievant. Only once she shared with him what she had written could he have known that a PSI existed for the subject and that Grievant was the author. No public record contained Grievant's words regarding the subject's justification for his behavior.

The Agency argued that Grievant should receive a Group III Written Notice based on its judgment regarding the severity of the offense. Based on the evidence presented, Grievant's behavior is best described as a violation of policy and, thus, a Group II Written Notice was warranted.

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"¹⁰ 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.

Grievant argued that she had been singled out to have her email account disabled while on short term disability. The evidence showed that under DOC Policy, employees who left work for short term disability were, "expected to leave work laptops, work phones or any other work related equipment at the office."¹¹ Although the Agency's policy referred to removing an employee's access to the Agency's computer system if the employee was expected to be absent at least 30 days does not mean the Agency was prevented from disabling the account of an employee expected to be absent for fewer than 30 days. The Agency disabled the email account of another DOC PSI writer who was absent from work due to illness.

Grievant presented evidence that other employees used their DOC computer to send personal email. This evidence does not change the outcome of this case. DOC

¹⁰ *Va. Code § 2.2-3005.*

¹¹ Agency A8.

employees were permitted to have occasional and incidental personal use of their Agency's computer. None of the witnesses who had sent personal emails, also used their Agency computer as their sole computer for personal use. Grievant and those employees were not similarly situated. In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action with a five work day suspension is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. The Agency's decision to removal Grievant 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.¹²

[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

¹² Agencies must request and receive prior approval from EDR before filing a notice of appeal.