

Issue: Group III Written Notice with Termination (internet abuse); Hearing Date: 05/18/15; Decision Issued: 05/19/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10590; 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: 10590**

Hearing Date: May 18, 2015

Decision Issued: May 19, 2015

#### **PROCEDURAL HISTORY**

On February 18, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for inappropriate use of the Agency's computer system.

On March 16, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 13, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2015, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

#### **APPEARANCES**

Agency Party Designee  
Agency Representative  
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 Corrections Officer at one of its Facilities until his removal effective February 18, 2015. He began working for the Agency on July 15, 2013. Grievant worked on the night shift. He was responsible for supervising inmates within the security perimeter of the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

An offender informant told the Agency's investigator that Grievant was letting offenders access a social media site. The Agency conducted an investigation consisting of examining Grievant's usage of the internet during work hours. The Agency was unable to substantiate the informant's allegation but learned of other behavior by Grievant giving rise to disciplinary action.

Employees have unique log on identification to access the Agency's internet. Every employee attempting to access the Agency's computer system and the internet must click through a screen warning users that the computer system is the property of the Commonwealth of Virginia and that he or she has no expectation of privacy when using the Agency's computer system.

The Agency has software on its computer system to enable it to identify websites accessed by an employee during the prior 90 days. An Information Security Officer examined Grievant's internet usage from November 14, 2014 through December 27, 2014. Grievant accessed many webpages unrelated to his work duties including a web

page which required the user to click on a button to gain access to video content. The webpage stated:

THIS CONTENT IS INTENDED TO ADULT AUDIENCES ONLY

If you have reached this page ... and are under the age of 18 please click the exit link below.

EXIT ENTER

On November 29, 2014, Grievant clicked on the web page to enter the website. He watched several non-work related videos including pornographic images. Grievant watched at least two videos showing explicit sex. One video showed a man and a woman having sexual intercourse. Another video showed a woman engaged in oral sex. The images were sexually explicit.

Watching videos and music slows the Agency's internet access. Grievant repeatedly accessed web pages for approximately 30 different shopping websites. Grievant spent many hours of his work day shopping online. Grievant streamed music on his computer. Grievant's internet usage exceeded the amount of time allowed for work breaks.

The Agency was concerned about corrections officers watching pornography inside the Facility because their usage may be visible to an offender who may threaten to report the corrections officer unless the corrections officer grants the offender's requests. The Agency was also concerned that a corrections officer watching pornography may print off sexually explicit images and sell them to inmates effectively bypassing the Agency's entry search for contraband.

### **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."<sup>1</sup> 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."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

DOC Operating Procedure 310.2 governs Information Technology Security. Section VI(B)(11)(a) prohibits “[a]ccessing, downloading, printing, or storing information with sexually explicit content ....” On several occasions including November 29 2014, Grievant used the Agency’s computer system to access the internet and view explicit content. He knew or should have known that he was viewing sexually explicit content and that his actions were contrary to policy.

DOC Operating Procedure 135.1 (V)(A)(2)(d) provides:

Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. DOC may consider any unique impact that a particular offense has on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.

Failure to comply with policy typically is a Group II offense. In this case, the Agency has presented sufficient evidence to support elevation of the offense to a Group III offense because of the unique impact viewing pornography at a corrections facility may have on Agency security.<sup>4</sup> Upon the issuance of a Group III offense, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

*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 ....”<sup>5</sup> 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 III Written Notice of disciplinary action with removal is **upheld**.

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<sup>4</sup> Grievant’s internet usage for streaming music and viewing web pages without pornography would constitute at most a Group II offense. The Agency failed to establish the amount of time Grievant devoted to viewing non-work related web pages but presented testimony that Grievant’s usage exceeded the amount of time he was allotted for breaks.

<sup>5</sup> *Va. Code § 2.2-3005*.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>6</sup>

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

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer