

Issue: Group II Written Notice (failure to follow policy and abuse of State time);
Hearing Date: 10/30/14; Decision Issued: 11/05/14; Agency: VSU; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10462; Outcome: Partial Relief; **Administrative
Review**: EDR Ruling Request received 11/21/14; EDR Ruling No. 2015-4050
issued 12/15/14; Outcome: Remanded to Hearing Officer for clarification;
Remand Decision issued 01/08/15; Outcome: Original decision affirmed;
Administrative Review: DHRM Ruling Request received 11/20/14; DHRM Ruling
issued 11/13/15; 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: 10462

Hearing Date: October 30, 2014
Decision Issued: November 5, 2014

PROCEDURAL HISTORY

On August 18, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions or policy and abuse of State time.

On August 20, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 29, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 30, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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:

Virginia State University employs Grievant as a Project Management Specialist. He has been employed by the Agency for over a year. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had two personal cell phones which he used to access the Agency's internet to view and listen to religious sermons and music. He sometimes listened to religious sermons while he was working and performing his duties.

Each time Grievant accessed the Agency's internet, even as a guest, he had to agree to the Agency's internet usage policy before he could connect to the internet.

The Agency was in the process of upgrading its internet bandwidth capacity because usage by its employees, students, and guests had exceeded the allotted bandwidth. The Agency's information system office reviewed internet usage among staff and Grievant was the person using the most data.

On August 8, 2014, the Deputy CIO sent Grievant an email stating:

It has been brought to my attention by management that you have a high usage of Internet/Network usage on YouTube and Netflix¹ during business

¹ The Agency was mistaken that Grievant was accessing Netflix. He used other websites to view personal videos.

hours. I also have [observed] several occasions of these incidents. Please refrain and comply with the University's Acceptable Use Policy on using University's computer for business use.

Here is the excerpt of the Acceptable Use Policy.

1. Personal use of the University's electronic resources and systems is permitted only when such use is incidental and occasional. Personal use is prohibited when:
 - A. It interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
 - B. It adversely affects the efficient operation of the computer system; or,
 - C. It violates any provision of this policy.

On August 8, 2014, Grievant replied to the Deputy CIO, "[u]nderstood it will be corrected immediately."² On August 11, 2014, Grievant went to the Deputy CIO's office to explain that he understood the Agency's concerns and intended to stop using the Agency's bandwidth.

Grievant worked his regular shift from approximately 8 a.m. until 5:30 p.m. on August 11, 2014, August 12, 2014, and August 14, 2014. He was on leave on August 13, 2014 and August 15, 2015.

During the week beginning August 11, 2014, Grievant attended a meeting with employees from other units. He was supposed to observe and provide assistance as needed. During the meeting, Grievant used his personal cell phone to watch religious videos. Several employees at the meeting observed Grievant's behavior and complained to Agency managers that Grievant was not performing his work duties.

CONCLUSIONS OF POLICY

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."³ 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."

² Grievant Exhibit 3.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The Agency alleged that Grievant failed to follow a supervisor's instructions to discontinue excessive use of the Agency's internet and that Grievant failed to follow policy by having excessive personal use of the internet. The Agency has not presented sufficient evidence to support this assertion.

The Agency disciplined Grievant for "activity from 8/11/2014 – 8/14/2014." The Agency presented a report showing Grievant used 9.85 GB of data during the time period of August 1 through August 14, 2014. The report was attached to the Written Notice and exchanged four work days prior to the hearing as required by the Hearing Officer's instruction to the parties. The report did not specifically identify Grievant's usage from August 11, 2014 through August 14, 2014. The Agency did not take disciplinary action against Grievant for his usage from August 1, 2014 through August 10, 2014 and on August 15, 2014. The evidence is insufficient for the Hearing Officer to identify the amount of data Grievant used from August 11, 2014 through August 14, 2014. In other words, it could be the case that the Agency is disciplining Grievant for his internet use from August 11, 2014 through August 14, 2014 based on his usage from August 1, 2014 through August 10, 2014 and on August 15, 2014 even though the Agency chose not to take disciplinary action against Grievant during those time periods.

The Agency calculated a second report showing Grievant's internet usage from August 11, 2014 through August 14, 2014. The Agency did not present that second report as an attachment to the Written Notice. The Agency did not exchange that second usage report four work days prior to the hearing date as required by the Hearing Officer. Although Grievant likely used the Agency's internet from August 11, 2014 through August 14, 2014, his usage may have been incidental and occasional and, thus, consistent with the Deputy CIO's email and the internet usage policy.

Abuse of State Time is a Group I offense.⁴ Grievant abused State Time because he watched personal religious videos when he was supposed to be observing a meeting involving other employees. Several employees complained about Grievant's behavior to Agency managers. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that he was capable of watching or listening to religious sermons while he performed his work duties. The Commonwealth of Virginia does not pay employees to watch personal videos or listen to music instead of performing their work duties. To the extent an agency permits an employee to watch personal videos or listen to music, it does so with the expectation that the employee's work performance will not be diminished. Grievant's personal activities distracted him from focusing on the meeting. His work performance diminished thereby justifying the issuance of a Group I Written Notice.⁵

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Grievant abused State time regardless of whether he used excessively the Agency's internet.

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”⁶ 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 the Agency issued the disciplinary action based on factors other than his behavior with respect to internet usage. The Hearing Officer does not believe the Agency acted based on an improper purpose. The Agency took disciplinary action because it believed Grievant violated the internet usage policy. 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 is **reduced** to a Group I Written Notice.

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.

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.