

Issues: Group III Written Notice with Termination (computer/internet misuse), and Group III Written Notice (fraternization); Hearing Date: 06/28/19; Decision Issued: 07/18/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11344; Outcome: Partial Relief; **Administrative Review Ruling request received 07/31/19; EDR Ruling No. 2020-4965 issued 09/27/19; Outcome: Remanded to AHO; Remand Decision issued 11/25/19; Outcome: Group III with termination for computer/internet misuse rescinded; Administrative Review Ruling Request on 11/25/19 remand decision received 12/10/19; Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11344

Hearing Date: June 28, 2019

Decision Issued: July 18, 2019

PROCEDURAL HISTORY

On March 5, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for computer/Internet misuse. On March 5, 2019, Grievant was issued a Group III Written Notice of disciplinary action for fraternization.

On April 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 15, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Lieutenant at one of its facilities. He had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received in-service training regarding Operating Procedure 310.2 but that training was not in-depth. He had access to the policy through the Agency's intranet but rarely had the opportunity to study the policy given the Facility's severe understaffing.

Grievant was assigned a computer which was located in his office. Grievant had a unique password and login identification to access the Agency's intranet and Internet. When Grievant logged into his computer account, he had access to VACORIS and the Internet. Anyone using his account would have the same access he had.

The Inmate began working as a clerk for Grievant in October or November 2016. The Inmate's job consisted of filing applications, writing memorandums, and picking up supplies. He typed memoranda and other nonsecurity documents using Word software. The Inmate had training in information technology.

Grievant typically watched the Inmate when the Inmate was using Grievant's computer and computer account to type memoranda. Grievant usually stood beside the Inmate or was within close proximity to the Inmate. On some occasions, Grievant was forced to leave his office to attend to urgent matters. Grievant would regularly look back at the Inmate to ensure he was performing his duties properly.

Grievant would have the Inmate check on job assignments using VACORIS as Grievant watched the Inmate.

In November 2018, the Inmate asked Grievant if he could print off pornography if he could find a way around getting caught. Grievant told the Inmate "absolutely not!"

Grievant allowed the Inmate to access the Internet to look up book prices so that he could print them off to call his mother and have his mother order the books for him.

At the Inmate's request, a friend of the Inmate uploaded pornography into an email account and gave Grievant access to the account. While working for Grievant, the Inmate would enter the email account and view the pornography when Grievant was distracted from the computer. The Inmate printed the pornographic images and kept them in his cell. Another inmate learned that the Inmate had pornography in his cell and notified Grievant. Grievant reported the claim to Agency managers who began an investigation. The Agency found pornography in the Inmate's possession and the images matched some of the images loaded into the email account.

The Agency Investigator interviewed the Inmate. The Inmate said that Grievant did not know anything about the pornography in the email account.

Grievant was honest and cooperative throughout the Agency's investigation.

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

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

Group III Written Notice - Computer/Internet Misuse

Operating Procedure 310.2 governs Information Technology Security. Section VI (B) (6) (A) provides:

Offenders are strictly prohibited from any access to DOC Information Technology Resources on the Agency's network/systems or resources that can access the Internet. Information Technology resources not on the agency's network/system or resources that do not have Internet access may be utilized by offenders in accordance with Operating Procedure 310.3, Offender Access to Information Technology.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.⁴ Grievant acted contrary to Operating Procedure 310.2 because he allowed the Inmate to use a computer with access to the Internet. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency argued that Grievant should receive a Group III Written Notice. Operating Procedure 310.2 does not specify that the consequences for breaching the policy would be a Group III Written Notice. The Agency's Standards of Conduct does not list violating Operating Procedure 310.2 as a Group II offense. The consequences to the Agency were not so extreme as to justify elevating the discipline from a Group II offense to a Group III offense. The appropriate level of disciplinary action in this case is a Group II Written Notice.

Group III Written Notice – Fraternalization

Employees are prohibited from fraternizing with inmates. Fraternalization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders, connections on social media, and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁵

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁵ Virginia Department of Corrections Operating Procedure 135.2, Rules of Conduct Governing Employees' Relationships with Offenders.

Black's Law Dictionary (6th edition) defines "associate", in part, "Signifies confederacy or union for a particular purpose, good or ill." Webster's New Universal Unabridged Dictionary defines "associate", in part:

2. to join as a companion, partner, or ally: *to associate oneself with a cause.* *** 5. To keep company, as a friend, companion, or ally: *He was accused of associating with known criminals.* 6. to join together as partners or colleagues. *** 8. a companion or comrade: *my most intimate associates.* 9. a confederate; an accomplice or ally: criminal associates.

Operating Procedure 135.2 IV (C) (3) provides:

Improprieties – Associations between staff and offenders that may compromise security, or undermine the employee's ability to carry out their responsibilities may be treated as a Group III offense under Operating Procedure 135.1, Standards of Conduct.

Special Privileges – Employee shall not extend or promise an offender special privileges or favors not available to all persons similarly supervised, except as provided for through official DOC channels.

Grievant gave the Inmate access to the Internet to search for book prices. This was a special privilege because it was not an opportunity available to other inmates at the Facility. Grievant's action constituted prohibited behavior that fell within the definition of fraternization. Fraternization is a Group III offense under the Agency's Standards of Conduct. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for fraternization.

Grievant argued that he was simply engaged in a "simple act of human kindness" by permitting the Inmate to look up book prices on the Internet. Although Grievant's assertion is true, his acts of kindness were a special privilege not afforded to other inmates at the Facility.

Grievant argued that the Agency permitted other inmates to have special privileges. For example, inmates working to assist with a staff lunch meetings were permitted to eat the food not eaten by staff. This constituted a special privilege. The evidence showed, however, that the Warden approved inmate workers eating leftover food. The Warden did not authorize Grievant to allow the Inmate to access the Internet to research book prices.

Removal

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated a Group II Written Notice any Group III Written Notice. Accordingly, the Agency is presented sufficient evidence to support its decision to remove Grievant from employment.

In this case, the Agency issued a Group III Written Notice for computer/Internet misuse with removal. The disciplinary action has been reduced to a Group II Written notice which would not by itself support removal. The Agency issued a Group III Written notice for fraternization but did not include removal on that Written Notice. It would appear that there is no basis to support Grievant's removal. EDR's practice, however, is that when more than one Written Notice is issued at the same time, Written Notices may be accumulated to support removal. Accordingly, the Agency's decision to remove Grievant is upheld.

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"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 disciplinary action for computer/Internet misuse should be mitigated because Operating Procedure 310.2 is poorly written and confusing. Grievant also asserted that the Agency failed to provide him with adequate training regarding the policy. Grievant was aware that the Inmate was not allowed to access the Internet, but was not aware that the Inmate was not allowed to use a computer that had access to the Internet.

The Hearing Officer agrees with Grievant's characterization of the Agency's policy and that the Agency failed to adequately train Grievant on the policy. This conclusion, however, is not sufficient to mitigate the disciplinary action. The mitigation standard is set by EDR, not the Hearing Officer. Grievant is deemed to have adequate knowledge of the Agency's policies once they are placed on the Agency's intranet. Because Grievant is deemed to have knowledge of the Agency's policy, the Agency's failure to write a clear policy and properly train Grievant on that policy does not make the Agency's disciplinary action exceed the limits of reasonableness.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

Recommendation

The Hearing Officer does not agree with the Agency's decision to remove Grievant from employment.⁷ The Agency's Information Technology policy consisted of 24 pages replete with computer jargon. The policy is difficult to read and understand. If Grievant had received adequate training on the policy, he would have complied with the policy. Although Grievant received notice of the policy, his notice was not an informed notice. The Hearing Officer recommends the Agency make Grievant eligible for immediate rehire.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for computer/Internet misuse is **reduced** to a Group II Written Notice. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for fraternization is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must

⁷ The Warden also did not agree with Grievant's removal.

refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

[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

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



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11344-R

Reconsideration Decision Issued: November 25, 2019

RECONSIDERATION DECISION

On September 27, 2019, EDR issued Ruling 2020-4965 remanding this grievance to the Hearing Officer. The Agency issued two Group III Written Notices to Grievant.

Group III Written Notice – Computer/Internet Misuse.

On March 5, 2019, the Agency issued Grievant a Group III Written Notice providing:

Over the course of several months, [Grievant] allowed an offender to utilize his state computer and his VADOC computer account to conduct official DOC business to include utilizing the DOC database CORIS. During this period, the offender was able to create a Yahoo Internet account in which he obtained pornography. The offender printed the pornography pictures off on a state connected printer. These actions are in violation of 310.2.

The question on remand becomes whether Grievant had adequate notice of Operating Procedure 310.2 and, if not, the result of that conclusion.

Grievant did not have actual notice of Operating Procedure 310.2. Grievant was poorly trained regarding the terms of Operating Procedure 310.2. Grievant's supervisor, the Unit Manager, also did not know the requirements of Operating Procedure 310.2. The Unit Manager observed Grievant allowing an offender to use Grievant's computer that was connected to the Internet. The Unit Manager had the opportunity to instruct Grievant to deny the offender access to his computer. The Unit Manager failed to do so.

An employee may be disciplined for violating a policy if he or she is deemed to have adequate notice of that policy. The Agency asserts the Grievant had adequate notice of Operating Procedure 310.2.

EDR interpretive Operating Procedure 310.2:

In sum, the agency's prohibitions on offender access to internet-connected machines are (1) inconspicuously placed in a policy that appears targeted to information technology specialists, (2) unclear as to who is responsible for preventing violations, and most importantly (3) contradicted by other policy provisions that do contemplate offender internet usage, especially in a supervised work context. ***

EDR interpretive the Rules for Conducting Grievance Hearings:

The Rules do not require so stringent a notice presumption as the hearing officer applied in this case. Under the Rules, "an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee." While such a presumption may often, or even typically, be appropriate under the particular circumstances of a case, the Rules' permissive language also allows for situations in which the presumption is inappropriate or rebutted by other evidence, as determined by the hearing officer.

Therefore, while the Rules promulgated by EDR permitted the hearing officer to presume adequate notice in this case based on the agency's distribution of OP 310.2, he was not required to do so. Accordingly, EDR will remand the case back to the hearing officer to determine (1) whether a presumption of adequate notice should be applied in this case; (2) if not, whether constructive notice was deficient to the point of being a mitigating circumstance; and (3) if so, whether the mitigating circumstances in total are sufficient to warrant reduction of the agency's disciplinary action.

The Hearing Officer declines to presume the Grievant had adequate knowledge of Operating Procedure 310.2 based on EDR's interpretation of that policy. Operating Procedure 310.2 appears targeted to information technology specialists and not Grievant. The policy is unclear as to who is responsible for preventing violations. The policy is contradicted by other policy provisions that do contemplate offender Internet usage, especially in a supervised work context.

Based on the facts and circumstances of this case, the Agency's managerial judgment has not been properly exercised. The Agency's disciplinary action exceeds the limits of reasonableness and should be mitigated. Grievant's work performance was satisfactory to the agency. He attempted to limit the Inmate's access to the Internet but was distracted by his other duties. Grievant's supervisor had a chance to correct his behavior, but failed to do so. There is little likelihood that Grievant will permit in the

future another inmate to access the Internet. The consequences to the Agency were not so significant as to prohibit Grievant's reinstatement. The Group III Written Notice of disciplinary action for computer/Internet misuse must be reversed.

Group III Written Notice – Fraternization

The Agency issued Grievant a Group III Written Notice:

Over the course of several months, [Grievant] allowed an offender to utilize his state computer and his VADOC computer account. [Grievant] also looked up items on Amazon so the offender could provide information to his mother so that she could order books and other items for him. This is not the normal procedure for offenders to use for purchasing personal property.

Employees are prohibited from fraternizing with inmates. Fraternization is defined as:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders, connections on social media, and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.⁸

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Grievant argued that the Agency permitted other inmates to have special privileges. For example, inmates working to assist with a staff lunch meetings were permitted to eat the food not eaten by staff. This constituted a special privilege. The evidence showed, however, that the Warden approved inmate workers eating leftover food. The Warden did not authorize Grievant to allow the Inmate to access the Internet to research book prices.

The Group III Written Notice for fraternization does not state that Grievant is removed from employment. Although the Agency could have removed Grievant from employment based on this Group III Written Notice, the Agency did not do so. The Agency did not allege it made an error or oversight. The Agency had the burden of proof to show that the Group III Written Notice for fraternization was intended to remove Grievant from employment. The Agency has not met this burden. The Due Process Notification given to Grievant by the Warden on January 9, 2019 listed the Disciplinary Actions that May Result as:

Based on the nature of the charges, the following disciplinary actions may be issued:

Two separate Written Notices

1. Group III for allowing offender to access your office computer.
2. Group II for Fraternization (offender allowed to research information and bypass procedures for obtaining property []).

Termination possible, however will seek to demote and transfer as an option.⁹

The Due Process Notification indicated "Termination possible" and did not indicate that termination was required.

⁹ Grievant Exhibit 6.

Agency Executives subsequently decided to issue Grievant a Group III for Computer/Internet Misuse with removal and a Group III Written Notice for fraternization. At the time Agency Executives decided to remove Grievant for Computer/Internet Misuse they could have also chosen to remove Grievant for fraternization. Because the Agency did not indicate Grievant would be removed based on the Group III Written Notice for fraternization, it is reasonable to infer that the Agency did not intend for Grievant to be removed by the Group III Written Notice for fraternization. Accordingly, Grievant must be reinstated to his position.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

ORDER

The Group III Written Notice for Computer/Internet Misuse is **rescinded**.

The Group III Written Notice for fraternization is **upheld**.

The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility.¹⁰ The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

¹⁰ If an equivalent position at the facility is not available, the Agency may reinstate Grievant to a position within the same region as the prior facility that does not impose an unnecessary burden on Grievant to commute to the new facility.

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 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 the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer