

Issue: Group III Written Notice with Termination (failure to report computer misuse violation, and fraternization); Hearing Date: 07/01/19; Decision Issued: 07/22/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11346; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling request received 08/02/19; EDR Ruling No. 2020-4966 issued 09/27/19; Outcome: Remanded to AHO; Remand Decision issued on 11/20/19; Outcome: Written Notice with Termination rescinded; Administrative Review Ruling Request on 11/20/19 received 12/05/19; Outcome pending.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11346**

Hearing Date: July 1, 2019  
Decision Issued: July 22, 2019

#### **PROCEDURAL HISTORY**

On March 15, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal.

On April 1, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 23, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2019, 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. 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 Unit Manager at one of its facilities. He was promoted to Major prior to his removal. He had been employed by the Agency for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Lieutenant reported to Grievant.

The Lieutenant was assigned a computer which was located in his office. The Lieutenant had a unique password and login identification to access the Agency's intranet and Internet. When the Lieutenant 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 the Lieutenant in October or November 2016. The Inmate's job consisted of filing applications, writing memoranda, and picking up supplies. He typed memoranda and other nonsecurity documents using Word software. The Inmate had training in information technology.

The Lieutenant typically watched the Inmate when the Inmate was using the Lieutenant's computer and computer account to type memoranda. The Lieutenant usually stood beside the Inmate or was within close proximity to the Inmate. On some

occasions, the Lieutenant was forced to leave his office to attend to urgent matters. The Lieutenant would regularly look back at the Inmate to ensure he was performing his duties properly.

At the Inmate's request, a friend of the Inmate uploaded pornography into an email account and gave the Inmate access to the account. While working for the Lieutenant, the Inmate would enter the email account and view the pornography when the Lieutenant was distracted from the computer. The Inmate printed the pornographic images and kept them in his cell.

On one occasion, Grievant walked into the Lieutenant's office and observed the Inmate working on the Lieutenant's Computer. The Inmate was typing a Word document. Grievant later pulled the Lieutenant aside and questioned the Lieutenant about what access the Inmate had because Grievant was concerned about internet access. The Lieutenant told Grievant that the Inmate only used Word with no internet access and direct supervision by the Lieutenant.

On another occasion, Grievant observed the Inmate at the Lieutenant's computer working on a new exception report sheet. Grievant questioned the Lieutenant about what access the Inmate had. The Lieutenant assured Grievant that the Lieutenant had direct supervision of the Inmate and no access to the internet was available at that time.

On both occasions, Grievant observed the Lieutenant standing directly over the Inmate's shoulder. Grievant told the Lieutenant not to allow internet access when the Lieutenant had the Inmate working on documents.

Another inmate learned that the Inmate had pornography in his cell and notified the Lieutenant. The Lieutenant 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. Grievant was honest and cooperative throughout the 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."<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

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

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>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

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.<sup>4</sup>

Operating Procedure 310.3 governs Offender Access to Information Technology. Section IV(B)(3) provides:

Offenders are prohibited from using computers assigned to a specific employee, computers used for general administrative purposes, or any technology resources tagged with VITA/NG identification i.e. computers, laptops, tablets, printers.<sup>5</sup>

Grievant knew that the Inmate was using the Lieutenant’s computer and that the Lieutenant’s computer had access to the internet. If Grievant had been aware of Operating Procedure 310.2 VI(B)(6)(A) and Operating Procedure 310.3(IV)(B)(3), he would have known to stop the Inmate from using the Lieutenant’s computer regardless of how closely the Lieutenant claimed to be monitoring the Inmate. If the Inmate had been prohibited from using the Lieutenant’s computer, the Inmate would not have been able to access the internet and the email account containing pornography.

Grievant was among the highest ranking employees at the Facility. He was expected to know Agency policy including Operating Procedures 310.2 and 310.3.

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

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

<sup>4</sup> Agency Exhibit 6.

<sup>5</sup> Agency Exhibit 7.

In the Agency's judgment, Grievant's behavior rises to the level of a Group III offense. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant asserted that he did not observe the Inmate accessing the internet and would have stopped the Inmate if he had observed the Inmate using the internet. The Agency's discipline does not depend on Grievant having observed the Inmate accessing pornography. The Agency's discipline was based on Grievant having observed the Inmate using a computer with internet access contrary to policy.

*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>6</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.

The Hearing Officer does not agree with the Agency's decision to remove Grievant.<sup>7</sup> Grievant was expected to focus on series 400 and 800 policies which involve inmate and employee physical security. Grievant is deemed to have adequate notice of Operating Procedure 310.2 and 310.3 because those policies were on the Agency's intranet. However, he was poorly trained regarding information security policies such as Operating Procedures 310.2 and 310.3. If he had been properly trained, he would have complied with those policies. Grievant was a competent and capable employee working in a poorly staffed facility. The Agency could have corrected Grievant's behavior without removal. 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 with removal is **upheld**.

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<sup>6</sup> *Va. Code § 2.2-3005*.

<sup>7</sup> The Warden recommended disciplinary action that did not include removal.

## 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 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 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 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.<sup>[1]</sup>

[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

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Office of Equal Employment and Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 11346-R**

Reconsideration Decision Issued: November 20, 2019

**RECONSIDERATION DECISION**

On September 27, 2019, Employment Dispute Resolution issued Ruling 2020-4966 stating:

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision considering whether the evidence (1) supports a conclusion that the grievant engaged in misconduct as to the agency's charges under OP 135.2, and (2) is consistent with a presumption that the grievant had adequate notice of the requirements giving rise to the agency's disciplinary action against him and, if not, whether any lack of notice merits mitigation of the discipline.

The Agency took disciplinary action for violation of:

- (1) Operating Procedure (OP) 310.3 and
- (2) OP 135.2 Rules of Conduct Governing Employee Relationships with Offenders, for failure to address and report a subordinate employee who allowed an offender to utilize his state computer.

Operating Procedure 310.3

Operating Procedure 310.3 governs Offender Access to Information Technology. Section IV(B)(3) provides:

Offenders are prohibited from using computers assigned to a specific employee, computers used for general administrative purposes, or any



technology resources tagged with VITA/NG identification i.e. computers, laptops, tablets, printers.<sup>8</sup>

Grievant knew that the Inmate was using the Lieutenant's computer and that the Lieutenant's computer had access to the Internet. If Grievant had been aware of Operating Procedure 310.2 VI(B)(6)(A) and Operating Procedure 310.3(IV)(B)(3), he would have known to stop the Inmate from using the Lieutenant's computer regardless of how closely the Lieutenant claimed to be monitoring the Inmate. If the Inmate had been prohibited from using the Lieutenant's computer, the Inmate would not have been able to access the Internet and the email account containing pornography.

EDR interpreted these policies as follows:

By way of example in this case, even if the agency's prohibitions on inmate access to internet-connected equipment are stated in policies made available to employees, those prohibitions are contradicted by other policy provisions that do contemplate internet use by inmates, especially in a supervised work context. OP 310.3, Offender Access to Information Technology, one of the policies underlying the grievant's Group III Written Notice, has a stated purpose to "establish controls that provide offenders regulated access to state owned computers for use in re-entry, education, training, and work programs in [the agency]." Section IV(A) of the policy provides in part:

Information Technology (IT) systems resources are provided for use by employees and offenders in conjunction with the operation of and participation in authorized programs and activities. . . . Offenders shall only be permitted to use IT resources to perform approved job assignments, educational, instructional, research, and specific career and technical education duties as defined in this operating procedure.

Under section IV(B) of OP 310.3, "[o]ffenders are strictly prohibited from unauthorized internet access. Offender internet access shall be strictly controlled and monitored at all times." This subsection then limits inmate use of technology resources to "stand-alone computers and isolated offender use networks" and prohibits offenders' use of "computers assigned to a specific employee." Yet Section IV(C) directs staff supervisors of offenders, presumably including their assigned inmate clerks, to "[p]rovide clear instruction on the expectations regarding internet use, including how and when they can navigate and which sites they may access."

The hearing decision in this case also references OP 310.2, Information Technology Security. This policy is 24 pages long and defines 40 terms. It

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<sup>8</sup> Agency Exhibit 7.

ascribes responsibilities to various actors, including the agency itself, the agency's Technology Services Unit, employees and "users," outside agencies, and other external entities and individuals. Many of the policy's provisions appear to be directed to members of the agency's Technology Services Unit.

The Access category of OP 310.2 does not address offender access. The Usage category, which includes ten parts, lists "Official Use" as Part B; Part B has 12 subparts. Subpart 6 (on page 9 of 24) provides that a facility warden must ensure that offenders do not have access to the intra- or internet, except with approval from higher authorities. Subpart 6 then sets forth six clarifications, including a reference to OP 310.3:

Offenders are strictly prohibited from any access to [agency] 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 [OP] 310.3, Offender Access to Information Technology. . . .

Offenders shall not have direct, unsupervised access to output and storage peripherals such as printers, scanners, DVD burners, and copy machines unless to perform specific educational or job tasks.

Offenders must be under constant sight supervision of [agency] staff when performing such tasks. At a workstation in a controlled area with locked doors (such as VCE shops or CTE classrooms) offender use of information technology equipment is allowed under the general supervision of a trained employee.

Subpart 12 of Part B addresses prohibited uses. Its 27-item list, though not exhaustive, does not cite offender use of information technology. Part E, "Internet Services Usage," also contains no provisions citing offender use. It lists "activities supporting . . . [j]ob functions" as an example of authorized use.

EDR interpreted the Rules for Conducting Grievance Hearings as follows:

[W]hile it is undoubtedly within a hearing officer's discretion to presume adequate notice of relevant policies where they have been made available to the employee, he or she may decline to apply the presumption – or consider it rebutted – where the relevant policy requirements are contradictory, exceedingly inconspicuous, and/or reliant on specialized or technical language in which the employee lacks training or expertise.

Grievant did not have actual notice of the relevant terms of OP 310.2 and OP 310.3. DHRM Policy 5.05 governs Employee Training and Development. This policy provides:

Agencies should provide, at a minimum, on-the-job training or work-related instruction that prepares employees to perform their current jobs (includes: instruction mandated by law, instruction necessary to accommodate technological changes, and new employee orientation.)

Grievant was poorly trained regarding OP 310.2 and OP 310.3. He did not have on-the-job training sufficient to inform him of his obligation to prevent inmates from using computers with access to the Internet.

The Hearing Officer declines to apply the presumption that Grievant had adequate notice of OP 310.2 and OP 310.3. EDR's interpretation of OP 310.3 shows that it is contradictory because it both prohibits but recognizes inmate access to the Internet. EDR's interpretation of OP 310.2 shows that the policy is poorly written, organized in a confusing manner, and directed primarily at the Agency's Technology Services Unit and not security staff like Grievant.

The absence of actual and constructive notice of the Agency's policies is a material and mitigating circumstance. In light of the surrounding facts and circumstances, the Group III Written Notice must be reversed. Several facts and circumstances support this conclusion. First, the context of this case is important. Grievant knew<sup>9</sup> that inmates should not have access to the Internet. He acted to remind the Lieutenant that the Inmate should not have access to the Internet. In other words, Grievant's behavior was intended to reduce the likelihood of any harm to the Agency. Grievant did not have any reason to believe or suspect that the Inmate was accessing the Internet. Second, Grievant's work performance was otherwise satisfactory to the Agency. Grievant received an overall rating of Exceeds Contributor on his 2018 annual performance evaluation. Grievant had no prior active disciplinary action. Grievant showed he was capable of performing his duties going forward. The Hearing Officer has no reason to believe Grievant will permit an inmate to have access to the Internet in the future. Grievant does not need an alternate sanction to deter similar future violations because Grievant is a motivated professional dedicated to performing his job duties who "has shown tremendous growth as a Unit Manager."<sup>10</sup>

### Operating Procedure 135.2

Operating Procedure 135.2(E)(2) provides:

Employee Responsibilities - In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate or compromises safety of

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<sup>9</sup> Grievant's knowledge arose independently of OP 310.2 and OP 310.3.

<sup>10</sup> Agency Exhibit 13.

staff, offenders, or the community and any staff or offender boundary violations.

An employee must report abuse, fraternization, hazing, and sexual misconduct under this policy. The Agency alleged that the Lieutenant fraternized with the Inmate by allowing the Inmate to use the Lieutenant's computer. The Inmate accessed the Internet to view pornography. The Lieutenant allowed the Inmate to use the Internet to research books the Inmate wanted. The Agency considered this to be fraternization.

The Agency was obligated to show that Grievant knew or should have known that the Lieutenant fraternized with the Inmate.

Grievant knew that the Lieutenant's computer had access to the Internet and that the Lieutenant allowed the Inmate to access the Lieutenant's computer under the Lieutenant's supervision.

Grievant did not have actual knowledge that the Lieutenant's behavior could constitute fraternization. Grievant did not know that the Agency's OP 310.2 and OP 310.3 could be construed as prohibiting an Inmate from having access to the Lieutenant's computer because it allowed access to the Internet. Grievant did not have constructive knowledge that the Lieutenant's behavior could constitute fraternization for the reasons explained above.

Grievant did not know the Lieutenant had permitted the Inmate to use the Internet to access information about books. Indeed, Grievant reminded the Lieutenant not to permit the Inmate to have access to the Internet. Thus, Grievant did not observe the Lieutenant fraternizing with the Inmate. Grievant did not fail to report abuse, fraternization, hazing, or sexual misconduct because he did not observe any such behavior. The Agency's basis for taking disciplinary action is not supported by the evidence.

### 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

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. 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.<sup>11</sup> 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:

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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> 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.