

Issue: Group II Written Notice (internet misuse); Hearing Date: 08/06/19; Decision Issued: 08/20/19; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11364; Outcome: No Relief – Agency Upheld.

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE  
MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE  
RESOLUTION

IN RE: DHRM CASE NO.: 11364

## **DECISION OF HEARING OFFICER**

HEARING DATE: AUGUST 6, 2019

DECISION DATE: AUGUST 20, 2019

### **I. PROCEDURAL BACKGROUND**

The Virginia Department of Corrections (hereafter “the agency”) issued the grievant a Group II Written Notice on January 16, 2019 alleging offenses occurring on September 20, 2018. The grievant filed his Form A on February 2, 2019. I was appointed as Hearing Officer on May 29, 2019. I held a prehearing conference call with counsel for the parties on June 5. By the agreement of all parties, the matter was scheduled for hearing on August 6. I issued a prehearing order on June 5. On July 15 a second prehearing conference call was held to deal with the request by the grievant for the production of certain documents. The hearing was held at the agency facility where the grievant is employed on August 6. The hearing lasted approximately 2.50 hours.

### **II. APPEARANCES**

The agency was represented by an attorney/advocate. It proffered fifteen exhibits. I accepted all of the exhibits into evidence. The agency presented one witness, the Warden at the facility. He was present throughout the hearing as the representative for the agency.

The grievant was represented by counsel. He offered as exhibits his employee work profile documents for the immediately preceding four years. He and two additional witnesses testified on his behalf.

### **III. ISSUE**

Whether the agency properly issued the grievant a Group II Written Notice for violating Operating Procedure 135.1 (V)(D)(2)(E) and Operating Procedure 310.2 VI.B.4.A?

### **IV. FINDINGS OF FACT**

The grievant is employed by the Virginia Department of Corrections as a Corrections Officer. At the time of the subject events, he had been an employee of the agency for approximately twenty years, serving the last ten of those in his position as a Corrections Officer. In recent years he had consistently been given contributor ratings in his evaluations. He had no active formal written disciplinary notices on September 20, 2018.

On or about that date an anonymous report was made to the Virginia State Employees Fraud, Waste, and Abuse telephone hotline. The reporter stated that the grievant had been using the Internet an improper amount of time while at work. The Shift Supervisor reported to the Warden around that same time that he had received a report of improper Internet usage by the grievant.

During that time frame the grievant was working an overnight shift from 5:45 p.m. until 6:15 a.m. the following morning. Once the inmates were secured in their cells each evening at approximately 11:15 p.m., the primary duty of the grievant was to make regular rounds through the cell pods. When he completed his rounds and prior to the next set of rounds, he would use an agency computer to view items on the Internet. Among these items were various videos. The

grievant used the Internet to “stay alert” between rounds. An internal investigation by the agency after the receipt of the reports revealed this usage by the grievant. No indication was found of his accessing prohibited or inappropriate websites.

Upon the completion of the investigation, the Warden issued the grievant a Group II Written Notice for violating the agency’s Operation Procedures named above. The disciplinary action did not include any suspension or other collateral consequences.

## **V. ANALYSIS**

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant has admitted that he used the agency computers to view various items on the Internet during his work time. Operating Procedure 135.1.V.2.E provides that the “unauthorized use or misuse of state property” can be punishable as a Group II offense under the Standards of Conduct. Group II offenses are defined as those offenses for which a second offense should result in termination from employment.

The agency has a comprehensive policy regarding information technology security, namely Operating Procedure 310.2. Sub-part VI of that policy deals with the personal use of a computer or the Internet. It provides:

“Personal use means use that is not job-related. In general, incidental or occasional personal use of the Commonwealth’s electronic communications tools, including the Internet, is permitted during work hours, but not so as to interfere with the performance of the employee’s duties or the accomplishment of the unit’s responsibilities.

Personal use is prohibited if it:

- A. Adversely affects the efficient operations of the computer system; or
- B. Violate any provision of this Operating Procedure. . .”

Sub-part VI.12 of the procedure further proscribes certain activities when using the Internet. One of those activities is “streaming audio and video, as it not only slows down the network speed but it also clogs network traffic.’

I find that to properly interpret Operating Procedure 310.2, I must read it as a whole. The grievant has argued that no evidence is presented that his Internet usage interfered with his work performance. Assuming this assertion is correct, it does address the more specific provision of the procedure prohibiting the streaming of videos. As I interpret the policy, streaming videos for viewing while on duty is sufficient to support the issuance of formal discipline without the need to show any specific incident where the performance of the employee was impacted, or even presumed to be impacted. I accordingly find that the actions of the grievant were a violation of Operating Procedure 310.2 and Operating Procedure 135.1.

The grievant raises several arguments in his defense. One of these arguments is that the portion of Operating Procedure 310.2 quoted above is so vague and ambiguous that it should not be enforced. He also argues that the evidence is lacking as to whether he received training on the Operating Procedure after it was revised on November 1, 2017. In particular, the grievant asserts that the phrase “incidental and occasional personal use” lacks any substantive meaning. That argument is without merit.

The word “occasional” or its variation “occasionally” are of common understanding and appear in the Code of Virginia in ninety-six different locations. Notable among these are §54.1-3900 (dealing with the practice of law), §15.2-17.2 (dealing with the part-time employment of law enforcement officers who are off-duty), and §46.2-730 (dealing with the use of antique vehicles on a public highway). Furthermore, the Department of Employment Dispute Resolution has determined that fundamental fairness is not implicated by an unwritten or ambiguous rule if the standard “is not one that merely embodies a standard of conduct a reasonable person would intuitively recognize as inappropriate.” EDR Ruling Number 2011-2861. The regular use of the

Internet to watch videos falls into the category of a matter which a reasonable corrections officer would intuitively understand to be a distraction from his assigned duties.

The grievant also testified that he had been told by superior officers merely to “watch your Internet usage.” That statement appears to have been taken by the grievant as permission to use the Internet. The focus, however, should have been on the admonition to limit the usage. The agency did not present detailed evidence as to the frequency of the usage or the length of the times of usage. Its case might have been made much stronger by the presentation of such evidence. In its absence, and considering the grievant’s testimony, as required by Section VI.B of the *Rules for Conducting Grievance Hearings*, I will nonetheless give deference to the agency’s determination that the results of the investigation were sufficient to support the Group II Written Notice.

I find no basis for ruling that the agency has applied its policies in an improper or discriminatory manner.

The last argument raised by the grievant is that others at the facility are also known to use the Internet at various times during work hours. I do not doubt that assertion. I also do not doubt that those individuals are only an anonymous tip to the hotline away from also receiving discipline. Because the grievant presented no evidence that other similarly situated employees avoided discipline after the discovery of their improper computer usage was discovered, I decline to mitigate the punishment issued the grievant.

## **VI. DECISION**

For the reasons stated herein, I hereby uphold the issuance of the Group II Written Notice dated January 16, 2019.

## VII. 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 EEDR 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].

**ENTERED** this August 20, 2019.

Thomas P. Walk  
Hearing Officer

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