

Issue: Group II Written Notice with suspension, demotion and pay reduction (failure to follow policy); Hearing Date: 09/25/15; Decision Issued: 10/08/15; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 10660; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10660

Hearing Date: September 25, 2015
Decision Issued: October 8, 2015

PROCEDURAL HISTORY

On April 30, 2015, the Grievant was issued a Group II Written Notice for:

On 3/11/15, we met to discuss the contents of a posting you placed on your facebook page that invited president Obama to a cook-out at your home. OP 310.2 - Information Technology Security, states “when posting entries on the internet, employees should ensure that they do not undermine the public safety mission of the [Agency]. They should not post information, images or pictures which will adversely affect their capacity to effectively perform their job responsibilities or which will undermine the public’s confidence.”¹

Pursuant to this Written Notice, the Grievant was suspended for 26 days, demoted and received a 10% reduction in his pay band.² On February 22, 2015, the Grievant timely filed a grievance to challenge the Agency’s actions.³ On August 20, 2015, this appeal was assigned to a Hearing Officer. On September 25, 2015, a hearing was held at the Agency’s location.

APPEARANCES

Attorney for Agency
Attorney for Grievant
Grievant
Witness

ISSUES

Did the Grievant violate Operating Procedure 310.2, Information Technology Security [“OP 310.2”]?

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1

³ Agency Exhibit 1, Tab 2, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁴ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

⁴ See Va. Code § 2.2-3004(B)

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing eight tabs, and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing five tabs, and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

The parties stipulated that the Grievant did in fact post on his personal Facebook page, using his personal computer, while at home, the following post:

Dear Barack Obama,

You are cordially invited to a cookout tomorrow at my house. I would like to sit out on the back deck and discuss global warming in the 10 inches of snow and subzero temperatures that are forecasted. You, however, will not be invited inside due to my fears that you may confiscate my possessions and give to the drug dealers, thieves and prostitutes whom the police have so unfairly targeted. I also fear you may take my guns and give them to the Mexican drug cartels so they can further strengthen their hold on our border. I also admit I have a Bible I read daily and could be targeted by ISIS. However that isn't really your concern just payback from the crusades I suppose. Stay warm my friend and I look forward to hearing from you.

Sincerely, [Grievant]

P.S. This will require you to make a decision so I'm not EXPECTING a response.⁸

The parties also stipulated that in his Facebook profile, the Grievant indicated that he worked at the Agency. Accordingly, there is no dispute before me regarding the fact that the posting was made on the Grievant's personal Facebook page, and it was made from the Grievant's home using his personal computer.

In its Written Notice, the Agency put the Grievant on notice that he was in violation of OP 310.2.⁹ In the Second Resolution Step, the Agency's position was upheld and again that Second Resolution Step finding indicated that the Grievant violated OP 310.2.¹⁰

In the Third Resolution Step, the Regional Administrator of the Agency upheld the Agency's position and stated that the Grievant had violated OP 310.2.¹¹

The Agency, through its witnesses in this matter, spent little time dealing with OP 310.2. To the extent that it did deal with that Operating Procedure, it suggested that OP 310.2(VI)(B)(9)

⁸ Agency Exhibit 1, Tab 3, Page 1

⁹ Agency Exhibit 1, Tab 1, Page 1

¹⁰ Agency Exhibit 1, Tab 2, Page 8

¹¹ Agency Exhibit 1, Tab 2, Page 9

and (10), were the governing sections that applied to this matter. The Grievant, through his counsel, argued that this section does not apply to the stipulated evidence before me.

OP 310.2, has as a subject, “Information Technology Security.” OP 310.2(I), states that its purpose:

...establishes security controls in accordance with Commonwealth of Virginia information technology resource management information security standard COV ITRIM standard SEC501. This standard defines the requirement to protect **[Agency] data** and information from lost, unauthorized use, modification, disclosure, or reproduction, and to ensure the implementation of, and compliance with, controls, standards, and procedures. This operating procedure ensures that all data and information, and the means by which they are created, gathered, processed, transmitted, communicated, and retained are identified, classified, controlled, and safeguarded. **[Agency] data** and information must also meet federal, state and other regulatory and legislative requirements. ¹² (Emphasis added)

Under the heading of Definitions, OP 310.2(II), defines “Compliance” in part as:

This operating procedure applies to all units operated by **the [Agency]...** ¹³
(Emphasis added)

Under the heading of Definitions, OP 310.2(III), defines “Data” as:

Raw, unorganized facts (written or electronic) that are in the possession of **the [Agency]** employees, volunteers, vendors, or contractors. ¹⁴ (Emphasis added)

OP 310.2(IV)(A), states in part as follows:

This operating procedure applies to all [Agency] employees...and partners **requiring access to or use of [Agency] Information Technology Resources.** Employee failure to follow this procedure is a violation of Operating Procedure 135.1, Employee Standards of Conduct, and may result in disciplinary action. ¹⁵ (Emphasis added)

OP 310.2(VI) is titled “Usage of [Agency] Information Technology Resources. OP 310.2(VI)(B), is titled, “Official Use.” OP 310.2(VI)(B)(1), immediately states that, “No user

¹² Agency Exhibit 1, Tab 7, Page 1

¹³ Agency Exhibit 1, Tab 7, Page 1

¹⁴ Agency Exhibit 1, Tab 7, Page 1

¹⁵ Agency Exhibit 1, Tab 7, Page 3

shall have expectation of privacy when using [Agency] Information Technology Systems.”¹⁶
(Emphasis added)

The entirety of OP 310.2, deals with Agency systems data and none of it deals with a personal computer operated by an employee from their home. Any reading of OP 310.2, whether in detail or cursory, indicates that it is an operating procedure which sets forth standards that must be followed and the manner which must be used to operate Agency systems. Indeed, OP 310.2(II), under “Compliance,” states as follows:

This operating procedure applies to all units operated by the
[Agency]...¹⁷

I can find no language in OP 310.2, that governs an individual’s computer used while not at work and while not connected in any way to the Agency’s system.

The Agency presented Policy 1.75, Use of Electronic Communications and Social Media.¹⁸ The Written Notice, Second Step Resolution and Third Step Resolution all stated that the Grievant violated OP 310.2. Counsel for the Grievant argued that the Agency cannot, at this late date, attempt to rely on another Policy. I agree with Grievant’s counsel’s argument.

The Agency provided me with a Circuit Court opinion that dealt with a case out of Wise, Virginia. In that case, the judge was dealing with Case No. 9890, which was decided by a Hearing Officer on November 13, 2012. In his opinion, the Circuit Court judge stated in part, as follows:

It is uncontested, as well, that the Agency has a written social media guideline - Memorandum HR-2010-02 which cautions employees about improper postings online...¹⁹

Memorandum HR-2010-02, was superseded by OP 310.2. In the case provided to me by the Agency, it is clear that the Grievant did not contest the applicability of Memorandum HR-2010-02. In this matter, the Grievant has contested the superseding procedure OP 310.2. As stated earlier, I find that the Agency has not borne its burden of proof that the Grievant violated Operating Procedure OP 310.2. That Operating Procedure is inapplicable in dealing with a personal computer at the Grievant’s home and on the Grievant’s time. Accordingly, I do not reach the First Amendment issue that was also raised in this matter. Should either EDR or DHRM find that OP 310.2, does address personal computers used on a Grievant’s time at a Grievant’s home or that Policy 1.75, which has appeared in this matter for the first time at the hearing, apply, then I will need to address the First Amendment issue and attempt to untangle what is, at best, an exceedingly sticky wicket.

MITIGATION

¹⁶ Agency Exhibit 1, Tab 7, Page 8

¹⁷ Agency Exhibit 1, Tab 7, Page 1

¹⁸ Agency Exhibit 1, Tab 6, Pages 1-8

¹⁹ Thirtieth Judicial Circuit Court of Virginia, In re: CL13-007, Dated May 28, 2013

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, I find that the Agency has not borne its burden of proof in this matter. I order that the Agency reinstate the Grievant to the same position or an equivalent position. I further order that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that he have a restoration of full benefits and seniority.

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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

or, send by email to EDR@dhrm.virginia.gov.

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. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management

101 North 14th Street, 12th Floor
Richmond, VA 23219

or, send by email to EDR@dhrm.virginia.gov.

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. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²⁰ 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.²¹

[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]

William S. Davidson
Hearing Officer

²⁰An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²¹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.