

Issue: Group II Written Notice with suspension (unauthorized removal of State property); Hearing Date: 08/12/15; Decision Issued: 08/17/15; Agency: VDH; AHO: Carl Wilson Schmidt, Esq; Case No. 10646; Outcome: No Relief - Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10646

Hearing Date: August 12, 2015

Decision Issued: August 17, 2015

PROCEDURAL HISTORY

On March 23, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for unauthorized removal of State property.¹

On April 14, 2015, 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 she requested a hearing. On July 21, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Agency used the offense code for a Group II offense of unauthorized use of State property.

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?
5. Whether the Agency retaliated against Grievant?

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:

The Virginia Department of Health employs Grievant as a Program Support Technician Senior. She has been employed by the Agency for approximately nine years. She was a non-Exempt employee under the Fair Labor Standards Act. She was not permitted to work overtime without prior authorization from a supervisor. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency had computer equipment that it loaned to employees so that they could perform business related functions outside of the workplace. The Business Analyst was responsible for tracking the computer equipment. His practice was to dispense equipment when requested to do so by an employee. He was not responsible for verifying the reason why the employee asked for the equipment.

The Agency provided Grievant with a Laptop computer on January 4, 2013. Grievant and the Agency entered a Teleworking Agreement dated March 1, 2013. As part of that Agreement, the Agency authorized Grievant to have the Laptop and a Cell Phone. Grievant was given the Laptop and Cell Phone for the purpose of telecommuting. Grievant was responsible for returning the equipment.

On September 24, 2013, the Telework Agreement was terminated by the Manager because the Supervisor needed Grievant to be at work to assist new employees. Grievant was a more senior employee and the Manager needed her in the office. The Manager instructed Grievant to bring the Laptop and Cell Phone to work on September 24, 2013. Grievant returned the Laptop and Cell Phone to the Manager on September 25, 2013. The Supervisor returned the Laptop to the Business Analyst.

On October 10, 2013, Grievant went to the Business Analyst and asked for the Laptop. She did not have permission from the Supervisor or Manager to take the Laptop home. He provided her with the Laptop because he assumed she had been authorized to obtain the Laptop and would use it for Agency-related business. Grievant took the Laptop away from her office and kept it for approximately 15 months. Neither the Supervisor nor the Manager knew Grievant had obtained the Laptop until the Agency discovered that the Laptop had been removed.

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.”² 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.”

“Unauthorized removal of state records/property” is a Group III offense.³ The Agency had computer equipment available to employees who needed equipment when they were away from their desks. The Laptop was owned by the Agency. The Laptop was taken away from Grievant when the Agency ended her telework agreement. Grievant approached the Business Analyst a few days later and re-acquired the Laptop. She removed the Laptop from the Agency’s Facility and retained it for approximately 15 months. She was not authorized by her Supervisor or Manager to remove the Laptop from the Agency. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for unauthorized removal of State property. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays. Accordingly, Grievant’s ten workday suspension must be upheld.

Grievant argued that the Business Analyst authorized her use of the Laptop when she obtained it from him. The evidence showed that the Business Analyst was not her supervisor and did not have the authority to approve Grievant’s use of the

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

Laptop. When he gave the computer to Grievant, he assumed Grievant had been authorized to receive the Laptop and would use it for business related reasons. His action was to “check-out” the computer and not to give permission to Grievant to take the Laptop.

Grievant argued that her behavior at most rises to the level of a Group II offense for unauthorized use of State property rather than a Group III Written Notice for unauthorized removal of State property. The Agency argued that the disciplinary action should be a Group III for unauthorized removal rather than a Group II for unauthorized use of State property because of the length of time Grievant kept the Laptop. The Agency’s analysis is justified in this case. By keeping the Laptop for approximately 15 months, Grievant essentially converted the Laptop from State property to her personal property.

Grievant argued that she used the Laptop to take online classes from a provider who was sanctioned by the Agency to provide education to State employees. She asserted that she participated in an ongoing development and training project in furtherance of the Agency’s mission. She points out that her personal use was work related. Grievant was disciplined for her removal of the equipment without authorization. She was not authorized to work overtime or away from the office. The removal was not authorized regardless of the reasons for which she used the Laptop. If Grievant used the Laptop solely for business reasons, it would not render the removal authorized.

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”⁴ 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity,⁵ (2) suffered an

⁴ Va. Code § 2.2-3005.

⁵ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁶

Grievant engaged in protected activity when she filed a grievance. She suffered an adverse employment action because she received a Group III Written Notice. Grievant has not presented sufficient evidence to show a nexus between her protected activity and the disciplinary action she received. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a ten workday suspension is **upheld**.

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.

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

⁶ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.