

Issues: Group I Written Notice (abuse of State time), Group II Written Notice (internet abuse), and Termination (due to accumulation); Hearing Date: 10/22/15; Decision Issued: 11/10/15; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10664.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10664

Hearing Officer Appointment: August 6, 2015
Hearing Date: October 22, 2015
Decision Issued: November 10, 2015

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the termination of his employment pursuant to a Group I and Group II Written Notice, each issued July 2, 2015 by the Department of Corrections (the "Department" or the "Agency"), as described in the Grievance Form A dated July 17, 2015.

The Grievant, the Grievant's recently substituted advocate, the Agency's attorney, and the hearing officer participated in hearing on October 22, 2015. By Decision entered September 24, 2015, the hearing officer granted the Grievant's request for a continuance of the hearing originally scheduled for September 21, 2015 for medical reasons.

At the hearing, the Grievant was represented by his advocate and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant also submitted certain exhibits.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. On July 2, 2015, the Agency terminated the employment of the Grievant pursuant to a Group II Written Notice issued July 2, 2015, after giving cumulative effect to an earlier active Group II Written Notice issued February 18, 2014. AE 1 & 6. The Group II was for Code 52 Internet Misuse:

"On May 21, 2015 your supervisor observed the computer in your work area paused on a YouTube video site. A subsequent review of your computer account by the Computer Security Unit revealed that your computer account usage far exceeds the incidental use as it defined in the policy. Attached is a snapshot of the various sites visited (this is not all inclusive)." AE 1.

2. The Agency also issued on July 2, 2015, a Group I Written Notice for Code 35 Abuse of State Time:

"On May 21, 2015 your supervisor observed the computer in your work area paused on a YouTube video site. A subsequent review of your computer account revealed significant amount of time spent on your computer account. Multiple sites were visited over a period of time." AE 2.

3. The Grievant was formerly employed as a Correctional Officer ("C/O") at a correctional facility (the "Facility") of the Agency. AE 2. The Grievant at the time of the termination of his employment had been so employed for approximately 4.25 years.

4. The Grievant admits:

"On May 21, 2015, in C3/4 control booth at approximately 4:40 p.m. [Sgt. B] seen that I was on the computer and had a video up on the computer. [Lt. C] called me and asked what I was doing. I told [Lt. C] I had YouTube up and was playing a music video to help pass time while in the booth. I was still performing my job duties as a correctional officer." AE 3.

5. At the time of the disciplinary incident, the Grievant admitted to Sgt. B. his immediate supervisor, that he was watching YouTube because he needed something else to listen to besides offenders. AE 4.
6. The Assistant Warden asked the Agency's Information Security Officer in the Agency Headquarters to investigate the matter.
7. The Information Security Officer searched the Grievant's internet usage history from April 27, 2015 through June 23, 2015 concerning the Grievant's individualized assigned alias account name.
8. The search showed, amongst other things, that the Grievant's usage of the internet far exceeded the Agency "incidental" personal use policy. AE 5 and AE 7.
9. The Grievant also violated Agency policy by engaging in internet usage strictly and specifically prohibited by policy, such as viewing YouTube videos. A.E. 5.
10. The Grievant received significant training concerning the Agency IT Security policies. See, e.g., AE 8.
11. The Grievant's admitted viewing of the YouTube video could potentially cause the Grievant to be distracted from his main functions of watching out for the safety and security of fellow officers and the inmates.
12. Security at the Facility is paramount and the consequences of security lapses can be serious.
13. The presence and alertness of security officers on their posts at all times is important to fulfill their dual role of both supervising and protecting offenders.
14. The Grievant's personal use of the internet was extensive and not incidental.
15. The testimony of the Agency's witnesses was credible. The demeanor of such witnesses was open, frank and forthright.
16. The Grievant has an active Group II offense which was appropriately used to support the termination. AE 6.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with

the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8. To make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or Group III offense.)

In this proceeding, the Agency has shown upon a preponderance of the evidence that the Grievant engaged in a violation of the Agency's policy regarding IT Security.

Personal use of the computer and internet by policy must be incidental and limited to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. AE 10. The Grievant's use of the computer and internet was pervasive and sustained and by no means incidental and limited. AE 5 and 7.

Personal use and certain activities are strictly prohibited if they involve, for example, streaming audio or video; and any other activities designated as prohibited by the Agency. AE 10. The Grievant clearly violated this policy and admitted the violation on numerous occasions.

The Grievant specifically raised mitigation as an issue arguing that the termination was too harsh. AE 2.

EDR's Rules for Conducting Grievance Hearings provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant. AE 1.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A, the Written Notice and all of those listed below in his analysis:

1. the Grievant's service to the Agency of 4.25 years;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the Grievant's candid admissions;
4. the Grievant's remorse; and
5. the Grievant's stress.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The Grievant for the first time in the hearing raised the issue of his disability. However, the Grievant's reliance on this defense fails. The Grievant did not raise the issue on his Form A or in the pre-hearing conference call for inclusion in the Scheduling Order entered by the hearing officer as one of the issues to be decided at the hearing.

In Ruling Number 2007-1409 dated September 21, 2006, at page 7, the Director of EDR appropriately noted the correlation between the Written Notice and the Form A:

(Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.) **This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.** (Emphasis supplied.)

Accordingly, because the issues concerning such asserted disability were not raised on the Form A or previously in this grievance process, the hearing officer declines to take up these issues in any greater detail and will instead focus on the issues actually raised by the Grievant on the Form A. AE 1. However, the hearing officer did take the Grievant's asserted positions into account for his mitigation analysis, discussed in greater detail above.

Similarly, the Grievant did not raise or exchange with the Agency pursuant to the Scheduling Order herein any VEC documents on which he sought to rely at the hearing and no copy of any such document was ultimately provided to the hearing officer as requested by the hearing officer at the hearing. Additionally, the hearing officer agrees with the Agency's attorney that Va. Code §60.2-623(B) precludes the admission of any such VEC documents in this proceeding.

The Agency has met its burden of proving upon a preponderance of the evidence that concerning the Grievant's violation of the IT Security policy, the Grievant engaged in the behavior contrary to policy, such behavior constitutes serious misconduct and is properly characterized as a terminable offense after giving effect to the accumulation of the 2 Group 2 offenses. While not required for the termination, the hearing officer upholds the Group I offense for abuse of state time as appropriate, further bolstering the Agency's termination.

DECISION

For the reasons stated herein, the discipline is upheld. The hearing officer hereby upholds the Agency's Written Notices and termination of employment as warranted and appropriate under the circumstances.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

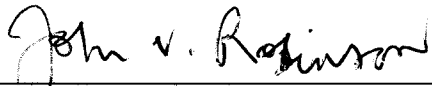
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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 EDR or 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 EDR before filing a notice of appeal.

ENTER: 11 / 10 / 15



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).