

Issue: Group III Written Notice with Termination (internet abuse); Hearing Date: 11/04/15; Decision Issued: 11/05/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10691; 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: 10691**

Hearing Date: November 4, 2015

Decision Issued: November 5, 2015

#### **PROCEDURAL HISTORY**

On August 5, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for accessing sexually explicit content using his Agency computer.

On August 14, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 21, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 4, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency's Counsel  
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. 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 Security Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a unique log on identification to access the Agency's computer system. He selected his own password for his access and was required to keep that password private. Grievant did not have remote access to the Agency's computer system.

When Grievant logged onto the Agency's computer system he received a warning advising him that the Agency's computer system was the property of the Commonwealth of Virginia and that he acknowledged his obligation to comply with the Agency's policies governing information systems. He was advised:

Certain activities are prohibited including but not limited to accessing, downloading, printing or storing sexually explicit information ....<sup>1</sup>

During a two month period in the summer of 2015, Grievant logged on to Agency's computer system to access the internet. He viewed numerous websites related to shopping, entertainment, and employment. He also viewed a video on a website showing sexually explicit content. The video depicted two men and one

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<sup>1</sup> Agency Exhibit 6.

woman. The image showed the back of the first man standing. The woman was bent over with her rear end towards the first man's genitals. The first man was nude from his middle back down to his shoes. He thrust his hips forward and back consistent with having sexual intercourse. The second man was seated in a chair. The woman engaged in oral sex with the seated man.

## 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>2</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 warrant removal."<sup>3</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>4</sup>

DOC Operating Procedure 310.2 governs Information Technology Security. Section VI(E)(5)(a) states that:

The use of DOC Internet services or any DOC Information Technology System for visiting pornographic web sites, or for accessing, storing, or distributing pornographic material, is prohibited.

Grievant used the Agency's computer equipment and computer system to access the internet. He accessed at least one sexually explicit video. The Agency has presented sufficient evidence to show that Grievant acted contrary to the Agency's information security policy.

DOC Operating Procedure 135.1 (V)(A)(2)(d) provides:

Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. DOC may consider any unique impact that a particular offense has on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.

Failure to comply with policy typically is a Group II offense. In this case, the Agency has presented sufficient evidence to support elevation of the offense to a Group III offense because Grievant's action was not merely a violation of policy but also a

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

violation of Va. Code § 2.2-2827(B) which prohibits an agency employee from accessing sexually explicit content. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

The Agency alleged but did not establish that Grievant's use of the internet exceeded incidental and reasonable use. Employees are permitted to have incidental personal use of the internet during their work hours. The Agency did not present evidence showing the amount of time Grievant used the internet for personal reasons, whether he used the internet outside of his breaks, and how his personal use may have affected his work responsibilities or the Agency's operations. The Agency's failure to establish excessive use of the internet, however, does not affect the outcome of this case.

Grievant argued that he was entitled to an accommodation under the Americans with Disabilities Act. Grievant argued that he suffered from post-traumatic stress disorder. Grievant did not take any action to request an accommodation from the Agency. He did not take any action that would place the Agency on notice that he might have a disability requiring further inquiry by the Agency. Even if the Hearing Officer were to assume that the Agency should have recognized his disability, Grievant has not presented sufficient evidence to establish a connection between his disability and his behavior giving rise to disciplinary action. Grievant's disability would not explain or excuse his decision to access sexually explicit material. Even if the Hearing Officer were to assume that Grievant was entitled to a reasonable accommodation, permitting Grievant to watch pornography during work hours would not be such an accommodation.

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>5</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.

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<sup>5</sup> Va. Code § 2.2-3005.

## 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**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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 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.<sup>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.