

Issue: Group II Written Notice with Suspension (computer/internet misuse); Hearing Date: 11/09/16; Decision Issued: 11/28/16; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10876; 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: 10876

Hearing Date: November 9, 2016
Decision Issued: November 28, 2016

PROCEDURAL HISTORY

On June 6, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a ten work day suspension for failure to report without notice, failure to follow instruction and/or policy, abuse of State time, and computer/internet misuse.

On July 1, 2016, 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 October 3, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 9, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
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 Virginia Department of Transportation employs Grievant as a Business Coordinator. She began working for the Agency in July 2005. No evidence of prior active disciplinary action was introduced during the hearing.

In September 2015, the locality where Grievant worked hosted an event affecting the locality's use of road. The Supervisor permitted his subordinates to telework from their homes or work in their offices for a week. Grievant chose to work from her home. At the conclusion of the week, the Supervisor reviewed Grievant's work product. He observed that Grievant produced only a few emails. She had not produced any spreadsheets reflecting a satisfactory work product. One of Grievant's duties included making fuel cards. Grievant did not make any fuel cards during the week.

As a result of Grievant's unsatisfactory work productivity, Agency managers decided to use software to monitor Grievant's computer usage. Beginning October 15, 2015, the Agency monitored Grievant's Agency owned computer. The software took "screen shots" of her computer display every 30 seconds when she was active on the computer.

On November 23, 2015, the Supervisor provided Grievant with a written counseling for several reasons including misuse of State computer resources and time.

She was advised that she had exceeded the permissible “incidental and occasional” personal usage of her VDOT workstation during work hours.

On December 23, 2015, the Supervisor provided Grievant with a second written counseling stating:

With complete disregard for the due process letter we provided you November 23, 2015, stemming from the investigation by the Assurance and Compliance Division, you again on November 25, 2015 worked on a resume for another person for an hour. I can't over emphasize to you enough that all computers are monitored daily. This is a serious matter and is in violation of the Electronic Communications and Social Media-Department of Human Resource Management Policy 1.75.¹

The Supervisor informed Grievant of his expectations that Grievant she repeat training regarding DHRM Policy 1.75. He instructed her to report to him “first thing upon your arrival to work and prior to leaving for the day, I will cancel this at a later date.” She reminded Grievant that “[y]our computer will continue to be monitored.”²

On February 5, 2016, Grievant spent approximately 1 hour and 40 minutes working on a presentation for her daughter during work hours.

On April 5, 2016, Grievant spent approximately one hour working on personal material during working hours.

On April 13, 2016, Grievant spent approximately 48 minutes working on personal material during working hours.

The Agency's computations for personal use accounted for and excluded from consideration the time Grievant took for lunch breaks.

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.”³ 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.”

¹ Agency Exhibit 2.

² Agency Exhibit 2.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

DHRM Policy 1.75 defines Electronic Communication Tools as:

Tools used as a means of sending and receiving messages or information electronically through connected electronic systems or the Internet. Tools may include networked computers, email, voicemail, cell phones, smart phones, any other similar system, and new technologies as they are developed.

This policy addresses incidental and occasional personal use of electronic communication tools:

Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's electronic communications tools including the Internet is permitted as long as the personal use does not interfere with the user's productivity or work performance, does not interfere with any other employee's productivity or work performance, and does not adversely affect the efficient operation of the Commonwealth's systems and networks. Personal use of social media that refers to any aspect of the work environment should be done in a responsible and professional manner.

Grievant used an Agency-owned personal computer as part of her work duties. Her computer was connected to the Agency's network and the internet. Grievant's work shift included at least eight hours of work each day. Grievant had been counseled regarding her excessive personal use of the Agency's computer equipment. On February 5, 2016, Grievant spent approximately 1 hour and 40 minutes working on a presentation for her daughter during work hours. On April 5, 2016, Grievant spent approximately one hour working on personal material during working hours. On April 13, 2016, Grievant spent approximately 48 minutes working on personal material during working hours. Grievant's use of her computer exceeded incidental and occasional use. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's suspension must be upheld.⁴

Grievant asserted that the disciplinary action was an unfair application or misapplication of policy. Grievant argued that the level of discipline was excessive. Although the Agency could have chosen a lesser level of disciplinary action, its decision to issue a Group II Written Notice with suspension is supported by the evidence and consistent with policy.

⁴ It is unnecessary to address the Agency's other allegations because the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violating DHRM Policy 1.75.

Grievant asserted that the Agency discriminated against her because of her sex and race and created a hostile work environment for her. No credible evidence was presented to support this allegation.

Grievant sought restoration of her teleworking privileges. The Agency removed Grievant's teleworking privileges prior to the issuance of disciplinary action. Grievant has not presented any policy requiring the Agency to restore her privileges.

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"⁵ 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.

Grievant asserted that she was treated differently from other employees. No credible evidence was presented to support this allegation. Grievant asserted that her satisfactory performance evaluations support a reduction in the level of disciplinary action. An employee's prior work performance does not form a basis for mitigation under the EDR standard of mitigation. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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

⁵ Va. Code § 2.2-3005.

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 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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.