COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11384

Hearing Date: September 17, 2019
Decision Issued: October 7, 2019

PROCEDURAL HISTORY

On April 29, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for Abuse of State Time, Violation of Policy 2.35, Civility in the Workplace, Unauthorized Use of State Property or Records, Computer/Internet Misuse, and Falsifying Records.

On May 24, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 17, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Game and Inland Fisheries employed Grievant as a Director of Capital Finance. He had been employed by the Agency for approximately 29 years. Grievant did not hold an executive level position within the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

The purpose of his position was:

> to coordinate and administratively support all aspects of the Capital Outlay Program, developed capital budgets, and ensures compliance with State, federal and agency policies and procedures. Provides technical leadership and supports project managers and others in accomplishing project objectives. Procures and manages professional consultant services.[1]

The Agency conceded it was unable to show Grievant falsified documents.

[1] Agency Exhibit 3.

The Agency provided Grievant with a laptop computer. Grievant had a unique login identification and password enabling him to gain access to the Agency's online databases and electronic communication system and the internet. The Agency provided Grievant with an email address containing the Agency's initials. Grievant used his Agency provided email address to send and receive emails from family members and friends.

Grievant was not authorized to telework. He took his laptop home but it is unclear whether he performed any work duties with the laptop while at home.

The Agency received an anonymous note alleging Grievant fraudulently misused agency resources. The Agency began an investigation including reviewing Grievant's computer and Internet usage.

Mr. D was a vendor of the Agency. He had been a friend of Grievant's for decades. Mr. D was a term contractor. His status was reviewed every five years by a committee that did not include Grievant. Grievant was not able to influence or award any contracts to Mr. D. Grievant's behavior did not create a conflict of interest on behalf of the Agency with respect to Mr. D.

Mr. Du owned a real estate agency. Grievant and Mr. Du were friends. Grievant's behavior with Mr. Du did not create a conflict of interest on behalf of the Agency with respect to Mr. Du.

In January 2018, Grievant called Mr. D and told him not to send emails "with nude women in them or inappropriate" and "we need to cut down on the jokes."[2] Mr. D disregarded Grievant's request and continued to send emails containing offensive content intended to be "jokes."

Grievant downloaded onto his computer some of the videos sent to him. He sometimes did so because he could not open them up so he downloaded them to his computer and then open the videos.

From March 1, 2018 through May 15, 2018, Grievant worked an average of 29 hours each week. He exchanged over 300 emails using the Agency-issued computer and email address. He received 102 personal emails from Mr. D. He received 100 personal emails from his Wife. Grievant sent approximately 13 emails to his Wife.

Grievant received or sent approximately six personal emails per day during the ten week period. Grievant testified that he was on the receiving end of approximately 74 percent of all the personal emails.

Grievant had over 250 non-work related photographs on his computer. Most of those pictures were of family members.

[2] Agency Exhibit 5.

Grievant received emails that contained jokes, videos, etc. that could be considered offensive to others with regard to the content related to gender, religion, or political affiliation. The Agency considered content and attachments to the emails to be offensive and unacceptable behavior in the workplace.

Grievant allowed a Family Member to use his Agency-issued laptop to download a song containing offensive language. An African American singer used the N-word (ending in "as") approximately nine times. The singer said "f—k" approximately ten times and also said "bi—hes". The Agency considered these words to be offensive and unacceptable.

The Agency did not allege any of the pictures or videos contained sexually explicit content contrary to State Statute. Grievant testified none of the videos were pornographic.

Grievant was not offended by the "jokes". No one complained to him or to anyone else about receiving personal emails with "jokes" from him.

Grievant's work performance was not affected by the amount of time he devoted to sending, receiving, and viewing personal emails and videos. He otherwise performed his work duties as expected by the Agency. Grievant testified that he always got his work done.

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."

DHRM Policy 1.75 governs Use of Electronic Communications and Social Media. This policy provides:

> 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

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

that refers to any aspect of the work environment should be done in a responsible and professional manner. ***

When using electronic communications tools and social media, users should: ***

- Be responsible and professional in their activities. Employees should conduct themselves in a manner that supports the mission of their agency and the performance of their duties. ***

When using electronic communications and social media, users should:

- Be clear that their communication or posting is personal and is not a communication of the agency or the Commonwealth when using electronic communications or social media for personal use, including personal use of social media outside of the work environment. For example:
    - Users should use their personal email addresses and not those related to their positions with the Commonwealth when communicating or posting information for personal use.

D. Prohibited Activities. Certain activities are prohibited when using the Commonwealth's Internet and electronic communications media or using social media in reference to the work environment. Employees who engage in prohibited activities may be subject to disciplinary action according to Policy 1.60, Standards of Conduct. Prohibited activities include, but are not limited to: ***

- Accessing, uploading, downloading, transmitting, printing, posting, or storing fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images.

C. Address Violations. Violations of this policy must be addressed under Policy 1.60, Standards of Conduct, or appropriate disciplinary policy or procedures for employees not covered by the Virginia Personnel Act. The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy.

Each time Grievant saved a video to his laptop or sent a video using his Agency issued email address, he engaged in separate behavior that could give rise to disciplinary action. Each behavior must be reviewed separately.

The Manager testified that the Agency could have issued dozens of Group I Written Notices and Group II Written Notices because of the "shear massive" amount of inappropriate information on the laptop. Instead of writing 50 to 60 Group I and Group II Written Notices, the Agency "put them together into one Group III." The Agency sought the advice of a former DHRM employee who mistakenly confirmed there was sufficient documentation to establish a Group III Written Notice.

An Agency may not take separate offenses otherwise constituting Group II offenses and combine them into a single Group III offense.[4] An agency may not do so for two reasons. First, DHRM Policy 1.60 does not authorize this practice. DHRM Policy 1.60 authorizes discipline based on the accumulation of separate active written notices. However, it does not authorize accumulation of separate behavior into a single written notice with a higher level of discipline than would otherwise be permitted by policy. Second, aggregating behavior in order to elevate the level of offense causes an extension of the active life of the disciplinary action. For example, if an employee were to receive two Group II Written Notices on a particular day (but not be removed from employment), those notices would expire after three years. If the employee received a Group I Written Notice in the fourth year, the employee could not be removed based on the accumulation of active disciplinary action. On the other hand, if an agency aggregated two Group II Written Notices into a single Group III Written Notice, and the employee received a Group I Written Notice in the fourth year, the employee could be removed from employment based on the accumulation of disciplinary action because the Group III would remain active in the fourth year. In short, an employee receiving two or more Group II Written Notices is not in the same position as an employee receiving one Group III Written Notice.

Failure to follow policy is a Group II offense. Unauthorized use of State property or records is a Group II offense.[5] Grievant violated DHRM Policy 1.75 for several reasons including that he downloaded and transmitted obscene messages and information. For example, Grievant allowed a Family Member to download a song onto his computer. The song contained obscene material. In addition, Grievant repeatedly used his Agency email address to send personal email to his Wife, Mr. D and others. By allowing his Family Member to download a Song and write the Song lyrics on the computer's word processing software, Grievant engaged in the unauthorized use of State property. 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 should be suspended for a period of ten workdays.

Violations of DHRM Policy 1.75 can be Group III offenses depending on the nature of the offense. The Manager asserted during the hearing that two videos and a song constituted Group III offenses standing alone.

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[4] In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. Each time Grievant downloaded or sent an offensive video or email, his behavior was a separate offense. Each offense must be evaluated separately to determine if there is a basis to elevate the disciplinary action. When one offense is considered, the fact that there were multiple other separate offenses is not a basis to elevate the one offense. Only the impact on the Agency arising from an offense can be considered in elevating that offense. The Agency has established the potential for an unfavorable impact on the Agency if any of the videos were discovered on Grievant's computer by third parties. The Agency has not established any actual impact or adverse consequences to the Agency because Grievant had offensive videos and emails on his computer. The Agency has not established any extreme circumstances that would justify elevating a separate Group II offense into a Group III offense. In addition, the Agency did claim extreme circumstances as the basis to elevate the disciplinary action to a Group III offense.

[5] See, Attachment A, DHRM Policy 1.60.

The first example was a video entitled “Romance”. The video depicts an African American woman sitting in the driver’s seat of a vehicle and an African American male sitting in the front passenger’s seat. The woman says, “What did you want to talk about?” The man says, “I can’t do this no more.” The man is suggesting that his relationship with the woman should end. He says, “I got to get away from you.” She says, “Ok, do you want to take your little nap?” The man becomes loud and agitated and says, “I don’t want to be with you. You and me are over!” The woman pulls a handgun from her left side, leans towards the man, and pressed the gun tip against the man’s neck. The woman says, “It will never be over! You my man. It’s till death do us part.” The man says, “but we aren’t married.” The woman says, “You my what?” The man says, “I’m your man.” The woman says, “Until when?” The man says, “death do us part.” The woman removes the gun from the man’s neck and says, “Ok. You look cute. You want to go get something to eat?” The man says, “Yea” and the woman says “Give me your wallet.” The woman puts on her seat belt and says, “I love your sexy ass. Do you love me?” When the man timidly responds “yes” the woman begins slapping her hands and yelling, “Do you love me my [N-word]!” The man responds loudly, “I love you.” The woman smiles and says, “Ok, let’s get something to eat.”

The romance video clearly was not appropriate for a State workplace and there is a basis to support disciplinary action of a Group I or Group II offense. It is not a Group III offense for several reasons. The context of the video is a “joke.” Romantic relations are typically mutual. The video shows two actors expressing a satirical view of a romantic relationship maintained by an aggressive woman who uses a handgun and intimidation to prevent the man from ending the relationship. The handgun threat was consistent with the type of violence appearing on commercial television. The “joke” was that the video did not portray an actual or expected romantic relationship between two people.

The second example was a video entitled “earthquake.” The video depicts an exercise class with approximately six young women facing a mirror as up-tempo music plays. The video shows the women from behind. For the most part, the women move in unison. The women move with the music. They exercise but also shake their rear ends quickly up and down and side to side. The “joke” was that the women’s movement was an earthquake or caused an earthquake in a locality in Virginia.

The earthquake video clearly was not appropriate for a State workplace and there is a basis to support disciplinary action of a Group I or Group II offense. It is not a Group III offense for several reasons. The context of the video is that it was presented as a “joke”. It is not pornographic. The women do not appear to be actors, but none of them appear to be engaged in any involuntary behavior.

The third example was the Song lyrics. The African American singer repeatedly used the N-word, f—k, and bi—hes. The Song lyrics were clearly not appropriate for a State workplace and there is a basis to support disciplinary action of a Group I or a Group II offense. The offensive words do not rise to a Group III offense for several reasons. The context of the words was lyrics in a Song. The words were obscene language. “[U]se of obscene language” is a Group I offense. Downloading a song with obscene language is

not an action significantly more severe than using obscene language such as to justify the issuance of a Group III Written Notice. There is no reason to believe Grievant was familiar with the Song or its lyrics prior to the Song being downloaded onto his computer. Grievant simply allowed a Family Member to download the Song into his computer and type the lyrics on the laptop. Grievant did not write the N-word or use the Song lyrics as a means of condemning anyone else.

Although not cited by the Manager as a video rising to the level of a Group III offense, Grievant sent to his Wife and Mr. D a video with a German title translating to "A Wife has An Opener." The video shows actors wearing German clothing in a German tavern drinking and attempting to drink beer. One man orders a bottle and it is served to him by a server but the server does not have a bottle opener. A woman signals for the man to come to her. The man walks to her. She is seated with her dress covering her chair. She takes the bottle, places it under the front of her dress, removes the bottle cap, and returns the bottle to the man. Other men line up with bottles waiting to hand their bottles to the woman. The seated woman repeats the process of opening the bottles but pulls back her dress to reveal a bottle opener attached to the front of the chair. The "joke" was for the woman to mislead the men into thinking she was opening the bottles with her genitals.

The video was not appropriate for a State workplace and there is a basis to support the issuance of a Group I or Group II Written Notice. The video does not rise to the level of a Group III offense for several reasons. The context of the video is that it was presented as a "joke" and to sell a brand of beer. The video shows actors following a script in a foreign language. It is not pornographic.

Grievant sent a video entitled "Greatcommercial nuns". The video presented as a commercial for an adhesive. The video shows actors portraying nuns in a religious setting. Two of the nuns approach a stone statute of a young boy. They notice that the stone penis of the boy had fallen to the ground. They take the stone penis to a third nun who removes a tube of an adhesive from a drawer. The three nuns return to the statute and the third nun glues the stone penis onto the statute with the tip of the stone penis pointing downwards. After the third nun leaves, one of the first two nuns twists the stone penis so the tip is pointing upwards. An announcer refers to the adhesive and says it is for "sticking and correcting."

The video was not appropriate for a State workplace and there is a basis to support the issuance of a Group I or Group II Written Notice. The video does not rise to the level of a Group III offense for several reasons. The context of the video was a commercial for an adhesive. Actors pretending to be nuns reattach a stone penis with the tip facing downward and then upward. Although the commercial could have been offensive to members of a church, there was no evidence that anyone was actually offended by the video.

The Agency alleged Grievant's behavior was contrary to DHRM Policy 2.35, Civility in the Workplace. DHRM Policy 2.35 did not become effective until January 2019. The

dates of Grievant's improper behavior were prior to the effective date of the policy. Accordingly, Grievant did not violate DHRM Policy 2.35.[6]

The Agency alleged Grievant was responsible for the content of the videos sent to him by Mr. D. Grievant was not responsible for the content of the emails or attached videos sent to him by Mr. D because Grievant did not choose the emails and videos that were sent to him. Although Grievant may have known that an email sent to him by Mr. D may have been intended as a personal joke, it did not know how offensive the content would be until he opened the email or watched the video.[7]

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 …."[8] 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.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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[6] The Agency alleged at the hearing that Grievant violated DHRM Policy 2.30, Workplace Harassment. The Agency's due process notice did not refer to DHRM Policy 2.30 and the Agency cannot allege violation of the policy for the first time during the hearing.

[7] Grievant was not responsible for the content of the emails he received from his Wife or Mr. Du.

[8] 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 is reduced to a Group II Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

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

[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

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11384-R

Reconsideration Decision Issued: December 6, 2019

RECONSIDERATION DECISION

The Office of Employment Dispute Resolution (OEDR) issued Ruling 2020-5003 remanding this grievance to the Hearing Officer. The OEDR wrote:

> The outcome of the hearing decision in this case is largely driven by an underlying interpretation of policy by the hearing officer: whether the grievant's conduct should be reviewed as individual acts or collectively. The agency took the approach that it would consider the grievant's conduct collectively, resulting in a single disciplinary action. The hearing officer has determined that the Standards of Conduct policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the grievant's behavior could be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here. The resulting charges in the disciplinary action at issue in this case are all reasonably viewed as a course of behavior by the grievant in his use of state e-mail and an agency-assigned computer, and not a collection of unrelated, distinct issues of misconduct. Accordingly, the hearing decision is inconsistent with policy.

The Department of Human Resource Management had a long-standing interpretation[1] of the Standards of Conduct that agencies may not take separate actions otherwise constituting Group II offenses and combine them into a single Group III

[1] See, DHRM Ruling 2006-8233, DHRM Ruling 2006-8299/8300/8301/8302, and DHRM Ruling 2008-8824/8833.

offense.[2] The Hearing Officer applied that previous DHRM standard in this grievance. The OEDR changed that interpretation for the reasons explained in its ruling.

The OEDR has decided to uphold the disciplinary action as a Group III Written Notice as it explained in its ruling. The matter has been remanded to the Hearing Officer for the Hearing Officer to implement OEDR's decision. Accordingly, the Agency's issuance to the Grievant of a Group III Written Notice with removal is upheld.

APPEAL RIGHTS

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 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 the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

[2] Each time Grievant downloaded and saved an offensive video, his behavior could have justified issuance of a separate Group II Written Notice. The Agency did not write on the Written Notice or otherwise assert that it was taking behavior that would constitute a Group II offense and then elevating that action to a Group III offense. The Agency combined separate behavior that would otherwise constitute several Group II offenses into a single Group III Written Notice.