



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11447

Hearing Date: February 3, 2020

Decision Issued: February 6, 2020

PROCEDURAL HISTORY

On July 30, 2019, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions.

On August 8, 2019, 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 he requested a hearing. On November 18, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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 Virginia Department of Transportation employs Grievant as an Operations Program Manager at one of its locations. Grievant has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action was introduced during the hearing.¹

The Facility had cameras recording the events at the Facility. The recording system retained video images for 30 days on a computer system within the Agency. If an employee wanted to search the video, the employee could access the recording and view it on a monitor at the Facility. If the employee wanted to search video older than 30 days, the Agency had to obtain the prior video from the Contractor who monitored the video system and then provide it to the employee wanting to conduct the search.

Facility supervisors had aimed the camera views towards employees to monitor their behavior. This led to numerous complaints by employees and numerous investigations of employees.

¹ The Agency attempted to introduce a Group II Written Notice issued in 2006. This notice cannot be used for accumulation. Although an agency may consider an employee's past performance, the Hearing Officer's authority to mitigate or aggravate disciplinary action based on work performance has been rendered extremely rare by DHRM. A Written Notice from 2006 reveals nothing material about whether the Hearing Officer should mitigate or aggravate disciplinary action.

The Manager began working for the Agency in August 2018. He was concerned about the employee culture at the Facility. He wanted to change the aim of the cameras away from employees and to entry/exit ways. He wanted to limit who had access to view prior recordings.

The Manager contacted the Contractor and asked the Contractor to change the access profiles of staff so that only the Manager and the Systems Engineer had access to video playback. The Contractor altered the access profiles of employees at the Facility (other than the Manager and Systems Engineer) to remove their authority to access video history. The Contractor, however, failed to remove access to video history from a control station. Thus, an employee using the control station monitor could view video history even though the employee may not have a separate authority to view video history. The Manager was not aware that the Contractor had not removed access to video history through the control station monitors.

On August 20, 2018, the Manager sent employees including Grievant an email stating, in part:

I had a chance to review the [location] security camera setup this past week at both [locations.] I see the purpose of those cameras to be twofold. First and foremost, for our staff to maintain a heightened level of Security Awareness in and around the crucial infrastructure at the tunnels. Second, the cameras can aid in piecing together facts after a significant event and allow subject matter experts to pick out crucial lessons learned.

After reviewing our current [location] security camera setup, I have decided to make the following changes. All video feed workstations that currently have LIVE video feed will continue to display that feed. No changes there. As stated above, I want to keep that heightened level of security awareness. The search function, however, that enables an individual to go back in time and record and/or view video will be deactivated for most. We have far too many personnel with that access. I view this feature as very sensitive and therefore only a select few will have access, much like access to black box following an aircraft mishap is restricted.

Camera positioning will also be reviewed and adjusted for peak security awareness. I noticed several camera position angles that were not optimum to monitor doorways and access to sensitive equipment, etc.

Lastly, all requests for video searches, recording and changes to the [location] security setup will need to go through me as the Facility Manager.

[Systems Engineer] will work with [Contractor] in the coming days to make the modifications to the workstations and the camera positions. Please accommodate that team as they come through.²

Grievant was aware of the Manager's instruction. He complied with the instruction on September 17, 2018 by asking for permission to view video history to determine how an Agency van was damaged.

On March 27, 2019, Mr. D was supposed to be in training with other staff. Grievant entered the training session location and noticed that Mr. D was not present. Later in the shift, Mr. D reported to the training. Grievant asked Mr. K to inform Mr. D to stop by Grievant's office to explain why he was late and why he had not obtained permission to take leave. Mr. K sent Mr. D an email asking Mr. D to "Please touch base with me or [Grievant] before you leave today."³ Later in the day, Mr. K informed Grievant that Mr. D had left for the day and was not responding to cell phone calls.

Grievant wanted to confirm the time Mr. D reported to the training. Grievant and Mr. K used gate access information to determine that Mr. D arrived at the Facility at 12:26 p.m. Grievant wanted to confirm this time, so he and Mr. K accessed the control station video recording. They looked at the video history to confirm the time Mr. K arrived at the Facility. Mr. K wrote a report about Mr. D and indicated Mr. D's action had been confirmed by "camera data." The Manager reviewed the report and became concerned Grievant had violated his instruction to obtain permission to view video history.

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."⁴ 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."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

² Agency Exhibit 1.

³ Agency Exhibit 1.

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

Failure to follow a supervisor's instruction is a Group II offense. Grievant knew he was to obtain permission from the Manager before viewing video history. He failed to do so on March 29, 2019 thereby acting contrary to the Manager's request. The Agency reduced the disciplinary action to a Group I Written Notice and has presented sufficient evidence to support that disciplinary action.

Grievant argued that he made a simple mistake and that the Manager improperly accused him of defiance and poor leadership. The Agency could have issued a counseling memorandum to address Grievant's behavior. There is some evidence that the Manager engaged in an improper motive when issuing disciplinary action. He wrote in the due process memorandum:

I contacted [Contractor] our security camera vendor, to determine how the access was obtained and after conducting research in the system, they provided me with a copy of a video reflecting you and [Mr. K] accessing the security system. [Contractor] confirmed that you accessed the security system through a local security workstation via a technical "back door", which I was previously unaware existed. According to [Contractor] this "back door" is required to sustain real time security. Clearly you knew of this back door and failed to advise me of its existence. Your actions indicate you purposely withheld information about this confidential access in an effort to gain access to the system without my knowledge.⁷

The evidence showed that Grievant did not access a "back door"⁸ to view the video history and there is no reason to believe Grievant knowingly refrained from disclosing the ability to access video history on the control room workstations. The Contractor failed to implement the Manager's instruction as the Manager had expected. The Manager blamed Grievant for the Contractor's mistake. Although the Manager's original statements raise concern about the Manager's motive, the level of discipline was mitigated to a Group I Written Notice when the Manager could have otherwise issued a Group II Written Notice. In addition, other Agency managers reviewed the grievance and Grievant's assertions about the Manager's motive and upheld the Group I Written Notice. The evidence is not sufficient for the Hearing Officer to reverse the disciplinary action based on being issued with an improper motive.

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"⁹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

⁷ Agency Exhibit 1.

⁸ The Manager's language is similar to references to computer hackers improperly accessing computer systems by finding a "back door" to the software. Grievant construed the Manager's reference to be suggesting he engaged in improper system access.

⁹ *Va. Code § 2.2-3005.*

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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]

[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

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