

Issue: Group III Written Notice with Termination (computer/internet misuse); Hearing Date: 07/12/16; Decision Issued: 07/14/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10828; 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: 10828**

Hearing Date: July 12, 2016

Decision Issued: July 14, 2016

### **PROCEDURAL HISTORY**

On April 18, 2016, Grievant was issued a Group III Written Notice of disciplinary action for computer/internet misuse.

On May 16, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 6, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2016, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

### **APPEARANCES**

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. 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 an Administrative Support Staff at one of its facilities. She had been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 29, 2015, Grievant completed training regarding use of the Agency’s internet. During the training, Grievant was advised:

Avoid inappropriate sites – Pornography, Nudity, or Gambling -- Visiting these type of websites is not only a violation of DOC Security policy, COV policy and the State code of Virginia, but can be cause for disciplinary action, even dismissal. \*\*\*

DOC has no tolerance for employees, contractors and volunteers who use DOC internet services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate, and unauthorized purposes.<sup>1</sup>

The training provided a link to the Agency’s policy Operating Procedure 310.2.

Grievant had a unique log on identification and password for access to the Agency’s computer system and internet. The Agency used software to automatically record every website every employee accessed using the Agency’s computer information system. The software retained records for approximately three months. The Information Security Officer routinely prepared a report ranking internet use by

---

<sup>1</sup> Agency Exhibit 11.

employees. She reviewed the list and noticed that Grievant had sought access to pornography websites.

Grievant searched for pornography. She used a search engine using key words “ride your man d—k”.

The Warden informed Grievant that the Agency had reviewed her internet access and was concerned about the websites she viewed.

On Friday April 11, 2016, the Warden called Grievant to his office and told her the Agency believed she accessed pornography websites using the Agency’s computers. The Warden asked “Were you actually looking at pornography?” Grievant said “yes.” The Warden asked Grievant why Grievant watched the pornography sites. Grievant said she was looking at pornography sites to try to get ideas of the ways to do different sexual things.

The Warden asked Grievant to write a statement. Grievant later presented the Warden with a statement admitting, “I was wrong for doing this and will never go to any more sites of [a] sexual nature.”

The Warden met with Grievant on April 14, 2016. Warden discussed with Grievant the possible outcomes with respect to disciplinary action. Grievant admitted to watching “a lot” of pornography using the DOC’s internet. Grievant admitted to the Warden that she knew DOC had a zero tolerance for accessing pornography.

## **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 (11) provides, “Certain activities are prohibited when using the Internet .... These include, but are not limited to: a. Accessing, downloading, printing, or storing information with sexually explicit content as prohibited by law (see COV §2.2-2827).

---

<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).

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”

In the Agency’s judgment, Grievant’s behavior rises to the level of a Group III offense. The Agency’s judgment is supported by the evidence. Grievant’s behavior was contrary to Code of Virginia §2.2-2827(B) making it illegal for an agency employee to “utilize agency-owned or agency-leased computer equipment to access, download, print or store any ... files or services having sexually explicit content.” The Agency placed Grievant on notice of her possible dismissal through its training regarding computer use. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that the Agency failed to issue progressive disciplinary action and that based on her good work performance without prior disciplinary action she should not be removed from employment. Agencies are encouraged to engage in progressive disciplinary action. Agencies are not required to take progressive disciplinary action prior to issuing a Group III Written Notice with removal.

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.

## 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**.

---

<sup>5</sup> Va. Code § 2.2-3005.

## 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>

---

<sup>6</sup> 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