

Issues: Group I Written Notice (unsatisfactory performance), Group II Written Notice (internet misuse) and Termination (due to accumulation); Hearing Date: 07/21/16; Decision Issued: 07/27/16; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10830; 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: 10830

Hearing Date: July 21, 2016

Decision Issued: July 27, 2016

PROCEDURAL HISTORY

On April 22, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On April 22, 2016, Grievant was issued a Group II Written Notice of disciplinary action. He was removed from employment based on the accumulation of disciplinary action.

On May 17, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 7, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 21, 2016, 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 Notices?
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 Social Services employed Grievant as a Program Support Technician at one of its locations. He began working for the Agency in 2009. Grievant had prior active disciplinary action. On June 16, 2015, Grievant received a Group II Written Notice with an eight workday suspension for excessive tardiness and failure to follow policy.

Grievant had a unique log on identification and password to access the Agency's database and internet. The Agency was able to track his online computer and internet activity.

Grievant was responsible for documenting his "worker actions" in the Agency's computer database. An employee holding Grievant's position would be expected to perform approximately 500 worker actions in a month. This amounts to approximately 25 worker actions per day.

On April 1, 2016, Grievant performed zero worker actions. On April 4, 2016, Grievant performed two worker actions. On April 5, 2016, Grievant performed zero worker actions. On April 6, 2016, Grievant performed zero worker actions. On April 7, 2016, Grievant performed zero worker actions. On April 8, 2016, Grievant performed one worker action. On April 11, 2016, Grievant performed four worker actions. On April 12, 2016, Grievant performed one worker action. On April 13, 2016, Grievant performed 14 worker actions. On April 14, 2016, Grievant performed two worker

actions. When Grievant was removed from employment and another person assumed his work duties, that employee began performing approximately 500 worker actions per month.

Grievant was advised that he was permitted to use the Agency's computer system to access the Internet for personal use during work hours for 15 minutes during lunch and for 5 minutes during each of two breaks. Grievant's personal internet usage was not to exceed approximately 25 minutes per day. To perform his work duties, Grievant had to access the internet approximately ten minutes per day.

On September 2015, the Manager observed Grievant watching a steaming video on his computer. She recognized that Grievant's behavior was inappropriate and counseled him. Grievant continued to access the internet inappropriately on subsequent days and the Manager and Supervisor counseled Grievant regarding his internet use.

On March 15, 2016, Grievant accessed the internet using the Agency's computer system for 1.3 hours. On March 16, 2016, he accessed the internet for 1.6 hours. On March 17, 2016, Grievant accessed the internet for 3.2 hours. On March 18, 2016, Grievant accessed the internet for 41 minutes. On March 21, 2016, he accessed the internet for 2.7 hours. On March 22, 2016, Grievant accessed the internet for 1.6 hours. On March 22, 2016, Grievant accessed the internet for 25 minutes.

On April 7, 2016, Grievant was at his work station using his Agency issued computer to access the internet. He viewed several pictures of naked men and women. Another employee observed Grievant's behavior and reported his behavior to a supervisor.

Grievant did not deny the Agency's evidence against him.

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."¹ 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."

Group I Written Notice

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“[U]nsatisfactory work performance” is a Group I offense.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for entering his “work actions” in the Agency’s database. An employee in his position should have entered approximately 500 work actions per month or 25 per day. For nine days in April 2016, Grievant performed fewer than four work actions during the day. His work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Group II Written Notice

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.

Failure to follow policy is a Group II Offense.³ Grievant was advised that his personal use of the internet should not exceed approximately 25 minutes per day. On March 15, 2016, Grievant accessed the internet using the Agency’s computer system for 1.3 hours. On March 16, 2016, he accessed the internet for 1.6 hours. On March 17, 2016, Grievant accessed the internet for 3.2 hours. On March 18, 2016, Grievant accessed the internet for 41 minutes. On March 21, 2016, he accessed the internet for 2.7 hours. On March 22, 2016, Grievant accessed the internet for 1.6 hours. Viewing images of naked men and women would not be appropriate personal use of the internet. Grievant failed to follow policy because his internet use exceeded the incidental and occasional limitation of DHRM Policy 1.75. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with DHRM Policy 1.75.

Accumulation of Disciplinary Action

Grievant has an active Group II Written Notice. With the accumulation of an additional Group II Written Notice, an agency has the authority to remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

² See Attachment A, DHRM Policy 1.60.

³ See, Attachment A, DHRM Policy 1.60.

Mitigation

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”⁴ 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 argued that he was singled out for disciplinary action. The evidence showed that the Agency’s information technology employee reviewed the internet use of other workers in the Agency and concluded Grievant’s usage was three times more than the usage of the average worker. Grievant received disciplinary action because his behavior was different from other employees.

Grievant argued that the Agency did not treat him with the same compassion that the Agency expected its employees to show to the Agency’s clients. The Agency applied the Standards of Conduct to Grievant’s behavior and concluded disciplinary action was appropriate. The Agency was not obligated to base its disciplinary decision on the compassion its employees should show to Agency clients.

Grievant presented evidence that he suffered from Anxiety, depression, and Attention Deficit Hyperactivity Disorder. Insufficient evidence was presented to show that Grievant’s behavior was caused by his medical condition. To the extent Grievant would be considered as having a disability under the American’s with Disability Act, his behavior remains subject to disciplinary action. The ADA does not prevent an employer from taking disciplinary action when an employee violates a workplace rule. 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 I Written Notice is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant’s removal based on the accumulation of disciplinary action is **upheld**.

⁴ 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 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.⁵

⁵ 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