Issue: Group II Written Notice with termination (Unauthorized use or misuse of state property or records, violation of Va. Code § 2.1-804 through 2.1-806, abuse of state time, and inadequate or unsatisfactory work performance); Hearing Date: October 10, 2001; Decision Date: October 20, 2001; Agency: Department of Health; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5304

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5304

Hearing Date: October 10, 2001
Decision Issued: October 20, 2001

PROCEDURAL HISTORY

On May 7, 2001, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

> *(1) Unauthorized use or misuse of state property or records; (2) Violation of Va. Code § 2.1-804 through 2.1-806; (3) Abuse of state time; and (4) Inadequate or unsatisfactory work performance.*

On May 14, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 20, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 10, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Computer Support Systems Engineer

Engineering Manager
Data Analyst
Health Policy Analyst II
Project Review Analyst

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with termination.

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 Health employed Grievant as a Health Planner until his removal based on the accumulation of two Group II Written Notices. His responsibilities included developing information necessary for the analysis of the public need for medical care facilities and services.[1] He received a Group II Written Notice on March 16, 2001 for failure to follow supervisor's instructions.[2]

On May 3, 2001 at approximately 9:20 a.m., a Computer Support Systems Engineer was attempting to configure a computer near Grievant's computer. He could not get the configuration to work so he accessed Grievant's computer while Grievant was away from his desk. When the Computer Support Systems Engineer booted the computer he observed an icon on the computer desktop which was in bright pink color and said "Porn Access". The Computer Support Systems Engineer immediately turned off the computer and notified Grievant's Supervisor.

Later in the day on May 3, 2001, the Supervisor and a Data Analyst went to Grievant's desk and indicated they needed to check something on Grievant's computer. The Supervisor accessed the Windows temporary Internet files and observed

[1] Agency Exhibit 7.

[2] Agency Exhibit 8.

references to numerous pornographic web sites. These sites included, for example, "free_sex_2.html", "absolutelynasty.html", and "livesex.html".[3]

The Agency printed off copies of some of the pictures contained in the temporary Internet files residing in Grievant's computer. Several pictures showed fully undressed men and women posed to simulate sexual relations.

After speaking with Grievant about the files found on the computer, the Supervisor instructed Grievant to go home for the day and return on Friday, May 4, 2001 for a due process interview. Grievant appeared briefly on May 4th and then the Supervisor instructed him to leave for the day. Grievant returned again briefly on Monday, May 7, 2001 and then left the Agency.[4]

Grievant received an email dated August 3, 1999 sent to all employees from the Agency's Security Office. The email stated in relevant part:

> *Accessing the Internet*, connection to any internet site must be related to your official duties. All connections to the internet, must by regulation be logged. Use of the internet to access personal outside E-Mail services i.e. Hotmail, Yahoo, Netaddress; for all non-official duties, could be considered misuse of the internet. Also, connections to the internet can and is monitored in accordance with VDH Policy and Procedures.

Grievant did not access any pornographic sites through the Porn Access icon. No "dialers" were installed on the computer.[5] This means the clicking on the icon would not connect the computer user to the modem and to the web site referenced by the Porn Access icon.

CONCLUSIONS OF LAW[6]

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).[7] Group II offenses "include acts and behavior which are

[3] Agency Exhibit 11.

[4] Agency Exhibit 9.

[5] Agency Exhibit 4.

[6] The decision does not include consideration of DHRM Policy 1.75 because that policy was effective August 1, 2001 and after the dates giving rise to this grievance.

[7] The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

The Agency's internal policy[8] states:

> The Internet shall not be used for any personal or non-job related purposes. *** Connection to any internet site must be related to your official duties. Internet sites that involve sexually explicit material are absolutely prohibited by law. Individuals who use the internet for this purpose are subject to disciplinary action. This is defined in Chapter 52 of Title 2.1 "Restriction on State Employee Access to Information Infrastructure," and is found at 2.1-804 through 2.1-806 of the Code of Virginia. This law places restrictions on state employees' access, via agency computer equipment, to material with sexually explicit content.

Va. Code § 2.1-805 states, "no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content." Information infrastructure is defined as "telecommunications, cable, and computer networks and includes the Internet, the World Wide Web, Usenet, bulletin board systems, on-line systems, and telephone networks."[9] Sexually explicit[10] content includes:

> content having as a dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390.

Failure to comply with established written policy is a Group II offense.[11] Grievant acted contrary to the Agency's established written policy in two respects. First, he accesses the web site of his home country which did not related to his job. Second, he accessed web sites that contained sexually explicit content as defined under *Va. Code § 2.1-805* and prohibited by the Agency's written policy.

Grievant contends he did not intentionally access pornographic web sites. The Hearing Officer agrees that Grievant did not intentionally access these sites. Many of the web site addresses reference "/tour.html" or "/guest.html" suggesting Grievant's web

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[8] Agency Exhibit 1.

[9] *Va. Code § 2.1-804.*

[10] *Va. Code § 2.1-804.*

[11] P&PM § 1.60(V)(B)(2)(a).

browser accessed pop-up ads for pornographic web sites. Grievant testified that the pornographic sites were sub-links that he accessed when browsing the web site of his home country. The Hearing Officer finds Grievant's testimony to be credible and confirmed by the statement of the Supervisor. When the Supervisor was confronting Grievant, Grievant showed the Supervisor how Grievant accessed the home country web site. The Supervisor testified that one of the link screens showed a large "Enter" button and that the Supervisor did not wish to click on that button because he suspected something was behind the button that should not be accessed.

Even though Grievant did not intentionally access web sites, it is clear that after repeatedly accessing his home country web site, he should have realized that each time he accessed the site he was at risk of encountering pop-up pornographic ads. Thus, he should have discontinued accessing the home country web site. There are simply too many instances of access to pop-up ads for the Hearing Officer to conclude Grievant did not realize he was at risk of additional encounters with pop-up ads each time he accessed his intended web site.

Grievant objects to the Group II Written Notice he received on March 16, 2001. He argues that Written Notice was improper. Because Grievant did not timely appeal that notice, however, he may not contest it in this appeal. Even if the Hearing Officer were to assume without deciding that the March 16, 2001 Group II Written Notice was issued in error, the Hearing Officer would lack the authority to reverse or otherwise modify that written notice.

The Agency contends Grievant spent too much time on the computer looking at web sites not related to his job responsibilities. The evidence presented is insufficient to support the Agency's contention. For example, the Agency contends computer cookies showing the time the cookies were created reveals the amount of time Grievant spent accessing web sites. Computer cookies do not show the amount of time a computer user spends at a particular web site; they only show that the computer user visited the site. The time between the creation of cookies may not necessarily involve any use of the Internet.

The Agency contends Grievant's work performance was inadequate or unsatisfactory because he failed to complete certain assignments. There is no merit to this allegation. The earliest due date for Grievant's assignments was May 8, 2001. Grievant was first removed from the Agency's facility on May 3, 2001 which was approximately three and a half work days before the assignments were due. Grievant testified that he could have completed the assignments had he remained employed. The Hearing Officer agrees. Thus, the Agency has failed to show that Grievant's work performance was inadequate or unsatisfactory.

The Agency contends Grievant abused state time by doing schoolwork during work hours. During the due process meeting on May 3rd, Grievant told the Supervisor he had a difficult school project on which he would have worked on May 3rd and May 4th. Since the Supervisor observed schoolbooks on Grievant's desk, he inferred that

Grievant would have had to devote work time to complete his school assignment. There is no merit, however, to the Agency's contention. The Supervisor confronted Grievant early on May 3rd and then sent him home. Once Grievant left the building, he could not have abused state time. Even if Grievant had intended to use state time to complete his homework, employees may only be disciplined for their behavior and not for what they intended to do.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**. The Agency is directed to amend the Group II Written Notice to indicate it was issued for failure to comply with established written policy.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 EDR or HRM, 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.

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Carl Wilson Schmidt, Esq.
Hearing Officer