Issues: Two Group II Written Notices with termination (personal use of the internet; visiting pornographic sites via internet); Hearing Date: 12/18/02; Decision Date: 01/24/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esquire; Case No. 5600; **Administrative Review: EDR Ruling Request received 01/31/03; EDR Ruling Date: 03/06/03; Outcome: No procedural error found in HO's decision or conduct of the hearing [Ruling #2003-023]; Administrative Review: DHRM Ruling Request received 01/31/03; DHRM Ruling Date: 02/18/03; Outcome: No reason to interfere with decision; however, HO was requested to revise policy determination contained in Footnote 8. Revised decision issued 02/25/03.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5600

Hearing Date: December 18, 2002
Decision Issued: January 24, 2003

PROCEDURAL HISTORY

On October 7, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for personal use of the internet and a Group II Written Notice of disciplinary action with removal for visiting pornographic sites on the internet during work hours.

On October 7, 2002, 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 December 4, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Internal Audit Director
IT Auditor

ISSUES

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for personal use of the internet.

Whether Grievant should receive a Group II Written Notice of disciplinary action for visiting pornographic sites on the internet.

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 Virginia Department of Transportation employed Grievant as a Transportation Engineer until his removal on October 7, 2002. He began working for the Agency approximately fifteen years ago and his performance has consistently exceeded the Agency's expectations. In June 2002, he received an upward inband pay adjustment because of his good performance.

Agency employees can access the internet using personal computers connected to the Agency's computer network. The Agency maintains a firewall securing the network. A firewall is software designed to protect the network from unauthorized access by persons outside of the network and to monitor usage of those within the computer network. When an employee uses an Agency computer to access the internet, the firewall software records the name of the person logged onto the personal computer and the website accessed by that computer. This is accomplished by assigning an internet protocol (IP) address to the personal computer and monitoring the uniform resource locator (URL) accessed by that computer.

Staff at the Office of the Attorney General received a complaint that a VDOT employee was accessing pornographic sites through the internet. VDOT investigated the allegation and determined it to be founded. The Agency concluded that if one employee was using the internet inappropriately, others may also be using the internet inappropriately.

Determining whether employees have inappropriately used their computers is time consuming and expensive.[1] Rather than reviewing the internet usage for several thousand employees, the Agency decided to target the employees with the highest usage of the internet and then determine if their usage was inappropriate. Agency auditors determined that, "the generation of 10,000 or more log records in one day from a single IP address was a good indicator that a 'substantial' abuse of the Internet facility could be taking place from the related PC."[2] Auditors reviewed the firewall log for the week of April 8th to 14th, 2002 ("review week"). They identified 93 unique IP addresses meeting or exceeding the 10,000 records on one or more than one day of the week reviewed.

For each of the 93 unique IP addresses, the auditors selected one day during the review week with the highest number of records generated and further examined activity during that day. The auditors considered as non-work activity, those websites accesses that fall into the categories of:

1. General non-work related activities, which includes sports, shopping (retailers and auction), movie and movie news, music, dating, vacations and travel, etc.
2. Sexually Explicit Material
3. Gambling
4. Terrorism
5. Drug abuse.

Auditors reviewed the activity for each IP address and determined how much time was devoted to non-work activity[3]. Once the auditors concluded they had identified at least two hours of non-work activity, they discontinued further review of the websites accessed by the computer. In essence, the auditors concluded that at least two hours

[1] DHRM Policy 1.75, Use of Internet and Electronic Communication Systems, informs State employees that they should not have any expectation of privacy when using Agency equipment to access the internet and that agencies have the right to monitor employee usage.

[2] Agency Exhibit 4. The auditors also noted that although "a much lower number of log records can also be represent a substantial Internet use, … we do not have resources to investigate these at the present time."

[3] Non-work activity can be difficult to measure. For example, if an employee visits a non-business related website and then turns away from the computer to perform work duties while leaving the website on the computer, the firewall would register the employee being engaged in non-work activity even though the employee had begun performing his or her job. To avoid this problem, the auditors assumed that if the firewall showed no activity for more than a minute, then the employee had turned away from the computer to perform work activities. No time was added towards the two hour benchmark. An example of this situation would be an employee who frequently clicks on websites for four minutes and then stops accessing any websites for more than one minute. Even though the last website accessed by the employee was not business related, the auditors would not count the time beyond one minute as being personal use.

of non-work related activity was sufficient to refer the matter to Agency managers for disciplinary action.

In order to confirm which person used the personal computer to access a particular website, the auditors reviewed the internet cookies[4], browser favorites[5], and temporary internet files[6] for each computer. If Windows NT or Windows 2000 was the operating software for a personal computer, then all of the above could be used to identify the computer user. If Windows 95 was the operating system, then only internet cookies could be attributed to a specific employee.

Once the auditors completed their analysis of website access, they referred their reports to managers and supervisors in the various regions of the State in order for those managers and supervisors to make final determinations of the identity of the employee using a particular personal computer from April 8th to April 14th, 2002.

Grievant had a total record count of 28,797 for the review week. His highest scoring day was April 8, 2002 with a record count of 11,299. Grievant used a password to log onto his personal computer and the Agency's network at 8:23 a.m. and the two hour cap was reached by 3:28 p.m. He logged off the computer at 4:47 p.m.

Grievant accessed radio station web sites. Several of these sites contained links to "Babe of the Day". Grievant accessed those links and typically the link showed a woman in a swimsuit. On some occasions, the link revealed a partially undressed woman. One picture included a woman wearing a thong revealing most of her rear end. Grievant downloaded onto his "my pictures" folder several pictures of topless women. He also downloaded a picture of a woman's genitals.

From April 10th to April 12th, 2002, Grievant accessed websites with adult sexuality themes. These included: Yahoo Groups: ADULT_FOTO_CLUD; Yahoo Groups: XXXpicsandmore; and Yahoo Groups: adult_movie_clips_mpg_avi_Adult_video.

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[4] When a computer user accesses some websites, a website may transfer a record onto the user's personal computer to identify that user. The website can use the cookie to track each time the user returns to that website or to other websites.

[5] A computer user may use his or her browser to make a list of the websites he or she most frequently wishes to access.

[6] The Temporary Internet Files folder is the location on the hard drive of a personal computer where Web pages and files (such as graphics) are stored as the user views them. This speeds up the display of pages that have already been accessed because a browser can open them from the computer's hard drive instead of reloading them from the internet.

CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).[7] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 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." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet.[8] This policy provides:

> Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:
>
> - accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
> - downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images;
> - installing or downloading computer software, programs, or executable files contrary to policy;
> - uploading or downloading copyrighted materials or proprietary agency information contrary to policy;
> - uploading or downloading access-restricted agency information contrary to policy or in violation of agency policy;
> - sending e-mail using another's identity, an assumed name, or anonymously;
> - permitting a non-user to use for purposes of communicating the message of some third party individual or organization;
> - any other activities designated as prohibited by the agency.

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

[8] The Agency adopted a policy IT-98 in accordance with Executive Order 51(99) governing use by VDOT employees. VDOT IT-98 creates a zero tolerance for personal use of the internet. State agencies are entitled to draft policies that vary from DHRM Policy 1.75 as long as those policies are consistent with DHRM Policy 1.75. VDOT IT-98 is contrary to DHRM Policy 1.75 because the Agency's policy sets a zero tolerance standard for personal use while the DHRM policy allows incidental and occasional use. To the extent the Agency's policy is not in accordance with DHRM policy, it is not enforceable. Thus, the Hearing Officer will analyze this case using DHRM Policy 1.75.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

> Personal use means use that is not job-related. In general, **incidental and occasional** personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:
>
> - interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
> - adversely affects the efficient operation of the computer system;
> - violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.) (Emphasis added).

"Failure to follow … comply with established written policy" is a Group II offense.[9] By using the internet for more than two hours during a workday, Grievant acted contrary to DHRM Policy 1.75. His personal use of the internet exceeded the incidental and occasional standard set by policy. Thus, the Group II Written Notice for personal use must be upheld as contrary to policy.

Grievant's access of sexually explicit websites and downloaded sexually explicit content prohibited by law. *Va. Code § 2827(B)* provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, 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. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700).
>
> Sexually explicit content is defined as:
>
> (i) any description of or (ii) any 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

[9] DHRM § 1.60(V)(B)(2)(a).

> defined in § 18.2-390, coprophilia, urophilia, or fetishism. (Emphasis added).
>
> *Va. Code § 18.2-39* defines nudity as:
>
> a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Downloading pictures of nude women may justify some sort of disciplinary action depending on the facts of the case, but in order for an employee to be deemed to have violated DHRM Policy 1.75 regarding sexually explicit content, that employee must have downloaded pictures constituting a "lewd exhibition of nudity." Whether nudity is lewd depends on many factors including contemporary morals as well as the degree the depiction is intended to generate sexual interest. For example, the Great Seal of the Commonwealth of Virginia depicts a female with her left breast unclothed and has been in use since 1776. This depiction of nudity would not be lewd given its acceptance by the people of Virginia. Grievant downloaded a picture of a portion of woman's body from her navel to her upper thigh with a picture drawn around the woman's genitals. This depiction is a lewd exhibition of nudity prohibited by law. Thus, the Group II Written Notice given to Grievant for downloading sexually explicit content must be upheld as contrary to policy.

Grievant contends he is being disciplined twice for the same offense. Since his access to sexually explicit content was in the nature of his personal use, the Agency should only take one disciplinary action against him. This argument fails because the offenses committed by the Grievant are materially different. Although accessing sexual content through the internet may be personal use, personal use does not have to be access of sexual content. In addition, Grievant downloaded sexually explicit content and stored it on the computer hard drive. Thus, he had to not only view the content on the internet, he intentionally saved it to his computer.

Grievant argues the disciplinary action against him for personal use should be mitigated because of his long tenure with good work performance. He adds that his workload was very light during the review week because the Agency had suspended work on several of his projects. His work performance was unaffected by his internet usage.

Although Grievant's work performance was good, the Hearing Officer will not mitigate the Agency's disciplinary action. Grievant's behavior can be explained because of his light workload, but it cannot be excused for that reason. It is unfortunate that the Commonwealth of Virginia is losing a talented and valuable employee, but there are no factors which would make it unfair to impose the Agency's choice to remove Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for personal use of the internet is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for accessing sexually explicit websites is **upheld**. Grievant's removal from employment is **upheld.**

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[10]

[10] Agencies must request and receive prior approval from the Director of 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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5600-R

Hearing Date: December 18, 2002
Decision Issued: January 24, 2003
Re-Issued: February 25, 2003

PROCEDURAL HISTORY

On October 7, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for personal use of the internet and a Group II Written Notice of disciplinary action with removal for visiting pornographic sites on the internet during work hours.

On October 7, 2002, 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 December 4, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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ISSUES

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for personal use of the internet.

Whether Grievant should receive a Group II Written Notice of disciplinary action for visiting pornographic sites on the internet.

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 Virginia Department of Transportation employed Grievant as a Transportation Engineer until his removal on October 7, 2002. He began working for the Agency approximately fifteen years ago and his performance has consistently exceeded the Agency's expectations. In June 2002, he received an upward inband pay adjustment because of his good performance.

Agency employees can access the internet using personal computers connected to the Agency's computer network. The Agency maintains a firewall securing the network. A firewall is software designed to protect the network from unauthorized access by persons outside of the network and to monitor usage of those within the computer network. When an employee uses an Agency computer to access the internet, the firewall software records the name of the person logged onto the personal computer and the website accessed by that computer. This is accomplished by assigning an internet protocol (IP) address to the personal computer and monitoring the uniform resource locator (URL) accessed by that computer.

Staff at the Office of the Attorney General received a complaint that a VDOT employee was accessing pornographic sites through the internet. VDOT investigated the allegation and determined it to be founded. The Agency concluded that if one employee was using the internet inappropriately, others may also be using the internet inappropriately.

Determining whether employees have inappropriately used their computers is time consuming and expensive.[11] Rather than reviewing the internet usage for several thousand employees, the Agency decided to target the employees with the highest usage of the internet and then determine if their usage was inappropriate. Agency auditors determined that, "the generation of 10,000 or more log records in one day from a single IP address was a good indicator that a 'substantial' abuse of the Internet facility could be taking place from the related PC."[12] Auditors reviewed the firewall log for the week of April 8th to 14th, 2002 ("review week"). They identified 93 unique IP addresses meeting or exceeding the 10,000 records on one or more than one day of the week reviewed.

For each of the 93 unique IP addresses, the auditors selected one day during the review week with the highest number of records generated and further examined activity during that day. The auditors considered as non-work activity, those websites accesses that fall into the categories of:

6. General non-work related activities, which includes sports, shopping (retailers and auction), movie and movie news, music, dating, vacations and travel, etc.
7. Sexually Explicit Material
8. Gambling
9. Terrorism
10. Drug abuse.

Auditors reviewed the activity for each IP address and determined how much time was devoted to non-work activity[13]. Once the auditors concluded they had identified at least two hours of non-work activity, they discontinued further review of the websites accessed by the computer. In essence, the auditors concluded that at least two hours

[11] DHRM Policy 1.75, Use of Internet and Electronic Communication Systems, informs State employees that they should not have any expectation of privacy when using Agency equipment to access the internet and that agencies have the right to monitor employee usage.

[12] Agency Exhibit 4. The auditors also noted that although "a much lower number of log records can also be represent a substantial Internet use, … we do not have resources to investigate these at the present time."

[13] Non-work activity can be difficult to measure. For example, if an employee visits a non-business related website and then turns away from the computer to perform work duties while leaving the website on the computer, the firewall would register the employee being engaged in non-work activity even though the employee had begun performing his or her job. To avoid this problem, the auditors assumed that if the firewall showed no activity for more than a minute, then the employee had turned away from the computer to perform work activities. No time was added towards the two hour benchmark. An example of this situation would be an employee who frequently clicks on websites for four minutes and then stops accessing any websites for more than one minute. Even though the last website accessed by the employee was not business related, the auditors would not count the time beyond one minute as being personal use.

of non-work related activity was sufficient to refer the matter to Agency managers for disciplinary action.

In order to confirm which person used the personal computer to access a particular website, the auditors reviewed the internet cookies[14], browser favorites[15], and temporary internet files[16] for each computer. If Windows NT or Windows 2000 was the operating software for a personal computer, then all of the above could be used to identify the computer user. If Windows 95 was the operating system, then only internet cookies could be attributed to a specific employee.

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[14] When a computer user accesses some websites, a website may transfer a record onto the user's personal computer to identify that user. The website can use the cookie to track each time the user returns to that website or to other websites.

[15] A computer user may use his or her browser to make a list of the websites he or she most frequently wishes to access.

[16] The Temporary Internet Files folder is the location on the hard drive of a personal computer where Web pages and files (such as graphics) are stored as the user views them. This speeds up the display of pages that have already been accessed because a browser can open them from the computer's hard drive instead of reloading them from the internet.

CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).[17] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 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." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

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> - accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
> - downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images;
> - installing or downloading computer software, programs, or executable files contrary to policy;
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> - uploading or downloading access-restricted agency information contrary to policy or in violation of agency policy;
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DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

> Personal use means use that is not job-related. In general, **incidental and occasional** personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

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

- interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.) (Emphasis added).

"Failure to follow … comply with established written policy" is a Group II offense.[18] By using the internet for more than two hours during a workday, Grievant acted contrary to DHRM Policy 1.75. His personal use of the internet exceeded the incidental and occasional standard set by policy. Thus, the Group II Written Notice for personal use must be upheld as contrary to policy.

Grievant's access of sexually explicit websites and downloaded sexually explicit content prohibited by law. *Va. Code § 2827(B)* provides:

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> Sexually explicit content is defined as:
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> (i) any description of or (ii) any 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, coprophilia, urophilia, or fetishism. (Emphasis added).
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> *Va. Code § 18.2-39* defines nudity as:
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> a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any

[18] DHRM § 1.60(V)(B)(2)(a).

portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Downloading pictures of nude women may justify some sort of disciplinary action depending on the facts of the case, but in order for an employee to be deemed to have violated DHRM Policy 1.75 regarding sexually explicit content, that employee must have downloaded pictures constituting a "lewd exhibition of nudity." Whether nudity is lewd depends on many factors including contemporary morals as well as the degree the depiction is intended to generate sexual interest. For example, the Great Seal of the Commonwealth of Virginia depicts a female with her left breast unclothed and has been in use since 1776. This depiction of nudity would not be lewd given its acceptance by the people of Virginia. Grievant downloaded a picture of a portion of woman's body from her navel to her upper thigh with a picture drawn around the woman's genitals. This depiction is a lewd exhibition of nudity prohibited by law. Thus, the Group II Written Notice given to Grievant for downloading sexually explicit content must be upheld as contrary to policy.

Grievant contends he is being disciplined twice for the same offense. Since his access to sexually explicit content was in the nature of his personal use, the Agency should only take one disciplinary action against him. This argument fails because the offenses committed by the Grievant are materially different. Although accessing sexual content through the internet may be personal use, personal use does not have to be access of sexual content. In addition, Grievant downloaded sexually explicit content and stored it on the computer hard drive. Thus, he had to not only view the content on the internet, he intentionally saved it to his computer.

Grievant argues the disciplinary action against him for personal use should be mitigated because of his long tenure with good work performance. He adds that his workload was very light during the review week because the Agency had suspended work on several of his projects. His work performance was unaffected by his internet usage.

Although Grievant's work performance was good, the Hearing Officer will not mitigate the Agency's disciplinary action. Grievant's behavior can be explained because of his light workload, but it cannot be excused for that reason. It is unfortunate that the Commonwealth of Virginia is losing a talented and valuable employee, but there are no factors which would make it unfair to impose the Agency's choice to remove Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for personal use of the internet is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for

accessing sexually explicit websites is **upheld**. Grievant's removal from employment is **upheld.**

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

4. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

5. 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.

6. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[19]

[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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Virginia Department of Transportation
February 14, 2003

The grievant has appealed the hearing officer's January 24, 2003, decision in Grievance No. 5600. The grievant is challenging the decision because he contends that, based on the hearing officer's statement that VDOT's Policy IT-98 is not in accordance with DHRM Policy 1.75 and therefore is not enforceable; then the Written Notice issued on the basis of violating Policy IT-98 should be withdrawn. It then follows that his termination would be reversed because he would have only one active Group II Written Notice. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Virginia Department of Transportation (VDOT) employed the grievant before he was terminated. On October 7, 2002, the agency issued to him the following two disciplinary actions: a Group II Written Notice with removal for visiting pornographic sites on the internet and a Group II Written Notice with removal for personal use of the internet. Based on the accumulation of the two Group II Written Notices, he was terminated on October 7, 2003. He grieved the disciplinary actions and the hearing officer upheld the agency's disciplinary actions, including the termination. The grievant appealed the decision to the Department of Human Resource Management.

The relevant policies include the Department of Human Resource Management's Policy #1.60 that states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive. Also applicable is DHRM Policy 1.75 that establishes guidelines for the use of the Internet and the state's electronic communication systems for state agencies and their employees. This policy establishes minimum standards. Agencies may supplement this policy as they need or desire, as long as such supplement is consistent with the policy.

Finally, also applicable is VDOT's Policy IT-98 whose purpose is to ensure the acceptable use of Internet access privileges granted to the VDOT user community. It covers all activities

associated with the use of the Internet, including the design and development of applications using the Internet.

In the instant case, the fact that the grievant accessed the Internet for personal use and accessed pornographic websites is supported by indisputable evidence. Based on that evidence, the hearing officer upheld all of the disciplinary actions and the grievant remained terminated.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the evidence supported that the grievant accessed the Internet during work hours for personal use. Thus, the agency issued to him a Group II Written Notice with removal. It was determined also that the grievant accessed pornographic websites from his computer. For that offense, the agency issued to him a Group II Written Notice and removed him from employment. Taking disciplinary action by issuing the written notices was in accordance with DHRM Policy 1.60. In accordance with Executive Order Number 51(99) and DHRM Policy Number 1.75, the agency adopted VDOT Policy IT-98 to govern Internet use by employees. Unlike DHRM Policy 1.75, VDOT Policy IT-98 is a zero tolerance policy. DHRM Policy 1.75 establishes minimum standards. Agencies are permitted to supplement that policy, or any DHRM policy, as they desire or need as long as such supplement is consistent with the policy in question. While more restrictive than DHRM Policy Number 1.75, VDOT Policy IT-98 is not in contradiction with that policy. Thus, VDOT Policy IT-98 is enforceable, and the disciplinary action the agency took under that policy was appropriate. In summary, we have no basis to interfere with this decision regarding the retention of the disciplinary action. However, we do take exception to the statement in footnote 8 of the hearing officer's decision which states that VDOT IT-98 is in contradiction to DHRM Policy 1.75 and there is not enforceable. We are requesting that the hearing revise that portion of his decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services