Issues: Two Group II Written Notices with termination (internet abuse and view sexually explicit material via internet); Hearing Date: 01/30/03; Decision Issued: 02/03/03; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 5625

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5625

Hearing Date: January 30, 2003
Decision Issued: February 3, 2003

PROCEDURAL ISSUES

Due to seasonal holidays and other factors, the first date on which all participants were available for a hearing was the 31st day following appointment of the hearing officer.[1]

Some of grievant's witnesses were contacted by the district Employee Relations Manager prior to the hearing to advise them of the date, time and location of the hearing. During the conversations, witnesses asked whether they would be adversely affected in their jobs or positions if they testified. The Employee Relations Manager told them they "shouldn't" be affected. Some witnesses felt this answer was hedging and therefore not sufficiently reassuring. Before each such witness testified, the hearing officer advised them that the grievance procedure prohibits an agency from retaliating against employees for

[1] § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

participating in the grievance process, and that the Department of Employment Dispute Resolution (EDR) will investigate allegations of any retaliation.[2]

Grievant requested that the Hearing Officer, in effect, issue a summary judgment against the agency for what he contends were various procedural violations. The practice of the Hearing Division has been to conduct a full hearing in order that all evidence can be presented and an appropriate decision rendered. Accordingly, motions for summary judgment are not entertained. Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge noncompliance at a later time.[3] When a grievance progresses as far as a hearing, the grievant then has an opportunity to have full due process by presenting his case before a neutral and impartial hearing officer. Thus, the hearing will effectively cure any earlier due process violations.

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Employee Relations Manager
Advocate for Agency
Two witnesses for Agency

ISSUES

Were grievant's actions subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

[2] § 1.5, EDR *Grievance Procedure Manual*, Ibid.
[3] § 6.3, EDR *Grievance Procedure Manual*, Ibid.

FINDINGS OF FACT

Grievant filed a timely appeal from two Group II Written Notices issued for failure to comply with established written policy by accessing the Internet for personal use, and by viewing sexually explicit content on the Internet.[4] The grievant was removed from state employment as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[5]

The Department of Transportation (Hereinafter referred to as "agency") has employed grievant for 10 years; he was an engineering technician before his removal from employment. Grievant did not have any active disciplinary actions, and his performance evaluations have always been satisfactory or better. Grievant's job duties took him out of the office approximately 40 percent of the time. In grievant's department, each classified employee has a computer. However, the department employed at least four wage employees who did not have computers assigned to them. They would use any computer they could find, including grievant's computer. Grievant's computer had the only memory stick reader in his department. Many other employees would use grievant's computer to access this software program.

The Commonwealth's policy on use of the Internet addresses non-business use of state-owned computers and states, in pertinent part:

> 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, regulations, 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.)[6]

The agency had promulgated an Internet Usage policy to supplement the above policy. Section 1.3 of that policy states that unauthorized access attempts or access to Internet sites for purposes other than conducting the business of VDOT are considered to be security violations. The policy further addresses Internet usage restrictions, stating that, "Internet access will be used explicitly for

[4] Exhibit 1. Written Notices, issued October 4, 2002.
[5] Exhibit 1. Grievance Form A, filed October 31, 2002.
[6] Exhibit 6. Department of Human Resource Management Policy No. 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.

the purpose of conducting VDOT business."[7] Grievant had signed an Information Security Agreement acknowledging that he had read and would comply with the agency's Internet Usage Policy.[8] However, uncontradicted testimony established that grievant and most employees routinely left their computer logged on when taking breaks, going to lunch, or were out of the area for other reasons. Other employees could then utilize grievant's computer and all activity would appear to have been performed by him.

In the spring of 2002, an agency criminal investigator advised the agency's internal audit director that one employee's use of the Internet appeared to be excessive and contrary to agency policy. An investigation of that employee's Internet use revealed substantial abuse. The audit director decided that it would be prudent to investigate all agency employees to ascertain whether there might be similar abuse by other employees. Because of the large number of employees employed by the agency, and the volume of data that would have to be examined, the director established a threshold of 10,000 Internet data records (lines of activity) per day.[9] The investigation therefore looked only at the computer records of those employees whose use of the Internet equaled or exceeded 10,000 records per day. A computer run extracted this data for the week of April 8-14, 2002. It was determined that 93 employees had Internet usage that exceeded the threshold; grievant was one of the 93.

The audit director took steps to assure that this investigation was kept confidential and therefore a small number of people worked on the investigation. The review of so much data by the small staff required nearly four months. Many employees are required to use the Internet as part of their responsibilities. The audit director advised his staff to give the benefit of the doubt to employees if the Internet use appeared to be work-related in any way. In many cases, the data would reflect that a screen was accessed and then there would be no additional activity for several minutes. This could mean either that the user was viewing the screen for an extended time, or that the user had left his workstation for a period of time. To give the employee the benefit of the doubt, screens that were static for more than one minute (even up to 30 or more minutes) were counted as only one minute for purposes of totaling the time viewing the Internet.

The Internal Audit Division distributed a draft discussion copy of its report to Division and District Directors on August 26, 2002. The audit division had identified most of the computer users by tracing the selected IP address to a specific computer, and in turn to the individual who is the principal user of the computer. District and division directors were also given a list of computers and people identified as the principal users within their jurisdiction. The report

[7] Exhibit 5. Agency policy number IT-98, *Internet Usage Policy*, revised November 6, 2000. NOTE: Subsequent to the publicity surrounding the mass discipline of agency employees, the agency has modified its Internet policy to be consistent with the Commonwealth's policy.

[8] Exhibit 4. *Information Security Agreement*, signed by grievant October 2, 2001.

[9] A line of activity is generated each time the Enter key is depressed or the mouse is clicked.

directed them to make reasonable efforts to satisfy themselves as to the identity of the users. The directors were not told to conduct their own investigations or expand the scope of the investigation completed by the audit division.[10] The directors were to provide to the Audit Division responses to four limited questions.[11] Because of the scope of the investigation and the widespread abuse uncovered, the agency's central management decided that any disciplinary actions should be controlled and coordinated centrally to assure that all employees would be disciplined in a uniform manner. In grievant's case, the audit team concluded that he had 11,182 lines of unauthorized Internet activity, totaling at least 1 hour, 53 minutes of non-work-related activity on April 11, 2002. The audit division did not find that grievant had viewed any pornographic/sexually explicit content.

Despite the audit division's instructions, the Human Relations Manager in the district in which grievant worked instructed the Employee Relations Manager to delve further into the data provided by the audit team. In late September 2002, the Employee Relations Manager undertook a line-by-line review of more than 600 pages of data. She found that virtually all of grievant's Internet usage involved access of automobile discussion boards, automobiles, personal email, personal website, online communities, shopping, USDA Forest Service, music software, and video games.[12] The data also indicated that a music radio station was accessed for 11 minutes on April 11, 2002. The home page for this radio station contains links to sites that include photographs of naked females whose breasts and genitals are covered by black rectangular bars. The agency did not provide copies of the photographs to grievant at any time prior to the hearing despite his repeated requests for evidence. The Employee Relations Manager's verbal description of the photographs reflects that they were neither pornographic nor would they meet the statutory definition of "lewd exhibition of nudity,"[13] except for one photograph that displayed uncovered buttocks.

On October 1, 2002, grievant's supervisor advised him that he was going to be disciplined for Internet abuse and for viewing sexually explicit content on the Internet. Grievant asked what the sexually explicit content was. The Employee Relations Manager gave him a CD-ROM disc containing 29,983 records of data and told him that the material was found on a web site on April 11, 2002. Grievant was given 48 hours to respond. On October 3, 2002, grievant provided a three-page typewritten response in which he admitted that he had violated the policy against non-work-related use of the Internet. However, he denied accessing sexually explicit content and stated that he had not been able to find any sexually explicit content on the CD-ROM. Grievant was given two written notices and removed from employment on the following day, October 4,

[10] Exhibit 3. *Report on Investigation*, August 26, 2002.
[11] Exhibit 10. *Report* attachment xxvi, investigative data for grievant.
[12] Exhibit 4. Summary of Internet activity on grievant's computer for week of April 8-14, 2002.
[13] Exhibit 2. Code of Virginia § 2.2-2827 & § 18.2-390. See Frantz v. Commonwealth, 9 Va. App. 348, 388 S.E.2d 273 (1990) for a discussion of the standard for "lewd exhibitions of nudity."

2002. On that day, after he had been discharged, the Employee Relations Manager told grievant that the offensive site was a radio station site that had been accessed for 11 minutes on April 11, 2002.

All agency employees found to have substantially abused the Internet were given Group II Written Notices. All employees found to have viewed sexually explicit content on the Internet were given separate Group II Written Notices. All employees who received two Written Notices were removed from employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[14]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees.

[14] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Standards of Conduct groups offenses according to their severity and lists some examples of each group. Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to comply with established written policy.

Grievant admitted in his letter of October 3, 2002 to his supervisor that he had violated the policy against non-work-related use of the Internet. The evidence amply demonstrated that grievant's extensive use of the Internet was in violation of both the Commonwealth's policy, and the agency's more restrictive zero-tolerance rule. Grievant did not dispute the violation and argued only that the discipline was too harsh for the offense. Given grievant's extensive personal use of the Internet, a Group II Written Notice is an appropriate level of discipline for the offense. It is also consistent with the discipline given to all other employees found to have substantially abused the Internet. Therefore, the disciplinary action issued for abusing the Internet is affirmed.

The agency has not borne the burden of proof to demonstrate, by a preponderance of evidence, that grievant viewed sexually explicit content on his computer for six reasons. First, the agency has not shown that the content was sexually explicit. Neither the audit director nor the senior auditor, both of whom testified for the agency, found any sexually explicit images during their months-long investigation. Only the local Employee Relations Manager saw any images, which she verbally characterized as sexually explicit. Thus, the preponderance of testimony – by the agency's own witnesses – establishes that the images were not sexually explicit.

Second, even if the images had been sexually explicit, the agency failed to provide the images prior to the hearing. The agency had ample opportunity between April 2002 and the hearing in January 2003 to make copies and provide them to grievant well before the day of the hearing. During the fall of 2002, grievant and his attorney made repeated written requests to the agency for such evidence. Moreover, during the prehearing conference, the agency was specifically directed to provide to grievant and the hearing officer copies of <u>all</u> evidence it intended to use in the hearing not later than four working days prior to the hearing. The Employee Relations Manager brought to the hearing images she generated on the night before the hearing. Because the agency failed to comply with the prehearing instructions, and because even the verbal description failed to establish that they were sexually explicit, those images were rejected as evidence.

Third, the agency viewed the images in September 2002. It could have made copies at that time and provided them to grievant on October 1, 2002 so that he could respond to the allegation within the 48-hour due process period. The CD-ROM given to grievant did contain the relevant line activity records somewhere among the 29,983 records on the disc. However, giving grievant only two days to review this amount of data, when the agency had more than five months to evaluate it hardly complies with the due process requirement to give grievant a reasonable opportunity to respond.[15] Fourth, undisputed testimony established that an image viewed on a site in September 2002 might not have been the same image that was on the site in April 2002. Such sites change pictures frequently. Thus, the images seen in September could have been different from those viewed in April.

Fifth, the agency has not demonstrated that the local district was authorized by the central office or the Internal Audit Director to conduct its own investigation. In fact, the central office stressed that it maintained strict central control over the entire investigation and disciplinary process in order to assure that all employees across the Commonwealth were disciplined in a uniform manner. The supplemental investigation conducted in grievant's district skewed the process and resulted in discipline being issued to grievant that would not otherwise have been issued.

Finally, and most importantly, the agency has not established a definite nexus between grievant and the viewing of the allegedly offensive images because it has not demonstrated that grievant was the person who viewed them. The preponderance of testimony established that many other employees used grievant's computer when he was not present. Some wage employees used his computer because they did not have one of their own, while some classified employees had to use his computer because of the special software that only grievant's computer was equipped with. The agency has presented no evidence that would show that grievant was at his computer for the 11 minutes on April 11, 2002 during which the allegedly offensive images were viewed. It is therefore entirely possible that the images were viewed by some other employee who was utilizing grievant's computer for a brief period.

Grievant argues that the agency did not consider mitigating circumstances that might have reduced his discipline. The evidence presented by the agency established that it did consider the length of grievant's service but that the overriding mandate from central office dictated that the same level of discipline be meted out to all employees who had committed the same offense. The Standards of Conduct provide that agencies "may " reduce discipline if mitigating circumstances exist. Given the permissive "may," the agency is not required to apply mitigation. In this case, the agency has established a reasonable basis for not applying mitigation in order to assure consistent application of discipline.

[15] Exhibit 7. Section IV.C, DHRM Policy 1.60, *Ibid*.

Grievant argues that the agency failed to comply with the EDR Director's ruling to provide information requested by grievant prior to initiation of the hearing process. The hearing officer concurs and finds that the agency did not comply with the Ruling requiring the production of documents.[16] The agency did provide a chart summarizing essential data but did not obtain the grievant's agreement to this alternative. However, in view of the grievant's admission of culpability with regard to the first written notice, and the hearing officer's rescission of the second written notice, the need for production of the documents is now moot.

DECISION

The decision of the agency is hereby modified.

The Group II Written Notice issued on October 4, 2002 for failing to follow established written policy by accessing the Internet for substantial personal use is UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

The Group II Written Notice issued on October 4, 2002 for failing to follow established written policy by accessing sexually explicit content on the Internet is RESCINDED.

The grievant is REINSTATED to his position immediately with full back pay and benefits.

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.

[16] Exhibit 24. *Compliance Ruling of Director*, No. 2002-215, December 17, 2002.

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.[17] 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.[18]

[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]

_____
David J. Latham, Esq.
Hearing Officer

[17] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

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