Issue: Group II Written Notice with 10-day suspension (failure to comply with established written policy by accessing the Internet for substantial and excessive personal use); Hearing Date: 03/04/03; Decision Issued: 03/05/03; Agency: VDOT; AHO: David J. Latham, Esq.; Case No.: 5645; **Hearing Officer Reconsideration Request received 03/14/03; Reconsideration Decision issued 03/21/03; Outcome: No basis to reopen the hearing or change original decision; Administrative Review: EDR Administrative Review requested 03/14/03; EDR Ruling dated 06/17/03; Outcome: HO neither abused his discretion nor exceeded his authority [Ruling No. 2003-066]; Administrative Review: DHRM Administrative Review requested 03/14/03; DHRM Ruling dated 04/14/03; Outcome: No basis to interfere with decision. HO directed to revise portion of decision regarding removal of written notice from personnel file; Judicial Review: Appealed to Richmond Circuit Court on 07/16/03; Outcome: Court finds that HO's decision is not contradictory to law [CH03-1157-4]. Court's ruling dated 08/19/03**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5645

Hearing Date: March 4, 2003
Decision Issued: March 5, 2003

PROCEDURAL ISSUES

The first date on which all participants were available for a hearing was the 42nd day following appointment of the hearing officer.[1]

Grievant requested as part of the relief he seeks, to have agency management issue an apology to him for issuing the disciplinary action. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.[2] However, hearing officers do not have authority to require agency management to make an apology.[3] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management

[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.
[2] § 5.9(a) EDR *Grievance Procedure Manual*, Ibid.
[3] § 5.9(b)2 *Ibid.*

reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Two Advocates for Grievant
Environmental Manager
Advocate for Agency
Three 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?

FINDINGS OF FACT

Grievant filed an untimely grievance from a Group II Written Notice issued for failure to comply with established written policy by accessing the Internet for personal use.[4] Grievant failed to file his grievance on a timely basis because he filed it more than 30 calendar days after the event that formed the basis of the dispute.[5] The grievant was suspended for ten days 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.[6]

The Department of Transportation (Hereinafter referred to as "agency") has employed grievant for two years; he is an environmental specialist I.[7] Grievant's job duties require him to be out of the office approximately 50-80 percent of the time. Grievant's manager was employed in grievant's position for ten years prior to his promotion, and is therefore highly knowledgeable about the job, its duties and requirements.

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

[4] Exhibit 1. Written Notice, issued September 19, 2002.
[5] § 2.2 EDR Grievance Procedure Manual, *Ibid*.
[6] Exhibit 1. Grievance Form A, filed October 24, 2002. NOTE: The grievance
[7] Exhibit 7. Grievant's *Employee Work Profile*, May 31, 2002.

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.)[8]

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. Whenever an employee logs on to a computer, the first screen to appear states that the computer "is to be used only for applications specifically in support of VDOT's and the Commonwealth of Virginia's Goals and Objectives."[9] Section 2.1 of the policy further addresses Internet usage restrictions, stating that, "Internet access will be used explicitly for the purpose of conducting VDOT business."[10] Grievant had signed an Information Security Agreement acknowledging that he had read and would comply with the agency's Internet Usage Policy.[11] Notwithstanding the agency policy, grievant's manager had operated under the premise that occasional and incidental personal use was acceptable during lunch or on a break. Grievant's coworkers either did not use the Internet for personal reasons, or used it occasionally on a "pop in pop out" basis.[12]

In late May 2002, grievant's supervisor reported to the environmental manager that grievant appeared to be spending an inordinate amount of time using his computer for personal purposes by browsing Internet sites unrelated to his work. During the next month, the manager casually observed grievant's computer use by walking through the area but did not undertake any organized investigation. In late June 2002, grievant's supervisor reported to the manager that grievant appeared to be spending several hours per week on the Internet. The supervisor's workstation is in close proximity to grievant's workstation and the supervisor is able to easily observe grievant's computer screen.

The environmental manager and his superior then requested the information technology manager to monitor grievant's computer usage. The agency's central office obtained a printout of grievant's computer activity for the

[8] Exhibit 8. Department of Human Resource Management Policy No. 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.
[9] Exhibit 9. First screen to appear at time of logon on VDOT computers.
[10] Exhibit 9. Agency policy number IT-98, *Internet Usage Policy*, issued March 1, 2000.
[11] Exhibit 9. *Information Security Agreement*, signed by grievant October 11, 2001.
[12] Exhibit 6. Memorandum from Environmental Manager to his superior, December 5, 2002.

period from July 1-18, 2002. During this period, grievant worked on nine days (due to holidays and annual leave). Many employees are required to use the Internet as part of their job responsibilities. In many cases, the data reflects that a screen was accessed and then that 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 grievant the benefit of the doubt, screens that were static for more than three minutes were recorded as only three minutes of personal use for purposes of totaling the personal use time.

The investigation revealed that grievant used his computer to access web sites about coins, lathes and milling machinery, hand engraving, jewelry and ornaments, finances, rhinestones, fine arts, Star Wars collections, artworks, auction sites, and vacuum tools.[13] Grievant also regularly accessed E-bay (an on-line auction site) where he viewed, sold, and purchased items. Grievant makes jewelry at his home and sells these items on the E-bay Internet site.

Grievant's use of the Internet is summarized in the attachment to Exhibit 1 and reflects the following totals:

July 1 - 2 hrs, 19 mins
July 2 - 2 hrs, 53 mins
July 3 - 1 hr , 16 mins
July 8 - 41 mins
July 9 - 4 hrs, 27 mins
July 15 - 1 hr , 10 mins
July 16 - 1 hr , 18 mins
July 17 - 1 hr , 15 mins
July 18 - 2 hrs, 40 mins

Average = 2.0 hours per day

In mid-spring of 2002, the agency had undertaken a confidential, agency-wide audit of computer usage because of suspected widespread abuse of computers for personal use. The investigation looked at the computer records of those employees whose personal use of the Internet equaled or exceeded two hours per day. A computer run extracted this data for the week of April 8-14, 2002. The audit was conducted on a highly confidential basis. Grievant, his supervisor, and his manager were <u>not</u> aware of the agency-wide audit. 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. According to widely published newspaper reports, the agency discharged or disciplined 86 employees for abusing Internet

[13] Exhibit 5. Data from Information Technology investigation.

access.[14] All employees found to have substantially abused the Internet (two or more hours per day) were given Group II Written Notices.

In early August 2002, grievant's manager concluded from the information technology report that grievant's personal use of the computer was excessive and warranted discipline. Routinely, human resources was consulted and central office was involved. Because central office was in the process of evaluating what discipline should be meted out to the 86 employees identified by the agency-wide audit, a decision on grievant's case was delayed until September in order to assure that his discipline was consistent with discipline given to other employees who had committed the same offense. Grievant was notified in September that disciplinary action was pending and that he had two days in which to provide any information in his own defense. Grievant told his manager that he had no information to provide.

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.[15]

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[14] Richmond Times-Dispatch, *VDOT Cites 86 for PC Misuse*, October 4, 2002. Grievant was not among the group of 86 employees identified in the agency-wide audit.

[15] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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. 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.[16] The Standards also state:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of the agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[17]

The grievant failed to file his grievance within 30 calendar days of the date the Written Notice was issued. The agency did not have to waive the 30-day requirement but apparently elected to do so when it proceeded through the resolution steps and qualified the grievance for a hearing. Normally, such a waiver of the 30-day requirement should be in the form of a written agreement between the parties.[18] However, in this case, the agency's acquiescence by proceeding through the process will be treated as a bona fide waiver.

The agency has demonstrated, by a preponderance of evidence, that grievant's personal use of his computer was substantial, on-going, and excessive. If grievant's usage had been only occasional and incidental, the undisputed testimony of his manager established that he would have considered the use to be acceptable, and he would not have disciplined grievant.

Grievant argued, correctly, that the agency's policy on Internet usage is more restrictive than the DHRM policy and is therefore inapplicable. DHRM policy provides that agencies may promulgate their own written policy providing it

[16] Exhibit 10. Section V.B.2.a, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.
[17] Exhibit 8. Section V.A., *Ibid.*
[18] § 2.2, EDR Grievance Procedure Manual*, Ibid.*

is consistent with the DHRM policy.[19] The fact that VDOT developed a more restrictive policy does not necessarily mean that its policy is inconsistent.[20] Subsequent to the mass discipline of 86 employees in September 2002, the agency decided to revise its policy to be more in concert with DHRM policy.[21] However, even under DHRM policy the 86 employees, and grievant, would have been disciplined because their excessive personal use of the computer was not incidental and occasional use.

One of grievant's more surprising arguments is that, although he read and understood the Internet Usage policy, and signed the Information Security Agreement, he disagreed with the policy and thus did not feel bound by it. The purpose of having grievant read the policy and sign the agreement was to assure that he would comply with it. Whether grievant agrees with the policy is irrelevant. A condition of grievant's employment is to comply with established written policy irrespective of his personal view about the policy. If grievant believes that he is required to comply only with those policies he personally agrees with, he is sadly mistaken.

Grievant asserts that he had an "understanding" with his manager that he could use his computer for personal use so long as he did not play video games or access pornographic sites. The manager denied having any such understanding with grievant, and grievant has offered no corroborative testimony or evidence from coworkers to support his assertion. Moreover, interviews with grievant's coworkers confirmed that they had no knowledge of any such "understanding."[22] The manager did acknowledge that he believed occasional "pop-in pop-out" usage was acceptable during lunch or a break but that this type of usage should not exceed about 30 minutes per day.

Grievant also contends that his discipline was greater than that of a coworker who received counseling for inappropriately using his computer. However, the coworker was a probationary employee (less than one year of employment) who is not subject to the Standards of Conduct policy.[23] More importantly, the coworker's offense was a one-time occurrence of copying a personal compact music disc. In contrast, grievant's offense was on-going, excessive, personal use of the Internet on a daily basis. Thus, the agency's

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[19] Exhibit 8. DHRM Policy 1.75, *Ibid.*

[20] In support of this argument, grievant submitted a decision rendered by another hearing officer (Exhibit 11). That decision includes a footnote in which that hearing officer opined that agency policy IT-98 is unenforceable because it establishes a zero-tolerance standard that is more restrictive than DHRM Policy 1.75. However, this tribunal is not bound by the opinion expressed by another hearing officer. Moreover, DHRM has subsequently issued multiple Policy Rulings that state that policy IT-98 is consistent with DHRM Policy 1.75, and required that the hearing officer's decision be revised accordingly.

[21] Richmond Times-Dispatch, *VDOT to Relax Computer Policy*, October 5, 2002.

[22] Exhibit 6. *Ibid*.

[23] Exhibit 10. Section 1, DHRM Policy 1.60, *Ibid.*

decision to counsel for a one-time offense, and discipline for an on-going excessive offense, was proportionate and appropriate to each situation.

Grievant suggests that his offense was only abuse of state time – a Group I offense. While grievant is correct in observing that he did abuse state time, his offense also falls under the category of failing to comply with established written policy – a Group II offense. As noted above, the offenses listed in the Standards of Conduct are only examples. The agency's selection of an appropriate level of Written Notice must be guided by the *definition* of Group I, II, and III offenses. In this case, the agency concluded that the offense was sufficiently egregious that any repetition would warrant grievant's removal from employment – the definition of a Group II offense. The evidence in this case supports the agency's conclusion.

Grievant notes that his performance evaluation completed on May 31, 2002 did not include any comments regarding his Internet usage. Grievant's manager responded that, at the time the evaluation was prepared, he had no more than an allegation that grievant was excessively using his computer. Therefore, it would have been improper to make mention of a problem that had not yet been documented. Now that grievant's excessive usage has been documented and disciplined, it will be an appropriate subject for inclusion in his next evaluation.

In grievant's response at the second-step of the grievance resolution process, he provided an expanded list of issues.[24] During the hearing, however, grievant deleted most of the issues and focused only on: inconsistent or unfair application or interpretation of policies, waiver, and improper notice. For reasons discussed elsewhere in this decision, it is concluded that the agency's application and interpretation of the relevant policies was fair and consistent.

Grievant's argument regarding waiver and improper notice alleges that his supervisor did not specifically tell him at the time of hiring what limits were placed on his personal use of the Internet. While this argument is superficially attractive it is not persuasive for four reasons. First, grievant signed a written agreement that made it unambiguously clear that computers "are to be used for official business only." Second, his manager told him that occasional use during lunch or break would be acceptable as long as it was just "pop-in pop-out" usage. Third, if grievant had been confused by the mixed messages conveyed by the agreement and his manager, grievant had ample opportunity to question his manager, the manager's superior, or human resources in order to obtain clarification. Finally, grievant's excessive use violated not only the written policy but also the limited, occasional use permitted by his manager.

This tribunal further concludes that grievant's credibility has been tainted by his written statements and testimony. First, in his response to the second

[24] Exhibit 3. Grievant's response to second resolution step respondent, November 20, 2002.

resolution step respondent, grievant alleges that the first-step respondents had agreed to reduce his discipline to a Group I Written Notice. However, both respondents denied that such a reduction had even been discussed, let alone offered.[25] Grievant did not question one of the first-step respondents about this issue during the hearing, and failed to request the other respondent to testify on his behalf. Second, grievant argued that he had an understanding with his manager that allowed his excessive personal use of the computer. However, in a written summary submitted for the hearing, grievant admitted that his manager had said only that there would be no reprimand for *occasional* personal use.[26] Third, grievant argued at length that his access of lathes and milling machine sites on the Internet was job-related because he had to understand how highway signs are constructed. Grievant's manager, who was in grievant's job for ten years, testified that there was absolutely no need to know about lathes and milling machines to perform the grievant's job responsibilities. Grievant's testimony about this issue was utterly unconvincing.

Perhaps most telling is the portion of grievant's in-office time expended in personal use of the computer. Grievant spends 50-80 percent of his workday outside the office and, therefore, is in the office an average of no more than 1.6-4.0 hours per day. Thus, by spending an average of two hours on personal use of the Internet, grievant expended at least 50 percent of his in-office time in personal pursuits rather than performing his job responsibilities. It must be borne in mind that this estimate is conservative since the computer log reflects that the personal use sites were on the screen for longer periods of time than was tallied. Thus, if grievant was viewing sites that remained on the screen for more than three minutes, he was spending more than 50 percent of his in-office time in personal business. By any standard, this is excessive personal use that warrants disciplinary action.

Grievant admitted 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 violated 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 purpose of disciplinary actions such as a Written Notice is to prevent recurrence of the offense in the future. Grievant testified (and the agency did not dispute) that he has not accessed the Internet at work since being issued this disciplinary action. Thus, the corrective action has had the desired effect. If grievant does not violate the Standards of Conduct during the active period of

[25] Exhibit 4. Third resolution step response to grievant, December 10, 2002.
[26] Exhibit 14.

this disciplinary action, the Notice will become inactive for the purposes of Section VII.D.2.b of the Standards.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice and 10-day suspension issued on September 19, 2002 for failing to follow established written policy by accessing the Internet for substantial and excessive personal use are UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

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.[27] 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.[28]

[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

[27] 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, 2002 Va. App. Lexis 756, (December 17, 2002).

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5645

Hearing Date: March 4, 2003
Decision Issued: March 5, 2003
Reconsideration Received: March 14, 2003
Reconsideration Response: March 21, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[29]

OPINION

To facilitate others' review of this case, the following response to grievant's concerns is in the same order presented in, and uses the page numbers of, the reconsideration request.

[29] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Page 3

Grievant's observation is irrelevant and moot because there is basis to suggest that agency management should apologize for issuing discipline that was justified.

Page 4

The grievance package admitted into the record during the hearing does not include a written mutual agreement to waive the time limit for filing a grievance. If such a document exists, grievant did not proffer it during the hearing. Moreover, grievant's argument is moot for reasons stated in the Opinion section of the Decision.[30] Years of employment in hearing decisions are routinely rounded to the nearest full year.

Page 5

The agency's Internet Usage Policy does not include the word "counseling." The third paragraph of the section addresses consequences of computer misuse stating:

> Employees cited for security violations, the misuse of computer resources and/or data can have *corrective actions* applied based on The Virginia Standards of Conduct and Performance, which specifically includes failure to comply with established written policy. Breaches to system security will be corrected as soon as possible on a priority basis.[31] (Italics added)

The Standards of Conduct provides that *corrective action* may range from counseling to disciplinary action. Since the cited section of the Internet Usage Policy specifically mentions the Group II offense of failing to comply with established written policy, the policy clearly contemplated the issuance of a Group II disciplinary action for computer misuse.

Grievant's disagreement regarding the characterization of the supervisor who reported him is entirely irrelevant to the substance of the grievance. Grievant's remaining disagreements on this page reflect a lack of understanding that a hearing officer finds facts based on the preponderance of testimony from all witnesses, and particularly the testimony of the most credible witnesses.

Page 6

The names of employees are specifically excluded from hearing decisions because decisions are published on the Internet in a manner that seeks to preserve the personal privacy of all employees.[32]

Many of grievant's comments on this page do not pertain to statements of fact but, rather, constitute argument. His argument that his manager *should* have handled the matter differently is irrelevant. It is undisputed that other employees were using their

[30] First full paragraph, p.6, Decision of Hearing Officer, issued March 5, 2003.
[31] Exhibit 9. Section 1.3, Policy Number IT-98, *Internet Usage Policy*, issued March 1, 2000.
[32] Section 8.1, EDR *Grievance Procedure Manual*, effective July 1, 2001.

computers for personal use. However, the manager had approved their limited usage (verified as limited by the statewide audit). Grievant's usage was significantly in excess of his peers, and occupied the majority of his time in the office. Grievant's suggestion that his break and lunch times should be removed from the cumulative time is illogical; his personal use of the computer constituted misuse regardless of when it occurred. Grievant's manager did not have knowledge of the April statewide audit until September 2002. The manager was unaware of the Central Office's instructions (about the April audit) to district administrators because they were closely guarded until September 2002. Grievant's manager testified that he now assumes that grievant's computer usage during the audit week in April was minimal because grievant's work responsibilities had kept him out of the office almost the entire week. The evidence in the record does not support grievant's statement regarding the length of the April audit.

Grievant correctly observes that time recorded should state Internet rather than personal. However, analysis of the Internet usage revealed that most of the usage was personal and could not reasonably be attributed to bona fide business usage.

Page 7

The Standards of Conduct requires that prompt corrective action be taken *as soon as a supervisor becomes aware* of an employee's unsatisfactory behavior.[33] In this case, the supervisor knew that grievant was using the Internet for personal use because he had told grievant that limited, brief, "pop-in, pop-out" usage was permissible. However, the supervisor was unaware of grievant's excessive usage until May 2002, and such usage was not confirmed until he received the July audit results at the end of July 2002. The issuance of discipline followed within a reasonable time thereafter, taking into account the circumstances discussed in the Decision.

Grievant's argument with regard to the statewide audit is partially correct and partially incorrect. There were slight variances in the two audits. However, there was no testimony presented by any information technology person who was involved in the statewide audit. Thus, some of grievant's assertions are speculative and not based on evidence in the record. For example, there is no basis to suggest that break and lunch time should be deducted from the amount of time the computer was used for personal reasons. While grievant's manager may have winked at such casual usage, there is no evidence that other managers in the agency did the same thing.

Page 8

The first eight comments on page 8 of the request for reconsideration appear to be redundant, or out of logical order and cannot be related to specific portions of the Decision.

Grievant's attempt to argue contract law as a way to avoid his signed agreement to comply with the Information Security policy is preposterous. As a state employee, grievant's continued employment is dependent upon his compliance with agency policies and signed agreements. Grievant signed this agreement as a condition of employment. Had he refused to sign the agreement, the agency could have terminated his employment.

[33] Section VI.A, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Contrary to grievant's contention, the Standards of Conduct does not require that an employee be counseled prior to a disciplinary action. The agency may take any corrective action deemed appropriate for the offense, ranging from counseling to disciplinary action to dismissal.

Page 9

The comment on this page duplicates the second comment on page 7.

Page 10

Each employee's discipline is handled on an individual basis. However, state agencies also strive to assure that discipline given for a particular offense is consistent with discipline meted out to other employees who have committed the same offense. Agencies appropriately seek such consistency to assure even-handed discipline and to avoid allegations of disparate treatment.

Page 11

This comment was addressed above (see Page 4 response).

Pages 12 & 13

Many of grievant's comments on these pages have been responded to earlier, or simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Page 13

Grievant failed to obtain testimony from a witness that grievant believes would be beneficial to him. He now attempts to proffer what he claims would be the testimony of that witness. Such evidence is not newly discovered[34] and could have been presented during the hearing had grievant requested an Order for that witness. Therefore, grievant has not offered a reason that would justify reopening the hearing.

Grievant further suggests that the hearing officer should undertake an investigation into personnel files and contact grievant's coworker by telephone. A hearing officer is not an investigator. A hearing officer is an adjudicator (administrative law judge) who conducts an evidentiary, quasi-judicial proceeding during which each party is expected to present all evidence and witnesses relating to their case. The hearing officer's decision must be based solely on the evidence introduced into the record during the hearing.

Page 14

[34] Section 7.2(a)1, EDR *Grievance Procedure Manual*, effective July 1, 2001.

Grievant takes issue with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

Page 15

Grievant questions why certain of his statements taint his credibility. Grievant asserted that an agreement to reduce the level of discipline had been reached with the first-step respondents. The respondents denied the existence of any such agreement, thereby bringing grievant's credibility into question. Grievant had the opportunity to resolve this matter by questioning the respondents about this issue during the hearing so that the hearing officer would be able to assess the facts, as well as the credibility of those involved. Grievant's failure to question the first-step respondents raises the presumption that grievant knew that their testimony would be unfavorable to him. Since grievant had the opportunity to explore this issue but elected not to challenge the respondents' denial, his credibility remains tainted.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on March 5, 2003.

APPEAL RIGHTS

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.[35]

[35] 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, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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David J. Latham, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

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

The grievant has appealed the hearing officer's March 5, 2003, decision in Grievance No. 5645. The grievant is challenging the decision because he contends that the Virginia Department of Transportation (VDOT) officials did not follow the proper steps in taking disciplinary action. He contends that the agency officials did not counsel him regarding the violation before they issued the Group II Written Notice. In addition, he contends that because the VDOT Policy IT-98 is more restrictive than DHRM Policy No. 1.75, it was unenforceable.

The VDOT officials also challenged the hearing officer's decision in that the hearing officer's decision stated, in part, "…If grievant does not violate the Standards of Conduct during the active period of this disciplinary action, the Notice will be removed from his personnel file and he will have an unblemished record…." The VDOT officials contend that such a statement changes the meaning of DHRM Policy No. 1.60.

The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Virginia Department of Transportation employs the grievant as an Environmental Specialist I. On September 19, 2002, the agency issued to him a Group II Written Notice with a ten-day suspension for failure to comply with established written policy by accessing the Internet for personal use. He grieved the disciplinary actions and the hearing officer upheld the agency's disciplinary actions, including the suspension. The grievant requested that the hearing officer reconsider his decision and also appealed the decision to the Department of Human Resource Management. The hearing officer issued his reconsideration decision on March 21, 2003. He did not modify his decision.

The relevant policies include the Department of Human Resource Management's Policy No. 1.60 which 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 No. 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 a 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 is supported by indisputable evidence. Based on that evidence, the hearing officer upheld all parts of the disciplinary action.

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 a ten-day suspension. Concerning DHRM Policy No. 1.60, VDOT officials took disciplinary action in accordance with that policy. While counseling is included among the corrective actions that management officials may take to address unsatisfactory work performance or workplace behavior, counseling is not necessarily a prerequisite to other disciplinary action, such as issuing a written notice. In accordance with Executive Order Number 51(99) and DHRM Policy No. 1.75, the agency adopted VDOT Policy IT-98 to govern Internet use by employees. Unlike DHRM Policy No. 1.75, VDOT Policy IT-98 is a zero tolerance policy. DHRM Policy No. 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 No. 1.75, VDOT Policy IT-98 is enforceable. Thus, it was appropriate for the agency to take disciplinary action under that policy.

Concerning the removal of the written notice from the grievant's file, DHRM Policy No. 1.60, section (VII)(B)(3) states, "Except as provided in section VII (B)(4)(a) below, Written Notices shall be kept in employees' personnel files." Section VII (B)(4)(a), in turn, states, "A Written Notice may be removed from an employee's personnel file if the agency modifies or vacates its disciplinary action. If, through the grievance procedure, it is determined that the Written Notice issued was not justified, the panel may direct its removal from the employee's personnel file." The hearing officer neither modified nor removed the disciplinary action. Therefore, the written notice shall remain in the grievant's personnel file, even beyond its active life.

In summary, we have no basis to interfere with this decision except for the part which states that "…If grievant does not violate Standards of Conduct during the active period of this disciplinary action, the Notice will be removed from his personnel file and he will have an unblemished record…." Therefore, we are directing that the hearing officer revise that portion of the decision so it will be in compliance with the above referenced policy.

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

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services