

Issue: Group III Written Notice with termination (using agency resources to support personal business operation); Hearing Date: 02/18/04; Decision Issues: 02/26/04; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 5832;

Administrative Review: DHRM Ruling Request received 03/05/04; DHRM Ruling issued 04/13/04; Outcome: HO directed to revise decision to restore grievant to her pre-disciplinary status of LWOP-Layoff as opposed to reinstatement; Revised Decision issued 04/26/04



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5832

Hearing Date: February 18, 2004
Decision Issued: February 26, 2004

PROCEDURAL HISTORY

On July 21, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for using university resources to support her business operations. On July 25, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 28, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.¹ On February 18, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
University's Counsel
Witnesses

¹ This appeal had been assigned to another Hearing Officer and was then assigned to this Hearing Officer.

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for using University resources to support her personal business operations.

BURDEN OF PROOF

The burden of proof is on the University 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:

Virginia Tech employed Grievant as a Fraud Waste and Abuse Coordinator in the Internal Audit and Management Services division until her removal on July 21, 2003.² She began working for the University in 1996. Her work evaluations were satisfactory and she did not receive any disciplinary action prior to the Written Notice subject to this hearing.

Grievant had a flexible work schedule. She worked closer to "normal" work hours during the winter months but left "early" on several days during the summer.

Grievant is the owner of a Corporation engaged in the business of boarding horses.³ Clients of the Corporation leave their horses to be boarded, fed, exercised, and otherwise cared for at Grievant's farm. Grievant is involved in providing those services on a daily basis. Grievant also occasionally leased and transported horses but not as part of her horse boarding business. Although not part of the horse boarding business, these activities constituted engaging in business as a proprietorship.

Grievant informed the Internal Audit Director of her company's horse boarding business. Although he did not formally sanction her activities, the Internal Audit Director did not object to her having a separate business. The Hearing Officer finds that Grievant had authorization to engage in outside employment.

² Grievant's Employee Work Profile was not submitted as evidence. Grievant's duties consisted of performing audits at the direction of her supervisor.

³ The Corporation is an "S" Corporation and Grievant owns 100% of the stock.

In addition to providing services on behalf of her Corporation, Grievant is a horse enthusiast. She owns, rides, and shows her own horses. She and members of her family belong to and perform volunteer work for various non-profit horse associations, clubs, and organizations.⁴

Tax forms for the Corporation were prepared by a CPA. Grievant kept certain financial records on her computer at work in order to answer questions of the CPA. The CPA did not work outside of normal work hours and Grievant could not answer his questions at night or on the weekends. Grievant prepared her own personal tax returns after obtaining a Schedule K for the Corporation from the CPA. She did not prepare her own tax returns at work.

In December 2002, the contents of Grievant's personal computer were copied onto a server. The University selected an Investigator to review the contents of those records. The Investigator formerly worked in the University's audit department.

Grievant maintained several documents on her computer that were not directly related to her duties for the University. Many of these documents related to Grievant's horse boarding business or her activities as a horse enthusiast. The Investigator identified 32 non-work related documents. He called these "exceptions" and listed a name for each document and showed the date and time Grievant last saved each document as follows:

<u>Ref</u>	<u>Document Name</u>	<u>Date</u>	<u>Time</u>
1	Farm Rental Schedule	3/5/2001	11:11 AM
2	Farm Income	11/20/2000	8:32 AM
3	Farm Rental	11/20/2000	8:32 AM
4	Farm Rental	11/20/2000	8:31 AM
5	Roughed Expenditures	3/5/2001	9:37 AM
6	Balance Sheet	11/7/2000	12:30 PM
7	Farm Expenses	2/23/2000	11:23 AM
8	Farm Capital	9/11/2000	7:40 PM
9	Income Statement	1/17/2000	12:32 PM
10	[LS] ⁵	1/17/2000	9:06 AM
11	Balance Sheet	2/4/2002	1:28 PM
12	Farm Income	1/22/2001	2:57 PM
13	[LS]	1/22/2001	2:57 PM
14	[LS]	1/22/2001	9:17 PM
15	Rental Depreciation	1/22/2001	2:57 PM
16	Balance Sheet	2/7/2002	1:10 PM

⁴ One of those organizations is Foxtails Pony Club.

⁵ "LS" is the first and last initial of Grievant's Corporation.

17	Income Statement	2/7/2002	12:55 PM
18	[LS]	2/4/2002	1:40 PM
19	[LS]	2/7/2002	1:11 PM
20	Rental Depreciation	2/7/2002	1:46 PM
21	Rental Expenses	3/5/2001	10:56 AM
22	Balance Sheet	2/7/2002	1:10 PM
23	Letters to Boarders	2/12/2002	6:32 PM
24	Flyer	8/23/2002	1:02 PM
25	Horse for Lease	11/27/2001	6:22 PM
26	Proposal 1	9/2/2002	8:19 PM
27	Proposal 2	9/2/2002	7:50 PM
28	Proposal 3	9/2/2002	8:08 AM
29	Rowde Points	11/5/2002	10:02 PM
30	Show Schedule	10/2/2002	3:46 PM
31	Foxtails Pony Club	10/16/02	9:30 PM
32	Minutes for Foxtales	10/16/02	9:53 PM

After reviewing these 32 documents, the Hearing Officer finds that documents numbered 1 through 24 and 26 through 28 relate to Grievant's operation of her company's horse boarding business. Item 25 relates to Grievant engaging in the business of leasing a horse she owned. Her horse boarding company was not involved in that lease. Documents 29 through 32 reflect Grievant's activities as a horse enthusiast and do not relate to her outside employment.

Although evidence was presented showing the dates and times Grievant accessed these documents, no evidence was presented showing how long Grievant viewed or worked on the documents. No evidence was presented showing the number of times Grievant accessed a particular document prior to its last save date.

The investigator examined the list of favorite web sites on Grievant's internet browser. He noted she had listed links to web sites on how to write a business plan and how to plan a business with care.

Grievant had a computer at her home that she used for personal activities including her horse boarding business. Virginia Tech served as her Internet Service Provider. She paid Virginia Tech \$9.90 per month for this service. When someone sent Grievant an email addressed to the Virginia Tech server domain, the email would appear both on her work personal computer and on her home computer.⁶ If she sent an email from her home or from her office, the sender would see an address containing the Virginia Tech domain extension "vt.edu". Grievant believed that the service she was paying for included using the email extension.⁷

⁶ Grievant sought this arrangement so that she could work at home when necessary.

⁷ Grievant's belief was mistaken. An email service, however, was available to Grievant at a higher monthly cost.

The Investigator concluded that for the period July 25, 2002 to December 6, 2002, Grievant made 320 personal calls during work hours over 131 days for a total of 10 hours. These calls included time when Grievant dialed a number but no one answered. Several of these calls were to Grievant's home, to a credit union, a public school, and other organizations. Since the nature of the telephone discussion is not known, it is unclear which calls related to Grievant's personal affairs and which calls related to her horse boarding business.

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).⁸ 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).

Internet and Email

DHRM Policy 1.75. *Use of Internet and Electronic Communication Systems*, establishes a policy for the use of the Internet and the State's electronic communication systems for State agencies and their employees. Under this policy, State employees are entitled to access the Internet and use email to assist in the performance of their jobs. Personal use of the Internet and email can be appropriate under certain circumstances:

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.)

⁸ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

DHRM Policy 1.75 does not distinguish between personal use for an employee pursuing a hobby and personal use for an employee pursuing a private business activity. In either case, the use is not related to the employee's State work and is personal use under DHRM Policy 1.75. Thus, any use of the internet and email that is not related to State business is personal business and is subject to the test of being incidental and occasional use.

After reviewing Grievant's emails from March 8, 2000 to November 18, 2002, the Hearing Officer finds that Grievant's personal use of email was incidental and occasional and, thus, not contrary to DHRM Policy 1.75. No evidence was presented suggesting Grievant gave out her email address and told people to send her email.⁹ Grievant cannot control whether an individual sends her an email and, thus, merely receiving an email of a personal nature without responding does not represent a violation of policy. Grievant sent a number of emails outside of normal work hours. Given her belief that her work email address was also her personal email address, her actions were not an intentional violation of policy. More importantly, no evidence was presented suggesting Grievant's productivity or work performance was affected based on the number or content of her emails.¹⁰

Use of Computer and Communications Facilities

Virginia Tech Policy 2015 governs the use and administration of the Virginia Tech computer and communication facilities. This policy applies to any individual using or administering Virginia Tech computer and/or communication facilities. This policy provides:

University communication and computing resources are used to support the educational, research, and public service missions of the institution. Activities involving these resources must be in accord with the University honor codes, Employee Handbook, student handbooks, and relevant local, state, federal, and international laws and regulations.

For use and administration to be acceptable, it must demonstrate respect of:

- the rights of others to privacy;
- intellectual-property rights (e.g., as reflected in licenses and copyrights);
- ownership of data;
- system mechanisms designed to limit access; and

⁹ Grievant's email address is not difficult to discern within the University community.

¹⁰ This conclusion was confirmed by the Investigator who testified that Grievant's emails were "incidental", not the "meat of the problem", and that he "did not pay a whole lot of attention to emails."

- individuals' rights to be free of intimidation, harassment, and unwarranted annoyance.¹¹

Virginia Tech's *Classified Employee Handbook* addresses outside employment and University property and states:

During the hours employed at Virginia Tech, employees may not engage in other employment with other state agencies or in any private business. If the individual works in those capacities outside the normal work schedule, the continuance of outside employment is contingent on whether the additional job affects the work performance of the primary position with Virginia Tech, and if so whether it is in violation of the Virginia Conflict of Interests Act. Employees must inform their supervisors or department heads if they have additional/outside employment. No Virginia Tech leased property or equipment may be used for outside employment. See Additional/Outside Employment Guidelines 4070.

The *Handbook* does not create an exception for limited, incidental, or occasional use for outside employment.¹² The Hearing Officer will not create such an exception. Grievant used her personal computer and University server to store documents relating to her outside employment.¹³ Her actions were contrary to the *Classified Employee Handbook*.

"Failure to ... otherwise comply with established written policy" is a Group II offense.¹⁴ "Unauthorized use or misuse of state property" is a Group II offense.¹⁵ Grievant's behavior rises to the level of a Group II offense. An employee receiving a Group II Written Notice may receive up to a ten workday suspension.

Virginia Tech Policy 4070 governs outside employment by University employees. Permission to work outside an employee's normal work schedule within or outside of the University may be granted by the department head in collaboration with the University's Personnel Services and/or the University Legal Counsel. Grievant's supervisor was aware of her outside employment and did not object to her activities. Although Grievant

¹¹ Grievant Exhibit 20.

¹² DHRM Policy 1.60(III)(E)(3) states, "No property belonging to or under contract to the Commonwealth may be used for outside employment activities." This policy does not establish a limited, incidental or occasional use exception.

¹³ By storing documents on the University's computer, Grievant was able to contact her CPA during the day if the CPA had question about her horse boarding business. Preparing tax and financial documents is a customary part of operating a business. Thus, Grievant used University property in furtherance of her outside employment.

¹⁴ DHRM Policy 1.60(V)(B)(2)(a).

¹⁵ DHRM Policy 1.60(V)(B)(2)(e).

did not strictly comply with the outside employment policy, she complied with the objective of the policy, namely notification to and approval by the University. Thus, her failure to comply with the strict terms of the policy is harmless error.

Telephone Calls

Virginia Tech's *Classified Employee Handbook* addresses long distance telephone calls and states:

University Telecommunications Systems are for official use. Personal use of the University long distance services is strictly prohibited and is considered to be misuse of state resources. Employees should check with their departmental administrative office about the procedures for verifying that all long distance charges were for official university business.

Virginia Tech's application of this policy differs from its written terms. Employees are permitted to make long distance telephone calls but are asked to reimburse the University for the cost of the calls. No evidence was presented suggesting Virginia Tech prohibits its employees from making personal local telephone calls such as to an employee's doctor, family members, or children's school. Accordingly, the Hearing Officer construes the University's policy to be that employees are permitted to make a reasonable number of local and long distance personal telephone calls and that the cost of long distance telephone calls must be reimbursed.

Grievant's telephone usage for personal matters is within reasonable limits. She devoted approximately 4.58 minutes per day to personal telephone calls.¹⁶ No evidence was presented suggesting Grievant was unable to complete her duties. Although the amount of time is unclear, evidence was presented suggesting Grievant worked beyond 40 hours per week when necessary.

The University contends Grievant failed to reimburse the cost of nine long distance telephone calls totaling \$2.27. Grievant's un rebutted testimony was that she had attempted to provide reimbursement but she was refused because the cost to process her payment check exceeded the cost of the telephone calls. Based on the evidence presented, the Hearing Officer finds no violation by Grievant of the University's telephone use policy and practice.

Group II vs. Group III

DHRM § 1.60(V) lists numerous examples of offenses. These examples "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 judgement of agency heads, undermines the effectiveness of agencies' activities may

¹⁶ The Hearing Officer derives number of minutes per day for personal calls from the Investigator's analysis and calculations.

be considered unacceptable and treated in a manner consistent with the provisions of this section.”

The University contends that because Grievant was a Fraud and Abuse Auditor she should be held to a higher standard of performance such that her failure to comply with policy justifies a Group III Written Notice with removal from employment. This argument fails for several reasons. First, no evidence was presented suggesting Grievant’s work performance suffered because of her personal use of University property. Second, Grievant did not hold an executive level position for which the University could conclude that it no longer trusted Grievant and that because she held an executive level position, it could no longer control Grievant’s work performance.¹⁷ Third, Grievant’s unauthorized use was not so excessive¹⁸ as to amount to a conversion of University property to her private business. Fourth, the University has presented evidence showing Grievant accessed documents on her computer but no evidence was presented showing how long she viewed or worked on those documents. Grievant improperly accessed documents eight times in 2000, eight times in 2001, and twelve times in 2002. If she accessed these documents for only a few minutes as Grievant testified, her use was not significant. The University has not presented any evidence to suggest otherwise.

When any employee engages in a Group II offense by failing to follow policy, the agency’s activities are undermined to some degree. In this case, the evidence is insufficient for the Hearing Officer to conclude that Grievant’s failure to follow policy undermines the effectiveness of the University’s activities to any degree beyond the extent effectiveness otherwise would be undermined by merely a failure to follow established written policy. The University’s assertion that Grievant was conducting an ongoing business out of her place of work is unfounded.

DECISION

For the reasons stated herein, the University’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice with ten workday suspension. The University is directed to **reinstate** Grievant to her former position or, if occupied, to an objectively similar position.¹⁹ The University is directed to provide the Grievant with **back pay** since the date of her

¹⁷ Grievant’s supervisor indicated Grievant was responsible for recommending policy. The evidence is insufficient for the Hearing Officer to conclude whether recommending policy is a significant portion of her duties. Grievant’s testimony suggested policy matters were an insignificant part of her job.

¹⁸ Grievant’s usage of University property was not so excessive as to equal a willful damaging or theft of State property which would otherwise constitute a Group III offense. See, DHRM Policy 1.60(V)(B)(3)(c) and (d).

¹⁹ After Grievant’s reinstatement, the University may wish to consider whether transferring Grievant to a comparable position within the University may enable her to work efficiently in an environment she perceives as less hostile.

removal less any interim earnings that the employee received and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2)..

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.²⁰

²⁰ 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

In the matter of
Virginia Polytechnic Institute and State University
April 13, 2004

The agency has requested an administrative review of the hearing officer's February 26, 2004, decision in Case No. 5832. The agency raises two issues regarding the hearing officer's decision: (1) the hearing officer's ruling is inconsistent with the Commonwealth's Layoff Policy and (2) the agency is seeking clarification of state policy relating to the use of state resources by state employees. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

Virginia Polytechnic Institute and State University employed the grievant as an Auditor III in the Internal Audit and Management Services Division until she was terminated. The grievant's working title was Fraud Waste and Abuse Coordinator. The University hired her in 1996 and her performance evaluations throughout her tenure were satisfactory.

As per instructions, she informed her director that she was engaged in an outside business. More specifically, she and her family operate a horse boarding business. She also occasionally leases and transports horses but not as a part of the horse boarding business. In addition, the grievant and other family members belong to and perform volunteer work for various non-profit horse associations, clubs, and organizations. When she informed her director that she was working outside the agency and owning a business, the director neither objected to nor approved the venture.

Unrelated to any disciplinary action, the employee had been laid-off, effective December 31, 2002. She collected severance pay and was receiving benefits in accordance with the provisions of the Commonwealth's policy. However, after she was laid off, the University conducted an audit on her computer files, e-mail records, and phone records and determined that she had violated the University Policy 2015, *Acceptable Use and Administration of Computer and Communications Systems*, Department of Human Resource Management Policy Number 1.60, *Standards of Conduct*, Department of Human Resource Policy Number 1.75, *Use of Internet and Electronic Communications Systems*, and certain sections of the *Employee Handbook*. In addition, based on the grievant signing statements that the phone bills were work related and that she had not used a university provided modem after she was laid off, she was

charged with falsification of records and false statements made to defraud the university. She was issued a Group III Written Notice with removal.

The grievant filed a grievance in which she stated, “The conclusions cited as justification for disciplinary action are erroneous and not supported by fact.” In a decision dated February 26, 2004, the hearing officer reduced the Group III Written Notice with removal to a Group II Written Notice with reinstatement “to her former position, or if occupied, to an objectively similar position.” He also directed the University “...to provide the Grievant with back pay since the date of her removal less any interim earnings that the employee received and credit for annual and sick leave that the employee did not otherwise accrue.”

The relevant policy, the Department of Human Resource Management’s Policy No.1.60, Standards of Conduct, 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, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted.

In addition, DHRM Policy Number 1.75, Use of Internet and Electronic Communication Systems, establishes a policy for the use of the Internet and the state’s electronic communication systems for state agencies and their employees. Under this policy, state employees are entitled to access the Internet and use email to assist in the performance of their jobs. Personal use of the Internet and email can be appropriate under certain circumstances.

Personal use means that it is not job-related. In general, incidental and occasional personal use of the Commonwealth’s Internet access or electronic communications system 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.

Concerning agency specific policies, Virginia Tech Policy Number 2015 governs the use and administration of the Virginia Tech computer and communications facilities. That policy states the following:

University communication and computing resources are used to support the educational, research, and public service missions of the institution. Activities involving these resources must be in accord with the University honor codes, Employee Handbook, student handbooks, and relevant local, state, federal, and

international laws and regulations.

Finally, the Employee Handbook states:

During the hours employed at Virginia Tech, employees may not engage in other employment with other state agencies or in any private business. If the individual works in those capacities outside the normal work schedule, the continuance of outside employment is contingent on whether the additional job affects the work performance of the primary position with Virginia Tech, and if so whether it is in violation of the Virginia Conflict of Interests Act. Employees must inform their supervisors or department heads if they have additional/outside employment. No Virginia Tech leased property or equipment may be used for outside employment. See Additional/Outside Employment Guidelines 4070.

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 the case where there is an allegation of a policy violation, the hearing officer reviews the facts to determine whether the personnel management action constitutes a policy violation. If a policy violation is found, the hearing officer directs that management officials take corrective action. Corrective action may be inclusive of a number of actions, ranging from redoing the personnel action starting at the point where the error was introduced to adjusting salaries. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This 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.

Concerning the grievant violating DHRM Policy Number 1.75, the hearing officer determined that the evidence supported that the grievant used the Internet and email for incidental and occasional use. The hearing officer stated that Policy 1.75 does not distinguish between personal use in pursuing a hobby and personal use in pursuing a personal business. Because the use of the Internet and email is not related to State business, it is personal use under DHRM Policy Number 1.75. In any event, the grievant stored data of a personal nature and for her personal use on her computer and on the University's server. The Employee Handbook makes no exception for use of leased property or equipment that is related to outside employment.

The hearing officer stated that in accordance with DHRM Policy 1.60(V)(B)(2)(a), "Failure to... otherwise comply with established written policy" is a Group II offense. "Unauthorized use or misuse of state property" is a Group II offense. It is the hearing

officer's contention that the grievant's behavior is consistent with a Group II offense and may carry up to a ten workday suspension.

The hearing officer further contended that Virginia Tech Policy 4070 governs outside employment by University employees. Permission to work outside may be granted by the department head in collaboration with the University's Personnel Services and/or the University's Legal Counsel. He stated that while the grievant did not comply strictly with the outside employment policy, she complied with the objective of the policy, namely notification and approval by the University. Thus, her actions in this instance did not warrant any disciplinary action.

Finally, the agency alleges that the grievant used the telephone for personal use and did not reimburse the University for its use. The hearing officer determined that the use of the telephone was in line with what was being enforced by the University. In addition, the evidence supports that when the grievant attempted to repay the University for the phone calls she was told the small amount for reimbursement was more trouble than it was worth.

After weighing all the evidence, the hearing officer directed that the Group III Written Notice with removal be reduced to a Group II Written Notice with a ten workday suspension. In addition, he directed that the University reinstate the grievant to her former position or, if occupied, to an objectively similar position. He also directed that the University provide the grievant with back pay since the date of her removal less any interim earnings that the employee received and credit for annual and sick leave that the employee did not receive.

While this Agency concurs with the level of discipline as determined by the hearing officer, we do not agree that the grievant should be reinstated to her position. The grievant was on LWOP-Layoff, effective December 31, 2002, with benefits and recall rights effective until December 31, 2003. The disciplinary action by the University terminated those rights, effective July 21, 2003. Because the hearing officer reduced the discipline to a level which would have supported only a suspension and the grievant was on LWOP-Layoff, it would have been proper to restore her only to her pre-disciplinary status of LWOP-Layoff, as it was prior to July 21, 2003, and to restore all other benefits associated with LWOP-Layoff. Therefore, by copy of this letter, we are directing that the hearing officer revise his decision to reflect this Agency's position. The new LWOP-Layoff period begin date should be based on the date the hearing officer releases the revised decision and the end date should be based on the exact amount of time she lost as a result of the termination.

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

Ernest G. Spratley
Manager, Employment
Equity Services



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

REVISED DECISION OF HEARING OFFICER

In re:

Case Number: 5832-R

Hearing Date:	February 18, 2004
Decision Issued:	February 26, 2004
Revised Decision:	April 26, 2004

PROCEDURAL HISTORY

On July 21, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for using university resources to support her business operations. On July 25, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 28, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.²¹ On February 18, 2004, a hearing was held at the Agency's regional office.

On April 13, 2004, the DHRM Director issued a Policy Ruling of the Department of Human Resource Management making additional findings of fact and directing the Hearing Officer to issue a revised hearing decision.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
University's Counsel

²¹ This appeal had been assigned to another Hearing Officer and was then assigned to this Hearing Officer.

Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for using University resources to support her personal business operations.

BURDEN OF PROOF

The burden of proof is on the University 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:

Virginia Tech employed Grievant as a Fraud Waste and Abuse Coordinator in the Internal Audit and Management Services division until her removal on July 21, 2003.²² She began working for the University in 1996. Her work evaluations were satisfactory and she did not receive any disciplinary action prior to the Written Notice subject to this hearing.

Grievant had a flexible work schedule. She worked closer to “normal” work hours during the winter months but left “early” on several days during the summer.

Grievant is the owner of a Corporation engaged in the business of boarding horses.²³ Clients of the Corporation leave their horses to be boarded, fed, exercised, and otherwise cared for at Grievant’s farm. Grievant is involved in providing those services on a daily basis. Grievant also occasionally leased and transported horses but not as part of her horse boarding business. Although not part of the horse boarding business, these activities constituted engaging in business as a proprietorship.

²² Grievant’s Employee Work Profile was not submitted as evidence. Grievant’s duties consisted of performing audits at the direction of her supervisor.

²³ The Corporation is an “S” Corporation and Grievant owns 100% of the stock.

Grievant informed the Internal Audit Director of her company's horse boarding business. Although he did not formally sanction her activities, the Internal Audit Director did not object to her having a separate business. The Hearing Officer finds that Grievant had authorization to engage in outside employment.

In addition to providing services on behalf of her Corporation, Grievant is a horse enthusiast. She owns, rides, and shows her own horses. She and members of her family belong to and perform volunteer work for various non-profit horse associations, clubs, and organizations.²⁴

Tax forms for the Corporation were prepared by a CPA. Grievant kept certain financial records on her computer at work in order to answer questions of the CPA. The CPA did not work outside of normal work hours and Grievant could not answer his questions at night or on the weekends. Grievant prepared her own personal tax returns after obtaining a Schedule K for the Corporation from the CPA. She did not prepare her own tax returns at work.

In December 2002, the contents of Grievant's personal computer were copied onto a server. The University selected an Investigator to review the contents of those records. The Investigator formerly worked in the University's audit department.

Grievant maintained several documents on her computer that were not directly related to her duties for the University. Many of these documents related to Grievant's horse boarding business or her activities as a horse enthusiast. The Investigator identified 32 non-work related documents. He called these "exceptions" and listed a name for each document and showed the date and time Grievant last saved each document as follows:

<u>Ref</u>	<u>Document Name</u>	<u>Date</u>	<u>Time</u>
1	Farm Rental Schedule	3/5/2001	11:11 AM
2	Farm Income	11/20/2000	8:32 AM
3	Farm Rental	11/20/2000	8:32 AM
4	Farm Rental	11/20/2000	8:31 AM
5	Roughed Expenditures	3/5/2001	9:37 AM
6	Balance Sheet	11/7/2000	12:30 PM
7	Farm Expenses	2/23/2000	11:23 AM
8	Farm Capital	9/11/2000	7:40 PM
9	Income Statement	1/17/2000	12:32 PM
10	[LS] ²⁵	1/17/2000	9:06 AM
11	Balance Sheet	2/4/2002	1:28 PM
12	Farm Income	1/22/2001	2:57 PM

²⁴ One of those organizations is Foxtails Pony Club.

²⁵ "LS" is the first and last initial of Grievant's Corporation.

13	[LS]	1/22/2001	2:57 PM
14	[LS]	1/22/2001	9:17 PM
15	Rental Depreciation	1/22/2001	2:57 PM
16	Balance Sheet	2/7/2002	1:10 PM
17	Income Statement	2/7/2002	12:55 PM
18	[LS]	2/4/2002	1:40 PM
19	[LS]	2/7/2002	1:11 PM
20	Rental Depreciation	2/7/2002	1:46 PM
21	Rental Expenses	3/5/2001	10:56 AM
22	Balance Sheet	2/7/2002	1:10 PM
23	Letters to Boarders	2/12/2002	6:32 PM
24	Flyer	8/23/2002	1:02 PM
25	Horse for Lease	11/27/2001	6:22 PM
26	Proposal 1	9/2/2002	8:19 PM
27	Proposal 2	9/2/2002	7:50 PM
28	Proposal 3	9/2/2002	8:08 AM
29	Rowde Points	11/5/2002	10:02 PM
30	Show Schedule	10/2/2002	3:46 PM
31	Foxtails Pony Club	10/16/02	9:30 PM
32	Minutes for Foxtales	10/16/02	9:53 PM

After reviewing these 32 documents, the Hearing Officer finds that documents numbered 1 through 24 and 26 through 28 relate to Grievant's operation of her company's horse boarding business. Item 25 relates to Grievant engaging in the business of leasing a horse she owned. Her horse boarding company was not involved in that lease. Documents 29 through 32 reflect Grievant's activities as a horse enthusiast and do not relate to her outside employment.

Although evidence was presented showing the dates and times Grievant accessed these documents, no evidence was presented showing how long Grievant viewed or worked on the documents. No evidence was presented showing the number of times Grievant accessed a particular document prior to its last save date.

The investigator examined the list of favorite web sites on Grievant's internet browser. He noted she had listed links to web sites on how to write a business plan and how to plan a business with care.

Grievant had a computer at her home that she used for personal activities including her horse boarding business. Virginia Tech served as her Internet Service Provider. She paid Virginia Tech \$9.90 per month for this service. When someone sent Grievant an email addressed to the Virginia Tech server domain, the email would appear both on her work personal computer and on her home computer.²⁶ If she sent an email from her home or from her office, the sender would see an address containing

²⁶ Grievant sought this arrangement so that she could work at home when necessary.

the Virginia Tech domain extension "vt.edu". Grievant believed that the service she was paying for included using the email extension.²⁷

The Investigator concluded that for the period July 25, 2002 to December 6, 2002, Grievant made 320 personal calls during work hours over 131 days for a total of 10 hours. These calls included time when Grievant dialed a number but no one answered. Several of these calls were to Grievant's home, to a credit union, a public school, and other organizations. Since the nature of the telephone discussion is not known, it is unclear which calls related to Grievant's personal affairs and which calls related to her horse boarding business.

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).²⁸ 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).

Internet and Email

DHRM Policy 1.75. *Use of Internet and Electronic Communication Systems*, establishes a policy for the use of the Internet and the State's electronic communication systems for State agencies and their employees. Under this policy, State employees are entitled to access the Internet and use email to assist in the performance of their jobs. Personal use of the Internet and email can be appropriate under certain circumstances:

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;

²⁷ Grievant's belief was mistaken. An email service, however, was available to Grievant at a higher monthly cost.

²⁸ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

- 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.)

DHRM Policy 1.75 does not distinguish between personal use for an employee pursuing a hobby and personal use for an employee pursuing a private business activity. In either case, the use is not related to the employee's State work and is personal use under DHRM Policy 1.75. Thus, any use of the internet and email that is not related to State business is personal business and is subject to the test of being incidental and occasional use.

After reviewing Grievant's emails from March 8, 2000 to November 18, 2002, the Hearing Officer finds that Grievant's personal use of email was incidental and occasional and, thus, not contrary to DHRM Policy 1.75. No evidence was presented suggesting Grievant gave out her email address and told people to send her email.²⁹ Grievant cannot control whether an individual sends her an email and, thus, merely receiving an email of a personal nature without responding does not represent a violation of policy. Grievant sent a number of emails outside of normal work hours. Given her belief that her work email address was also her personal email address, her actions were not an intentional violation of policy. More importantly, no evidence was presented suggesting Grievant's productivity or work performance was affected based on the number or content of her emails.³⁰

Use of Computer and Communications Facilities

Virginia Tech Policy 2015 governs the use and administration of the Virginia Tech computer and communication facilities. This policy applies to any individual using or administering Virginia Tech computer and/or communication facilities. This policy provides:

University communication and computing resources are used to support the educational, research, and public service missions of the institution. Activities involving these resources must be in accord with the University honor codes, Employee Handbook, student handbooks, and relevant local, state, federal, and international laws and regulations.

For use and administration to be acceptable, it must demonstrate respect of:

²⁹ Grievant's email address is not difficult to discern within the University community.

³⁰ This conclusion was confirmed by the Investigator who testified that Grievant's emails were "incidental", not the "meat of the problem", and that he "did not pay a whole lot of attention to emails."

- the rights of others to privacy;
- intellectual-property rights (e.g., as reflected in licenses and copyrights);
- ownership of data;
- system mechanisms designed to limit access; and
- individuals' rights to be free of intimidation, harassment, and unwarranted annoyance.³¹

Virginia Tech's *Classified Employee Handbook* addresses outside employment and University property and states:

During the hours employed at Virginia Tech, employees may not engage in other employment with other state agencies or in any private business. If the individual works in those capacities outside the normal work schedule, the continuance of outside employment is contingent on whether the additional job affects the work performance of the primary position with Virginia Tech, and if so whether it is in violation of the Virginia Conflict of Interests Act. Employees must inform their supervisors or department heads if they have additional/outside employment. No Virginia Tech leased property or equipment may be used for outside employment. See Additional/Outside Employment Guidelines 4070.

The *Handbook* does not create an exception for limited, incidental, or occasional use for outside employment.³² The Hearing Officer will not create such an exception. Grievant used her personal computer and University server to store documents relating to her outside employment.³³ Her actions were contrary to the *Classified Employee Handbook*.

"Failure to ... otherwise comply with established written policy" is a Group II offense.³⁴ "Unauthorized use or misuse of state property" is a Group II offense.³⁵ Grievant's behavior rises to the level of a Group II offense. An employee receiving a Group II Written Notice may receive up to a ten workday suspension.

³¹ Grievant Exhibit 20.

³² DHRM Policy 1.60(III)(E)(3) states, "No property belonging to or under contract to the Commonwealth may be used for outside employment activities." This policy does not establish a limited, incidental or occasional use exception.

³³ By storing documents on the University's computer, Grievant was able to contact her CPA during the day if the CPA had question about her horse boarding business. Preparing tax and financial documents is a customary part of operating a business. Thus, Grievant used University property in furtherance of her outside employment.

³⁴ DHRM Policy 1.60(V)(B)(2)(a).

³⁵ DHRM Policy 1.60(V)(B)(2)(e).

Virginia Tech Policy 4070 governs outside employment by University employees. Permission to work outside an employee's normal work schedule within or outside of the University may be granted by the department head in collaboration with the University's Personnel Services and/or the University Legal Counsel. Grievant's supervisor was aware of her outside employment and did not object to her activities. Although Grievant did not strictly comply with the outside employment policy, she complied with the objective of the policy, namely notification to and approval by the University. Thus, her failure to comply with the strict terms of the policy is harmless error.

Telephone Calls

Virginia Tech's *Classified Employee Handbook* addresses long distance telephone calls and states:

University Telecommunications Systems are for official use. Personal use of the University long distance services is strictly prohibited and is considered to be misuse of state resources. Employees should check with their departmental administrative office about the procedures for verifying that all long distance charges were for official university business.

Virginia Tech's application of this policy differs from its written terms. Employees are permitted to make long distance telephone calls but are asked to reimburse the University for the cost of the calls. No evidence was presented suggesting Virginia Tech prohibits its employees from making personal local telephone calls such as to an employee's doctor, family members, or children's school. Accordingly, the Hearing Officer construes the University's policy to be that employees are permitted to make a reasonable number of local and long distance personal telephone calls and that the cost of long distance telephone calls must be reimbursed.

Grievant's telephone usage for personal matters is within reasonable limits. She devoted approximately 4.58 minutes per day to personal telephone calls.³⁶ No evidence was presented suggesting Grievant was unable to complete her duties. Although the amount of time is unclear, evidence was presented suggesting Grievant worked beyond 40 hours per week when necessary.

The University contends Grievant failed to reimburse the cost of nine long distance telephone calls totaling \$2.27. Grievant's un rebutted testimony was that she had attempted to provide reimbursement but she was refused because the cost to process her payment check exceeded the cost of the telephone calls. Based on the evidence presented, the Hearing Officer finds no violation by Grievant of the University's telephone use policy and practice.

³⁶ The Hearing Officer derives number of minutes per day for personal calls from the Investigator's analysis and calculations.

Group II vs. Group III

DHRM § 1.60(V) lists numerous examples of offenses. These examples “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 judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

The University contends that because Grievant was a Fraud and Abuse Auditor she should be held to a higher standard of performance such that her failure to comply with policy justifies a Group III Written Notice with removal from employment. This argument fails for several reasons. First, no evidence was presented suggesting Grievant's work performance suffered because of her personal use of University property. Second, Grievant did not hold an executive level position for which the University could conclude that it no longer trusted Grievant and that because she held an executive level position, it could no longer control Grievant's work performance.³⁷ Third, Grievant's unauthorized use was not so excessive³⁸ as to amount to a conversion of University property to her private business. Fourth, the University has presented evidence showing Grievant accessed documents on her computer but no evidence was presented showing how long she viewed or worked on those documents. Grievant improperly accessed documents eight times in 2000, eight times in 2001, and twelve times in 2002. If she accessed these documents for only a few minutes as Grievant testified, her use was not significant. The University has not presented any evidence to suggest otherwise.

When any employee engages in a Group II offense by failing to follow policy, the agency's activities are undermined to some degree. In this case, the evidence is insufficient for the Hearing Officer to conclude that Grievant's failure to follow policy undermines the effectiveness of the University's activities to any degree beyond the extent effectiveness otherwise would be undermined by merely a failure to follow established written policy. The University's assertion that Grievant was conducting an ongoing business out of her place of work is unfounded.

DHRM Ruling

The parties did not address Grievant's employment status at the hearing. The only evidence presented regarding Grievant's employment status was Grievant Exhibit

³⁷ Grievant's supervisor indicated Grievant was responsible for recommending policy. The evidence is insufficient for the Hearing Officer to conclude whether recommending policy is a significant portion of her duties. Grievant's testimony suggested policy matters were an insignificant part of her job.

³⁸ Grievant's usage of University property was not so excessive as to equal a willful damaging or theft of State property which would otherwise constitute a Group III offense. See, DHRM Policy 1.60(V)(B)(3)(c) and (d).

24 which showed the Division of Hearings, hearing decision 5770. Grievant previously appealed her layoff and the Hearing Officer in that decision held:

The agency is directed to reevaluate grievant's position classification based on the duties she was performing during the 2002 performance evaluation cycle and, to reapply the layoff policy according to the guidelines enunciated in the policy and to include in the potential pool for layoff all employees who were performing substantially the same work as grievant.

No evidence was presented regarding whether the University complied with that instruction and, if so, the outcome.

As part of the University's appeal to DHRM, the DHRM Director found that Grievant was on LWOP-Layoff effective December 31, 2002 with benefits and recall rights effective until December 31, 2003. The DHRM Director stated:

The disciplinary action by the University terminated those rights, effective July 21, 2003. Because the hearing officer reduced the discipline to a level which would have supported only a suspension and the grievant was on LWOP-Layoff, it would have been proper to restore all other benefits associated with LWOP-Layoff. Therefore, by copy of this letter, we are directing that the hearing officer revised his decision to reflect this Agency's position. The new LWOP-Layoff period begin date should be based on the date the hearing officer releases the revised decision and the end date should be based on the exact amount of time she lost as a result of the termination.

The Hearing Officer is obligated to comply with the DHRM direction even though the Hearing Officer has not heard complete evidence regarding Grievant's status.³⁹

Neither party addressed the issue of whether the University has jurisdiction to discipline an employee in LWOP-Layoff status. Accordingly, the Hearing Officer will not address a jurisdiction issue not raised by the parties prior to the appointment of a Hearing Officer.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II

³⁹ The Hearing Officer will also disregard section VI(B)(3) of the *Rules for Conducting Grievance Hearings* which states: "if the hearing officer rescinds or reduces a Written Notice and the employee's remaining accumulated active Written Notices are insufficient to sustain a termination, the employee must be reinstated."

Written Notice.⁴⁰ The University is directed that the new LWOP-Layoff period begin date should be based on the date the hearing officer releases the revised decision and the end date should be based on the exact amount of time she lost as a result of the termination.

APPEAL RIGHTS

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.

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴⁰ Since Grievant is on LWOP-Layoff status, a suspension is no longer appropriate.