

Issue: Group II Written Notice with suspension (failure to follow established written policy); Hearing Date: 04/22/04; Decision Issued: 04/23/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 655



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 655

Hearing Date: April 22, 2004
Decision Issued: April 23, 2004

APPEARANCES

Grievant
Business Manager
Representative for Agency
One witness for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to comply with established written policy.¹ Grievant was suspended for ten days as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) has employed grievant as an Engineer Technician for eight years.

The Commonwealth’s policy governing use of the Internet permits personal use of state-owned computers within specified parameters. Personal use is defined as use that is not job-related. In general, incidental and occasional personal use is permitted if it does not interfere with the user’s productivity or work performance, or adversely affect efficient operation of the computer system.³ The agency has had in place for some time a security agreement which provides, in pertinent part, “All computer resources and equipment are the property of VDOT and are to be used for official business only, and are not for personal use.”⁴

In 2002, the agency conducted an audit of all computer usage and determined that a significant number of employees were spending inordinate amounts of time in personal use of their computers and viewing prohibited sites. A number of employees were removed from employment and a larger number were disciplined and suspended from work. At that time, the agency had in place its own policy that mandated “zero tolerance” for personal use of state-owned computers. The agency’s actions at that time received widespread publicity in both the print and broadcast media. All agency employees were acutely aware of the discipline issued to abusers. As a consequence of the publicity, the agency subsequently determined that its zero tolerance policy was too restrictive and unrealistic, and rescinded the policy. The agency did not promulgate a new policy, and thereby defaulted to DHRM policy 1.75.

Since 2002, the agency has stressed to employees that, while incidental and occasional personal Internet usage would be allowed, the agency would continue to periodically review usage and discipline those who were excessive users. Grievant attended multiple meetings in which the department head strongly suggested to employees that they err on the side of caution by not accessing the Internet at all, except for work-related reasons. When an employee signs on to his computer, he must affirmatively click on a screen to signify acknowledgement of the agency policy language on that screen.⁵

¹ Exhibit 2. Written Notice, issued January 30, 2004.

² Exhibit 1. Grievance Form A, filed February 27, 2004.

³ Exhibit 5. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.

⁴ Exhibit 6. *VDOT Information Security Agreement*, signed by grievant November 14, 2001.

⁵ Exhibit 4. VDOT Computer Disclaimer.

In October 2003, the agency's Internal Audit unit conducted another review of the level of employee personal use of the Internet. During the week targeted for review (July 21-27, 2003), the review identified 67 users whose volume of Internet use suggested abuse. The audit deducted from the total Internet use time, all time that could reasonably be identified as work-related and, usage during breaks and lunch. The audit also granted an additional allowance to users who recorded less than 30 minutes of personal Internet usage time after the above mentioned break/lunch times were deducted from their daily total.⁶ Thus one could spend up to 1 hour and 44 minutes⁷ each full day in personal use of the Internet and still remain below the screening threshold. Anyone whose personal Internet use was 1 hour and 45 minutes or more was considered to be engaging in excessive personal use.

After applying the guidelines to the initially screened group of 67 users, Internal Audit concluded that 44 users had an excessive amount of personal Internet usage time. Those found to be accessing sexually explicit web sites were removed from employment. Those found to have excessive personal use were disciplined with a Group II Written Notice and suspended without pay for ten days.⁸

Grievant's normal work hours are from 9:00 a.m. to 5:45 p.m. The audit identified grievant for potential excessive personal Internet usage during the sample period. On the day at issue herein, grievant utilized his computer only during the afternoon from 2:09 p.m. to 5:51 p.m. During that period, he spent 54 minutes on the Internet in personal usage viewing real estate sites and movie sites.⁹ Grievant works part-time in the real estate business. The auditors reduced the 54 minutes by 15 minutes to account for grievant's afternoon break which left 39 minutes of excess personal usage. Grievant's second-level supervisor (section manager) reviewed the audit information and checked the web sites involved; none of the sites were related to grievant's work for the agency. Subsequently, the section manager issued the Group II Written Notice and suspension to grievant.

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

⁶ Exhibit 11. Background memorandum from Internal Audit unit.

⁷ Time is computed as: 45 mins. lunch + 30 mins. for two 15-min. breaks + 29 mins. additional allowance = 1 hour, 44 minutes.

⁸ Exhibit 10. *2004 Non-Work Related Internet Abuse* summary of discipline. Some of those cited for excessive usage were removed from employment because of accumulation of previous disciplinary actions, or because they were wage employees not subject to the Standards of Conduct. Other employees resigned in lieu of termination, had already left the agency, or were contract employees that the agency released from their assignments.

⁹ Exhibit 7. Internet Follow-up Review 2003.

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. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁰

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, 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. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to comply with established written policy is a Group II offense.¹¹

Because the agency has defaulted to the Commonwealth's Internet policy, this case must be adjudicated based on the language in that policy. The

¹⁰ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

¹¹ Exhibit 3. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

operative language is “incidental and occasional” personal use. The policy does not offer a definition for these terms and, therefore, one must defer to the standard dictionary definitions of the terms. “Incidental” is defined as “likely to ensue as a chance or minor consequence.”¹² “Occasional” means “occurring at irregular or infrequent intervals.”¹³ “Infrequent” is defined as “seldom occurring,” and “occurring at wide intervals in time.”¹⁴ Thus, the policy language suggests that personal internet use should not be a regular or frequent occurrence. It should seldom occur, and when it does, it should be at wide intervals in time. One may reasonably conclude from this language that personal Internet use should not be a routine daily occurrence. However, even if one uses the Internet daily, the usage should occur only sporadically and at wide intervals.

Grievant used the Internet for personal purposes on July 24, 2003 on six separate occasions during one afternoon at work. The personal uses ranged from two minutes to 22 minutes each, and totaled 54 minutes.¹⁵ All but one of the uses involved real estate web sites – the part-time business in which grievant is involved. Grievant’s personal usage time totaled 24.3 percent of the time he was being paid to work on state business. By any reasonable interpretation, grievant’s personal usage of the Internet absorbed a significant portion of his work period. It cannot be concluded that this amount of usage was either incidental or occasional. Rather, it was pervasive and *frequent*. Accordingly, based solely on policy language, grievant’s personal usage was impermissible because it was significantly more than either incidental or occasional.

The agency has demonstrated that the criteria for screening employee personal usage of the Internet was applied uniformly for all employees. It has also shown that its screening threshold of one hour and 45 minutes per day is exceedingly generous, especially when weighed against the “incidental and occasional” language of the state policy. The agency also took pains to assure that discipline was consistently applied to all Internet abusers by issuing a memorandum with disciplinary guidelines.¹⁶ Therefore, grievant has not shown that the agency misapplied policy. Moreover, the agency’s actions were not arbitrary because it applied its guidelines uniformly and fairly.

Grievant knew of the policy, was aware of the mass disciplinary actions two years ago, understood the admonition of department management to avoid *any* personal use of the Internet, but he nonetheless exceeded the permissible amount of personal Internet usage. Grievant argues that the “incidental and occasional” language is insufficiently specific to be a good guideline. However, grievant was well aware that the department head had admonished him (and all

¹² *Merriam-Webster’s Collegiate Dictionary*, Tenth Edition.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Grievant argues that six minutes of the personal use occurred after his official work hours ended at 5:45 p.m. This argument is not persuasive because deducting six minutes would still leave 33 minutes of use above the allowable limit.

¹⁶ Exhibit 8. Memorandum to Commissioner, District/Division Administrators from Human Resources Acting Administrator, January 20, 2004.

employees) that, because of the lack of a specific guideline, employees should just not use the Internet for personal use at all. Grievant chose to ignore this suggestion and pushed the envelope too far by becoming an excessive user. Out of approximately 10,000 agency employees, grievant was making more personal use of the Internet than 99.6 percent of his coworkers.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and ten-day suspension issued on January 30, 2004 for failure to comply with established written policy are hereby UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.¹⁷ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁸

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁷ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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