Issues: Group II Written Notice (unauthorized use of the Internet) and Group II Written Notice with termination due to accumulation (failure to report to work without proper notice to supervisor); Hearing Date: 10/20/04; Decision Issued: 10/26/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7880/7881

COMMONWEALTH *of* VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 7880/7881

Hearing Date: October 20, 2004
Decision Issued: October 26, 2004

PROCEDURAL ISSUES

Grievant received two disciplinary actions on May 10, 2004 and subsequently filed two separate grievance forms. When the agency qualified the grievances for hearing, it requested that the two grievances be consolidated. The Department of Employment Dispute Resolution (EDR) agreed and the two cases (Case Numbers 7880 and 7881) were heard during one hearing. This decision addresses both grievances.

Grievant requested as part of his relief that he be awarded attorney fees and costs. A hearing officer does not have authority to award damages or attorneys' fees.[1]

[1] § 5.9(b)1. EDR *Grievance Procedure Manual*, effective July 1, 2001. [NOTE: Effective for grievances filed on or after July 1, 2004, the statute was amended to permit the award of attorneys' fees in specified circumstances; however, the grievances in these cases were filed prior to the effective date of the statutory change.]

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Employee Relations Consultant
Representative for Agency
Two witnesses 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 timely grievances from two Group II Written Notices issued for: 1) unauthorized use of the Internet to access proscribed websites and, 2) failure to report to work as scheduled without proper notice to supervisor.[2] Grievant was removed from employment effective May 11, 2004 as part of the disciplinary action due to an accumulation of active disciplinary actions. The first-step respondent offered to reduce the second Written Notice (failure to report to work) from Group II to Group I conditional upon grievant concluding his grievance. Grievant rejected the offer and the grievance proceeded to the second step. The second-step respondent unilaterally reduced the second disciplinary action to a Group I Written Notice. Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances for a hearing.[3]

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant for four years. He was hired into one department where he worked for about three years. In the summer of 2003, grievant applied for, and was hired as, a Program Manager in a different department. Grievant has significant experience in computers and is a Microsoft Certified Systems Engineer. He has one prior active disciplinary action – a Group II Written Notice for failure to follow supervisory instructions, failure to perform assigned work, and unprofessional and disruptive behavior.[4] That disciplinary action was not grieved and has, therefore, become final.

[2] Agency Exhibit 2. Two Group II Written Notices, issued May 10, 2004.
[3] Agency Exhibits 3 & 4. Two Grievance Forms A, filed June 8, 2004.
[4] Agency Exhibit 5. Group II Written Notice, issued February 13, 2004.

Grievant received, and agreed to abide by, the Department of Human Resource Management (DHRM) policy on Internet usage.[5] The policy prohibits personal use of agency computers if the use violates any supplemental policy adopted by the agency.[6] Agency computers, when first logged on, display the agency's Computer Usage Policy.[7] The policy states that authorized users are permitted access to the Internet to assist in the performance of their jobs. It warns users that they are "subject to having all activities monitored and recorded without notice and without user knowledge or permission." The agency's Information Technology Helpdesk sent a message to all VDOT employees in September 2003 stating, "Anyone connected to the VDOT network may not access personal email accounts. Examples of personal web-based email systems are Hotmail, Yahoo mail and AOL mail."[8]

Over the years, the Assistant Division Administrator (ADA) of the division in which grievant was employed had formulated a set of rules and expectations for his subordinates.[9] As a direct result of the Helpdesk directive quoted above, the ADA revised his rules and expectations to include portions of the directive. He also stated, "I would prefer that you not use the Internet for any personal use while at the office."[10] He gave a copy of the revised rules to grievant and all employees during a September 2003 staff meeting and emailed the rules to each employee on September 16, 2003. By the end of 2003, the ADA began to notice that grievant was often on the Internet. He directed grievant's immediate supervisor to begin monitoring grievant's Internet usage. The supervisor contacted the agency's Audit Division and asked for assistance from the Internal Information Technology (IT) Manager. In late February 2004, the IT Manager installed a surveillance software program on grievant's computer.[11] The software captures periodic images of what is being viewed on the computer and retains them for subsequent analysis.

The analysis of grievant's Internet usage revealed that grievant often accessed a personal web-based email system (similar to AOL mail, Yahoo mail or Hotmail), and the email system of a university where grievant had taught classes in the past. The images reveal that grievant was reading email on the two email systems and, in some cases, responding to the sender of the incoming message.

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[5] Agency Exhibit 8. *Certificate of Receipt, Use of the Internet and Electronic Communication Systems,* November 6, 2002.
[6] Agency Exhibit 15. DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[7] Agency Exhibit 9. VDOT Computer Usage Policy computer screen.
[8] Agency Exhibit 10. Email from Helpdesk to all VDOT employees, September 9, 2003.
[9] Agency Exhibit 14. [ADA's] Rules and Expectations.
[10] Agency Exhibit 14. *Ibid.*
[11] Agency Exhibit 18. Description of proprietary surveillance software program.

On April 26, 2004, grievant woke up with his eyes crusted over and could not open them, his throat was sore, and he could not talk. He asked his wife to call his supervisor when she got to work to report that he would be off sick that day. Grievant's wife went to work, became extremely busy, and forgot to call grievant's supervisor.

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. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[12]

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. 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

[12] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

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 that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions, failure to comply with established written policy, and failure to report to work as scheduled without proper notice to supervisor are Group II offenses.[13]

Accessing web-based personal email

The agency has shown, and grievant has admitted, that grievant regularly accessed two different email systems – one a personal web-based system and the other a university email system. Grievant's access violated an agency-wide directive and a supervisor's specific instruction. Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant committed a Group II offense by failing to follow a supervisor's instruction and by failing to comply with applicable established written policy.

Grievant suggests that the agency's computer firewall should prevent viruses, worms and other destructive programs from getting into the agency's computer system. In fact, a firewall is a program or device that filters information coming from the Internet; information flagged by the filter is not allowed through. However, some of the methods used to infiltrate computer systems are hard, if not impossible, to filter using a firewall.[14] In most cases, a user cannot determine whether an incoming email contains a virus, worm or other destructive program.

Grievant argues that he only views emails from persons he knows and therefore they must be safe. However, if the sender of the email is unaware that his own email is infected with a virus or worm, the email coming to grievant may be infected without the knowledge of either the sender or grievant. Therefore, grievant's argument that having knowledge of the sender makes email safe is invalid. The IT Audit Manager credibly testified that even previewing email can expose a computer to viruses and worms.[15]

Grievant correctly notes that the ADA's rules state that he *prefers* that employees not use the Internet for personal use. Accordingly, the ADA's preference does not preclude an employee from making *some* personal use of the Internet (as long as that usage complies with state, agency, and supervisory rules). In this case, grievant was not disciplined for personal use of the Internet; rather, he was disciplined for violating his supervisor's rule (and the agency's rule) that employees may not access personal email accounts. Grievant argues

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[13] Agency Exhibit 16. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[14] Grievant Exhibit 5. *How Firewalls Work* by Jeff Tyson.

[15] For verification, see the following sources: www.enterprisesecurity.Symantec.com; www.forums.McAfeehelp.com; www.anabelassociates.com/virus.s (Bubbleboy and Davinia viruses); www.weblens.org/virus2; www.appsynthesis.com; and, www.antivirus.about.com (Kak virus).

that the Helpdesk instruction was not an agency rule. By his own testimony, grievant has far more computer knowledge, training, and experience than most employees. Based on that experience, grievant knew, or reasonably should have known, that the agency Helpdesk is the source to which employees go whenever they experience computer problems. He also knew that the Helpdesk email was an agency-wide instruction with which he was obligated to comply.

However, even if grievant did not understand that, he clearly understood that his own manager had issued the same rule and that he was obligated to follow such a supervisory instruction. Grievant contends that the rule stating employees "may not access personal email accounts," means that *possibly* he could access personal email. Although one can conjure up many ambiguous instructions, "you may not access," is not one of them. The instruction does not contain any ifs, ands, buts or possiblys. Grievant continues his spurious argument stating that his particular personal email was not among the examples listed by the rule's author, and therefore must be acceptable to the agency. Obviously, when one lists examples, the absence of other personal email accounts from the list does not create an exemption. The meaning of the rule is clear – employees may **not** access ANY personal email accounts, including the email accounts grievant accessed.

In a similar vein, grievant attempted to justify his conduct by claiming that if the agency firewall does not specifically block access to a site, it must be permissible to view that site. The volume of sites available through the Internet is so huge, and expanding so rapidly, that it would be impossible for a firewall to block every possible objectionable site. While a firewall can screen out a large proportion of prohibited sites, new sites are created daily. Accordingly, the agency supplements its firewall protection with additional specific written prohibitions, viz., sexually explicit sites and personal email sites. The agency expects and directs employees not to access these sites even though some of them might be accessible through the imperfect firewall. Grievant knowingly chose to ignore his supervisor's instruction – a Group II offense.

Grievant cites as evidence of alleged inconsistency in discipline a human resources memorandum issued to ensure consistency in discipline meted out as the result of a specific Internet usage investigation.[16] In the fall of 2003, the agency conducted an agency-wide investigation to identify Internet users who were viewing sexually explicit sites or who were spending excessive amounts of time "surfing the web." Because this memorandum addressed a specific investigation and two specific forms of Internet abuse, it is not directly relevant to the instant case. It is tangentially relevant because it demonstrates the seriousness of the agency's attempts to monitor and curtail Internet misuse. However, it is not relevant to an assessment of the appropriate level of grievant's discipline because grievant was disciplined for failure to follow instructions and failure to comply with policy – not for Internet abuse.

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[16] Grievant Exhibit 19. Memorandum from human resources to division/district administrators, January 20, 2004.

Failure to report to work without proper notice to supervision

On the day following his absence, grievant reported to his supervisor that he had been absent due to crusted eyes and a sore throat. He said that his wife called the doctor, who recommended Benadryl. She called grievant, he took the Benadryl and fell asleep until after 4:00 p.m. However, at the hearing, grievant testified to a much different story. Grievant claims that he woke up at 4:30 a.m., took hydrocodone for severe neck pain (resulting from an old injury) and Benedryl. After taking these two medications, he asked his wife to call his supervisor and then went back to sleep. Contrary to grievant's assertions in the April 27, 2004 email to his supervisor, grievant's wife testified that she did not call either the doctor or her husband during the day. She states that grievant was waking up when she came home at about 6:00 p.m.

There are so many inconsistencies between the two stories that it is clear that grievant was untruthful – either when he wrote to his supervisor or when he testified in the hearing. Grievant contends that he did not tell his supervisor about his neck pain because he felt that his supervisor would take adverse action against him. If grievant was legitimately ill and had to use sick leave, it is unclear why a supervisor would take adverse action because grievant had neck pain, but would not do so if grievant had a sore throat. If grievant was legitimately unable to work due to illness or injury, he was entitled to utilize sick leave regardless of the nature of the illness or injury.

The agency has shown, by a preponderance of evidence, that grievant failed to report for work as scheduled without proper notice to his supervisor. An employee is always responsible for giving proper notice to supervision. When an employee elects to ask someone else to call their supervisor, the employee is not absolved of the responsibility. Accordingly, in the instant case, grievant may not evade responsibility for giving proper notice on the basis that his spouse forgot to call in for him. It was grievant's responsibility to follow through and assure that his supervisor received proper notice. At the very least, grievant could have emailed his supervisor on April 26, 2004 to advise that he was ill and unable to work. Even though the failure to report is a Group II offense, the agency considered the fact that grievant was in a professional-level position and elected to reduce the discipline to a Group I Written Notice. In view of grievant's mendacity, any further reduction of discipline (rescission) would be unwarranted.

Summary

The Standards of Conduct provides that a second active Group II Written Notice normally results in discharge.[17] Therefore, grievant's removal from employment was occasioned, not by any particular offense, but by his accumulation of three active disciplinary actions.

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[17] Agency Exhibit 16. Section VII.D.2.b(1), DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for failing to report for work without proper notice, the Group II Written Notice for failing to follow a supervisor's instructions, and grievant's removal from employment 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.[18] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[19]

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

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David J. Latham, Esq.
Hearing Officer

[18] 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).

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