

Issue: Group II Written Notice with suspension (internet abuse); Hearing Date: 11/01/04; Decision Issued: 11/29/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 7892



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7892

Hearing Date: November 1, 2004
Decision Issued: November 29, 2004

PROCEDURAL HISTORY

On August 6, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from August 9, 2004 to August 20, 2004 for "Internet Abuse". On September 2, 2004, 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 he requested a hearing. On October 7, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to comply with policies governing internet use.

BURDEN OF PROOF

The burden of proof is on the Agency 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:

The Virginia Department of Transportation employs Grievant as a Transportation Operations Manager II at one of its facilities. No evidence of prior disciplinary action against Grievant was presented at the hearing.

When Grievant logs onto his computer, a notification screen appears stating:

Incidental and occasional non-job related use is permitted as defined by Department of Human Resource Management Policy No. 1.75 "Use of Internet and Electronic Communications Systems." Non-job related use is prohibited if it interferes with the user's productivity or work performance, or with any other employee's productivity of work performance; adversely affects the efficient operation of the computer system; violates any provision of this policy or any other policy, regulation, law or guideline as set forth by local, State or Federal law.¹

On March 5, 2004, Agency managers issued a memorandum to staff including Grievant stating:

Over the past several days, the use of the Internet has again become a point of attention within the agency due to abuse of time, policy and/or violation of State law. *** This abuse is a form of stealing.

If you have any doubt, or you feel you need to be more careful about your use of the Internet, please ask questions or make changes in your use before your actions could be identified as a pattern or show up in audit findings.

¹ Agency Exhibit 2.

I strongly encourage each of you to be extra vigilant in your use of the Internet. While “occasional and incidental” personal use is permitted according to policy, I recommend that you not attempt to “stretch” this policy. To me, a reasonable example of “occasional and incidental” use might consist of a quick look at the headlines, a check on a purchase, etc. during your normal lunch period. **I would not recommend any personal use outside of your normal lunchtime or any non-VDOT use that shortens the productive hours of your normal workday.** (Emphasis original.)²

The Agency has software that enables it to monitor the time, date, and website address each time an employee uses his computer to access a website. Agency auditors reviewed internet usage of its employees including Grievant. After excluding from consideration internet usage occurring prior to and after Grievant’s work schedule and also excluding his lunch time, the auditors concluded Grievant’s personal use of the internet exceeded what was appropriate under policy. On June 30, 2004, Grievant used the internet for 51 minutes for personal use. On July 6, 2004, Grievant used the internet for 44 minutes for personal use. On July 19, 2004, Grievant used the internet for 37 minutes for personal use.³

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).⁴ 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).

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

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:

² Agency Exhibit 2.

³ Agency Exhibit 4.

⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

- 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.)

"Failure to follow ... comply with established written policy" is a Group II offense.⁵ By using the internet for 51, 44, and 37 minutes during work hours, Grievant acted contrary to DHRM Policy 1.75. His personal use of the internet exceeded the incidental and occasional standard set by policy. Grievant's use interfered with his productivity because it distracted him from his duties.⁶ Thus, the Group II Written Notice for personal use of the internet must be upheld.

Grievant argues that the Agency failed to establish concrete guidelines regarding what constitutes internet abuse. He also states the Agency failed to issue a Notice of Improvement/Substandard Performance prior to issuing the Group II Written Notice.

The March 5, 2004 memorandum put Grievant on notice that the Agency would strictly construe DHRM Policy 1.75 and warned Grievant that he placed himself at risk of disciplinary action by using the internet outside of his lunch period. Although the Agency did not provide Grievant with notice of the specific number of minutes of personal use that could occur before disciplinary action would take place, the Agency was not obligated to do so. Accordingly, Grievant received adequate notice that his usage outside of his lunch period was subject to disciplinary action. A suspension of up to ten workdays, however, is permitted when an employee receives a Group II Written Notice.

DHRM policy does not require the Agency to issue Grievant a Notice of Improvement Needed/Substandard Performance prior to taking disciplinary action. The Agency did not act contrary to policy by failing to issue such a notice.

DECISION

⁵ DHRM § 1.60(V)(B)(2)(a).

⁶ Most of Grievant's work time is spent outside of the office and in the locality.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.⁷

⁷ 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