Issue: Group II Written Notice (abuse of State time, misuse of State equipment, failure to follow established written policy); Hearing Date: 12/16/04; Decision Issued: 12/20/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7928; **Administrative Review: HO Reconsideration Request received 12/30/04; HO Reconsideration Decision issued 01/25/05; Outcome: No newly discovered evidence or incorrect legal conclusion. No basis to change original decision. Administrative Review: EDR Ruling Request received 12/30/04; EDR Ruling issued 03/02/05 (2005-936); Outcome: HO ordered to reconsider decision. Administrative Review: DHRM Ruling Request received 12/30/04; Outcome: pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7928

Hearing Date: December 16, 2004
Decision Issued: December 20, 2004

PROCEDURAL ISSUES

More than 18 months elapsed between the filing of this grievance on May 3, 2003 and the appointment of a hearing officer on November 23, 2004. During that unusually long period, grievant made repeated requests to the agency for documentation and requested the assistance of the Department of Employment Dispute Resolution (EDR). EDR issued multiple rulings requiring the agency to produce relevant documentation.

Grievant requested as part of the relief he seeks that his disciplinary action be rescinded and that "all records of its existence be removed from Commonwealth records." While a hearing officer may rescind disciplinary actions, he does not have authority to direct an agency to destroy records relating to the matter.[1] When disciplinary actions are rescinded, the agency must remove the rescinded Written Notice from a grievant's personnel file. However,

[1] §5.9(b)5 & 7, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

agencies are permitted to retain rescinded Written Notices in a separate file in the Human Resources office.

Grievant also requested that there be no further disciplinary action attributed to this incident and that there be no retaliation. The agency may not discipline grievant a second time for the same specific incident and it may not retaliate against grievant (or any participant in the grievance process).[2]

Finally, grievant requested written documentation regarding the responsibilities of his position and, stating that grievant is employed and qualified to fill his position. A hearing officer does not have authority to provide such documentation or to direct the agency to provide such documentation. Such matters are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Three witnesses for Grievant
Assistant District Administrator
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? Was the disciplinary action retaliatory?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for abuse of state time, misuse of state equipment and failure to follow established written policy.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4] The Virginia Department of Transportation (VDOT) (Hereinafter

[2] §1.5, Ibid.
[3] Agency Exhibit 1. Written Notice, issued March 5, 2003.
[4] Agency Exhibit 2. Grievance Form A, filed May 3, 2003. [NOTE: The grievance in this case was initiated more than 30 calendar days after grievant was disciplined. §2.2, EDR *Grievance Procedure Manual*, effective July 1, 2001, provides that the 30-day requirement may be extended only if the parties agree. To be enforceable, SUCH AN AGREEMENT MUST BE IN WRITING. Neither party produced evidence of such a writing in this case. However, since the agency

referred to as "agency") has employed grievant for six years. He is an assistant facilities manager.

The Commonwealth's policy on use of the Internet addresses non-business use of state-owned computers and states, in pertinent part:

> Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:
>
> - Interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
> - Adversely affects the efficient operation of the computer system;
> - Violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulations, law or guideline as set forth by local, State or Federal law. (See Code of Virginia § 2.1-804-805; § 2.2-2827 as of October 1, 2001.)[5]

In the last quarter of 2002, an anonymous complaint was made to the Fraud Waste & Abuse Hotline alleging, among other things, that grievant and another employee abused state computers by using the Internet for personal use. The case was assigned to an Internal Audit manager in the district where grievant works. The auditor's report concluded that most allegations were unsubstantiated, however, it also concluded that grievant was using the Internet for personal use between one and two hours per day based on analysis of firewall logs and other information.[6]

At about the same time as grievant's case was being investigated, the agency's central office was conducting an agency-wide review of the Internet usage of all agency employees. The agency-wide review, although being conducted concurrently, was conducted by the central office and was entirely independent from the audit manager's investigation. The agency-wide review revealed that an extremely large number of VDOT employees were in violation of the agency's more restrictive zero tolerance policy.[7] That policy provided that the Internet could only be used for the purpose of conducting VDOT business. Because the number of employees was so large, the agency made a policy decision to discipline only those who had been viewing pornographic sites and those whose personal usage exceeded two hours per day – a total of 86

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allowed the grievance to proceed through the resolution steps and qualified it for hearing, the agency is deemed to have waived its right to deny the grievance as untimely.]

[5] Agency Exhibit 4. Department of Human Resource Management (DHRM) Policy No. 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.

[6] Agency Exhibit 7. Investigation Summary, March 25, 2003.

[7] Although not entered into evidence by either party, it is public knowledge (based on extensive newspaper accounts in late 2002) that the agency's internal policy applicable to VDOT employees prohibited any use of the Internet except for agency business reasons.

employees.[8] After issuing the disciplinary actions, the agency decided that its internal zero tolerance policy was too restrictive and reverted to the DHRM policy that allows for incidental and occasional personal use of the Internet.

When the agency issued discipline as a result of the state-wide review, it made a concerted effort to assure that the disciplinary actions meted out were consistent throughout the agency by controlling the process from central office. Of those employees with excessive usage, only those whose personal usage time was equal to or greater than two hours per day were disciplined. In almost all cases, the disciplinary action for excessive usage was a Group II Written Notice with ten days of suspension.[9]

The Internal Audit manager utilized a different methodology from that of the state-wide Internet usage review to assess grievant's Internet usage.[10] For example, the State-wide review used one-minute intervals to determine whether there was continuous activity; in grievant's case, the audit manager used two-minute intervals. This resulted in grievant being charged with a greater amount of time being charged as personal Internet use than if the one-minute interval had been used. Second, the amounts of time charged against grievant were always rounded up to the next minute rather than using the actual number of seconds of access.[11] If, for example, grievant accessed a site for 10 seconds, he was charged with a full 60 seconds. Third, in a number of instances, grievant was charged with personal Internet usage for sites that easily could have been, and probably were) business related sites (e.g., state government web sites with addresses ending in state.va.us and other sites which his manager acknowledged could have been for business use).

After the investigation was completed, district management reviewed the data and removed amounts of Internet usage time incurred outside normal business hours. Grievant often worked in the office before or after his normal hours of 8:15 a.m. to 5:00 p.m. After deducting Internet usage that occurred outside these hours, grievant was found to have averaged non-business usage of 1.09, 1.53, 1.03, and 2.01 hours for each of four one-week periods during the months of July, August, October, and November 2002, respectively.[12] As a result, management disciplined grievant with a Group II Written Notice.

APPLICABLE LAW AND OPINION

[8] Grievant was not disciplined either as a result of the 2002 agency-wide Internet review, or as a result of a second follow-up review of all VDOT employees conducted in 2003.

[9] A very small number of excessive usage cases received lower disciplinary actions based on extenuating circumstances unique to those individuals.

[10] Grievant Exhibit 26. Memorandum from Internal Audit Director to Commissioner, December 4, 2002.

[11] Grievant Exhibit 24. Examples of firewall logs used to discipline employees in state-wide reviews.

[12] Agency Exhibit 2, pp. 33 & 34. Handwritten summary of data.

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).

Va. 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, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[13]

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 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. Misuse of state property and failure to comply with established written policy are Group II offenses.[14] Abuse of state time is a Group I offense.

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[13] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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

The agency has demonstrated, and grievant has acknowledged, that he did use the Internet for personal use during the cited weeks in 2002.[15] Grievant also acknowledged that his usage may have averaged over one hour per day during that period. Accordingly, the agency has shown that grievant violated the zero tolerance policy in effect at the time of the offense.

However, grievant contends that the agency's issuance of discipline was an unfair misapplication of policy for multiple reasons. First, the methodology used to calculate grievant's personal usage was different from all others who were disciplined as a result of the agency-wide review. As discussed in the Findings of Fact, the grievant's personal Internet usage time was overestimated for three reasons: 1) the use of a different time interval, 2) times were rounded up to the next full minute rather than adding actual seconds of usage and, 3) because accesses of state agency web sites and other probable business-related sites were charged as personal time.

Second, if the grievant's access of state agency web sites is removed from the time totals, the average access time is less than two hours. For example, removal of state agency access times on November 12, 2002 results in a recalculated average time of 1.97 rather than 2.01. It is undisputed that the agency's state-wide review of Internet usage resulted in discipline being issued only to employees with average personal Internet usage in excess of two hours per day. Those employees whose personal usage was one hour and 59 minutes or less were not disciplined.

If one were to recalculate grievant's personal usage using the same methodology as was used in the state-wide review, his average times would be significantly less than he was charged with in this case. This is corroborated by the fact that grievant was not disciplined as a result of either of the two state-wide reviews conducted in 2002 and in 2003. Accordingly, it must be concluded that grievant's discipline was not consistent with that of all other similarly situated VDOT employees.[16] Except for grievant, there is no documentary evidence that any other agency employees with the same amount of personal Internet usage have been disciplined. Moreover, it is clear from the agency's emphasis on consistency of discipline in the other Internet abuse cases, that the agency wants to avoid inconsistent discipline. Therefore, issuance of discipline to grievant in this case constituted disparate treatment.

Retaliation

[15] Grievant avers, and the agency did not dispute, that since the issuance of discipline in March 2003, he no longer uses the agency's computer to access the Internet for personal use.

[16] Grievant's second-line manager asserted that, in his district, two or three other cases of alleged Internet use that have not been part of the agency-wide reviews have been treated consistently with grievant's case. However, no evidence was produced to support this assertion.

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[17] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant meets the first two prongs of the test because he has reported policy violations to higher management and, he has received the written disciplinary action at issue herein. However, in order to establish retaliation, grievant must show a nexus between his reporting of policy violations and the disciplinary action.

Grievant complains that his department has been the subject of much closer management scrutiny than other departments as the result of problems that had occurred even before grievant was hired. Management may well have had good reason to scrutinize activities in grievant's department more closely. However, grievant has not shown that the scrutiny was directed at him personally. If management is simply watching the department and everyone in it more closely, and is doing so for legitimate business reasons, that is management's prerogative. Grievant argues that the rationale for closer scrutiny is outdated because the problems in the department occurred more than six years ago. Without knowing the nature of the problem or the scrutiny, the hearing officer is unable to evaluate whether the added scrutiny has outlived its usefulness or whether valid business reasons still exist. In any case, grievant has not shown that there is any connection between management scrutiny and the disciplinary action at issue herein.

Grievant has not established any connection between the two events. Grievant must offer more than speculation that the disciplinary action was linked to his reporting of policy violations. However, even if such a nexus could be found, the agency has established a nonretaliatory reason for disciplining grievant. For the reasons stated previously, grievant has not shown that the agency's reason for issuing discipline was pretextual in nature. Therefore, grievant has not borne the burden of proof to show that the disciplinary action was retaliatory. The discipline is being rescinded, not because it was retaliatory, but because it constituted disparate treatment.

Summary

The preponderance of evidence indicates that while grievant violated policy, there were hundreds of other agency employees who committed the same offense, with the same amount of usage, during the same time period but who were not disciplined or even counseled. Normally, in a case like this, the hearing officer would recommend that the grievant be given written counseling. However, grievant testified that he has not been using the Internet for personal use for nearly two years since issuance of the disciplinary action. Given the

[17] EDR *Grievance Procedure Manual*, p.24

attention this issue has received since 2002, and grievant's own corrective action, it would be unnecessarily redundant to make such a recommendation in this case.

DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice issued on March 6, 2003 is hereby RESCINDED.

Grievant has failed to prove that the disciplinary action was retaliatory.

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. 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 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.[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.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7928

Hearing Date: December 16, 2004
Decision Issued: December 20, 2004
Reconsideration Request Received: December 30, 2004
Response to Reconsideration: January 25, 2005

PROCEDURAL ISSUE

The agency appointed a representative who represented the interest of the agency prior to and during the hearing. The agency has now submitted a request for reconsideration authored by someone other than its appointed representative. The appointed representative has not notified the hearing officer that he no longer represents the agency, and the requestor did not copy the representative on her request for reconsideration. Normally, requests for reconsideration must be filed by a party's appointed representative. In those cases where a party is represented by an attorney, the party must submit written notice to the hearing officer that it is no longer using the attorney's services if the party wants to request reconsideration without benefit of counsel. In this case, because the agency did not use an attorney, and because the requestor is presumed to have taken over representation of the case, the hearing officer will respond to the request.

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the

other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[20]

OPINION

Evidentiary Issues

In support of its request for reconsideration, the agency has submitted two documents not entered into evidence at the hearing – a User Security Summary, dated March 1991, and a Confidential Report on Non-Work Related Use of the Internet by VDOT Employees, dated October 4, 2002. The agency has not asserted that these documents constitute *newly discovered evidence*. Based on the dates and subjects of the documents, they could have been entered into evidence at the hearing had the agency chosen to do so. Both parties are required to exchange all documents upon which they intend to rely in order to give the opposing party an opportunity to review the documents and to raise objections to their admissibility. Since the opposing party did not have an opportunity to review or to challenge these two documents, it would be unfair for the hearing officer to consider them now. Accordingly, because the two documents cited above do not constitute newly discovered evidence, they will not be considered in rendering the following decision.

Similarly, the agency attempts to offer evidence regarding details of the 2002 agency-wide audit in order to rebut the hearing officer's characterization of the audit. Most of the details the agency offers (first full paragraph on page 3) were not entered into evidence during the hearing and are therefore inadmissible here. For example, the agency now contends that there were a few employees with usage less than two hours who were disciplined as a result of the agency-wide audit. However, no such evidence was presented during the hearing nor was documentation proffered in support of the agency's request for reconsideration. Accordingly, such unsupported assertions do not constitute newly discovered evidence and may not be considered ex post facto.

Agency arguments

The agency argues that the hearing officer does not have authority to determine that the agency was required to use the same analytical basis for all investigations. That argument is correct – as far as it goes. However, a hearing officer is obligated to assure that disciplinary actions are fair and consistent. If two persons have committed the same offense but only one is disciplined, the treatment is disparate. One of the purposes of a grievance hearing is to assure that agencies treat all employees equally and to avoid disparate treatment in the administration of disciplinary actions.

The agency correctly observes that the auditor who conducted the investigation of grievant's computer usage was not involved in the agency-wide audit going on at about the same time. Accordingly, although the evidence did not address this issue, it is presumed that he was unaware of the precise methodology being used in the agency-

[20] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

wide audit. It is not within the scope of this decision to determine which of the two methodologies was more appropriate. The hearing officer did not, and does not now conclude that the agency must always use the same methodology. However, to the extent that there were differences in methodology that resulted in different outcomes for similarly situated individuals, it is necessary to consider whether or not the different outcomes were fair and equitable.

The agency points out that grievant used his computer for personal use before or after his normal work hours. However, the agency did not discipline him for such use. In fact, the agency removed personal use time which occurred outside normal working hours when it calculated grievant's personal usage. Grievant acknowledged that when he worked beyond his scheduled hours, he used the computer for personal usage during part of this time. The agency presented no evidence to show what portion of the extra hours grievant worked was productive work and what portion involved personal computer usage. Based on the evidence presented, one can only conclude that when grievant worked past quitting time, he sometimes used the computer for personal use and some of the time he was engaged in productive work for the agency. Since the agency voluntarily excluded time after hours, this factor must be assigned little or no evidentiary weight in this decision.

The agency notes that grievant's personal computer usage constituted a clear pattern of abuse. That fact is undisputed – just as it is undisputed that dozens of other employees were found during 2002 to have exhibited the same pattern of abuse for the same amounts of time as grievant. Grievant acknowledged violating the zero-tolerance rule then in effect. However, hundreds of other employees also violated the zero-tolerance rule but grievant was the only one disciplined among those whose usage was the same as or similar to grievant's usage.

The agency takes issue with the hearing officer's characterization of the two investigations as being conducted concurrently. In fact, as the decision states, the two investigations were being conducted "at about the same time" – i.e., the latter part of 2002. The agency also contends that the hearing officer misunderstood facts that were entered into evidence. Since the person who requested the reconsideration was not present at the hearing, she has no personal knowledge of what facts were entered into evidence. The hearing officer carefully reviewed the evidence and facts prior to rendering a decision. The agency alleges that the decision ignores grievant's admission of personal computer usage. To the contrary, the decision states unambiguously that grievant acknowledged his personal usage (bottom of page 5).

The agency attempts to justify its disparate treatment of grievant by the fact that he was investigated separately from other employees because of a specific hotline complaint. However, the impetus for the investigation should have no bearing on whether he was treated equally to those investigated by a different team. The agency's argument ignores one of the most salient points elicited in the testimony – grievant was <u>not</u> identified for discipline in the agency-wide audit. If his usage was determined to be not subject to discipline using the criteria applied to all agency employees, why should he be subjected to discipline merely because someone uses different methodology to arrive at a different result? The answer, of course, is that he should not be. To uphold the agency's discipline under these circumstances would, in effect, amount to double jeopardy.

DECISION

The agency has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered the agency's arguments and concludes that there is no basis to change the Decision issued on December 20, 2004.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[21]

_____
David J. Latham, Esq.
Hearing Officer

[21] 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).