Issue: Group II Written Notice with 10-day suspension (failure to comply with established written policy); Hearing Date: 06/01/04; Decision Issued: 06/02/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 687

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 687

Hearing Date: June 1, 2004
Decision Issued: June 2, 2004

APPEARANCES

Grievant
Employee Relations Manager
Representative for Agency
Three 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 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

[1] Agency Exhibit 3. Written Notice, issued February 12, 2004.

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 Engineering Technician (surveyor) for five years.[3]

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.[4] Grievant received a copy of this policy.[5] 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."[6] Grievant also received a copy of this agreement.

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.[7] 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 promulgated a new information security policy that addresses, inter alia, user responsibilities and defines personal use identically to DHRM policy 1.75.[8]

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 excessive users. Grievant's manager met with all of his subordinates, including grievant, and advised them to curtail their personal use of the Internet. 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.[9]

In October 2003, the agency's Internal Audit unit conducted another review 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 total Internet use, all time that could reasonably be identified

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[2] Agency Exhibit 2. Grievance Form A, filed February 24, 2004.
[3] Grievant Exhibit 4. Employee Work Profile, October 25, 2002.
[4] Agency Exhibit 5. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems,* August 1, 2001.
[5] Agency Exhibit 9. Certificate of receipt, signed by grievant, November 6, 2002.
[6] Agency Exhibit 10. *VDOT Information Security Agreement*, signed by grievant October 1, 2001.
[7] Agency Exhibit 13. News articles, *Richmond Times-Dispatch*, October 4 & 12, 2002. See also Grievant Exhibit 1, News articles, unattributed and undated.
[8] Agency Exhibit 14. Agency IT Policy SEC2002-01.1, *Information Security Policy*, January 2003.
[9] Agency Exhibit 7. VDOT Computer Disclaimer.

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. Thus one could spend up to 1 hour and 44 minutes[10] each full day in personal use of the Internet and still remain below the screening threshold. Anyone whose full-day 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 with excessive personal use were disciplined with a Group II Written Notice and suspended without pay for ten days.

Grievant's normal work hours are from 7:00 a.m. to 5:30 p.m., four days per week, with 30 minutes allowed for lunch. 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 2:07 p.m. to 5:07 p.m. During that period, he spent 88 minutes on the Internet in personal usage viewing personal email, movie sites, motorcycle sites, dating services, and automobile sites.[11] The auditors reduced the 88 minutes by 15 minutes to account for grievant's afternoon break which left 73 minutes of excess personal usage.[12] 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 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:

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

[11] Agency Exhibit 11. Internet Follow-up Review 2003. See also Agency Exhibit 12. *Internet Abuse Log.*

[12] Because this work period was outside the normal lunch time of 11:00 a.m. to 1:00 p.m., and occurred during the afternoon, grievant is not entitled to credits for the 30-minute lunch or the morning break. Therefore, he was given credit for one 15-minute afternoon break.

> 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.[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 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.[14]

Because the agency has defaulted to the Commonwealth's Internet policy, this case must be adjudicated based on the language in that policy. The operative language is "incidental and occasional" personal use. The policy does not offer a definition for these terms and, therefore, the hearing officer will utilize the standard dictionary definitions of these terms. "Incidental" is defined as "likely to ensue as a chance or minor consequence."[15] "Occasional" means "occurring at irregular or infrequent intervals."[16] "Infrequent" is defined as "seldom occurring," and "occurring at wide intervals in time."[17] 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 during the afternoon of July 24, 2003 on seven separate occasions. The personal uses ranged from four minutes to 25

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[13] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.
[14] Agency Exhibit 4. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[15] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.
[16] *Ibid.*
[17] *Ibid*.

minutes each, and totaled 88 minutes. Grievant's personal usage time totaled 48.9 percent of the time he was being paid to work on state business.[18] By any reasonable interpretation, grievant's personal usage of the Internet absorbed a significant portion of his work period from 2:07 p.m. to 5:07 p.m. 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 full work 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. 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 contends that he "understood" the acceptable incident personal use allocation was two hours per day. However, grievant offered no testimony or documentary evidence to support his "understanding." Therefore, the criteria that must be used in adjudicating this case is the incidental and occasional language of Policy 1.75. Also, grievant suggests that the agency is spending more time and money on this issue than 73 minutes warrants. However, grievant's abuse on the one day at issue is merely the tip of a much larger problem. When one extrapolates 73 minutes in one day to a full work year, it is clear that such excessive Internet use is a substantial problem for the agency.

Grievant argues that his disciplinary action was not timely. The Standards of Conduct requires that disciplinary action be issued as soon as possible. In this case, the audit required extensive and detailed review of massive amounts of computer data for 10,000 employees. The audit begun in October 2003 was completed in January 2004 and the results were disseminated to managers. Local human resource managers, in consultation with individual managers, further reviewed the data to assure that only those who had actually engaged in excessive use were properly identified. Given the amount of data and the multiple reviews of data, it is concluded that grievant's discipline was issued within a reasonably prompt time.

Grievant objects that his suspension of ten work days is disproportionate to the 73 minutes of Internet usage. However, grievant ignores two things. First, grievant had been viewing the Internet for personal use utilizing his own theory that up to ten percent of his day was acceptable. If during the year, grievant regularly wasted up to ten percent of his day viewing personal sites on the Internet, his aggregate usage would

[18] The Information Technology Internal Audit Manager testified that 88 minutes is a conservative estimate. If a screen was not changed within one minute, the audit only charged grievant with one minute of personal use time. Thus, for example, grievant may have viewed a particular web site screen for several minutes but was only charged with one minute. Therefore, grievant's actual personal use time could have been significantly *more* than 88 minutes.

have been far more than the 10 days of suspension. Second, and more importantly, the amount of suspension associated with a disciplinary action is intended to have a deterrent effect. There is no requirement that a suspension have a direct relationship to any quantifiable aspect of the offense. Thus, the length of the suspension is intended to get the offender's attention in order to deter him from engaging in the same behavior in the future.

Grievant knew of the policy, was aware of the mass disciplinary actions two years ago, understood the admonition of his manager to curtail 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 ill defined in the policy. However, grievant was well aware that the department head had admonished him (and all employees) that, because of the lack of a specific guideline, employees should curtail their personal use of the Internet. 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 February 12, 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.[19] 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]

[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

[19] 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).

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