

Issue: Group I Written Notice (unsatisfactory performance and inappropriate use of State computer); Hearing Date: 01/13/05; Decision Issued: 01/18/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7942



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7942

Hearing Date: January 13, 2005  
Decision Issued: January 18, 2005

**PROCEDURAL ISSUE**

Grievant requested as part of the relief he seeks that he be paid attorney fees. A hearing officer may award attorney fees only in discharge grievance hearings where the hearing officer orders reinstatement and the employee is represented by an attorney.<sup>1</sup> In this case, grievant was not discharged and an attorney did not represent him; he received a Group I Written Notice and his wife represented him. Therefore, attorney fees are not available as part of the relief in this case.

**APPEARANCES**

Grievant  
Representative for Grievant  
Supervisor

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<sup>1</sup> §5.9(a)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Representative for Agency  
Four 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 grievance from a Group I Written Notice issued for unsatisfactory performance and inappropriate use of a state computer.<sup>2</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as an engineering technician for 17 years.

Grievant has received a copy of the Commonwealth's policy on Use of the Internet and Electronic Communications Systems.<sup>4</sup> The policy allows for occasional personal use of state-owned computers unless it interferes with productivity or work performance, adversely affects computer system operation, or violates any applicable policy or law.<sup>5</sup> Grievant has also read the disclaimer that appears on all agency computer screens when signing on.<sup>6</sup> The disclaimer prohibits storing information with sexually explicit content.

On August 6, 2004, a coworker sent an email to grievant, three other coworkers, and grievant's supervisor. The email is intended as a humorous comment regarding Middle Eastern religious militants. It contains several paragraphs of text and two photographs, one of Osama Bin Laden and one of a full frontal nude female.<sup>7</sup> The photographs are not attachments but follow the text. To view the nude photograph, it is necessary to scroll to the end of the email.

During early August 2004, grievant had been assigned to work on a project out of town. Each day he reported early in the morning to his normal work station to review any important work emails and then promptly left to report to the out-of-town project. Early on August 7, 2004, grievant checked his email messages. When he clicked on the email sent to him the day before by his

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<sup>2</sup> Agency Exhibit 2. Written Notice, issued September 13, 2004.

<sup>3</sup> Agency Exhibit 3. Grievance Form A, filed September 20, 2004.

<sup>4</sup> Agency Exhibit 5. Certificate of Receipt, signed October 22, 2002.

<sup>5</sup> Agency Exhibit 8. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.

<sup>6</sup> Agency Exhibit 5. Disclaimer.

<sup>7</sup> Agency Exhibit 1. Email, August 6, 2004.

coworker, grievant read the subject line and concluded that the email was a joke. He was in a hurry and did not read the text of the message or scroll through it. He left the message and went on to the rest of his incoming emails. About three weeks later, grievant's computer flashed a message that his email inbox was full and that he should delete messages to make space in the inbox. Grievant reviewed his inbox and deleted all but the most important work-related messages. He again did not read the coworker's email because he assumed it was a joke; he deleted it without viewing the full text or the photographs. Grievant did not print the email and did not forward it to anyone.

One of the other recipients of the email had previously given his wife his VDOT user identification and password so that she could check his VDOT emails during his absence from work. When the coworker's spouse read the email in question and viewed the nude photograph, she notified agency management. The matter was investigated and the agency disciplined the sender and four of the recipients, including grievant. One recipient was not disciplined because he had deleted the email immediately after viewing it.

#### 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.<sup>8</sup>

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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe; unsatisfactory work performance is a Group I offense.<sup>9</sup>

The Code of Virginia defines "sexually explicit content" to include, *inter alia*, any photograph depicting a lewd exhibition of nudity.<sup>10</sup> The Code also defines nudity to include a showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.<sup>11</sup> The Code does not define "lewd," however Black's Law Dictionary defines this term as "Obscene, lustful, indecent, lascivious, or lecherous." While reasonable minds might disagree about the nature of the photograph at issue herein, it is such that it could appeal to the prurient interest. Accordingly, it is concluded that the photograph does constitute sexually explicit content.

It is undisputed that grievant did not take any action to receive the email containing the offensive photograph. The email was sent to grievant without his knowledge by a coworker. When grievant opened his email folder to review incoming messages, the email was already in his computer. Grievant did not download or print the email; further he did not forward the email to anyone else. In fact, the only evidence available establishes that grievant did not read the full email, did not view the offensive photograph, and was unaware of the complete content of the email. He did not see the offensive photograph until he received the agency exhibits in preparation for this hearing.

The agency contends that grievant's offense was his failure to "immediately" delete the email upon receipt. However, this argument fails for three reasons. First, the agency assumed that grievant actually viewed the full email including the offensive photograph. In fact, grievant testified credibly that he never viewed the photograph at any time prior to preparation for this hearing. The agency failed to present any testimony or evidence that would rebut

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<sup>8</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>9</sup> Agency Exhibit 6. Section V.B.1.d, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>10</sup> Agency Exhibit 7. Va. Code § 2.2-2827.A.

<sup>11</sup> Agency Exhibit 7. Va. Code § 18.2-390.

grievant's credible denial of knowledge of the photograph. Second, the agency contends that it has a policy requiring employees to immediately delete emails that contain offensive material. However, the agency failed to produce such a policy at the hearing. The hearing officer offered to allow the agency time during the hearing to produce such a policy if it exists; the agency did not produce any policy. Finally, even if the agency had such a policy, it has not shown that grievant was aware of the offensive photograph.

The agency also cited grievant for failing to report this email to his supervisor. This argument fails as well. First, the agency admitted that it has no policy requiring such reporting. The agency suggests that it is "incumbent" on grievant to report but cites no authority for such a statement. Second, even if there had been a reporting requirement, grievant was unaware that there was anything to report. He never saw the offensive photograph until months after he had been disciplined.

Finally, the agency argues that grievant's failure to immediately delete the email constituted a "storing" of the offensive photograph. While this is technically correct, grievant cannot be held accountable for failing to delete something that he was unaware constituted offensive information. The agency failed to present any witness to dispute grievant's sworn testimony that he never saw the photograph until December 2004 – months after discipline had been issued. At most, grievant stored for three weeks what he believed to be a joke. The agency has not shown that this occasional personal use interfered with his productivity, adversely affected the computer system, or knowingly violated any law.

Accordingly, the agency has failed to prove, by a preponderance of evidence, that grievant's work performance was unsatisfactory or that he inappropriately used a state computer.

### DECISION

The disciplinary action of the agency is reversed.

The Group I Written Notice issued on September 13, 2004 is hereby RESCINDED.

### 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 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>12</sup> 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.<sup>13</sup>

[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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<sup>12</sup> 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).

<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer