

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 01/31/05; Decision Issued: 02/22/05; Agency: VDACS; AHO: Carl Wilson Schmidt, Esq.; Case No. 7950



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7950**

Hearing Date: January 31, 2005  
Decision Issued: February 22, 2005

**PROCEDURAL HISTORY**

On September 2, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

*Violation of VDACS Policy 10.1 Section II, subsection M, item 10, regarding the storage of files and documents containing inappropriate and offensive content in an agency-owned computer. The attached report outlines the findings reported by staff in the Office of Information Systems following maintenance work performed on the agency computer assigned to [Grievant]. In his explanation of these findings, [Grievant] admitted to retaining "pictures of a personal nature" on said computer. [Grievant]'s decision to access and store those files violated agency policy, and contravened the good judgment and prudence expected of his role as a supervisor.*

On September 30, 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 December 21, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow established written policy.

## **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 Agriculture and Consumer Services employees Grievant as a Senior Investigator. He began working for the Agency in 1997. He supervises three employees. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Beginning in 2001, Grievant received emails with attached pictures showing partially clothed and nude people. Some of the pictures showed women not wearing clothing but covered in body paint. Another picture showed over a dozen women sitting on bicycles facing in the same direction. One woman is wearing nothing but shoes. The remaining women are wearing only shoes and thong underwear. The picture is taken from behind the women. On different dates, Grievant would open emails and download the attached pictures to the hard drive on his agency owned computer. Grievance failed to delete the offensive pictures.

As a part of routine maintenance, an Agency Computer Technician accessed Grievant's personal computer and created a folder called "stuff". The Computer

Technician moved many unused files and folders into the stuff folder. In April 2004, Grievant received a new personal computer. Data and information stored on his old computer was moved on to his new computer.

In order to carry out his job duties, Grievant devotes approximately ten to twenty percent of his time accessing Internet web sites. He accessed a number of web sites containing spyware and adware. These programs caused his computer's Internet browser to be filled with pop-up advertisements. Grievant had so many unwanted advertisements that his computer's Internet browser would shut down. Grievant contacted the Agency's helpdesk and asked for assistance. A Computer Technician accessed Grievant's computer and reviewed files on his hard drive. The Computer Technician notice the offensive files and reported his findings to Agency managers.

After the offensive files were identified, the Division Director presented Grievant with a sheet showing the name of each file that the Agency believed was inappropriate. After reviewing the file names but not seeing the actual pictures themselves, Grievant responded in a memorandum dated August 5, 2003,

Yes there is a "Stuff" file on the root directory that contains some items of a personal nature (mostly pictures). In addition, there were some items relating to personal issues and some attachments from internal correspondence. I take full responsibility for the items that file.

In his Grievance Form A, Grievant states,

As stated in my memorandum ... I did not actively access the files stored in the "stuff" file. These items were attachments to e-mails sent me both internally and from the outside. I did in fact store some of them.

### **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).<sup>1</sup> 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).

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

“Failure to ... comply with established written policy” is a Group II offense.<sup>2</sup> VDACS Policy and Procedure 10.1 addresses Ethical Use of Agency Computing Resources. This policy prohibits,

Accessing, downloading, sending, printing or storing information that includes offensive language, sexually explicit, fraudulent, threatening, obscene, defamatory, intimidating, harassing, discriminatory, or otherwise unlawful or inappropriate content or images.<sup>3</sup>

Some of the pictures found on Grievant's computer showed partial or full nudity and were of inappropriate content to be stored on an Agency owned computer. Grievant intentionally downloaded these pictures to his hard drive and failed to remove them. His actions were contrary to Agency's policy.

Grievant contends that he did not intentionally store the offensive material on his computer. He contends that he had not seen the actual pictures at the time he admitted downloading files. The evidence, however, shows the Grievant has admitted to downloading offensive pictures. Grievant was presented with a list of the file names for those files the Agency considered offensive. These file names included, Bounceyourbooty.gif, Don\_takeGrandpatoMardiGra, and ThongPic.jpg. Upon reading the file names, Grievant should have realized that some of the underlying pictures may involve inappropriate content or images. If he had not downloaded offensive material, Grievant would have questioned the file contents before admitting he placed them on his computer.

Grievant contends someone else may have accessed his computer and download the items to his hard drive. Although this is certainly possible, it is not the most likely scenario of facts. It is not necessary for the Agency to exclude every explanation other than one involving Grievant's behavior in order to uphold disciplinary action. It is only necessary for the Agency to show by a preponderance of the evidence that Grievant downloaded the pictures to his hard drive. The Agency has done so.

## DECISION

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

## APPEAL RIGHTS

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<sup>2</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>3</sup> Agency Exhibit 3.

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>4</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>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer