Issue: Two Group II Written Notices with suspension (failure to comply with established written policy/inappropriate use of a state computer, and unauthorized use of state equipment/inappropriate use of a state computer); Hearing Date: 02/02/05; Decision Issued: 02/03/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7960: **Administrative Review: HO Reconsideration Request received 02/17/05; Reconsideration Decision issued 02/18/05; Outcome: No newly discovered evidence or incorrect legal conclusion. Request to reconsider denied**.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7960

Hearing Date: February 2, 2005
Decision Issued: February 3, 2005

APPEARANCES

Grievant
Representative for Grievant
Human Resource Generalist
Representative for Agency
Two 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 two Group II Written Notices issued for failure to comply with established written policy/inappropriate use of a state computer, and unauthorized use of state equipment/inappropriate use of a

state computer.[1] As part of the disciplinary actions, grievant was suspended for 15 calendar days (11 work days). Following failure of the parties to resolve the grievance at the 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 a Drill Crew supervisor for five years.

The Commonwealth's policy on Use of the Internet and Electronic Communications Systems 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.[3] Grievant has also read the disclaimer that appears on all agency computer screens when signing on.[4] The disclaimer prohibits storing information with sexually explicit content, consistent with the Commonwealth's policy on Use of Electronic Communications Systems.[5] The agency's written electronic mail policy specifically prohibits dissemination of sexually-oriented messages.[6]

On August 6, 2004, a coworker sent an e-mail to grievant and four other coworkers. 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.[7] The photographs are not attachments but follow the text. To view the nude photograph, it is necessary to scroll to the end of the e-mail. When grievant reviewed the e-mail he did not delete the e-mail, did not report it to his supervisor, and did not contact either the sender or his subordinates. About two weeks later, grievant reviewed his inbox and deleted all but the most important work-related messages.

When the Information Technology manager learned of the e-mail, he notified the Human Resources (HR) manager. The HR manager and a human resources generalist met with grievant to discuss the e-mail. Although grievant initially denied knowledge of the e-mail, he then recalled that he had seen the e-mail and described its contents (including the photographs) to the HR manager and the generalist. The matter was investigated and the agency disciplined the sender and four of the recipients, including grievant. One recipient (who is not a supervisor) was not disciplined because he had deleted the e-mail immediately after viewing it.

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[1] Agency Exhibit 2. Written Notices, issued September 13, 2004.
[2] Agency Exhibit 3. Grievance Form A, filed September 29, 2004.
[3] Agency Exhibit 8. Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*, August 1, 2001.
[4] Agency Exhibit 5. Disclaimer.
[5] Agency Exhibit 8. *Ibid*., defines Prohibited Activities to include storing information with sexually explicit content. *See also* Exhibit 7. Va. Code §§ 2.2-2827 & 18.2-390.
[6] Agency Exhibit 10. VDOT Department Policy Memoranda Manual Number 1-20, *Electronic Mail Policy*, November 28, 2000.
[7] Agency Exhibit 1. Email, August 6, 2004.

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.[8]

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

[8] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

employment.[9] Failure to comply with established written policy and, unauthorized use of state property are two examples of Group II offenses.

The Code of Virginia defines "sexually explicit content" to include, *inter alia,* any photograph depicting a lewd exhibition of nudity.[10] 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.[11] 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 e-mail containing the offensive photograph. The e-mail was sent to grievant without his knowledge by a coworker. When grievant opened his e-mail folder to review incoming messages, the e-mail was already in his computer. Grievant did not download or print the e-mail and he did not forward the e-mail to anyone else. However, grievant did view the e-mail in its entirety. After viewing it, grievant took no action regarding the e-mail; he simply left it stored in his computer.

Grievant now denies that he saw the photographs included in the e-mail.[12] However, grievant's denial is not credible for three reasons. First, both the HR manager and an HR generalist testified credibly that grievant described the e-mail's content including the photographs, when he was first confronted. Second, grievant has offered no reason to challenge the credibility of these two witnesses. Grievant had never met the HR manager before and had only met the generalist once or twice. Grievant acknowledged that he had never had any problems with either witness and that he does not know of any reason for them to falsify their testimony. Finally, grievant admits to reading the e-mail in his attachment to the grievance form and states that he was not offended by it.[13] He did not deny viewing the photographs in this memorandum. Since the nude photograph is the genesis of this disciplinary action, it would have been logical for grievant to have denied seeing it when he wrote the memorandum, if in fact he had not seen it. Since he did not deny it, it is more likely than not that the idea of denial occurred to him only at some later time. Accordingly, the preponderance of credible testimony from these two witnesses outweighs grievant's denial. It is concluded that the agency has shown that grievant viewed the entire e-mail message but took no action either to delete it or to report it to supervision.

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[9] Agency Exhibit 6. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[10] Agency Exhibit 7. Va. Code § 2.2-2827.A.

[11] Agency Exhibit 7. Va. Code § 18.2-390.

[12] Agency Exhibit 4. Memorandum from Human Resource Manager to Interim District Administrator, August 26, 2004. Grievant acknowledged during the initial interview that he had seen the female's photograph but asserts that he could not tell if she is nude. Given the blatant nature of the pose and explicitness of the photograph, grievant's assertion is not credible.

[13] Agency Exhibit 3. Memorandum from grievant to his supervisor, September 29, 2004.

The agency cited grievant for failing to report this e-mail to his supervisor or someone else in authority. The agency has not produced any written policy requiring such reporting but argues that supervisors and managers have a duty and responsibility to report acts and behavior that they know to be contrary to established policy. It would be impractical to formulate written policies to cover all possible supervisory responsibilities. However, all supervisors and managers are responsible to carry out the agency's mission, goals, and objectives. Part of that responsibility is to assure that employees comply with agency policies and procedures. In this case, grievant knew that the e-mail violated agency policy because it contains sexually explicit content.

He also knew, or reasonably should have known from the names of addressees on the email, that this prohibited e-mail had already been distributed to several employees. As a supervisor, grievant had a duty to assure 1) that the e-mail was promptly removed from state computers, 2) that other employees were directed not to further disseminate the e-mail and, 3) that appropriate corrective action be taken with regard to the sender of the e-mail. The easiest and most appropriate course of action was for grievant to notify his supervisor or other management employees so these steps could be taken. Grievant failed to report the matter, promptly remove the e-mail from his own computer, or direct his subordinates to delete the e-mail. Therefore, grievant did not fulfill his supervisory responsibilities.

Finally, the agency argues that grievant's failure to immediately delete the e-mail constituted a "storing" of the offensive photograph. This is technically correct because not deleting an already-viewed e-mail results in it being stored on the computer's hard drive where it is available to be accessed at a later time.

The agency cited several bases for its disciplinary actions including failure to follow established policy, inappropriate use of the computer, inappropriate use of state time to receive, read and store the email, unauthorized use of state equipment, and abuse of state time.[14] However, when examined objectively, some charges are unsupportable. For example, grievant could not have known that the e-mail was objectionable until he had read it; therefore, receiving and reading the email were not inappropriate uses of state time. Another charge – abuse of state time to store the e-mail – is so de minimis as to be unworthy of consideration. Only one push of a key on the keyboard was needed to move to the next e-mail message and thereby store the offensive message. Two of the bases – inappropriate use of the computer, and unauthorized use of state equipment – actually refer to the single offense of storing the e-mail.

The two written notices overlap each other. Both notices cite grievant for inappropriate use of the computer, and one notice cites him for unauthorized use of state equipment. As noted in the preceding paragraph, both of these charges relate to the same offense – storing the offending e-mail. Given the totality of the

[14] Agency Exhibit 2. Memorandum from supervisor to grievant, September 10, 2004.

circumstances in this case, the bifurcation of grievant's corrective action into two Group II Written Notices appears to be partially duplicative and unnecessarily punitive. The essence of his offense was that he did nothing, i.e., he abdicated his supervisory responsibilities by ignoring the email and failing to report it.[15] His failure to fulfill his supervisory duty was sufficiently serious to warrant a Group II Written Notice for failing to comply with policy and inappropriately using a state computer.

DECISION

The disciplinary action of the agency is affirmed in part and reversed in part.

The Group II Written Notice issued on September 13, 2004 for failure to comply with established written policy/inappropriate use of state computer and the 15-day (11 workdays) suspension are hereby UPHELD.

The Group II Written Notice issued on September 13, 2004 for unauthorized use of state equipment/inappropriate use of state computer 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 14th St, 12th floor
Richmond, VA 23219

[15] It is important to note that if grievant had promptly reported the email, it would have been improper for him to *immediately* delete it because it would have been needed as evidence by management.

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.[16] 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.[17]

[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

[16] 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).

[17] 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: 7960

Hearing Date:	February 2, 2005
Decision Issued:	February 3, 2005
Reconsideration Request Received:	February 17, 2005
Response to Reconsideration:	February 18, 2005

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.[18]

OPINION

[18] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

Grievant requests that the hearing be reopened for what he contends is new evidence. He submits three statements that were prepared and dated *subsequent* to the issuance of the decision in this case. Further, the statements address only the concerns that the three writers have about being misquoted in their individual interview notes. None of the three statements address grievant's case. Grievant claims that he did not know about these witnesses before the hearing. In fact, the names of these witnesses were on the e-mail message that was the subject of the hearing. Moreover, testimony indicated that most, if not all, of the people involved work in the same area and were aware of this case because they were questioned as a group during the early stages of the investigation.

Grievant alleges that the Human Resource Director and a Human Resource Generalist instructed him not to talk to the witnesses and threatened disciplinary action if he did. This is a serious allegation, however, grievant did not raise this allegation at the hearing. Grievant has not shown that he could not have raised this issue either during cross-examination of these witnesses or directly to the hearing officer. Since grievant could have raised this issue at the hearing, it does not constitute newly discovered evidence. More importantly, the hearing officer advised grievant during the pre-hearing conference that he should interview the witnesses well in advance of the hearing. This office also sent to grievant a copy of *Basic Skills for Presenting Your Case at Hearing*. This pamphlet instructs grievant to meet with his witnesses and prepare them prior to hearing. Grievant never called the hearing officer to allege that he was under a restriction not to talk to witnesses. If he had, the hearing officer would have ordered the agency to make any and all witnesses available to the grievant without restriction.

Finally, grievant attempts to supplement his testimony with additional information. However, grievant has not shown that he could not have presented this testimony during the hearing.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to reopen the hearing.

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.[19]

_____
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).