Issue: Group II Written Notice with suspension (misuse of State property, abuse of State time, and failure to follow management's instructions); Hearing Date: 05/11/05; Decision Issued: 05/19/05; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8051; Outcome: Agency upheld in full. **Administrative Review: EDR Ruling Request received 05/28/05; EDR Ruling No. 2005-1053 issued 09/30/05; Outcome: Remanded to HO; Revised decision issued 10/18/05; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8051

Hearing Date: May 11, 2005
Decision Issued: May 19, 2005

PROCEDURAL HISTORY

On January 3, 2005, Grievant was issued a Group II Written Notice of disciplinary action with a four workday suspension for misuse of State property, abuse of State Time, and failure to follow management's instructions.

On February 2, 2005, Grievant 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 April 18, 2005, the EDR Director issued Ruling Numbers 2005-1013 and 2005-1014 consolidating case 8052 and case 8051 but authorizing the Hearing Officer to issue two separate decisions for each case at his discretion. This Hearing Officer will issue two separate decisions for the purpose of expediency.

On April 19, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 11, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written notice with a four workday suspension for misuse of State property, abuse of State Time, and failure to follow management's instructions.

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 Information Technologies Agency employs Grievant as an IT Specialist I. He provides information technology support to employees of the Virginia Department of Transportation. For example, if a VDOT employee has a problem with a personal computer and calls Grievant, Grievant will attempt to find solutions to that employee's computer problem. Grievant works from 7 a.m. to 3:30 p.m. with a 30 minute lunch break. The Agency permits its employees to take a 15 minute break in the morning and one in the afternoon. Grievant has been employed by the Commonwealth for approximately six years.

On September 8, 2000, Grievant was issued[1] a Written Notice for "Misuse of state property, abuse of state time, failure to follow a supervisor's instructions, and failure to comply with VDOT's Internet Usage Policy."[2] Following this Written Notice,

[1] Grievant received the written notice while an employee of the Virginia Department of Transportation. His position was later transferred to the Virginia Information Technologies Agency.

[2] Agency Exhibit 6. The Written Notice is no longer active. The Agency offers the Written Notice as evidence that Grievant was notified of the internet policy and instructed and informed of his obligation to comply with that policy. Although VDOT changed its internet policy subsequent to the Written Notice, the evidence is clear that Grievant knew he was expected not to engage in excessive personal use of the internet.

Grievant asked that his internet access be removed to ensure that he did not violate the Agency's internet usage policy again. Grievant's internet access was removed. In August 2004, Grievant's Supervisor asked that Grievant's internet access be restored. The Supervisor felt that Grievant needed access to the internet to perform his job duties.

During staff meetings attended by Grievant, the unit Manager reminded information technology staff that they were to be held to a very high standard regarding their usage of the internet because VITA is responsible for providing technology and services to other State agencies who may discipline their respective employees for excessive internet usage. The Manager gave examples of permitted personal internet usage such as 30 minutes during lunch or during short breaks.

The Agency uses an Excel macro created by VDOT to calculate internet activity. The Excel macro calculates time usage based on the elapsed time between idle periods. Idle periods are defined as the time between log records separated by a period of more than one minute.[3] This method of calculating internet time results in a conservative estimate of an employee's actual time using the internet.

On a monthly basis, the Manager receives a ranking of total internet usage by employees in his unit. Grievant consistently has been among the top employees using the internet. For the period October 31, 2004 to December 18, 2004, Grievant was the highest internet user for three weeks, he was the second highest internet user for three weeks, and was the third highest internet user for one week.[4]

During the period from October 31, 2004 to November 16, 2004, Grievant accessed the internet and visited websites that were of a personal interest and not related to his employment. Grievant made personal use of the internet as follows:

November 2, 2004	29 minutes, 53 seconds.
November 3, 2004	28 minutes, 13 seconds.
November 4, 2004	16 minutes, 38 seconds.
November 5, 2004	26 minutes, 47 seconds.
November 9, 2004	22 minutes, 12 seconds.
November 10, 2004	5 minutes, 42 seconds.
November 15, 2004	22 minutes, 27 seconds.
November 16, 2004	15 minutes, 35 seconds.

The Agency calculated these totals after first applying a 30 minute block of time to the time periods when Grievant was most active using the internet. This was to account for Grievant's 30 minute lunch period. The Agency also applied a 15 minute

[3] Agency Exhibit 9.

[4] Agency Exhibit 8.

block of time before and after the lunch period in order to account for a morning and afternoon break.

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).[5] 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).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.[6] Grievant was instructed to minimize his personal use of the internet not to exceed approximately 30 minutes during lunch or during breaks. DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

> 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, regulation, 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.)[7]

[5] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[6] DHRM § 1.60(V)(B)(2)(a).

[7] The Agency contends Grievant acted contrary to this provision of the policy because he accessed websites entitled "Babe of the Week" which depicted woman wearing little clothing. There is no evidence to suggest the women were nude as defined by the Code of Virginia and, thus, there is no evidence that Grievant acted contrary to local, State or Federal law. A basis for disciplinary action, however, remains

Although the policy does not specify a threshold to determine the amount of personal use that exceeds what is reasonable, Grievant's use on November 2nd and 3rd, 2004 is clearly excessive in light of the Agency's expressed desire for employees to minimize personal use of the internet. Grievant acted contrary to DHRM Policy 1.75 because his personal use of the internet exceeded the incidental and occasional standard set by policy.[8] Thus, the Group II Written Notice for personal use of the internet must be upheld.[9] An employee receiving a Group II Written Notice (without prior active disciplinary action) may be suspended for up to ten workdays. Grievant's suspension must be upheld.

When calculating the amount of personal time, the Agency mistakenly considered Grievant's access to Payline and to the Code of Virginia. Payline is a website maintained by the Virginia Department of Accounts to enable employees to check their leave balances and verify pay deposits. Requesting leave is part of a State employee's business relationship with his or her employer. Employees are expected to request leave only if they have available balances. By accessing Payline to determine available leave, an employee is acting in accordance with State policy. Accessing Payline using the internet is not a personal use of the internet. Furthermore, Grievant believed the Agency was creating a hostile work environment. He researched the Code of Virginia and other legal websites to determine how to stop what he viewed as harassment. A State agency is required to avoid creating a hostile work environment. By exploring the extent of his rights under Virginia law, Grievant was acting in accordance with his business relationship with his employer.

The Hearing Officer reviewed a document showing all of the websites visited by Grievant to determine the amount of time Grievant spent accessing Payline and the Code of Virginia, etc. Most of this time occurred on November 5, 2004. If the Hearing Officer excludes from consideration Grievant's internet usage on November 5, 2004, the evidence remains sufficient to uphold the disciplinary action. Accordingly, the Agency's miscalculation was harmless error.

Grievant objects to the behavior of a co-worker and the reaction by Agency managers. Grievant and a co-worker received web cameras to assist them with their jobs. The co-worker placed his web camera on a shelf at an angle so that the camera was aimed at Grievant. There was on reason for the camera to be aimed at Grievant. It could have been placed elsewhere. Grievant expressed his concerns to the co-worker

---

because of the amount of personal use of the internet (as opposed to the type of personal use such as accessing sites prohibited by law).

[8] Although the Written Notice refers to misuse of State property and abuse of State time, the thrust of the Agency's assertion against Grievant is that he failed to comply with a supervisor's instruction to comply with DHRM Policy 1.75. An abuse of State time resulted from failing to comply with the instruction.

[9] No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings.*

who refused to change the camera's location. Grievant then informed Agency managers of his concern. The Manager spoke with the co-worker and instructed him to stop aiming the camera at Grievant. The co-worker changed the location of the camera.

Grievant's concern about the co-worker's actions was understandable. An employee should not be using a web camera to "spy" on another employee. The Agency's reaction was appropriate. Upon learning of the co-worker's actions the Agency instructed the co-worker to remove the camera. Agency witnesses testified that the co-worker may be subject to disciplinary action if he repeats his behavior.

Grievant contends the Manager is retaliating against him because Grievant contested a proposed written counseling memorandum written by the Manager. Grievant brought his concern to the attention of the Agency's Human Resource Director. She sided with Grievant because Grievant's Supervisor had previously verbally counseled Grievant and a written counseling memorandum from the Manager was not necessary in her opinion. She instructed the Manager to rescind the written counseling memorandum. The Manager became visibly upset with the instruction. The Manager attempted to comply with the instruction and asked Grievant to return his copy of the memorandum. On the following day, Grievant returned a copy of the memorandum to the Manager. The Manager asked Grievant if he could trust Grievant and then asked Grievant if he had made copies of the memorandum. Grievant said he had returned his copy of the memorandum to the Manager but that Grievant's attorney retained a copy. Upon hearing this, the Manager again displayed anger and said he guessed he could not trust Grievant.

When an employee engages in behavior giving rise to disciplinary action, an agency may discipline that employee. Legitimate disciplinary action becomes retaliatory only when the employee can show that the agency would not otherwise have disciplined him or that the agency failed to discipline or inconsistently disciplined employees engaging in similar behavior. In this case, Grievant has not presented any evidence suggesting other employees engaged in similar behavior without being disciplined. If the Hearing Officer were to construe the facts of this case to show that the Manager "seized upon the opportunity" to take disciplinary action, that fact alone would not establish retaliation since Grievant's behavior rises to the level justifying disciplinary action.

Grievant argues that the Agency is noncompliant with the grievance procedure because the Agency did not advance a complete copy of his grievance to the Hearing Officer. Grievance Procedure Manual § 4.3 provides:

> Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must mail a copy of the grievance record, complete with all attachments, to EDR. (The original grievance record should be kept by the agency).

The Hearing Officer cannot determine whether the Agency complied with this requirement. The Agency submitted several documents to the EDR Director who then referred the case file to the Hearing Officer. No evidence was presented to establish what were the contents of the original grievance file.

If the Hearing Officer assumes for the sake of argument that the Agency failed to submit all of the contents of the original grievance record, the Agency actions would constitute harmless error. Hearing decisions are based on the relevant evidence presented at the hearing. During the prehearing conference and subsequent correspondence, the parties were advised by the Hearing Officer to submit whatever documents they intended to rely upon to establish their respective cases. To the extent the grievance record failed to contain documents supporting Grievant's position, he could have submitted those exhibits during the hearing.[10]

DECISION

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

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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th 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

[10] In addition, documents submitted as part of the grievance record do not necessarily become evidence in the grievance hearing. For example, if a party were to attach numerous irrelevant documents to the grievance record during the Step Process, the Hearing Officer would not be obligated to give weight to those irrelevant documents.

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.[11]

[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].

_____
Carl Wilson Schmidt, Esq.
Hearing Officer

[11] 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: 8051-R

Reconsideration Decision Issued: October 18, 2005

RECONSIDERATION DECISION

On September 30, 2005 the EDR Director issued Ruling Number 2005-1053 asking the Hearing Officer to "determine what the limits of the personal use policy/instruction were at the time the grievant was disciplined, and apply that standard to this case."

The EDR Director discusses the third step respondent's (SL Director) statement and testimony as follows:

> When pressed by the grievant at hearing as to the amount of time that VITA employees were allowed for personal use, the SL Director attempted to draw a distinction between the VITA and VDOT policies. He stated somewhat equivocally[12] that "We're not working for VDOT, so that standard [the VDOT standard of approximately an hour and a half of permissible personal use] is *not necessarily* upheld. Any minute over your break and lunch *can be* deemed usage that exceeds what it should be." Moreover, the SL Director's testimony at hearing contradicts his earlier written communications with the grievant. In his third-step response to the

[12] Although the SL Director's statement when examined by itself may appear to be somewhat equivocal, the Hearing Officer finds that the SL Director's testimony was credible and was not expressed "somewhat equivocally". During cross examination, Grievant challenged the SL Director's failure to apply the standard adopted by VDOT to his case. Grievant was arguing VITA was obligated to follow the VDOT standard. The SL Director answered in a manner designed to avoid appearing to be directly confrontational. He was suggesting the VDOT standard was not necessarily applicable in this case since VITA had the authority to apply a more restrictive standard. He couched is response in a manner to be diplomatic towards Grievant. The Hearing Officer found the SL Director's testimony to be credible.

grievant, the SL Director's commentary on the grievant's allowable personal Internet use was as follows:

> [The grievant's] internet use was monitored and cited for two weeks from 10/31/2004 through 11/16/2004. I additionally pulled for review the period from 11/30/2004 to 12/13/2004. The actual facts to how Audit applies allowable usage applied in the case **hearing #687** were as follows: an allotment of 15 minutes in the morning and 15 minutes in the afternoon for breaks, as well as an allotment of 45 minutes for lunch was applied. An additional 30 minutes was allotted across the entire day for personal usage. This total was one hour and forty-five minutes of personal usage allowed daily. (Bold emphasis added by Hearing Officer).
>
> In [the grievant's] case, I determined, from current and previous management, his work hours are and have been from 7 am to 3:30 p.m. Monday thru Friday with 30 minute lunches. With this information I was able to determine his allowable time would be reduced by 15 minutes since the original case allowed for a 45 minute lunch period and he did not have that long for lunch. *This brings [the grievant's] total allotment down to one hour and thirty minutes for his daily personal Internet allowable usage*.[13]

Although the SL Director's third step response may appear contrary to his testimony, it is not contradictory. The third step response is merely unclear. During the step process, Grievant argued to the SL Director that the VDOT audit standard applied in this case and that since Grievant's usage was below that standard, he should not be disciplined. Grievant cited case #687 to support his position. The SL Director's written response focuses on the application of the VDOT standard.[14] When the SL Director says "*one hour and thirty minutes for his daily personal Internet allowable usage*", the SL Director is referring to the VDOT standard, not the VITA standard.[15] The SL Director is arguing that Grievant's usage exceeded the VITA standard because his usage approached the VDOT standard. For example, the third step response says Grievant

[13] (Emphasis added). Agency Hearing Exhibit Number 2.

[14] Part of the SL Director's discussion is to point out that the VDOT case involved an employee with a 45 minute lunch break but Grievant has only a 30 minute lunch break.

[15] The EDR Director assumed the SL Director was referring to the VITA standard; this was a reasonable assumption because the SL Director's written statement is unclear.

"had 9 occurrences where his usage over and above lunches and breaks[16] was greater than 21 minutes and 5 of these were 25 minutes or greater. I think this shows a pattern of large Internet usage during the work day." (Emphasis added).

To the extent the SL Director's written statement may be unclear, he clarified his position in his testimony. The Hearing Officer gave little weight to the third step response in this case because it is not sworn testimony subject to cross examination. In addition, as the EDR Director's reading of the step response shows, it was not well-written. The SL Director's testimony was of importance but was not the testimony setting forth the standard by which Grievant's work performance was measured.

The standard by which to determine whether Grievant should be disciplined was set by the unit Manager.[17] The Manager testified that on an average of every six months, he would send an email to the Information Technology community reminding them of the State's policy governing Internet usage and pointing to a website where they could read the State's Internet policy. In addition, during staff meetings attended by Grievant, the unit Manager reminded information technology staff that they were to be held to a very high standard regarding their usage of the internet because VITA is responsible for providing technology and services to other State agencies who may discipline their respective employees for excessive internet usage. He told them they should be setting the precedent, not breaking the rules. He told them to "use the internet for business purpose" and to "limit personal use as much as possible." The standard set by the Manager was more restrictive than permitted by DHRM Policy 1.75. For example, the following exchange between the Hearing Officer and the Manager reveals the Manager's standard:

> Hearing Officer: "In other words, if an employee complied with DHRM 1.75, that employee has complied with your instructions? Yes or no?"
>
> Manager: "To be honest with you, Mr. Schmidt, the answer would be 'no' because I was setting a standard I felt higher for my IT staff."

DHRM has ruled that an agency may set forth a more restrictive standard than the one established by DHRM Policy 1.75.[18] Thus, the Manager's instruction is not contrary to DHRM Policy 1.75.

---

[16] In this comment, the SL Director is not using the VDOT standard because the VDOT standard would be lunches, breaks, plus 30 minutes. Here the SL Director only refers to lunches and breaks and treats amounts exceeding lunches and breaks as problematic.

[17] The Manager is not the SL Director referred to in the EDR Ruling.

[18] In Hearing 5610 (January 27, 2003), the Hearing Officer refused to apply VDOT Policy It-98 because it provided for a zero tolerance to internet use and thus was not consistent with DHRM Policy 1.75 which permitted incidental and occasional personal use. DHRM ruled:

> Unlike DHRM Policy No.1.75, VDOT Policy IT-98 is a zero tolerance policy. DHRM Policy No. 1.75 establishes minimum standards. Agencies are permitted to supplement any DHRM policy as they desire or need as long as such a supplement is consistent with the

It is not necessary for the Agency to have informed Grievant of the precise number of minutes over which it would consider Grievant's use excessive. The Manager instructed Grievant and the other IT staff to minimize their personal usage of the internet. On five days Grievant's usage was at least 22 minutes over his lunch and two discretionary breaks.[19] The Agency believes Grievant was not limiting his personal internet use. The Hearing Officer agrees. Grievant was not limiting his personal use as much as possible. Accordingly, Grievant acted contrary to the Manager's instruction to minimize his person use thereby justifying issuance of the Group II Written Notice with suspension.

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 DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

---

policy in question. While more restrictive than DHRM Policy No. 1.75, VDOT Policy IT-98 is not contrary to that policy. Thus, VDOT Policy IT-98 is enforceable and the agency can take disciplinary action under that policy.

[19] Grievant testified he rarely took scheduled breaks; thus, the Agency's assessment of Grievant's internet usage was conservative.