

Issue: Group II Written Notice with demotion and pay reduction (violation of workplace harassment policy, failure to comply with established written procedures, and failure to take immediate corrective action); Hearing Date: 06/08/05; Decision Issued: 06/09/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8069



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8069

Hearing Date: June 8, 2005  
Decision Issued: June 9, 2005

**APPEARANCES**

Grievant  
Assistant 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**

Grievant filed a timely grievance from a Group II Written Notice issued for violation of workplace harassment policy, failure to comply with established

written procedures, and failure to take immediate corrective action.<sup>1</sup> Because grievant had a prior active Group II disciplinary action,<sup>2</sup> the agency could have removed him from state employment.<sup>3</sup> In lieu of termination, the agency elected to demote grievant to security officer (traffic controller) with a pay reduction of five percent. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>4</sup>

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) has employed grievant for 14 years. He was a traffic control supervisor at the time of the disciplinary action.<sup>5</sup> Grievant has one prior active disciplinary action – a Group II Written Notice for failing to follow established written procedure because he did not summon State Police to assist with an intoxicated person at the inspection station.<sup>6</sup>

The facility has published an operations memorandum that provides that employees must never engage in distracting activities while on duty. “Reading material of any kind and crossword puzzles are not allowed.”<sup>7</sup> Since 1992, grievant has received training on a wide range of topics including supervisory training such as: empowering leader (2003), interaction skills for success (2001), preventing sexual harassment (1994 and 2000), performance management discipline (1995), and new supervisor orientation (1995).<sup>8</sup>

On December 28, 2004, grievant and two subordinates were on duty in a control center. Normally, four employees work in the control center but on this occasion only three employees were on duty. The three employees were responsible for monitoring a total of 34 video displays that show traffic in and around the bridge-tunnel area. As supervisor, grievant also had responsibility to log any events occurring during the shift, and to handle radio calls. One of the employees had brought a Playboy magazine to work and read portions of it while on duty. During a break, grievant returned from the kitchen and noticed the magazine on the subordinate’s desk. Grievant picked it up and read the jokes on the Party Joke page. After a few minutes, he returned the magazine to the subordinate and told him that he should not have the magazine at work.

On December 30, 2004, the other employee who had been on duty with grievant on December 28, 2004 spoke with the Facility Manager about an unrelated issue. The employee had received a memorandum that instructed employees to comply with the agency’s policy on personal Internet usage.

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<sup>1</sup> Agency Exhibit 3. Group II Written Notice, issued January 25, 2005.

<sup>2</sup> Agency Exhibit 11. Group II Written Notice, issued November 26, 2002.

<sup>3</sup> Agency Exhibit 4, Section VII.D.2 & 3, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993 regarding accumulation of disciplinary actions.

<sup>4</sup> Agency Exhibit 1. Grievance Form A, filed February 14, 2005.

<sup>5</sup> Agency Exhibit 10. Grievant’s Employee Work Profile Work Description, October 25, 2004.

<sup>6</sup> Agency Exhibit 11. Group II Written Notice, issued November 26, 2002.

<sup>7</sup> Agency Exhibit 7. Operations Memorandum 8-17, *Distracting Activities*, July 1, 1995.

<sup>8</sup> Agency Exhibit 9. Grievant’s Training History record.

Although the memorandum had been sent to all employees, this employee believed that it was directed at him. He complained to the Facility Manager that he was being warned about Internet usage but that no action was being taken against his coworker who was reading Playboy magazine, newspapers, and doing his checkbook in the control center.

The Manager subsequently spoke with grievant to see whether grievant knew about the allegation. Grievant acknowledged that he was aware of the situation. Grievant told the Manager that the employee read the Playboy jokes for about five minutes. Grievant admitted to the Manager that he had also read the Party Joke page of the magazine for about five minutes. Grievant said he then told the employee that he should not have the magazine in the control room. Grievant does not know what the employee did with the magazine after that conversation. The Manager told grievant that reading newspapers and magazines, especially pornographic<sup>9</sup> magazines, could not be allowed. He directed grievant to counsel the employee. Grievant said he would speak with the employee on January 3, 2004. Grievant did not say that he had told the employee to remove the magazine, nor did he say that he was preparing a written counseling memorandum.

Grievant then drafted a proposed written counseling memorandum and gave it to his supervisor for review on January 4, 2004. The supervisor told grievant that he had to review the entire matter with his superiors and with human resources. Grievant heard nothing further about the matter until January 24, 2004 when he received a due process memorandum indicating that grievant had 24 hours to respond as to why he should not be disciplined.<sup>10</sup> The employee who brought the Playboy magazine into the Control Center received a Group II Written Notice for violating Operations Memorandum 8-17.

### 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

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<sup>9</sup> The agency characterized Playboy as pornographic. Whether this magazine is pornographic will not be decided in this forum. As Supreme Court Justice Potter Stewart said, "I shall not today attempt to define the kinds of material I understand to be embraced [by the term hard-core pornography] ... but I know it when I see it..." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Suffice it to say that Playboy magazine unarguably contains sexually explicit content.

<sup>10</sup> Agency Exhibit 3. Memorandum from Operations Superintendent to grievant, January 24, 2005.

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>11</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.2 of 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 employment.<sup>12</sup> Failure to comply with established written procedures is one example of a Group II offense.

The agency did not proffer any policy that specifically prohibits bringing sexually explicit magazines into the workplace. However, it may reasonably be inferred that sexually explicit material should not be brought into the workplace. First, since many employees consider sexually explicit material to be offensive, bringing such material into the workplace can create an offensive place for employees to work. The state's policy on workplace harassment requires managers and supervisors to "Stop any acts that they see that may be considered workplace harassment, and take appropriate steps to intervene."<sup>13</sup>

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<sup>11</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>12</sup> Agency Exhibit 4. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>13</sup> Agency Exhibit 5. DHRM Policy 2.30, *Workplace Harassment*, effective May 1, 2002.

Second, state law prohibits state employees from using state-owned computer equipment to access, download, print or store anything having sexually explicit content.<sup>14</sup> The state's policy on Internet usage references the law in declaring that printing or storing sexually explicit content is a prohibited activity.<sup>15</sup> It stands to reason, therefore, that bringing printed sexually explicit material into the workplace should also be considered an equally prohibited activity.

The agency has shown, and grievant admitted, that he read a sexually explicit magazine in the Control Center while on duty. While grievant avers that he only read jokes for five minutes, it is clear that Operations Memorandum 8-17 specifically prohibits reading material of *any* kind. The reason for such a policy is self-evident. Monitoring 34 video displays at the busiest bridge-tunnel in the state is a demanding task, even for four people. On the night at issue, only three employees were available, thereby increasing the workload by 33 percent. Employees cannot be distracted by reading any material when they are supposed to be monitoring traffic flow and bridge-tunnel operations. As supervisor, grievant had an additional responsibility to assure that his subordinates also did not read distracting material. Grievant failed to properly supervise his subordinates to prevent the magazine from being brought into the control room and to prevent it from being read. The written policy specifically advises employees that reading distracting material in the control room can be considered a Group II offense.

During the hearing the facility manager stated that reading a newspaper while on break, or at lunch does not violate the policy. Grievant contends that reading in the kitchen would negate the policy. It is evident from the language of the policy that reading is prohibited only while an employee is *on duty*. When employees are at lunch or on an authorized break, they are not performing their regular duties. Obviously, when an employee is in the kitchen eating lunch, he is not expected to be watching video displays. Thus, reading while eating lunch in the kitchen does not distract employees from performing their work. Accordingly, there is nothing inconsistent in the facility manager's position that reading in the kitchen is permitted if the employee is on an authorized break or at lunch.

The agency could have removed grievant from state employment because he had accumulated two Group II disciplinary actions. Both of grievant's disciplinary actions demonstrated that grievant was not properly fulfilling his supervisory responsibilities. However, the agency felt that grievant had been a good traffic controller and could continue to perform well in that capacity. Therefore, it mitigated the discipline and demoted grievant in lieu of removal. There is no evidence to show that the agency's decision was not reasonable and appropriate under the circumstances.

## DECISION

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<sup>14</sup> Va. Code § 2.2-2827.

<sup>15</sup> DHRM Policy 1.75, *Use of Internet and Electronic Communications Systems*, August 1, 2001.

The disciplinary action of the agency is affirmed.

The Group II Written Notice, demotion, and five percent salary reduction issued on January 25, 2005 are hereby 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. 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>16</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>16</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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>17</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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David J. Latham, Esq.  
Hearing Officer

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.