

Issue: Group II Written Notice with suspension (gambling on State property and abuse of State time); Hearing Date: 07/06/05; Decision Issued: 07/08/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8105



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8105

Hearing Date: July 6, 2005
Decision Issued: July 8, 2005

APPEARANCES

Grievant
Assistant for Grievant
One witness for Grievant
Representative for Agency
Assistant for Agency Representative
Six witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 for gambling on state property and abuse of state time.¹ As part of the disciplinary action, grievant was suspended from work without pay for ten work days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for 20 years; she is currently an assistant manager.

In June 2002, grievant was transferred as an assistant manager from another location to a customer service center in which her brother was employed as a generalist. Grievant directly supervised her brother. Grievant's brother had been playing an Internet-based game known as Pro Football Pick'em (PFP).³ The Yahoo! sponsored game does not involve payment of money, does not award prizes, is for entertainment purposes only, and may not be used in connection with any form of gambling or wagering.⁴ The PFP web site also allows participants to establish a Private Group of up to 50 friends and office mates. Yahoo! performs the same functions of gathering scores and computing results for both Public and Private Groups. The person establishing and coordinating the Private Group is designated "Commissioner." In 2002, grievant's brother took over a Private Group from a friend and became the Commissioner.

He recruited 35 friends, relatives, and agency employees (including grievant) to join his private group. He gave participants an option to play in the Private Group for free, or to pay a season fee of \$15 each; 25 people including grievant opted to play for money and paid the \$15 fee. The fee was used to pay weekly monetary prizes to the person making the most correct picks, and to pay a prize to the person who made the most correct picks for the entire season. Grievant paid the \$15 fee to participate in the Private Group. At times, grievant utilized agency computers to access Yahoo! and view the PFP site and her standing in the game. Grievant knew that other employees in the office were playing the PFP game and using agency computers for that purpose. Standings of the participants were a common Monday morning topic of conversation in the office.

During the 2003 football season, grievant's brother and a male coworker who was participating in the PFP Private Group had a heated discussion at the office's front counter in the presence of other employees. The discussion involved a dispute about the payment of money as a result of the coworker's wife's participation in the PFP game. Although the office was closed to the public

¹ Agency Exhibit 3. Written Notice, issued April 12, 2005.

² Agency Exhibit 3. *Grievance Form A*, filed April 14, 2005.

³ Agency Exhibit 5. Description from Yahoo! Web site. Pro Football Pick'em is available through Yahoo! Sports and is described as "a weekly game that lets you show your smarts by picking the winner of the year's regular season games." Participants enter selections weekly and receive points for each correct pick. Yahoo! gathers results and computes point totals and standings.

⁴ Agency Exhibit 5. *Ibid.* Yahoo! disclaimer.

at the time, two other employees became sufficiently concerned about the heated nature of the discussion that they went to a back room and told grievant what was happening and that she should do something. Grievant did not take any action, even though she was the only management person in the office that day. The discussion between the two males ended after two minutes without any further repercussions. The office manager learned about the incident the following day. She did not take any corrective action with regard to either the two male participants or grievant.

Grievant was transferred to a different location in November 2003. In the spring of 2004, the office manager met with the entire office staff and told them that the PFP Private Group was considered gambling and not to use office computers to access the game. From September 2003 through March 2005, the agency became aware of concerns in the customer service center because of statements from employees and the manager of the office, a grievance filed by one employee, and complaints made to a General Assembly Delegate who contacted the agency. The agency pursued "various initiatives"⁵ to look into the concerns but did not undertake a detailed investigation until January 2005. The agency concluded its investigation in April 2005 and disciplined seven employees including grievant.

The Customer Service Operations Director counseled grievant in writing in March 2005 that she should cease any gambling activities on state property.⁶ In the same letter, he advised her that she might be subject to disciplinary action and gave her five days to submit any mitigating facts regarding her involvement in the gambling activities. Grievant responded in writing claiming that she had only participated in the activity from her home computer.⁷ Two employees stated that grievant had accessed the web site from her agency computer.

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).

⁵ Agency Exhibit 4A. CSC Report, undated.

⁶ Agency Exhibit 3. Letter from CMSA Director to grievant, March 26, 2005.

⁷ Grievant Exhibit 7. Letter from grievant to manager, March 27, 2005.

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 grievant must present her evidence first and prove her 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 (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. 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 DHRM *Standards of Conduct* Policy 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.⁹ Gambling on state property or during work hours is a Group III offense; abuse of state time is a Group I offense.

The agency has shown, by a preponderance of evidence, and grievant has acknowledged, that she paid \$15 to participate in the PFP Private Group with the hope of receiving monetary prizes, utilized a state-owned computer to access the web site on which the game was played, and knew that several subordinate employees were playing for monetary prizes and using state computers to access the web site. The grievant was also aware that a verbal confrontation had erupted in the office between two employees as a direct result of their participation in the PFP Private Group game, but she failed to take any action either to intercede in the confrontation or to curtail participation in the gaming activity.

⁸ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

⁹ Agency Exhibit 7. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

Grievant argues that participation in the PFP Private Group for money is not gambling because a player can utilize individual skill to make picks. Alternatively, grievant claims that, if it is considered gambling, the agency's sponsorship of a golf tournament (with a \$45 entry fee) also constitutes gambling. Grievant's attempt to analogize the two types of events is based on the fact that both require an entry fee, and the outcome of both events is not a certainty before the events begin. Gambling has multiple dictionary definitions¹⁰ but is generally considered to involve placing a monetary bet on an uncertain outcome. In the most general sense, life itself is a gamble because one never knows with certainty what will occur in the next moment of life. However, gambling is most commonly used to describe the activity of a person who places a bet or wager on an event, the outcome of which the bettor is unable to influence once the event begins.

A golf tournament is not considered gambling because each participant is able to influence the outcome of the event *during* the event by playing more skillfully than other participants. But, players in the PFP game for money are unable to influence the outcome after the football contests have begun; the outcome is determined solely by events beyond the control of the players. This distinction results in a golf tournament being a contest of skill for the participants, while betting on the outcome of a football game is gambling. The distinction is even clearer when one contrasts the nonparticipant who bets on the outcome of a golf tournament to one who participates in the tournament for prizes; the nonparticipant is gambling, but the participant is competing in a game of skill. Accordingly, it is concluded that paying an entry fee for potential future payouts in the PFP Private Group constitutes gambling.

Grievant argues that she should not be disciplined for not interceding in the argument between her brother and the other male employee because the manager did not do anything about it. In fact, the manager was not in the office on the day of the argument; grievant was the only available management person. The fact that the manager did not take corrective action after learning about the incident does not absolve grievant of her responsibility to take the necessary action. In any case, the manager was also disciplined as a result of this investigation.

Grievant's involvement in this situation is unique when compared to other employees. Grievant's own brother was the "Commissioner" of the PFP Private Group. Grievant, as a member of management, is held to a higher standard because she is expected to set an example for subordinates and to take appropriate action when offenses are being committed. Grievant knew, or reasonably should have known, that paying money in the hope of winning more money based on the outcome of a sporting event constitutes gambling. Grievant

¹⁰ Agency Exhibit 5. Various dictionary definitions of gambling.

knew that her brother was promoting the game among coworkers, that other employees paid to play the game, that the game was a frequent topic of conversation, that employees were accessing the game on state computers, and that an argument had occurred in the office between two employees over the payment of money for the PFP game. By participating in the gambling activity, and by failing to take appropriate action to curtail it, grievant effectively promoted the continuance of gambling.

The agency could have issued a Group III Written Notice and removed grievant from state employment. It elected to issue only a Group II notice with ten-day suspension. In effect, the agency mitigated the disciplinary action. Given the above circumstances, and grievant's otherwise satisfactory performance and length of service, the agency's disciplinary action was reasonable and appropriate.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and ten-day suspension are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

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

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.¹¹ 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.¹²

[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]

David J. Latham, Esq.
Hearing Officer

¹¹ 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).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.