

Issue: Group II Written Notice with suspension (gambling on State and abuse of State time); Hearing Date: 07/06/05; Decision Issued: 07/11/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8106



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8106

Hearing Date: July 6, 2005
Decision Issued: July 11, 2005

APPEARANCES

Grievant
Representative for Agency
Assistant to Representative for Agency
Three 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.

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

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 eight years as a customer service generalist.

In 2002, a coworker of grievant 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 functions of gathering scores and computing results for both Public and Private Groups. The person who establishes and coordinates a Private Group is designated "commissioner." In 2002, the coworker took over a Private Group and became "commissioner."

The coworker 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 by mailing it to the "commissioner." On one occasion, grievant received money from the "commissioner" for winning the week's PFP competition; the exchange of money occurred after work hours, in the parking lot outside the office.

During the 2003 football season, grievant and the coworker ("commissioner") had a heated discussion in the office in the presence of other employees. The discussion involved a dispute about the payment of money as a result of grievant's wife's participation in the PFP game. Although the office was closed to the public at the time, two other employees were concerned about the heated nature of the discussion; they went to a back room and told the assistant manager what was happening and suggested she should do something. The assistant manager did not take any action and the discussion between grievant and the "commissioner" ended after two minutes without further repercussions. The office manager learned about the incident the following day. She did not take any corrective action with regard to either of the two participants.

From September 2003 through March 2005, the agency became aware of concerns in the customer service center because of statements from employees

² Agency Exhibit 3. *Grievance Form A*, filed April 19, 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.

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.⁶

The Customer Service Operations Director counseled grievant in writing in March 2005 that he should cease any gambling activities on state property.⁷ In the same letter, he advised grievant that he might be subject to disciplinary action and gave him five days to submit any mitigating facts regarding his involvement in the gambling activities. Grievant responded in writing stating that he had only participated in the activity from his home computer.⁸

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

⁵ Agency Exhibit 4A. CSC Report, undated.

⁶ Two other employees were counseled.

⁷ Agency Exhibit 3. Letter from CMSA Director to grievant, March 25, 2005.

⁸ Grievant Exhibit 7. Letter from grievant to manager, March 25, 2005.

circumstances. In all other actions the grievant must present his evidence first and prove his claim by a preponderance of the evidence.⁹

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 *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.¹⁰ 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 not shown that grievant used an agency computer to access the PFP web site. In fact, the preponderance of evidence demonstrates that grievant participated in the game solely through his personal computer in his home and that he paid the \$15 fee to the “commissioner” outside of the state work environment. The evidence revealed only two alleged connections to state property or work hours. First, grievant acknowledged that the heated argument in the office was a dispute about payment of the PFP entry fee. However, this argument does not constitute gambling on state property or during work hours. Employees regularly discuss personal off-duty activities with each other. Such discussions can include discussions of gambling activity that occurs off site (betting on horse races, buying a lottery ticket, etc.). Merely *talking* about one’s off-site gambling activities is not equivalent to gambling on state property. Further, such a discussion during work hours is no more an abuse of state time¹¹ than a discussion of what movie one saw the previous night – it is merely normal, everyday, social interaction among coworkers.

While the discussion became heated, it was brief (by all accounts no more than one to two minutes), took place after the office had closed to the public, and ended without any further repercussions. The assistant manager did not see a need to intercede in the discussion. The office manager learned of the incident the following day but found no need to take any corrective action with grievant, the male coworker, or the assistant manager. Accordingly, if in 2003 two management members found the incident so insignificant that it did not even

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

¹⁰ Exhibit 3. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹¹ Assuming the discussion is of limited duration.

warrant counseling, it cannot be used as a basis to justify disciplinary action two years after the fact.¹²

The second alleged connection to state property involved payment for the weekly prize. Grievant admitted that on one occasion when he won the weekly prize of \$5, the “commissioner” paid him in the office parking lot after work hours had ended. Since the payment occurred after work hours, the agency has not proven that this payment constituted an abuse of state time. The customer service center in which grievant works is a leased building with a parking lot used by both customers of the agency and a private business in the building next to the DMV office. Neither party was able to definitively prove whether the parking lot is leased solely by the agency or shared with the neighboring private business. The burden of proof is on the agency to prove that the payment occurred on state property; the agency has not met that burden.¹³

Summary

The agency has not shown, by a preponderance of evidence, that grievant gambled on state property, used agency computers to gamble, paid or received money from gambling on state property, or abused state time for such activities. The heated discussion about off-site gambling does not constitute gambling on state property. Accordingly, the discipline must be rescinded. Nonetheless, given all of the circumstances in this case, counseling is warranted to emphasize the prohibition against gambling on state property or during work hours.

DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice and ten-day suspension are hereby **RESCINDED**. The agency shall reimburse grievant for the ten-day suspension and restore any benefits lost during the suspension period.

¹² One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee’s unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior (Section VI.A., DHRM Policy 1.60, *Ibid.*). Management should issue a written notice as soon as possible after an employee’s commission of an offense (Section VII.B.1, DHRM Policy 1.60, *Ibid.*). One purpose in acting promptly is to bring the offense to the employee’s attention while it is still fresh in memory. Unless a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

¹³ Moreover, the fact that the payment of \$5 occurred after work hours, in a parking lot outside the facility is an extremely tenuous basis to assert that gambling occurred on state property. Had grievant been standing a few feet away on the public sidewalk or on an adjoining property, there would be no basis for the agency’s charge.

The agency shall verbally counsel grievant about the prohibition of gambling on state property and document the counseling in writing.

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.¹⁴ You must file a notice of appeal with the clerk of the circuit court in the

¹⁴ 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.