

Issue: Group III Written Notice with termination (gambling on State property, accessing pornography with agency computers, sexual harassment, and abuse of State time); Hearing Date: 07/07/05; Decision Issued: 07/12/05; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8122



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8122

Hearing Date: July 7, 2005
Decision Issued: July 12, 2005

APPEARANCES

Grievant
Spouse of Grievant
Representative for Agency
Assistant to Representative for Agency
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? Was the disciplinary action retaliatory?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written notice for gambling on state property and during work hours, accessing pornography on

agency computers, sexual harassment, and abuse of state time.¹ As part of the disciplinary action, grievant was removed from state employment effective 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 ten years; he was a customer service generalist senior.

In June 2002, grievant's sister was transferred as an assistant manager from another location to the customer service center (CSC) in which grievant was employed. Grievant's sister was his supervisor. 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 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 took over a Private Group from a friend and became "commissioner."

Grievant recruited 35 friends, relatives, and agency employees in the CSC 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 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 regularly utilized an agency computer to access Yahoo! and view the PFP site and the standings in the game.⁵ He also utilized an agency computer to access the PFP game site and show at least one or more employees how to participate in the game. Standings of the participants were a common topic of conversation in the office.

During the 2003 football season, grievant and a male coworker who was participating in the PFP Private Group 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 the coworker's wife's participation in the PFP game. Although the office was closed to the public at the time, two other employees became sufficiently concerned about the heated nature of the discussion that they told the assistant manager (grievant's sister) what was happening and that she should do something. The assistant manager did not

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

² Exhibit 3. *Grievance Form A*, filed May 9, 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.

⁵ Exhibit 3. Attachment to grievance form, May 9, 2005.

take any action, even though she was the only management person in the office that day. The discussion between the two males ended after one or 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 the assistant manager.

On at least two occasions in 2003, grievant used agency computers to access via the Internet pornographic photographs of nude women and two people having sexual intercourse. He showed the intercourse photograph to two female employees; one male employee saw sexually explicit photographs when he walked by grievant's computer. During an investigation in early 2005, grievant gave the investigators the names of specific web sites and described images he had accessed. Other employees acknowledged that grievant had shown these images to them. One of the women who saw the pornography testified that she was embarrassed and did not want to see such images again. The male employee wrote a statement that the photographs made him uncomfortable.⁶

Grievant's sister 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 in March 2004 by grievant against the manager, and complaints made to a General Assembly Delegate who contacted the agency. The agency pursued "various initiatives"⁷ 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 he should cease any gambling activities on state property.⁸ In the same letter, the Director advised grievant that he might be subject to disciplinary action and gave him five days to submit any mitigating facts regarding his involvement in gambling and other activities. Grievant responded in writing.⁹

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

⁶ Exhibit 6. Statement from male employee, May 3, 2004.

⁷ Exhibit 4A. CSC Report, undated.

⁸ Exhibit 3. Letter from CMSA Director to grievant, March 25, 2005.

⁹ Exhibit 3. Letter from grievant, March 30, 2005.

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 grievant must present his evidence first and prove his claim by a preponderance of the evidence.¹⁰

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.3 of the *Standards of Conduct* Policy provides that Group III offenses include acts and behavior of such a severe nature that a first occurrence normally should warrant removal from employment.¹¹ Gambling on state property or during work hours, and violation of the workplace harassment policy are examples of Group III offenses. Abuse of state time is a Group I offense. Accessing information with sexually explicit content on a state-owned computer is prohibited by state law.¹²

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

¹¹ Exhibit 9. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹² Va. Code § 2.2-2827.B states, in pertinent part: "... no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content." § 2.2-2827.A defines sexually explicit content to include photographs depicting sexual conduct. Va. Code § 18.2-390 defines

Gambling on state property or during work hours

The agency has shown, and grievant has admitted, that he was the “commissioner” of a PFP Private League gambling game that he established and operated. Grievant collected money from coworkers who wanted to participate. He also admitted to paying prize money to participants in the agency office.¹³ He operated the game primarily from his residence but also regularly utilized agency computers during work hours to check standings and to demonstrate to coworkers how to participate in the game. On one occasion, he engaged in a heated discussion in the office during work hours about one participant’s failure to pay the fee. The heated nature of the discussion sufficiently concerned coworkers that they immediately reported it to the assistant manager.

Grievant avers that he personally did not pay an entry fee and that his participation in the game was solely for entertainment. Even if true, the fact is that grievant was the organizer, operator, and facilitator of the gambling game. He promoted and encouraged coworkers to play, collected money from them, paid prize money, and showed coworkers how to play the game using an agency computer. Thus, the totality of his activity constituted participation in and facilitation of gambling on state property and during work hours. The fact that grievant did not personally pay or win money is irrelevant under these circumstances.

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 definitions¹⁴ 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

sexual conduct to include sexual intercourse. The prohibition against viewing pornography on state computers is also promulgated in state policy, viz., DHRM Policy No. 1.75, *Use of Internet and Electronic Communications Systems*, effective August 1, 2001.

¹³ Exhibit 3. Attachment to grievance, May 9, 2005.

¹⁴ Agency Exhibit 5. Various dictionary definitions of gambling.

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.

Accessing pornography

The agency has proven, and grievant has acknowledged, that he accessed pornography on a state-owned computer on two occasions.¹⁵ Moreover, at least three other employees saw the pornography, either because grievant showed it to them or because they walked by the computer. Two of the employees wrote statements and testified that grievant's showing such pornography was unwelcome conduct. Grievant's action constitutes sexual harassment by the creation of a hostile or offensive workplace. Such conduct is a violation of the workplace harassment policy, for which discipline up to and including discharge may be issued by the agency.¹⁶ Accessing pornography on a state-owned computer is prohibited by both state law and written policy, and also is a basis for discipline under the *Standards of Conduct* policy.

Grievant argues that another female employee encouraged him to access the pornography and show it to two other female employees. Even if true, this does not absolve grievant of his responsibility for actually accessing the pornography. Regardless of encouragement by another person to violate the law, grievant was the person who violated the law and therefore must be held accountable for his own action.

Workplace harassment, hostile environment

Grievant admitted that on two occasions he briefly wore costumes in the back office that were suggestive. However, there was no testimony that anyone was offended by these costumes. Grievant also on occasion told off-color jokes but the one female employee who testified that she heard such a joke said she was not offended by it. Another female employee testified that off-color jokes were often told in the office and that management participated in such joke telling. Therefore, the preponderance of evidence indicates that, while grievant participated in this behavior, the other females in the office, including both the manager and assistant manager, also participated in such behavior. Since there is no evidence that anyone was offended, and no one told grievant his behavior was unwelcome, the agency has not shown that such boorish behavior constituted workplace harassment or created a hostile environment.

¹⁵ Exhibit 3. *Ibid.*

¹⁶ Exhibit 9. DHRM Policy No. 2.30, Workplace Harassment, May 1, 2002.

Abuse of state time

Grievant's involvement in gambling and his access of pornography constituted abuse of state time because both activities are prohibited on state property or during work hours. Grievant argues that management had stated that employees could use state computers for personal use during lunch, breaks, and free time. While Policy 1.75 permits incidental and occasional personal use of state computers, the same policy specifically prohibits illegal uses such as accessing sexually explicit material. Thus, the manager's permission to use computers for occasional personal use implicitly was only for *legal* personal use. Grievant's use of the computers for gambling and accessing pornography were *illegal* personal uses of state equipment.

Retaliation

Grievant asserts that he was disciplined as retaliation because he had filed a grievance in March 2004 against his office manager. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁷ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant satisfies the first two prongs of this test because he had filed a grievance, and he has been disciplined and removed from employment. However, grievant has not demonstrated a nexus between these two events. The disciplinary action was issued by a different manager from the one against whom grievant had previously filed a grievance. Moreover, the agency has shown that the disciplinary action was considered and decided upon by several upper management and human resource people before it was issued. Grievant has not shown that any of these persons had any reason to retaliate against him, or that any of them ever indicated in any way that the discipline was being taken for retaliatory reasons.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment are hereby UPHeld. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

¹⁷ § 9, EDR *Grievance Procedure Manual*, Definitions.

Grievant has not proven that the disciplinary action was retaliatory.

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.¹⁸ You must file a notice of appeal with the clerk of the circuit court in the

¹⁸ 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.¹⁹

[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

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.